

By holding that the trial court did not abuse its discretion by finding Mr. Kuhs competent to stand trial without holding an evidentiary hearing, the Supreme Court of Arizona narrowly interpreted the due process requirements outlined in the Arizona Statute. After decades of broadening due process protections for defendants whose competence to stand trial is in question, this ruling and others are defining the outer limits of those protections.

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Limitations of Expert Testimony on Battered Woman Syndrome

Susan Kimmel, MD

Fellow in Forensic Psychiatry

Assistant Professor of Psychiatry

Susan Hatters Friedman, MD

Assistant Professor of Psychiatry and Pediatrics

Department of Psychiatry

Case Western Reserve University

Cleveland, OH

Compelled Examination of Defendant by Psychiatrist for the State: Limitations on Testimony of State's Expert

In *State v. Goff*, 942 N.E.2d 1075 (Ohio 2010), the Ohio Supreme Court considered three major issues: the appropriateness of psychiatric expert testimony on battered woman syndrome (BWS); whether a defendant raising a self-defense based on BWS could be subjected to a psychiatric evaluation by the state; and whether the state's expert could testify regarding inconsistencies in information the defendant provided, or the expert could testify only to the nature of BWS and whether the defendant's actions were related to the syndrome.

Facts of the Case

On March 18, 2006, Megan Goff shot her estranged husband William Goff 15 times, killing him. Mrs. Goff reported that he had been physically and emotionally abusive to her during their seven-year marriage. On January 18, 2006, Mrs. Goff called the sheriff, stating that the abuse had escalated to include their children. Mr. Goff and 63 guns were removed from the home. The following day, Mrs. Goff obtained a civil protection order, and she and the chil-

dren moved to a shelter for victims of domestic violence.

On March 17, 2006, Mr. Goff allegedly called her, stating that he intended to kill her and the children on March 20, 2006. This was a significant date, because it was the anniversary of the first time the couple had had intercourse and was Mrs. Goff's mother's birthday. The next day, armed with two guns, Mrs. Goff went to Mr. Goff's home. Mrs. Goff stated that she had wanted to talk him out of harming the children. Mr. Goff had reiterated his intent to kill her and the children. Mrs. Goff reported that she believed that he was going to kill her right then, and she shot him, emptying both guns of ammunition. Mrs. Goff then raised the affirmative defense of self-defense based on battered woman syndrome.

The state requested to have Mrs. Goff examined by their expert to determine whether her actions were related to BWS. Though Mrs. Goff objected, the trial court ruled that if she was raising the defense, the state had the right to have her evaluated by their expert. The defense expert, Dr. Bobby Miller, opined that Mrs. Goff had symptoms of BWS and that she reasonably believed that she and her children were in imminent danger of being killed. At trial, Mrs. Goff objected to the testimony of the state's expert, because it violated her right to avoid self-incrimination. The state's expert, Dr. Phillip Resnick, did not diagnose BWS. He testified about the many inconsistencies found between what Mrs. Goff told him and what she had told others. He stated that he could not offer an opinion to a reasonable degree of medical certainty regarding BWS, because he could not be certain that Mrs. Goff was telling the truth.

Mrs. Goff waived her right to a jury and was found guilty of aggravated murder, with the judge stating in his ruling that Dr. Resnick's testimony was helpful in reaching his verdict. Mrs. Goff appealed, claiming that information from the state's compelled psychiatric evaluation used in her trial violated her Fifth Amendment right against self-incrimination.

The Fourth District Court of Appeals affirmed Mrs. Goff's conviction, stating that raising the BWS defense and using her own psychiatric expert amounted to waiving her privilege against self-incrimination. She appealed to the Ohio Supreme Court.

Ruling and Reasoning

Three major issues were considered on appeal: the appropriateness of expert testimony in the BWS de-

fense, the appropriateness of compelled psychiatric examinations, and the placement of limits on the state expert's testimony. Regarding inclusion of expert testimony on BWS, the Ohio Supreme Court cited previous cases of precedent allowing this testimony. Expert testimony on BWS addresses the second element of the affirmative defense of self-defense, specifically the "bona fide belief that she was in imminent danger of death or grave bodily harm and that her only means of escape was the use of force" (*State v. Thomas*, 673 N.E.2d 1339, 1342 (Ohio 1997)). Because the state of Ohio has a subjective test for self-defense, expert testimony to determine the defendant's state of mind at the time of the act is crucial. *State v. Koss*, 551 N.E.2d 970 (Ohio 1990), allowed expert testimony to prove this element of self-defense and the General Assembly established that BWS "is a matter of commonly accepted scientific knowledge" (Ohio Rev. Code Ann. § 2901.06 (1990)) that is beyond the ken of lay jurors.

Regarding whether compelled psychiatric examinations by the State's expert violated Mrs. Goff's right against self-incrimination, the Ohio Supreme Court affirmed. They agreed with the appeals court that if the defendant raises the defense and uses an expert, the state is entitled to its own expert examination and testimony. They further clarified this decision by indicating that if the defense expert had testified only to the general characteristics of BWS, then the state could not have had its own expert evaluation. However, if the defense claims that the defendant has BWS, then "a limited examination by the state's expert concerning battered woman syndrome and its effect on the defendant's behavior" (*Goff*, p 1086) is allowed. They agreed with the appeals court that if a defendant raises the BWS defense, it is similar to testifying and essentially waives the right to protection against self-incrimination.

On whether there should be limits on the testimony of the state's expert in a BWS case, the Ohio Supreme Court determined that expert testimony should be limited to "testimony about the syndrome in general, testimony regarding whether the defendant experienced the syndrome, and testimony concerning whether the syndrome accounts for the requisite belief of imminent danger of death or great bodily harm to justify the use of the force in question" (*Goff*, p 1087). In this case, when the state's expert commented on the discrepancies of Mrs. Goff's statements and raised her credibility as an is-

sue, the expert became essentially another cross-examiner. This testimony was compared with *Estelle v. Smith*, 451 U.S. 454 (1981), regarding statements made by a defendant during a competency evaluation and later used at the capital sentencing phase. The Ohio Supreme Court considered Dr. Resnick's commenting on Mrs. Goff's discrepancies to be similar to recounting "unwarned statements in a post arrest custodial setting" as in *Estelle* (p. 467). The court held that expert testimony should be limited to the nature of BWS and whether the defendant met its characteristics. Other testimony by the expert should not be allowed. Therefore, the case was remanded.

Discussion

There is legal precedent for the admissibility of expert testimony on BWS in the United States and overseas in the United Kingdom, Canada, Australia, and New Zealand. However, BWS is not in the Diagnostic and Statistical Manual of Mental Disease (DSM), and there is a lack of an agreed-on definition. In Ohio, BWS is codified into law as being part of common scientific knowledge (which is questionable), specifically to potentially excuse women for violent acts. Only one gender may benefit from BWS laws. It raises the question of why PTSD is not allowed as a diagnosis that would precipitate a self-defense claim only in "offenses involving the use of force against another" for both genders.

Logically, if a defendant raises BWS and uses her own expert at trial, then in the interest of a level playing field, the prosecution should be able to have its own expert examine the defendant and testify. The court's view that this is not a violation of an individual's right not to incriminate himself is well supported.

The major issue in this case is limiting the state's expert to testifying only about the characteristics of BWS and whether the defendant had BWS. If the expert has serious questions about the credibility of the defendant's reports, the expert is not allowed to testify regarding the presence of BWS, even though it may be pivotal in reaching an opinion regarding a BWS defense. The result of this limitation is that when an expert is unable to form an opinion with reasonable medical certainty because of inconsistencies in reporting and collateral evidence, the expert is not allowed to testify. Furthermore, the expert will not even be allowed to explain why a conclusion could not be reached. These hindrances will tip the

scales in the favor of the defense, as the defense's expert testimony will go unrefuted.

The usefulness of a state's expert in cases where BWS is alleged will be limited, and dishonesty will be encouraged during the state's expert examination, as a defendant's deceitfulness has little consequence unless a diagnosis of malingering is substantiated. If the state's expert cannot offer an opinion because the defendant lacks credibility and the expert cannot explain the reasoning behind the inability to form an opinion, then it will make it much easier for the defense, even when inappropriate, to use battered woman syndrome as a successful defense.

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Determination of Volitional Impairment as a Condition of Continued Involuntary Confinement of Insanity Acquittee

Sai Li, MD

*Fellow in Forensic Psychiatry
Center for Forensic Psychiatry
Saline, MI*

Melvin J. Guyer, PhD, JD

*Professor of Psychology
Department of Psychiatry
University of Michigan
Ann Arbor, MI*

While the *Kansas v. Crane* Holding Concerning Proof of Volitional Impairment Applies to the State's Criteria for Continued Confinement of an Insanity Acquittee, a Separate Finding of Volitional Impairment Is Not Necessary

In *Richard S. v. Carpinello*, 589 F.3d 75 (2d Cir. 2009), the U.S. Court of Appeals for the Second Circuit denied Mr. S.'s petition for a writ of *habeas corpus*, holding that while the New York state courts erred in not applying the *Kansas v. Crane*, 543 U.S. 407 (2002), standards to the determination of his continued confinement as an insanity acquitted, they did not conclude unreasonably that the basis for his confinement met the requirements of the due process clause, since a separate finding of "volitional impairment" was not needed where a nexus between mental illness and such impairment can be established.

Facts of the Case

While on probation after pleading guilty to second-degree manslaughter for the killing of a male sex partner in 1978, Mr. S. was charged with attempted second-degree murder for stabbing a 15-year-old boy after a sexual encounter in 1980. In 1981, Mr. S. pleaded and was found not guilty by reason of mental disease or defect (NGRMDD) to that charge.

Pursuant to New York's Criminal Procedure Law, Mr. S. began his involuntary commitment at a secure psychiatric facility, after having been determined to be both mentally ill and dangerous. In 1986, Mr. S. was convicted of the murder of another male partner in 1979 and was sentenced to 25 years to life. However, in 1991, Mr. S.'s conviction was reversed, as his initial disclosure of that crime, made under hypnosis, was considered unreliable, and he was transferred back to a secure facility.

In 2004, Mr. S. appealed an order for his continued confinement in a nonsecure psychiatric facility. After a four-day hearing, the county court found Mr. S. to be both mentally ill and dangerous, warranting his continued retention. Mr. S. then appealed to the Third Department of the New York Supreme Court Appellate Division, arguing that the state must apply the holding of the U.S. Supreme Court decision in *Kansas v. Crane*, which was that under the Kansas Sexually Violent Predator (SVP) Act of 1994, involuntary civil commitment can be imposed only if "serious difficulty in controlling behavior" can be proven as a separate mental condition, in addition to evidence of mental illness and dangerousness. After weighing arguments and psychiatric testimony from both sides, the New York appellate division court agreed with the county court's finding of Mr. S.'s mental illness and dangerousness "by a strong preponderance of the credible evidence." Regarding his claim of improper confinement since the state had failed to prove that he had a volitional impairment, the court found the argument to be "without merit."

In 2008, Mr. S. petitioned the U.S. District Court, seeking a writ of *habeas corpus* on the grounds that the lower New York courts failed to extend and apply the *Crane* holding to his case. The federal district court held that Mr. S.'s main argument, that the holding in *Crane* applied to the conditions of his confinement, was irrelevant, as he had not been charged as a Sexually Violent Predator (SVP), and that the provisions of *Crane* did not extend to insanity acquittees (*Richard S. v. Carpinello*, 628 F. Supp.