On appeal, the court granted Dr. Rank's motion for an evidentiary hearing. The appeals court held that it could not be determined from the record alone whether Dr. Rank, if properly advised and represented, would have rejected the plea offer and proceeded to trial. Specifically, the court found that the record did not establish whether his counsel had investigated an EED defense and that Dr. Miller's testimony did not foreclose this question.

The Commonwealth appealed and the Kentucky Supreme Court granted review.

Ruling and Reasoning

The Kentucky Supreme Court affirmed the decision of the appeals court. The court concluded that the probability that EED played a role in Dr. Rank's crime would have been apparent to any lawyer versed in criminal law and that the record did not conclusively show that Mr. Gettys had understood and explored the potential for an EED defense.

The court rejected the argument that retaining a mental health expert was enough to satisfy Mr. Gettys' responsibility of exploring an EED defense, because the record did not conclusively establish that Dr. Miller examined Dr. Rank specifically for the purpose of testifying about EED. Nothing in Dr. Miller's testimony showed that he had explored the defense with Dr. Rank. Moreover, the court stated, "If Dr. Miller was not expressly instructed to evaluate Rank and the circumstances of his crime in light of the definition of EED, the error is Gettys', not Miller's" (*Rank*, p 485). Further, the court noted that because EED does not arise from a mental disease or defect, even though expert psychiatric or psychological testimony may be helpful in understanding an emotional reaction like EED, it is not required.

In sum, the court concluded that had Dr. Rank been advised about EED, there was a reasonable possibility that he would have rejected the plea offer and opted to go to trial, because a successful EED defense could significantly reduce the severity of the principal charge and its accompanying punishment.

Discussion

In *Rank*, the Supreme Court of Kentucky clarified that it is the responsibility of defense counsel to explore the defense of EED and discuss it with the defendant, noting that the defense counsel is obligated "to make reasonable investigations [of potentially applicable legal and factual issues] or to make a reasonable decision that makes particular investigations unnecessary" (*Rank*, p 485, citing *Strickland*, 466 U.S. at 691). Failure to explore a possible EED defense may be grounds for invalidating a guilty plea or sentence due to ineffective assistance of counsel.

Further, the court noted that unlike a determination of competency or insanity, the defense of EED does not mandate the opinion of a forensic psychiatric expert. However, if an expert is retained to assist with this defense, defense counsel is also obligated to instruct the expert regarding its exploration.

Forensic experts are ethically obligated to learn and apply the legal standards of the jurisdiction in which they are performing the evaluation (AAPL Practice Guidelines for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense, *J Am Acad Psychiatry Law* 42:S21, 2014). However, in *Rank*, the court made it clear that it is not the forensic psychiatrist, but defense counsel who is responsible for making the inquiries and decisions to pursue one defense strategy over another.

Disclosures of financial or other potential conflicts of interest: None.

Duty to Warn for Federal Parole Officers

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No Claim Under the Federal Tort Claims Act for Failure to Report When Plaintiff Is Not a Specifically Identified Victim of a Federal Parolee

In *Dugard v. United States*, 835 F.3d 915 (9th Cir. 2016), the plaintiff was sexually abused by a parolee over many years. She successfully sued the state of California for its negligence in supervising the parolee. She then attempted to sue the federal government for the same negligence. The district court ruled that the Federal Tort Claims Act (FTCA) precludes her recovery.

The Court of Appeals for the Ninth Circuit, apologetically, agreed with the ruling of law.

Facts of the Case

Phillip Garrido had a history of sexual violence, particularly while under the influence of drugs. In 1976 he was charged with the kidnapping and rape of a woman in California. That same year, he kidnapped another woman, drove her across state lines, hid her in a shed and raped her. He was convicted of federal kidnapping, and in 1977 was sentenced to 50 years in prison. In court, Mr. Garrido admitted that while under the influence of drugs, he experienced violent, uncontrollable sexual urges.

Mr. Garrido was released in 1988 on federal parole. The court mandated drug testing as a condition of his parole. Parole officers were aware that Mr. Garrido was capable of "great physical harm" should he resume drug use. In the 30 months after his release from prison, he had approximately 70 violations of the imposed conditions on drug use and monitoring. None of these violations was reported by his parole officers to the Parole Commission.

In 1991, Mr. Garrido and his wife kidnapped 11-year-old Jaycee Dugard and held her captive for the next 18 years in a shed in their backyard. During that time, Mr. Garrido, often under the influence of drugs, repeatedly drugged and raped Ms. Dugard. Over the course of her captivity, Ms. Dugard gave birth to two of Mr. Garrido's children. Ms. Dugard and her children were held captive in Mr. Garrido's shed until they were discovered and freed in 2009.

After receiving a cash settlement from the State of California for negligence, Ms. Dugard filed a complaint in federal district court on behalf of herself and her two children under the FTCA. She claimed the parole officers' failure to report Mr. Garrido's many violations amounted to negligence. Ms. Dugard alleged that such reporting would have led to revocation of Mr. Garrido's parole and directly prevented her kidnapping and confinement.

The federal government filed a motion to dismiss the matter, stating that private individuals and entities under California law would not be held liable in like circumstances. Therefore, the federal government argued they should not be found liable here. The federal district court ruled that private criminal rehabilitation programs serve as a proper comparison for immunity in such cases. Explaining the limited liability of such programs under California law, the district court granted the government's motion for dismissal under the FTCA.

Ruling and Reasoning

The Ninth Circuit Court of Appeals affirmed the federal district court's ruling. The court noted, as the lower court did, that the FTCA renders the United States liable for its agents' actions only in situations when analogous private parties would also be held liable under state law. Hence, both courts' rulings hinged on identifying similar cases involving the most analogous private entity to the federal parole officers in this instance. The appellate court agreed with the federal district court in that the most comparable private party in this case would be private criminal rehabilitation programs.

In its majority ruling, the court cited multiple cases to establish liability standards. In *Cardenas v. Eggleston Youth Center*, 238 Cal. Rptr. 251 (Cal. Ct. App. 1987), the court of appeals held that a private rehabilitation facility has no duty of care to the community for conduct of persons under its supervision. Also, in *Beauchene v. Synanon Foundation Inc.*, 151 Cal. Rptr. 796 (Cal. Ct. App. 1979), the court held that a private rehabilitation facility owed a duty only to foreseeable and specifically identifiable victims.

The court indicated that decisions regarding liability and duty are a product of all relevant policy and safety interests. Extending governmental immunity to private criminal rehabilitation programs in California emerged from a public policy interest in promoting the development of such programs.

The majority acknowledged that the release of criminals confers some level of risk to the public. Outside of instances that involve a specifically foreseeable and identifiable victim, however, a duty to warn and protect responsibility placed on these programs would undermine rehabilitative efforts, including job training and education. Programs would instead be forced to become more restrictive and punitive, and the increase in public safety would be unjustifiably small. The court resolved that the only way to completely ensure public safety would be to abandon rehabilitation programs completely. Hence, some risk to public safety must be tolerated if criminal release and rehabilitation is to be pursued. The majority argued that this balance of public policy and safety interests applies to federal parole and probation officers.

Thus, the appellate court affirmed the lower court's decision finding that the FTCA and California law do not allow for recovery for Ms. Dugard based on the failure of the parole officers to report Mr. Garrido's violations. Had she been able to establish that she was a specifically identifiable victim, she would have established a cause of action, analogous to a private person under California law and the FTCA.

Dissent

The dissent found the majority's comparison of the federal parole officers to private criminal rehabilitation programs inappropriate. Judge Smith agreed that both federal parole and private criminal rehabilitation programs manage the release of incarcerated individuals and their transition back to society. He additionally conceded that public policy interests support the immunity granted to private and public criminal rehabilitation programs. However, he argued that no such policy is applicable to federal probation and parole programs. He stated that probation and parole officers are required to report on the behavior of their supervisees and that this obligation does not prevent the release of prisoners. Federal district judges, not parole or probation officers, determine when prisoners are released. Accordingly, the imposition of mandated reporting requirements on parole officers would have no impact on the operation and success of private rehabilitation programs.

The dissent highlighted a handful of cases regarding duty to warn and duty to protect. In *Poncher v. Brackett*, 55 Cal. Rptr. 59 (Cal. Ct. App. 1966), grandparents were found to have a duty to the previously unidentifiable victim of their violent grandson. In *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976), the court opined that a therapist had a duty to use reasonable care to protect the target of a patient's threats. Similarly, in *Myers v. Quesenberry*, 193 Cal. Rptr. 733 (Cal. Ct. App. 1983), a physician failing to warn an uncontrolled diabetic patient not to drive was found to have a duty to the previously unidentifiable victim of a subsequent car crash.

Although these cases were diverse, they all included medical professionals, and others considered to have "special relationships." Judge Smith outlined "the general rule under California tort law that, where there is a special relationship, there is a duty to warn or control that extends to foreseeable, but not readily identifiable victims, provided that the action required would be reasonable and not futile." (*Dugard*, p 922–23). He said that when this rule is applied to federal parole officers, they were negligent in carrying out their mandated duties. He further stated that the immunity granted to private rehabilitation centers should be considered an exception to the rule.

Discussion

Although the majority and dissenting opinions in the current case disagree on whether liability should be imposed on Mr. Garrido's parole officers, both opinions highlight important considerations when determining an appropriate duty to warn, regardless of setting.

In California, the determination of duty versus immunity stems from a series of exceptions. A party may be found liable for those actions toward a third party in cases where a "special relationship" exists with the tortfeasor, but only when the relationship confers some ability to control the tortfeasor and the required intervention would not be futile. For example, blanket warnings sent to a community before the release of a criminal would not appreciably alter the behaviors and safety of a community and would therefore be considered futile.

In some cases, as seen in *Dugard*, public policy interests may limit the liability. In the instance of medical providers and therapists, the duty to warn and protect is given some latitude, preserving the therapeutic interests of a confidential patient–provider relationship.

Disclosures of financial or other potential conflicts of interest: None.

Miranda Warnings in Noncustodial Interrogation of Juveniles and Voluntariness of Statements Made at the Request of Interested Adults

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