

cluded from the barring of appeal of acquittals, they could have done so.

The Illinois Constitution's barring of appellate review of acquittals, similar to the Double Jeopardy Clause in the Federal Constitution's Fifth Amendment, is intended to protect the individual from the state. In the majority of cases of an acquittal, there is no need for a defendant to appeal the judgment, because there is simply nothing to appeal. Yet, an NGRI verdict precludes the acquittee from later challenging the finding of his actually having committed the underlying crime, or reviewing the adequacy of the state's proof. Even if new evidence of actual innocence emerges, or proof of prosecutorial misconduct, the individual cannot clear his record. He is left with the more burdensome civil commitment conditions that accompany an NGRI-based commitment, though he may be factually innocent of the crime he is said to have committed. Yet, in the case of an NGRI finding, the predicate finding of guilty can be the deciding factor that commits the defendant to many years of restrictive, inpatient treatment. Since an NGRI ruling is not subject to appellate review and since there is no other way of challenging the issue of guilt, the result is a law that theoretically protects the defendant, but in this instance produces the converse effect. As Justice Burke said in his special concurring opinion:

Because of the serious consequences that follow a finding that an NGRI defendant is in need of mental-health services on an inpatient basis, I urge our legislature to craft a remedy that affords these defendants an opportunity to contest the finding that they committed the act charged [*Harrison*, p 441].

Psychiatric Diagnosis Delays Parole

Philip Saragoza, MD
Resident in Psychiatry

Melvin Guyer, PhD, JD
Professor of Psychology

Department of Psychiatry
University of Michigan
Ann Arbor, MI

State Prisoner Who Is Otherwise Eligible for Parole May Have His Parole Postponed if He Presently Suffers From a Severe Mental Disturbance That Constitutes a Public Danger

In *Hess v. Board of Parole and Post-Prison Supervision*, 514 F.3d 909 (9th Cir. 2008), the U.S. Court of Appeals for the Ninth Circuit affirmed the judgment of the district court that the Board had the right to postpone Willie Hess' parole release date. The postponement was partially based on the finding that Mr. Hess had psychiatric diagnoses constituting a present, severe emotional disturbance that represented a danger to the community. Mr. Hess had a diagnosis of pedophilia and personality disorder with antisocial and narcissistic features, and in this case the threat was one of recidivism (i.e., future sexual assaults on children). The appeals court determined that contrary to Mr. Hess' claim, the postponement ruling that guided the Board's decision was not unconstitutionally vague in specifying the criteria for psychiatric diagnoses that may support the decision to postpone parole. The decision highlights the obstacles facing the offender with diagnosed psychiatric illness that is considered to endure over time and is associated with a high probability of recidivism when the offender seeks release from the correctional institution.

Facts of the Case

Willie Hess had been incarcerated in Oregon since 1984 for multiple convictions of rape, sodomy, and child sexual abuse. Before his 2003 parole hearing, he underwent psychological evaluation by a licensed psychologist. The examiner submitted a report to the court indicating his opinion that Mr. Hess did not display any "behavioral signs for the presence of significant mental or emotional disturbance" at the time of the evaluation. However, in the same report he also provided a diagnosis of pedophilia and personality disorder with narcissistic and antisocial features, according to the criteria of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). Furthermore, he characterized Mr. Hess' diagnoses as "severe ones predisposing him to the commission of crimes to a degree rendering him an ongoing threat to the health and safety of the community" (*Hess*, p 912). He added that based on the nature and pattern of Mr. Hess' offenses and his refusal to participate in treatment

programs during his prison sentence, Mr. Hess remained at “high risk for recidivating” (*Hess*, p 912). The psychologist concluded that containment (and thereby postponement of Mr. Hess’ parole release date) was “the only viable protective factor relative to ensuring community safety” (*Hess*, p 912).

In September 2003, after conducting a hearing in which the psychologist’s report and testimony from Mr. Hess and the mother of one of Mr. Hess’ victims were considered, the parole board unanimously voted to postpone Mr. Hess’ parole release date by two years and specifically cited the psychologist’s report as evidence that Mr. Hess remained a threat to the community. Their decision was guided by Ore. Rev. Stat. § 144.125(3) (1991), which states that a parole board may postpone a prisoner’s release date if the prisoner has a psychiatric diagnosis “of a present severe emotional disturbance such as to constitute a danger to the health and safety of the community.” Following the board’s decision, Mr. Hess sought judicial relief in the Oregon Court of Appeals and the Oregon Supreme Court. Both courts dismissed his appeal for failing to present a substantial question of law.

Mr. Hess then filed in federal district court a petition for *habeas corpus* under 28 U.S.C. 2254, challenging the administrative decision. The federal district court denied his *habeas* petition. He then appealed the denial of relief to the Ninth Circuit United States Court of Appeals. The appeal by that court was considered under the Antiterrorism and Effective Death Penalty Act (AEDPA), which states that a federal court can grant *habeas* relief only if the state adjudication resulted in “a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” (28 U.S.C. 2254(d)(1) (2007)). According to this standard, a petitioner must demonstrate that “the state court’s application of Supreme Court precedent to the facts of his case was not only incorrect but ‘objectively unreasonable’ ” (*Davis v. Woodford*, 384 F.3d 628, 637–8 (9th Cir. 2004) quoting *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002)). Mr. Hess argued that although there were not any procedural deficiencies in his parole hearing, the Oregon statute under which the Board postponed his parole was impermissibly vague and thereby violated the Fifth Amendment’s Due Process Clause.

Ruling and Reasoning

The appeals court determined that Mr. Hess failed to meet the standard of demonstrating that the law in question was impermissibly vague “in all of its applications,” or at least as applied to his own conduct. The statute in question guides an administrative decision by granting the Board the authority to postpone a prisoner’s parole release date. Although such a delay lengthens the time the prisoner spends in prison, it does not in itself impose a criminal penalty for past behavior. No court has identified the level of specificity necessary for a parole release statute to avoid impermissible vagueness, and the Due Process Clause does not require the same precision in parole statutes as it does of penal laws. As noted in *Hoffman Estates v. Flipside*, *Hoffman Estates*, 455 U.S. 489 (1982), “the degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment” (p 498), and the court has “greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe” (pp 498–99).

As mentioned earlier, under Ore. Rev. Stat. § 144.125(3) (1991), to postpone parole, the parole board must find that the prisoner has a “psychiatric or psychological diagnosis of a present severe emotional disturbance such as to constitute a danger to the health or safety of the community.” In the case of Mr. Hess, it was determined that the statute being challenged was not impermissibly vague, since he had been determined to have two psychiatric diagnoses that were deemed present and severe, posing a danger to the health and safety of the community.

Discussion

The appeals court was asked to rule on matters of statutory construction and of the Constitutional standards of due process—in particular, whether the state law is so vague as to fail to give proper direction to state officials and thus allow for arbitrary, capricious, and discriminatory application. The terms “severe emotional disturbance” and “constitutes a danger to the health or safety of the community” all carry the risk of being applied to prisoners in a vague or arbitrary manner.

Mr. Hess was unsuccessful in challenging the state statute on the grounds of vagueness; the appeals court concluded that he very clearly met the criteria for postponement of parole, since the testifying psychologist had offered two psychiatric diagnoses and

had made a prediction that there was significant risk of danger to the community if Hess were released. This case brings attention to the inclusiveness of the statute's language about criteria for psychiatric diagnoses that warrant postponement of parole. The statute has two prongs: first, the diagnosis must be "present and severe"; and second, the disturbance must "constitute a danger to the health or safety of the community." In Mr. Hess' case, his diagnoses of pedophilia and personality disorder with narcissistic and antisocial features met the criteria. Mr. Hess' past offenses were taken as evidence of pedophilia, as he had repeatedly acted on sexual urges involving prepubescent children. By definition, personality disorders are considered "enduring pattern(s) of inner experience and behavior" that manifest in ways including deficient impulse control and interpersonal functioning.

Given the language included in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) diagnostic criteria, any disorder that is considered to have an enduring, chronic quality could be deemed "present." Currently, pedophilia and personality disorders are not considered curable psychiatric disturbances. Thus, a psychologist's observation of a lack of "outward signs" of these disturbances may amount to merely a definitional truism. Furthermore, considering the level of dysfunction these diagnoses tend to cause, they can easily be considered "severe." Therefore, these particular diagnoses might always fulfill the first prong of the statutory criteria.

The statutory standard's second prong relates to the fact that certain psychiatric diagnoses carry significant rates of recidivism of dangerous behaviors. In Mr. Hess' case, the behaviors associated with pedophilia would include sexual acts involving children, and more generally a lack of respect for the rights of others and rules of society associated with a personality disorder. His personality disorder diagnoses include features such as interpersonal exploitation, disregard for the rights of others, impulsivity, and failure to conform to social norms regarding lawful behavior. These features could contribute to recidivism, threatening the safety of others. Thus, the psychologist's diagnostic opinion fulfilled the two-pronged criteria of the statute, leading to postponement of parole.

Of importance, in this case the appeals court evaluated only the legal arguments and took the psychologist's opinions at face value. The sufficiency of those opinions and the data that provided their foundation

were not considered. The opinions were not subject to cross-examination, to rebuttal by opposing experts, or to the reliability tests of expert testimony as set forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). Thus, the courts hearing Mr. Hess' appeal were unaware of the clinical questions and the limits of scientific evidence concerning the accuracy of predictions of future dangerousness, of the data suggesting relatively low recidivism rates among released pedophiles, or the data on the inter-rater reliability of psychiatric diagnoses. From the record of the case, it seems that nothing in Mr. Hess' current clinical presentation was the basis for the psychologist's diagnoses; instead, they were based on crimes committed some 20 years previously. The record of the case cites little about the clinical evaluation that formed the basis of the expert's clinical opinions. Since those opinions were not the focus of the appeal, there was little reason for the record to focus on clinical foundation or reliability.

It may well be that in parole hearings the prisoner has little opportunity to challenge expert opinions that are adverse to his interests and that may rest on subjective clinical assumptions. It may also be that constitutionally based challenges to statutes that give deference to expert opinions afford the prisoner little chance to prevail, either against law or clinical judgments. The administrative context of parole hearings does not afford the prisoner the full panoply of confrontation tools that are available in criminal proceedings.

In the realm of sexual offenders, it may be that courts, legislatures, and some clinical experts participate in a synchronicity that assures that sex offenders will serve the maximum sentence and perhaps even longer if they come under the reach of state sexual violent predator acts that permit open-ended civil commitments imposed at the end of a maximum term of criminal incarceration (see *Kansas v. Hendricks*, 521 U.S. 346 (1997)).

Mental Health Expert Witness Testimony

Anthony J. Wolf, MD
Resident in Psychiatry

Melvin J. Guyer, PhD, JD
Professor of Psychology

Department of Psychiatry
University of Michigan
Ann Arbor, MI