

did not outweigh any mitigating circumstances, then Mr. Saranchak would have been sentenced to life imprisonment. The circuit court found that the earlier PCRA court had misapplied the law by opining that Mr. Saranchak's mental health history would not have swayed even one juror under the case's facts and Mr. Saranchak therefore was not prejudiced. The circuit court pointed out that Mr. Saranchak was not required to establish prejudice by showing that one juror would have been swayed, but instead, that he only had to show a reasonable probability that the outcome would have been different absent counsel's errors. The court found that the presentation of Mr. Saranchak's mental health history to the jury could have been a vital mitigating factor that would have supported a sentence of life imprisonment. Accordingly, the Third Circuit Court overturned the death sentence.

#### Discussion

The *Saranchak* court weighed the importance of mental health evidence in the guilt and penalty phases of trial. Failure to present a defendant's history of mental problems alone during either trial phase will not automatically render a conviction or sentence defective, since courts will weigh the probable impact of such evidence against the factual circumstances of a particular case. A defendant exhibiting signs indicating mental health problems, as in this case, should have prompted a full psychiatric evaluation, especially in the setting of a capital case. Such an evaluation may not provide a viable defense or grounds to suppress a confession at the guilt phase, but it is difficult to argue that the evaluation would not be beneficial to a capital defendant during the penalty phase. Further, sole reliance on an evaluation limited to the question of competence to stand trial to determine the need for further evaluation is problematic, even if a defendant is not forthcoming about his personal history.

There may be numerous reasons why a defendant or his family would not disclose the defendant's mental health history or dysfunctional family dynamics, including stigma or shame. However, that lack of disclosure does not absolve counsel from the responsibility of investigating a defendant's mental health when other sources point to such a history. Mitigation offers the defense an opportunity to humanize a capital defendant, countering the prosecution's charge to present aggravating factors to secure a death

sentence. Failure to attempt to humanize a capital defendant through mitigating evidence pointing to his personal circumstances, including problematic psychological and developmental histories, precludes a jury from weighing the entire picture as the law intended during the penalty phase.

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## Expert Witness Testimony in Civil Commitment Hearings for Sexually Dangerous Individuals

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## The North Dakota Supreme Court Considers the Admission of Contested Expert Testimony during Commitment Proceedings

In *In re Loy*, 862 N.W.2d 500 (N.D. 2015), Garrett Alan Loy appealed his civil commitment as a sexually dangerous individual directly to the North Dakota Supreme Court, in part, on the basis of his assertion that the court erred in admitting the testimony of two expert witnesses and that the state did not prove by clear and convincing evidence that he was a sexually dangerous individual.

#### Facts of the Case

In 2005, Mr. Loy pleaded guilty to a charge of gross sexual imposition, resulting in the revocation of his probation from a prior 2004 conviction for a similar charge. He was ordered to serve two consecutive terms of 10 years of incarceration suspended to 5 years and to complete an intensive sex offender treatment program while incarcerated, which he did in 2012. Before his release, Mr. Loy was evaluated under the sexually dangerous individual statute, and

the North Dakota Department of Corrections and Rehabilitation did not recommend civil commitment. However, the evaluator was concerned that Mr. Loy was at high risk to reoffend after release; she recommended treatment to help him gradually reintegrate into society.

The state filed a petition to commit Mr. Loy as a sexually dangerous individual. Dr. Lynne Sullivan submitted an evaluation on behalf of the state. Before the commitment hearing, Mr. Loy was deemed indigent and given a court-appointed attorney. He motioned for an independent evaluation, and the court appointed Dr. Gregory Volk. Mr. Loy later hired a private attorney. Because he was able to hire private counsel, the district court required Mr. Loy to provide a financial affidavit. He had \$2,800 in assets and was ordered to pay \$2,700 toward the expense of the independent evaluation. Mr. Loy moved to replace the court-appointed evaluator with his own independent evaluator, but his motion was denied.

At the time of the hearing, Dr. Sullivan's psychology license was under probation. Mr. Loy moved to exclude her testimony, arguing that she was not a qualified expert. The court denied his motion. Dr. Sullivan testified that Mr. Loy had "hypersexuality" and other specified paraphilic disorder (hebephilia) and opined that he was at high risk of engaging in further acts of sexually predatory conduct.

Dr. Volk testified that Mr. Loy met criteria for other specified paraphilic disorder (hebephilia), unspecified depressive disorder, and other specified personality disorder; he opined that Mr. Loy was of moderate to high risk to reoffend, but that Mr. Loy could be successfully released into the community if he was actively engaged in treatment and adequate levels of supervision were maintained. At the commitment hearing, Dr. Volk testified that Mr. Loy failed to pay him \$2,700, as ordered by the court. He testified that this failure to pay indicated a likelihood of disobeying a court order. Mr. Loy moved to have Dr. Volk's testimony excluded for alleged bias, but was denied.

The district court determined that there was clear and convincing evidence that Mr. Loy is a sexually dangerous individual. The district court specifically stated that his failure to pay Dr. Volk was not a pivotal factor in the court's finding. The court amended its prior order, deleting the requirement that he pay for the independent evaluation.

Mr. Loy appealed to the North Dakota Supreme Court. He argued that the district court erred in allowing the testimonies of Drs. Sullivan (due to the probationary status of her license) and Volk (due to his alleged bias against Mr. Loy) as expert witnesses. He also argued that the district court erred in determining that the state had proved by clear and convincing evidence that he was a sexually dangerous individual. This argument was based on Dr. Sullivan's lack of an in-person interview of Mr. Loy, her failure to reach a diagnosis with a specific psychological examination, her alleged erroneous diagnosis of Mr. Loy, and Dr. Volk's evaluation supporting Mr. Loy's transition back into society.

#### *Ruling and Reasoning*

In a three-to-two decision, the North Dakota Supreme Court held that the district court did not err in allowing the testimonies of Drs. Sullivan and Volk. It also held that the court did not err in determining that there was clear and convincing evidence that Mr. Loy was a sexually dangerous individual.

The North Dakota Supreme Court ruled that the probationary status of Dr. Sullivan's license did not nullify her license. Thus, she met the statutory standard (under N.D. Cent. Code § 25-03.3-01(4), (2007)) and the evidentiary standard (under N.D.R. Evid. 702) required to testify as an expert witness. The state supreme court found that the probationary status of her licensure spoke to the credibility, not the admissibility, of her testimony, and that the district court did not abuse its discretion in admitting her as a qualified expert witness.

The North Dakota Supreme Court also found that the requirement that Mr. Loy pay for Dr. Volk's evaluation was made in error. The majority found this error to be harmless. The state supreme court, in *In re O.H.W.*, 775 N.W.2d 73 (N. D. 2009), had held that alleged professional ethics violations, including conflicts of interest, have bearing on the credibility of the testimony, but not on admissibility. It ruled that the district court did not abuse its discretion in admitting Dr. Volk as a qualified expert witness and it gave deference to the district court's assessment of witness credibility.

The North Dakota Supreme Court opined that Dr. Sullivan's lack of an in-person interview did not bar her issuing a diagnosis, but that the absence of a face-to-face interview affected credibility, not admissibility. Both experts diagnosed Mr. Loy with mental

disorders that would make him likely to engage in further acts of sexually predatory conduct. They agreed that he had difficulty controlling his sexual impulses and also agreed in the results of the examinations conducted according to methodology accepted in the profession. The state supreme court opined that the district court's determination was not erroneous.

In dissent, two justices agreed with the majority that the district court's order requiring Mr. Loy to partially pay for Dr. Volk's evaluation was based on "an erroneous view of the law," but disagreed that this was a harmless error under the circumstances. They stated that ordering Mr. Loy to pay for a portion of the independent evaluation was an obligation the court should not have imposed in the first place. They found that these errors (allowing biased testimony and an erroneous interpretation of the law) may have been individually harmless; however, the errors were so intertwined and interrelated, and the cumulative effect so tainted the process that it required reversal.

*Discussion*

Sexually dangerous individual (or sexually violent predator) laws across the country follow a general scheme. The individual has been convicted of certain sexual offenses and has a mental abnormality or personality disorder that makes him likely to commit similar crimes in the future. Whether decided by a judge or jury, the result is frequently the indefinite commitment of the person. Because the questions at hand are generally outside the expertise of the trier of fact, the testimony of qualified expert witnesses is crucial. Therefore, the admissibility and credibility of mental health testimony are often heavily scrutinized during the proceedings.

Mr. Loy sought to find Dr. Sullivan's and Dr. Volk's testimonies inadmissible on different grounds. Having a license on probation, giving testimony that creates an alleged bias, or, for example, routinely testifying for one side versus the other does not automatically render the witness unqualified or the testimony inadmissible. In most jurisdictions, the case law and statutes governing the admission of expert witness testimony allow for its use if the witness has some degree of expertise in the field in which he will testify and if the testimony helps the trier of fact to understand the evidence or determine a fact at issue.

Inherent in the civil commitment of sexual offenders are complex concerns regarding psychiatric diagnoses, risk assessment, and volitional impairment. The trier of fact depends on expert testimony to understand and decide these questions. If the expert has a skeleton in the closet, has an imperfection in his qualifications, or holds an alleged bias, the trier of fact should appropriately weigh the credibility of that testimony when rendering a decision. Such testimony is not automatically inadmissible. A court's discretion in admitting expert witness testimony will not be reversed unless the district court abuses its discretion in admitting expert testimony. Finally, in most jurisdictions, the court's assessment of witness credibility is granted deference.

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## **Child Testimony and Best Interests of the Child in Child Custody or Visitation Cases**

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### **The Supreme Court of Kentucky Considered Whether the Trial Court Can Refuse to Permit Children to Testify in Child Custody or Visitation Cases and Whether the Trial Court Appropriately Applied the Best-Interests-of-the-Child Standard to Each Child in Determining Child Custody**

In *Addison v. Addison*, 463 S.W.3d 755 (Ky. 2015), Kevin and Lydia Addison were involved in a child custody dispute. They both appealed to the Kentucky Supreme Court. Mr. Addison appealed the Kentucky Court of Appeals' decision that the trial court erred in refusing to permit the children to testify. Ms. Addison contended that the trial court failed to apply the best-interests-of-the-child