was part of a contested debate and did not reflect universal consensus.

Finally, the Fifth Circuit emphasized the "and" in the Eighth Amendment prohibition of cruel and unusual punishment. Both arms must be met to violate the Eighth Amendment. A policy cannot be unusual if it is widely practiced in prisons across the country.

Dissent

The dissenting opinion, authored by Justice Barksdale, was based on two main arguments: the unfair procedure employed by the district court and the lack of consideration of Mr. Gibson's individual medical needs. Regarding the procedural unfairness, the district court improperly addressed the merits of the Eighth Amendment, which was beyond the claim addressed in the summary judgment, which referred to qualified immunity. The district court also incorrectly placed the burden of production on Mr. Gibson, as opposed to Mr. Collier, who moved for summary judgment. Justice Barksdale noted that the summary judgment ruling prevented evidence about the medical community's current opinion about the necessity of SRS.

Justice Barksdale noted that the Eighth Amendment requires individualized assessments to determine the medical necessity of a particular treatment in the specific case. Mr. Gibson did not receive an assessment for SRS, despite an order by a TDCJ doctor, and his individual medical needs were unknown. In *Kosilek*, the holding was based on Mr. Kosilek's specific circumstance, but Mr. Gibson was denied a determination about the personal necessity of SRS. If not based on medical judgment, refusing to evaluate Mr. Gibson for SRS or deciding to deny SRS could equate to deliberate indifference. The dissent stated that the focus should be on the efficacy of SRS for a particular prisoner, rather than questioning if there was varying medical opinion. Consequently, Mr. Gibson should be allowed to have a medical evaluation to determine if SRS is medically necessary for him.

Discussion

In this case, the Fifth Circuit found that the TDJC did not act with deliberate indifference when they declined a transgender inmate SRS, which was not considered to be medically necessary for the treatment of gender dysphoria.

There is a growing lineage of landmark cases in this arena. As mentioned, in *Estelle*, the U.S. Supreme Court ruled that deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment. In *Farmer v. Brennan*, 511 U.S. 825 (1994), the U.S. Supreme Court rejected an objective rule for deliberate indifference, rather finding that subjective knowledge and deliberately failing to act on that knowledge is required to violate the Eighth Amendment. According to Simopoulus and Khin Khin, correctional facilities have not been required historically to approve surgical procedures for inmates with gender dysphoria, or even to provide hormone treatment for inmates who have not received hormone treatment prior to incarceration (Simopoulos EF, Khin Khin E: Fundamental principles inherent in the comprehensive care of transgender inmates. J Am Acad Psychiatry Law 42:26–36, 2014). For example, in *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987), the Seventh Circuit ruled that that a transgender inmate is constitutionally entitled to treatment but does not have a right to any particular type of treatment.

Gibson v. Collier highlights the unique challenges and opposing views in the treatment of gender dysphoria. The research in gender dysphoria treatment is in the infancy stage, and the efficacy of treatments, such as SRS, is yet to be determined. With increasing advocacy for transgender individuals, more questions are likely to be raised about the treatment of transgender inmates. As more research is completed in the area of gender dysphoria treatment, evidence-based treatment protocols will likely be developed to better address the approach to the medical needs of inmates with gender dysphoria.

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Access to Treatment Records in Proceedings for Evaluation and Potential Commitment of Sexually Violent Predators

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Treatment Records Reviewed by Forensic Evaluators May Also Be Accessed by the Prosecuting Attorneys and Experts Retained by the Prosecution

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In the case of *People v. Superior Court (Smith)*, 6 Cal. 5th 457 (Cal. 2018), the California Supreme Court considered whether the prosecuting district attorney pursuing civil commitment of an individual under the sexually violent predator (SVP) statute might be able to obtain confidential mental health evaluations and related records used to support the evaluation, as well as whether they may share such records with experts they retain for evaluation and commitment determinations. The court affirmed the judgment of the appellate court in ruling that full records of the State Department of State Hospitals (SDSH) mental health professional examinations may be provided to the attorney petitioning for commitment, and may also be shared with an expert retained by the prosecution.

Facts of the Case

In 2002, Richard Anthony Smith was a prison inmate facing upcoming parole. The Orange County District Attorney filed a petition to commit him as an SVP based on evaluations by two psychologists, Dana Putnam, PhD, and Charles Jackson, PhD. After a series of continuances, in 2006 the district attorney requested updated and replacement evaluations, in accordance with the Cal. Welf. & Inst. Code § 6603 (c) (2016), which permitted the district attorney to request state evaluators to perform an updated evaluation or a replacement evaluation if the original evaluators were no longer available. After several continuances, in 2011 Mr. Smith was re-evaluated by Dr. Putnam and was evaluated by Nancy Rueschenberg, PhD. Both evaluators opined that Mr. Smith no longer qualified as an SVP. Based on the updated evaluations, Mr. Smith filed a motion to dismiss the SVP petition. His motion was denied by the trial court and granted by the court of appeal, which directed the trial court to dismiss the SVP petition. The case was then transferred to the state supreme court, and then transferred back to the court of appeal for reconsideration. In 2014, the district attorney sought a new and more current evaluation from Dr. Putnam and also requested that their retained expert, Dawn Starr, PhD, be allowed to review the SVP evaluations and their supporting background records. Although the trial court first denied the request, the appellate court disagreed, concluding that the district attorney's retained expert should be able to review the evaluations and records with an appropriate protective order. The state supreme court granted Mr. Smith's petition for review in this case. The court considered Mr. Smith's privacy interests and the interests of the government, and whether the district attorney may review confidential mental health records and prior evaluations on which SVP re-evaluations relied, and, if so, whether those records may also be shared with an expert retained by the district attorney for the purpose of assisting with the SVP proceeding.

Ruling and Reasoning

The court considered two questions first, whether the prosecuting district attorney pursuing a commitment under the California Sexually Violent Predator Act (SVPA) is entitled to directly review the mental health treatment records that served as a basis for the SVP evaluations, and, if so, whether these records may also be shared with an expert who has been retained by the district attorney.

In addressing the first question, the court noted that, prior to 2015, appellate courts had disagreed as to whether prosecuting district attorneys could directly access full treatment records on which SVP evaluations were based, or could only see the limited excerpts contained within the evaluation. After the court granted review of this case, the California legislature amended the SVPA in July 2015 (enacted January 1, 2016) to explicitly state that the prosecuting attorney shall have access to all the records on which the evaluators have based their evaluations (Cal. Welf. & Inst. Code § 6603 (j) (1) (2016)). Mr. Smith argued in his petition that the amended statute should not be retroactive and should therefore not apply to records supporting his 2011 evaluations, which included communications with mental health professionals. The Supreme Court of California disagreed, citing its decision in *Albertson v. Superior Court*, 23 P.3d 611 (Cal. 2001), in which it found that an amended statute applied "to any future pretrial and/or trial proceedings in this litigation" (*Albertson*, p 617). Similarly, in this case of *People v. Superior Court (Smith)*, the court concluded that "even though treatment records might have been created before section 6603 was amended, the statute now allows copies of those records to be disclosed to the

district attorney to the extent that they were reviewed as part of an updated or replacement evaluation" (*People v. Superior Court (Smith)*, p 466).

Mr. Smith also argued that the plain letter of the statute meant that his treatment records should not be shared with the district attorney based on a narrow reading of the SVPA amendment, which refers only to "updated" as opposed to "replacement" evaluations that are performed when the original evaluator is no longer available. The Supreme Court of California disagreed with his arguments and concluded that the best understanding of the amendment language "encompasses all evaluations that update previous SDSH evaluations" (*People v. Superior Court (Smith)*, p 467).

Mr. Smith had made an additional contention that granting the district attorney access to his underlying mental health records violated his constitutional right to equal protection because others receiving the same therapies, such as mentally disordered offenders and mentally disordered sex offenders, may have their treatment records kept confidential. The Supreme Court of California responded that Mr. Smith does not distinguish how the governing statutes for those other offenders differ from the SVPA in terms of access to these records. Citing *United States v. Armstrong*, 517 U.S. 456 (1996), the court rejected Mr. Smith's argument as failing to satisfy the required threshold for an equal protection claim.

The second question considered by the Supreme Court of California was whether mental health treatment records may be reviewed by the district attorney's retained expert. This matter was not directly addressed in the 2016 SVPA amendment, though the statute does state that the district attorney may not disclose confidential records for other purposes. The court noted that while an earlier draft of the bill required the court's consent to allow the prosecution to permit access to the records by its retained expert, this was removed in the final amendment. The court concluded that nothing in the text of the SVPA amendment explicitly bars the government from sharing otherwise confidential records with an expert it has retained for the purpose of assisting with SVP proceedings, and that the text "at the very least suggests that attorneys *may* disclose them" in SVP proceedings (*People v. Superior Court (Smith)*, p 469).

In considering the necessity of disclosing records, the court broadened its analysis to consider the context of the entire SVPA as well as section 5328 of the Welfare and Institutions Code, which establishes records as confidential. The SVP designation requires conviction for a sexually violent offense and a diagnosable mental health condition that makes the individual likely to engage in sexually violent behavior. Standardized evaluations by mental health experts are essential in establishing the latter criteria, and "the civil commitment trial usually turns on the quality and credibility of the expert witnesses and the extent to which their evaluations are persuasive" (*People v. Superior Court (Smith)*, p 471). A primary way that one party counters an opposing expert's opinion is by challenging the bases for the expert's opinion. This proceeding would be of limited value if the district attorney did not have "the assistance of an expert to interpret and explain the significance of the specialized information at issue" (*People v. Superior Court (Smith)*, p 471).

In weighing the value of access to information against the importance of confidentiality of treatment, the court noted that section 5238 lists numerous exceptions to confidentiality, including an exception for disclosure "[t]o the courts, as necessary to the administration of justice" (Cal. Welf. & Inst. Code § 5328 (a) (6) (2019)). Citing *People v. Garcia*, 391 P.3d 1153 (Cal. 2017), which emphasized the need for open communication among professionals working with sex offenders, the court concluded that as long as an appropriate protection order is in place, confidential treatment records may be shared among members of the prosecution team. The court further determined that, because these records are already shared with SDSH mental health professionals and the district attorney, an additional potential disclosure of treatment records to the prosecution's expert would be unlikely to inhibit an individual from participating fully in treatment.

Discussion

Identifying an individual as a SVP is frequently based on forensic evaluations and expert opinion. These evaluations might need to rely, at least in part, on available medical and psychological treatment records. Although such clinical records are usually confidential, in the case of individuals convicted of a sexually violent offense these records may eventually be subject to scrutiny not only by forensic evaluators, but also by prosecuting attorneys and mental health experts retained by the prosecuting team. This case is particularly relevant to forensic mental health profes-

sionals who work in prisons with individuals convicted of a sexually violent offense in jurisdictions with SVP laws. Specifically, this case highlights that clinical documentation could eventually be used by the prosecuting team should the individual convicted of a sex offense later face SVP proceedings in a given jurisdiction. Documentation of treatment is important, but treating clinicians who work with offender populations should familiarize themselves with SVP procedures in their state, so that they may be aware of the implications of their documentation and related standards for what to note in treatment records for this patient population.

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Medicaid Coverage for Transgender Women Seeking Gender-Affirming Surgery

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Medicaid Is a Government Unit Under the Iowa Civil Rights Act's Definition of a Public Accommodation and Denial of Gender-Affirming Surgeries Is Gender Discrimination and a Violation of the Iowa Civil Rights Act

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In *Good v. Iowa Dep't of Human Servs.,* 924 N.W.2d 853 (Iowa 2019), the Iowa Supreme Court found that Medicaid was a government unit under the definition of a public accommodation and that denial of coverage for gender-affirming surgeries violated the Iowa Civil Rights Act on the basis of gender discrimination. The court affirmed the decision of the district court to strike down Iowa Admin. Code r. 441–78.1 (4), which denied Medicaid coverage for gender-affirming surgeries. EerieAnna Good and Carol Beal, the plaintiffs in the case, are transgender women from Iowa with gender dysphoria who sought gender-affirming surgery as deemed medically necessary by their doctors. They both were enrolled in a managed care organization (MCO) with Medicaid, which denied their request for coverage of gender-affirming surgeries.

Facts of the Case

Ms. Good and Ms. Beal had presented as female for many years. They had changed their names, birth certificates, driver's licenses, and social security cards. Both women experienced anxiety and depression as a result of their gender dysphoria and had health care providers who deemed that surgery was medically necessary to treat their gender dysphoria. They sought Medicaid coverage for surgical interventions through their MCOs; Ms. Good sought a gender-affirming orchiectomy procedure from AmeriHealth Caritas Iowa in January 2017, and in June 2017 Ms. Beal sought gender-affirming vaginoplasty, penectomy, bilateral orchiectomy, clitoroplasty, urethroplasty, labiaplasty, and perineoplasty from Amerigroup of Iowa, Inc.

Iowa Admin. Code r. 441–78.1 (4) (2014) stipulates that coverage of "cosmetic, reconstructive, or plastic surgery" is prohibited because these procedures are aimed to improve appearance and help people feel better from a psychological perspective, rather than improve bodily functions. Gender-affirming surgeries are excluded from coverage under this rule because they do not restore bodily function. Iowa code includes language that specifically prohibits "[p]rocedures related to transsexualism, hermaphroditism, gender identity disorders, or body dysmorphic disorders . . . [b]reast augmentation mammoplasty, surgical insertion of prosthetic testicles, penile implant procedures, and surgeries for the purpose of sex reassignment" (IAC Ch 78, p 3 (2014), available at: https://www.legis.iowa.gov/docs/iac/rule/02-05-2014.441.78.1.pdf).

Ms. Good filed her request for Medicaid preapproval on January 27, 2017, but Medicaid denied her request given the rule that excluded "sex reassignment" surgery as a covered benefit. She filed an internal appeal and later an appeal to the Department of Human Services (DHS), both of which were denied, upholding AmeriHealth's denial of coverage. Ms. Good then appealed to the director of DHS, but the denials were upheld and it was determined that DHS lacked jurisdiction to review Ms. Good's constitutional challenge to the rule. She filed a petition for judicial review in the district court on September 21, 2017 claiming that Iowa Admin. Code r. 441–78.1 (4) is in violation of the Iowa Civil Rights Act (ICRA) (Iowa Code § 216.7(1)(*a*) (2009)) and the equal protection clause of the Iowa Constitution,