

## Discussion

One of the most challenging situations for a psychiatrist is working with patients who may be dangerous to others. In such cases, in addition to performing a risk assessment, the law and professional ethics may require that psychiatrists take additional actions to protect or warn others. Duties to protect or warn are typically framed as exceptions to confidentiality, i.e., a patient's right to not have communication that has been imparted to treaters in confidence revealed to third parties. Such a right is protected by state legislatures and professional guidelines, and unauthorized breaches can result in legal action against the clinician or lead to adverse actions by state licensing boards and professional organizations.

The legal concept of a psychiatrist's duty to protect others from dangerous patients was first articulated in the California Supreme Court's landmark decision in *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976). *Tarasoff* recognized the duty of mental health professionals to use reasonable care to protect their patients' foreseeable victims. Subsequently, concerns about excessive civil liability for clinicians (and its negative consequences for public policy) resulted in setting a high threshold as to what triggers the duty to third parties in many states, generally requiring a threat toward an identifiable victim communicated directly to the clinician.

In its decision, the Nebraska Supreme Court referenced the Mental Health Practice Act (Neb. Rev. Stat. Ann. § 38–2137(1) (2013)), the language of which limits the duty to warn and protect (and the liability for failing to do so) to the "limited circumstances" where a patient has communicated to the provider a serious threat of physical violence to a reasonably identifiable victim. A critical factor, therefore, in determining whether a clinician has a duty is whether the patient has communicated a threat and whether the victim is identifiable.

In *Rodriguez*, however, strict adherence to the statute would not seem to permit breach of confidentiality based on a failure to meet the "communication" requirement. The ruling in *Rodriguez* increases decision-making ambiguity (and anxiety) for Nebraska mental health practitioners because the court's decision portends a distancing from the protections built into Nebraska statute regarding interpretation of what triggers the clinician's duty.

## The Value of an Expert Witness and the Utility of Psychological Diagnoses

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**Cross Examination of a Psychiatric Expert Without Presenting an Opposing Expert May Be Insufficient to Challenge Deficits in Psychiatric Diagnoses**

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In *Richardson v. Belleque*, 406 P.3d 1074 (Or. 2017), the state appealed to the Supreme Court of Oregon, challenging the findings of the trial post-conviction court and the Oregon Court of Appeals, which determined that ineffective assistance of counsel in sentencing prejudiced Mr. Richardson and contributed to his being sentenced as a "dangerous offender" (Or. Rev. Stat. Ann. § 161.725(1)(a) (2005)), resulting in a significantly longer sentence. The state supreme court affirmed the appeals court's findings, vacating the sentence determination and remanding the case to the trial court for sentencing.

### Facts of the Case

In 2006, Charles Edward Richardson argued with his wife in a local bar. As he left the bar, an elderly man followed. Mr. Richardson struck the man, who fell and hit his head. The victim died the next day of a head injury.

At a jury trial, Mr. Richardson was convicted of manslaughter and assault; the state petitioned for and was granted a presentence hearing to determine if Mr. Richardson qualified for dangerous-offender sentencing. Under Oregon statutes, a defendant being sentenced for a Class A felony who is found to have a severe personality disorder indicating a propensity to endanger others through criminal behavior can be sentenced to an indeterminate sentence of 30 years (Or. Rev. Stat. Ann. § 161.725, § 161.735, and §161.737 (2005)). The typical sentencing for manslaughter in Oregon is 10 to 20 years.

In preparation for the hearing, the court ordered George Suckow, MD, to conduct a psychiatric evaluation for the dangerous-offender sentencing. Dr. Suckow interviewed Mr. Richardson for one hour, reviewed his criminal records, and conducted a mental status exam. At the sentencing hearing, Dr. Suckow testified to the jury that Mr. Richardson met diagnostic criteria for antisocial personality disorder (ASPD) and, therefore, met the statutory requirements for dangerous-offender sentencing.

Mr. Richardson's attorney, James Jagger, cross-examined Dr. Suckow and attempted to discredit his testimony by highlighting inconsistencies between the diagnostic criteria of ASPD and Mr. Richardson's history, but Mr. Jagger did not call an expert witness for the defense or consult with a mental health evaluator. The jury found Mr. Richardson was a dangerous offender and sentenced him to 260 months and an indeterminate sentence of 30 years.

Mr. Richardson petitioned the court for a post-conviction proceeding, alleging inadequate counsel due to deficient performance and resultant prejudice because Mr. Jagger did not consult with a mental health evaluator or present an expert witness. Mr. Richardson presented a psychiatric evaluation prepared by Dr. Norvin Cooley, a clinical psychologist. Dr. Cooley reviewed childhood psychiatric records and opined that Mr. Richardson did not meet diagnostic criteria for conduct disorder, but rather of adjustment disorder as a teenager. Mr. Richardson argued that Dr. Cooley's report, which contradicted Dr. Suckow's opinions, could have altered the outcome. The postconviction court ruled in favor of Mr. Richardson and determined that a psychiatric expert's report on behalf of the defense could have influenced his sentencing. It vacated the sentence and remanded the case to the trial court for sentencing. The court of appeals upheld the postconviction court ruling. The state then appealed to the Oregon Supreme Court.

#### Ruling and Reasoning

The Supreme Court of Oregon affirmed that Mr. Richardson received inadequate counsel at his presentencing hearing. The justices reasoned that his attorney had not consulted a mental health expert and that this lack of consultation may have impacted the outcome of the case.

Although the courts found that his defense attorney performed well in highlighting the discrepancies

between Dr. Suckow's findings and the diagnostic criteria, lack of an expert witness prevented the jury from considering alternative findings. Mr. Jagger did not have the expertise or background to sway the jury's opinion.

Dr. Cooley argued that Mr. Richardson did not meet the criteria for ASPD because he did not meet the criteria for conduct disorder as a child. The court determined that, although Dr. Cooley's report provided unflattering information about Mr. Richardson's history, it was of potential benefit to his defense. The justices found that the alternative report offered an opposing viewpoint regarding his behavior and described that key criteria were not met for a diagnosis of ASPD. The court ruled that this information was vital to his dangerous-offender sentencing.

The justices cited several precedent-setting cases and determined that attorneys may operate within professional standards if they choose to not present a psychological expert, but that this choice should be made with expert consultation. The court cited *Strickland v. Washington*, 466 U.S. 668 (1984), in which the defense strategically decided not to provide a psychiatric defense because the lawyers had previous knowledge of the results and had concern it would bias the jury against their client. The justices opined that this case set the precedent that lack of an expert witness does not equate to inadequate counsel if the decision was made strategically and with consultation. The justices similarly cited *Johnson v. Premo*, 399 P.3d 431 (Or. 2017), in which the defense's failure to obtain additional data or investigate the defendant's version of the facts constituted inadequate counsel. The court opined that Mr. Jagger's lack of investigation of Mr. Richardson's childhood records constituted an inadequate defense.

#### Discussion

The court's decision raises two important topics relevant to the practice of legal and mental health professionals. The case highlights the utility and importance of an expert witness on jury decision making and the value of diagnostic labeling in contrast to the determination of functional impairment.

The courts acknowledged the impact and importance of an expert witness on the jury's perceptions and decision making in the case of *State v. Brown*, 687 P.2d 751 (Or. 1984). In the present case, the importance of an expert witness was based on well-

established case law, but the weight of an expert witnesses' opinion has also been extensively researched in the psychological literature (Mantle WP, Chenane J: *The Encyclopedia of Criminology and Criminal Justice* (ed 1). Hoboken, NJ: Wiley Publishing, 2014, pp 1–5). While the attorney may do an admirable job highlighting discrepancies and attempting to discredit the witness, the effort is not as impactful as an expert witness to the perception of the jury.

It is interesting that the state of Oregon uses diagnosis to determine dangerousness, given the variability of symptoms among people with the same diagnosis and the limited information that diagnosis provides about functional behavior. This case touched upon a prominent discussion in the field regarding the utility and appropriateness of categorical diagnoses in psychological care (Trull TJ, Durrett CA: Categorical and dimensional models of personality disorder. *Annu Rev Clin Psychol* 1:355–80, 2005). Under Oregon law, offenders with a severe personality disorder, specifically ASPD, warrant harsher sentencing. ASPD requires that the individual diagnosed display entrenched patterns of disregard for and violation of the rights of others. However, it is a common misconception that all people with ASPD are violent and possess the propensity to violence. Due to symptom variability and the potential nonviolent manifestations of the disorder (e.g. impulsivity, failure to obey laws, pattern of irresponsibility), it is possible that a defendant could meet diagnostic criteria for ASPD without posing a violence risk. Diagnoses were not developed to evaluate risk of violence, and lack of diagnosis does not indicate a lack of dangerousness. A functional determination of the dangerous-offender statute through a dimensional approach to an ASPD diagnosis or the assistance of standardized risk measures would allow evaluators to better inform the court who is at highest risk for violence.

Furthermore, the defense expert opined that Mr. Richardson's traumatic past influenced his interactions with others, leading him to misperceive hostility. The link between traumatic early childhood events and ASPD has been well documented in psychological research (Bierer LM, Yehuda R, Schmeidler J, *et al*: Abuse and neglect in childhood: relationship to personality disorder diagnoses. *CNS Spectr* 8: 737–54, 2003). Should the pathway to the disorder be considered when determining whether someone meets criteria for dangerous-offender sen-

tencing? If so, how should the courts determine whose traumatic history warrants a dangerous-offender sentence?

In conclusion, the case demonstrates the vital importance of an expert witness in the courtroom and highlights difficulties within the field of psychology regarding the use of diagnoses to inform risk. Considering evidence-based risk assessment and assessment of functional impairment, rather than diagnosis alone, may better support the intent of sentencing procedures like those in Oregon. A structured risk and impairment assessment would assess different areas of dangerousness and enable the courts to designate dangerous offenders with increased accuracy.

## Softening the Insanity Defense

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### **Significant Lowering of a Sentence Due, in Part, to Mental Illness**

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In *United States v. DeRusse*, 859 F.3d 1232 (10th Cir. 2017), the government appealed the sentencing decision of the District Court for the District of Kansas, arguing that the sentence imposed on Joseph DeRusse, a man who struggled with mental illness, was substantively unreasonable in its downward departure from the advisory sentencing range.

#### **Facts of the Case**

Mr. DeRusse was 24 years old and had no prior criminal history when he kidnapped his ex-girlfriend (also age 24 at the time of the offense) using a BB gun. He started driving her from her home in Austin, Texas to Kansas. His plan was to persuade her to marry him while keeping her at a bed and breakfast for three weeks. Eight hours after kidnapping her, Mr. DeRusse was apprehended by the police on the highway. He was questioned and quickly admitted to kidnapping the victim.