

cess grounds” (*Orden v. Stringer*, 262 F. Supp. 3d 887 (E.D. Mo. 2017)).

The *Karsjens* case remains in litigation. At the time of this writing, the plaintiffs have filed a petition for *certiorari* with the Supreme Court for review, and briefs from the state, petitioners, and *amicus curiae* have been submitted. The legal point for the Supreme Court’s consideration will be the standard of review that should apply to substantive due process claims brought by civilly committed sex offenders. It is unclear whether the Supreme Court will change its stance from *Hendricks* or pursue more zealous protection of sex offenders’ rights.

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

## Unconditional Discharge of a Sexually Violent Person From Civil Commitment

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### What Is the Duty of the State to Manage Dangerousness of Persons Released From Sexually Violent Person Civil Commitment After Onset of Dementia and Failure to Benefit From Program?

In *Estate of Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W. 2d 579 (Iowa 2017), the Supreme Court of Iowa affirmed the ruling of the Court of Appeals of Iowa and the judgment of a district court that the state owed no duty to supervise, and thus incurred no liability for, the behavior of a sexually violent person after release from civil commitment as a sexual offender secondary to the onset of dementia and failure to participate in and benefit from the program, despite civil commitment under the mental illness statute to a nursing home.

#### *Facts of the Case*

Mr. William Cubbage was a four-time convicted sex offender for sexual misconduct against children. Adjudicated a sexually violent person (SVP) in May

2002 pursuant to Iowa Code § 229A.1 (2002), based on his diagnoses of pedophilia and personality disorder not otherwise specified with antisocial and narcissistic features, he was committed to the state of Iowa’s Civil Commitment Unit for Sexual Offenders (CCUSO).

In 2006, Mr. Cubbage was diagnosed with Alzheimer’s dementia with a decline in function. In 2010, CCUSO team opined that Mr. Cubbage was no longer benefitting from SVP treatment because he had not participated in treatment since 2005 and he required full-time custody because of serious mental impairment. In an annual report in July 2010, a psychologist at CCUSO determined that Mr. Cubbage no longer met the statutory definition of an SVP and that he did not meet criteria for a transitional release program. Based on this report, the district court deemed Mr. Cubbage a danger to himself and others and civilly committed him to the Pomeroy Care Center pursuant to Iowa Code § 229.13 (2010) in November 2010. The district court also granted Mr. Cubbage’s motion for unconditional discharge from the SVP civil commitment pursuant to Iowa Code § 229A.10 (2010). Mr. Cubbage was transferred to the Pomeroy Care Center in December 2010.

Before the transfer, CCUSO staff met with Pomeroy Care Center staff to present Mr. Cubbage’s criminal and medical history. CCUSO staff focused on his decline in function and told Pomeroy staff that “it was not likely [he] would be a risk” (*Estate of Gottschalk*, p 583). They discussed monitoring him when children were present. In August 2011, Mr. Cubbage sexually assaulted Mercedes Gottschalk, a resident of the Pomeroy Care Center. An eight-year-old child of a staff member witnessed the assault.

Mrs. Gottschalk (and later, her estate) filed a negligence suit against Pomeroy and the state of Iowa. Pomeroy asserted a cross-claim against the state for negligence and failure to represent Mr. Cubbage’s accurate level of risk. The specific claim by the estate was that the state failed to prepare a safety plan for Mr. Cubbage when he was in the Pomeroy Care Center and failed to inspect and monitor the safety of his placement. The claim did not challenge the basis for his release from CCUSO.

In May 2014, the state filed a motion for summary judgment against these claims. In its ruling, the district court granted summary judgment to the state, agreeing that the state owed no duty for monitoring or supervising Mr. Cubbage after he was uncondi-

tionally discharged from CCUSO. It also held that the doctrine of sovereign immunity prevented any claim of misrepresentation against the state pursuant to Iowa Code § 669.14(4) (2014). The estate and Pomeroy appealed to the Court of Appeals of Iowa on claims of negligent discharge, negligent placement, and failure to warn. The court of appeals affirmed the district court's decision granting summary judgment to the state, concluding that the state did not owe a duty after the district court's decision to unconditionally discharge Mr. Cubbage from CCUSO. The appeals court also held that the estate had failed to raise the matters of negligent discharge and placement and failure to warn in the initial claim. The appeals court noted that even if it had raised those claims, the court would not rule in favor of the plaintiffs, because it was the district court and not the state that discharged Mr. Cubbage from SVP commitment. The estate appealed the decision to the Supreme Court of Iowa.

#### *Ruling and Reasoning*

The Supreme Court of Iowa reviewed the lower court's decision based on points raised in the initial claim of the state's duty after unconditional release from SVP civil commitment, but also addressed duty to warn and duty to assure safety protocols. The court held that after unconditional discharge there was no special relationship between the state and Mr. Cubbage, finding the negligence claims to be unfounded. The court found the state to be immune from any liability under the Iowa Tort Claims Act. For the claims preserved by Pomeroy regarding failure to supervise and negligent civil commitment, the court found no duty because there was no special relationship. The court concluded that it was the district court and not the state that discharged Mr. Cubbage from the civil commitment, thus dismissing the claim for the state's negligent discharge.

The concurring opinion reasoned that since "liability follows control," it was Pomeroy (not the state) that was responsible to control and manage Mr. Cubbage, because he was under the center's care at the time of the incident, citing *Estate of McFarlin v. State*, 881 N.W.2d 51,64 (Iowa 2016), which held the party in control liable for reducing risk of harm to others. The concurring opinion also emphasized that the state's duty to warn does not apply in this case, because Mr. Cubbage made no individualized threats toward Mrs. Gottschalk or any other resident at

Pomeroy. It cited *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980), in which the Supreme Court of California affirmed the trial court's dismissal of the claim for duty to warn when a released inmate killed a child after having made generalized threats toward children during his imprisonment. The concurring opinion also reasoned that because Pomeroy was apprised of Mr. Cubbage's past criminal behavior, an inherent generalized warning pertaining to the associated risks was implicit.

#### *Dissents*

Two justices dissented. Justice Hecht emphasized the legislature's focus in establishing SVP civil commitment on a "small but extremely dangerous group" of persons whose "likelihood of engaging in repeat acts of predatory sexual violence is high" (*Estate of Gottschalk*, p 596). He reasoned that Mr. Cubbage, a member of that group, was of special interest to the state and continued to be so because of his lack of participation in SVP treatment and lack of improvement in the mental condition underlying his SVP commitment. Justice Hecht argued that a special relationship akin to a doctor-patient relationship existed between the state and Mr. Cubbage, warranting duties to care and warn. He further argued that the vulnerable population of Pomeroy warranted warning of risk. Justice Zager stated that although the court formally discharged Mr. Cubbage, the state put forth the evidence and arguments in favor of discharge, and so it should not be absolved of its duty of care. He argued that the state of Iowa had been responsible for Mr. Cubbage's care for past years because of his risk; thus, the state continued to bear the responsibility to provide the care, custody, and control of Mr. Cubbage.

#### *Discussion*

This case highlights the legal and psychiatric complexity involved in the care and management of persons at risk for sexual offenses. Although states have developed SVP programs to mitigate risk, treatment in and discharge from such programs present challenges, including the provision of treatment and monitoring when psychiatric and cognitive conditions evolve. In this case, Mr. Cubbage, with developing dementia and resistance to participating in SVP treatment, was considered a poor candidate for continued SVP treatment, but his lack of progress prohibited him from qualifying for a transitional release program. The dissent expressed concern that his

failure to qualify for transitional release was not justification for unconditional release. Therein lies the challenge for placement when complex risks and needs are involved. Mr. Cabbage was an outlier for the SVP program in which he was placed because of his dementia. With his sexually violent history, he also presented a challenging combination of problems for a nursing home level of care.

The case illustrates the need for public policy to address the risk management and care requirements for sexually violent offenders who fail to benefit from treatment while requiring higher and changing levels of care related to medical, psychiatric, and aging conditions. Given the typically long lengths of stay in SVP programs, problems associated with aging among these populations will continue to expand. Forensic psychiatric expertise can aid in developing, evaluating, and legislating systems of care for sexually violent offenders designed to manage violence risk while attending to the health care and daily living needs of the offenders.

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

## First Amendment Rights and Forensic Evaluations

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### Collateral Consequences of First Amendment Protected Activities Can Be Used as Criteria in Forensic Evaluations

In *Oliver v. Roquet*, 858 F.3d 180 (3d Cir. 2017), the Third Circuit Court of Appeals reversed and remanded a district court decision that supported a First Amendment retaliatory claim of a civilly committed patient against a psychologist. The circuit court found that while patients are still able to enjoy First Amendment liberties, medical consequences of those protected activities can be used as criteria in forensic decision making.

### Facts of the Case

Lorenzo Oliver was civilly committed under New Jersey's Sexually Violent Predator Act (N.J. Stat. § 30:4-27.32 (1999)). Mr. Oliver was in treatment at the Special Treatment Unit (STU) in Avenel, NJ, where his case was reviewed at least annually by the Treatment Progress Review Committee (TPRC) to make recommendations to the Clinical Assessment Review Committee (CARP) regarding his advancement along five phases of treatment.

During one of these reviews, Debra Roquet, PsyD, a psychologist on the TPRC, recommended that Mr. Oliver not be promoted to the next phase of treatment, a recommendation that the CARP followed. Her recommendation was made, in part, because she thought that Mr. Oliver's focus on legal activities interfered with his ability to participate in recommended treatment and negatively impacted his relationship with staff. Mr. Oliver was a paralegal and advised other civilly committed individuals with legal matters, including at least one involving the STU. He was also an editor of a legal newsletter that focused on the rights of STU residents. Dr. Roquet reported that Mr. Oliver said that he did not attend treatment at Alcoholics/Narcotics Anonymous "because he was too busy" (*Oliver*, p 185). In addition, Dr. Roquet reported that during an interview with him, Mr. Oliver "did not demonstrate remorse for his crimes or empathy for his victims" (*Oliver*, p 195). She also noted that he often charged legal fees for the work he did for peers, something which she described as manipulative.

Mr. Oliver, representing himself, filed suit in the U.S. District Court for the District of New Jersey alleging that Dr. Roquet had recommended against promoting him in treatment in retaliation for his legal activity, thereby violating his First Amendment rights. He also made other violation claims that were dismissed by the district court. Dr. Roquet moved for dismissal, which was denied. She did not appeal, but asserted a qualified-immunity defense. Her defense was denied on procedural grounds, but the court explained that she could raise such a defense in a motion for summary judgment. However, her motion for summary judgment was denied as it was premature. Mr. Oliver argued that additional discovery was necessary, and the court agreed.

Dr. Roquet appealed to the U.S. Court of Appeals for the Third Circuit the district court's denial of her motion for summary judgment. The circuit court