

different time points, the court, and therefore the forensic evaluator, must look to mental status at the time of the waiver when involved in these retrospective reviews.

Although not discussed in this case, the facts illustrate that previous involuntary psychiatric commitment can terminate an individual's right to possess firearms. Given the ongoing policy debate concerning mental illness and Second Amendment rights, this case provides a helpful delineation of the potential impact and legal case complexities of firearms restrictions for one individual and the justice system.

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Expert Opinions Based on Inadmissible Evidence

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Experts May Not Form Opinions Based on Inadmissible Self-Incriminating Statements or Out-of-Court Accusations Consisting of Unreliable Hearsay, Nor May They Introduce Hearsay Facts, Even if Reliable, Through Their Testimony

The Supreme Court of Nebraska held that in sexually dangerous person commitment proceedings, experts must base their opinions on admissible evidence in *In re Interest of A.M., Jr.*, 797 N.W.2d 233 (Neb. 2011). At issue was whether the experts could testify to potentially involuntary self-incriminating statements made by the defendant and out-of-court accusations made by alleged witnesses, as contained in police reports or presentence reports. The court held that self-incriminating statements could be relied on by experts only if the statements were voluntarily made by the defendant. The court also held that because an expert's opinion is only as reliable as the evidence on which it is based, the underlying facts contained in any hearsay evidence must be suffi-

ciently reliable to meet due process requirements. Further, even if the hearsay is reliable enough to be used by the expert in forming an opinion, the underlying hearsay-based facts or statements cannot be introduced to the trier of fact by the expert. That is, experts in Nebraska can testify to their opinions, but cannot divulge hearsay-related elements that form the basis for the opinion.

Facts of the Case

Mr. A.M., Jr, was convicted of first-degree sexual assault in 1993 for being over 19 and having sex with a 15-year-old girl, violating Neb. Rev. Stat. § 28-319 (1989). He was sentenced to 10 to 30 years of prison. Shortly before his scheduled release in September 2008, the state filed a petition with the Mental Health Board alleging that Mr. M. was a dangerous sex offender who should be civilly committed. He repeatedly objected to state motions seeking various sources of information, especially statements, documents, or other evidence stemming from a vacated 1992 third-degree sexual assault conviction. The conviction was vacated in 2003 after the district court concluded that the county court had failed to ensure that Mr. M.'s plea agreement was voluntary. This vacated conviction became a flashpoint of the current case. After the 1992 conviction, Mr. M. made incriminating statements during a presentence investigation and during court-ordered treatment, evidence on which the state's experts in the 2008 civil commitment proceeding relied.

The state called three experts to testify. Mr. M. refused to meet with all three evaluators, and they therefore relied on records of his conviction, his behavior in prison, and other collateral sources, including his statements during the 1992 presentence investigation and subsequent court-ordered treatment. Each expert reported that relying on records and external sources was an accepted practice among mental health professionals, but two of them conceded that their opinions were contingent on the truth of the underlying facts. Mr. M. made "countless" objections to the admission of the underlying facts. However, the board allowed the testimony after the state argued that it had offered Mr. M.'s statements not for substantive purposes but merely so the board could see how the experts arrived at their opinions. The three psychologists agreed that Mr. M. had a mental health diagnosis of pedophilia, sexually at-

tracted to females, nonexclusive type and that he met the statutory definition of a dangerous sex offender.

Mr. M. consented to be interviewed by his own expert. This psychiatrist testified that if the information on which the three state psychologists based their opinions were true, then Mr. M. would meet the definition of a dangerous sex offender. If, however, Mr. M.'s statements to the defense psychiatrist were true, then a pedophilia diagnosis would be inappropriate. The defense psychiatrist concluded, "I must leave it to the court to determine which historical information is accurate and therefore, whether or not [Mr. M.] meets criteria [for being] a dangerous sex offender."

The board found Mr. M. to be a dangerous sex offender and ordered him committed to the custody of Department of Health and Human Services. Mr. M. appealed to the district court, which affirmed the board's decision. He then appealed to the Supreme Court of Nebraska. Among other things, he argued that his incriminating statements made during his 1992 presentencing investigation and court-ordered treatment should be inadmissible. He contended that these statements arose as a result of his vacated conviction and therefore constituted fruit of the poisonous tree and that the statements had been coerced. Mr. M. also contended that the board erred in allowing the state's experts to base their opinions on unreliable witness statements in his inmate file. Finally, he claimed that the board deprived him of his due process witness confrontation rights by allowing an expert to testify about details contained in those witness statements.

Ruling and Reasoning

The court reversed and remanded the case for further proceedings. Specifically, they required the board to determine whether Mr. M. was compelled to make the incriminating statements as part of his 1992 probation-required sex offender treatment; to ensure that the facts underlying the experts' opinions were sufficiently reliable; and to prohibit the experts from introducing the underlying hearsay-based facts in their testimony, because such a practice would violate Mr. M.'s constitutional right to confrontation.

The court first considered whether the self-incriminating statements made by Mr. M. were admissible. Under Nebraska statutes, the board could only consider evidence in a sex offender commitment pro-

ceeding that would be admissible in a criminal proceeding. The vacation of Mr. M.'s 1992 conviction did not by itself preclude expert reliance on his presentencing and probationary treatment statements. Both the Fifth Amendment and the Due Process Clause of the U.S. Constitution, however, prohibit use of a defendant's involuntary statements at a criminal trial. Routine presentence interviews are not normally considered coercive. Because Mr. M. did not claim that a state officer threatened him with punishment for failure to make incriminating statements, the court determined that his statements made during the 1992 presentencing investigation were admissible. Sex offender treatment programs, in contrast, often explicitly or implicitly threaten participants with revocation of probation if they fail to admit criminal sexual conduct. If Mr. M. had been compelled to make incriminating statements as part of his treatment, then the state's experts in the 2008 proceeding could not rely on them. Thus, the court reversed the order of commitment and remanded for a determination of coercion.

Second, the court considered the reliability of the experts' opinions. Nebraska statutes permit experts to base their opinions on inadmissible facts, so long as experts in their field reasonably rely on such facts. The rule was designed to reduce time, introducing the factual bases for experts' opinions when experts rely on data produced by others. The court held that because hearsay can "permeate" the evidence used to commit a sex offender, a victim's hearsay statements in police or presentence reports must be sufficiently reliable to be admitted, even if the statements otherwise fit within any hearsay exception. Although the court did not exhaustively define indicia of reliability for hearsay statements, it noted that whether a defendant is convicted is a critical consideration for determining the reliability of unsworn accusations, as are the contents of trial transcripts and whether the defendant challenges a victim's hearsay statements. Because the board had not ensured the reliability of the facts underlying the experts' opinions, the court also remanded on this basis.

Finally, Mr. M.'s right to confront and cross-examine witnesses was considered. The court held that the experts' testimony to out-of-court accusations or other testimonial statements contained in the records they had reviewed violated his right to confront those witnesses directly. The court concluded that experts could use such statements in

reaching an opinion, so long as the inadmissible evidence was determined to be sufficiently reliable as indicated above, but that the experts could not relay the underlying hearsay information to the trier of fact. Therefore, experts might be allowed to form opinions and testify based on information that they would be prohibited from introducing during testimony. The court reversed and remanded on this basis, as well.

Discussion

This case has two unusual holdings. First, Nebraska courts must authenticate the reliability of hearsay evidence that experts use in forming their opinions. Second, even if a court finds the underlying facts legally reliable, experts cannot introduce those facts through their testimony. Both holdings have immediate implications for experts who practice in Nebraska and similar jurisdictions.

Federal and most state jurisdictions usually make exceptions to the hearsay rule for experts for information on which people in their field typically rely. Experts in Nebraska and similar jurisdictions, however, are now on notice that, despite the hearsay exception, courts may prohibit them from basing their opinions on unreliable out-of-court statements. If a court issues such a prohibition during or shortly before testimony, experts may have little time to reconsider their opinions after excluding some of the information on which they initially relied. This difficult task could be made easier if the expert prepared in advance.

For preparation, experts testifying in sex offender commitment hearings in Nebraska and similar jurisdictions might systematically think through how their opinion would be affected in turn if each of their out-of-court sources of information were ruled inadmissible. However, we do not recommend that experts begin eliminating such information from their evaluations in anticipation of legal admissibility rulings. Experts in these jurisdictions should continue their usual practices, but prepare for legal rulings on a case-by-case basis.

The court's ruling that the confrontation clause prohibits experts from introducing underlying hearsay facts through their testimony, even when a court has determined that the expert can rely on those facts in forming an opinion, creates additional challenges. In effect, the expert will say, "In forming my opinion I relied on information from the following

sources. . .," without divulging the actual information. This is a difficult position for the expert as well as for the trier of fact. It remains to be seen how this new rule will unfold in practice in Nebraska.

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The Adam Walsh Child Protection and Safety Act of 2006: Civil Commitment and Supervised Release for Sexually Dangerous Persons

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Proceeding Under 18 U.S.C. § 4248 Proper for Civil Commitment of Allegedly Sexually Dangerous Persons: Civil Commitment of Allegedly Sexually Dangerous Persons in the Custody of the Bureau of Prisons Is Appropriate, With a Period of Supervised Release Included in the Prison Sentence

The case of *United States of America v. Broncheau* 645 F.3d 676 (4th Cir. 2011) involved nine respondent prisoners in the custody of the Bureau of Prisons (BOP) who were certified as sexually dangerous persons under 18 U.S.C.S. § 4247(a)(5) (2013). The United States, as petitioner, initiated proceedings against the respondent prisoners for civil commitment as sexually dangerous persons. The proceeding was initiated in the United States District Court for the Eastern District of North Carolina in Raleigh, under 18 U.S.C.S. § 4248 (2006) of the Adam Walsh Child Protection and Safety Act of 2006. After the District Court dismissed the petition, the government appealed the dismissal to the Court of Appeals for the Fourth Circuit.

Facts of the Case

As outlined in the United States Code Service (U.S.C.S) § 4248, the federal government may pursue the civil commitment of a sexually dangerous