cating that the plaintiff was agitated to the point of creating an unsafe environment for the delivery of an insulin injection, or documentation from the physician that a missed dose of insulin would not be expected to have an appreciable effect on his long-term diabetes control) would have made a difference in the Fourth Circuit's opinion. Clinicians in correctional settings are advised to pay special attention to documenting situations where medical care is withheld, both to protect themselves from accusations of deliberate indifference and to be mindful of providing proper medical treatment to inmates.

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Municipalities May be Held Liable for Warrantless Removal of Child

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Ninth Circuit Rules That Warrantless Removal of a Child Is Constitutional Only in the Most Exigent of Circumstances

In *Kirkpatrick v. County of Washoe*, 843 F.3d 784 (9th Cir. 2016), an infant, B.W., was removed from her mother's care two days after her birth. Under 42 U.S.C. § 1983 (1996), the father, Jamie Kirkpatrick, sued the social workers involved and the County of Washoe, Nevada, for damages, claiming that they violated his Fourth and Fourteenth Amendment rights in removing the child from her parent without a warrant. The district court awarded summary judgment to the defendants, in part because of improper filing by Mr. Kirkpatrick and his not having established his paternity at the time of the removal. The Ninth Circuit Court of Appeals ruled that B.W.'s constitutional rights, in addition to Mr. Kirkpatrick's, should be considered. However, although the social workers had violated B.W.'s constitutional rights, they had qualified immunity because of a lack of legal guidance that would have made them aware of their constitutional violations. The court reversed the summary judgment for the County of Washoe. There was inadequate evidence to indicate that the county should have had a policy regarding obtaining warrants, and there was not a direct link between the lack of a policy and the violation of B.W.'s constitutional rights.

Facts of the Case

B.W., a female, was born on July 15, 2008, in Reno, Nevada. At birth, she tested positive for methamphetamine. Her mother, Rachel Whitworth, admitted to smoking methamphetamine throughout her pregnancy. The father, Jamie Kirkpatrick, was present for the birth, but his paternity had not been established. It was later proved that he was B.W.'s father.

Ms. Whitworth informed the hospital staff that she had had two other children removed from her care. The hospital obtained information that her other two children were in foster care and that the Washoe County Department of Social Services (DSS) was pursuing termination of parental rights because Ms. Whitworth had not followed through with the case plan. Specifically, she had failed to obtain housing for her children and had not demonstrated an ability to care for them. In the hospital, Ms. Whitworth failed to change and feed B.W. appropriately, prompting the social worker to recommend that the hospital place a hold on the infant.

On July 17, 2008, B.W. was discharged into DSS custody and placed in foster care with her siblings. The next day a protective custody hearing was held by the Nevada Second Judicial District Court, where reasonable cause was established to retain B.W. in protective custody. A petition was subsequently filed by DSS on July 28, 2008, alleging that B.W. required protection. Ms. Whitworth had not retained an attorney, made no further contact with DSS, and was unable to be located for future hearings.

Mr. Kirkpatrick did not attend the protective custody hearing on July 18, 2008. The court completed a paternity test, at his request, and his paternity was established. In January 2009, he expressed interest in having B.W. placed with him and ultimately obtained custody on December 31, 2009. Before that placement, in October 2009, Mr. Kirkpatrick filed the original suit against Washoe County and the three DSS social workers involved in the case.

Mr. Kirkpatrick claimed violations of the Fourth and Fourteenth Amendments for removal of B.W. from her parents without a warrant. He asserted that the social workers should have obtained a warrant for her removal and that the county had a policy of not training its social workers to obtain warrants, leading directly to the Fourth Amendment violation.

The United States District Court for the District of Nevada granted summary judgment to the defendants, in part because of an apparent mistake where Mr. Kirkpatrick was the only listed plaintiff when he was not the person taken into custody. In addition, he had not established parental rights at the time B.W. was seized. Mr. Kirkpatrick appealed.

Ruling and Reasoning

The Ninth Circuit Court of Appeals ruled that B.W.'s father had "no enforceable parental rights" and so did not have Fourteenth Amendment due process rights at the time that B.W. was seized. In addition, the court found that the social workers, who met the criteria for qualified immunity, had not violated B.W.'s established rights under the Fourth Amendment, and so the Court upheld the district court's grant of summary judgment to the defendants on the first two claims. However, there was sufficient evidence that the County of Washoe may have had a policy of seizing children in non-exigent circumstances that raised a genuine point of material fact and so remanded on the claim against Washoe County.

The Ninth Circuit analyzed several factors related to this case in determining whether summary judgment should have been awarded to the county and to the social workers. Based on that analysis, the court then evaluated and decided whether there was merit in the original Fourth and Fourteenth Amendment claims against the defendants, and if the facts supported the requirements for bringing suit against the County of Washoe under 42 U.S.C. § 1983. They also decided whether the social workers had qualified immunity under the same code.

All justices concurred with the district court's decision that Mr. Kirkpatrick could not have suffered a Fourteenth Amendment violation at the time of B.W.'s removal because he had not established paternity at the time, and the district court summary judgment was affirmed.

Based on a two-prong test for qualified immunity, the Ninth Circuit affirmed the summary judgment for the social workers regarding the Fourth Amendment claim that B.W. had a right to be with her parents. The first prong was to assess whether the officers of the state, the social workers, had violated a constitutional right. The second was to determine whether the right was clearly established at the time of the violation. Negation of either prong qualifies state workers for immunity from prosecution.

For the analysis of the first prong, the court referred to *Rogers v. County of San Joaquin*, 487 F.3d 1288 (9th Cir. 2007). The opinion in *Rogers* was that, although there had been obvious neglect of the children involved, the lack of exigency would have been apparent to any reasonable social worker and so the Roger's children should not have been removed before getting a warrant. The court determined that B.W. was also in no imminent risk before the time of removal, and so the social workers violated her Fourth Amendment rights by removing her without obtaining a warrant.

For the second prong, they analyzed whether B.W.'s right to require a warrant before being removed was clearly established, beyond debate as defined in *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011). This standard was said to exist as a way to protect all but the plainly incompetent or those who knowingly violate the law. The court noted that there is no clear legal standard for social workers to define exigent from nonexigent circumstances. They concluded that for the second prong, the right was not clearly established; therefore, the social workers had qualified immunity. This ruling provided the rationale for affirming the district court's summary judgment on the Fourth Amendment claim against the social workers.

The court also reviewed whether the County of Washoe violated B.W.'s Fourth Amendment rights. They determined that no official policy existed regarding the need to obtain a warrant when the decision for removing children is made and no imminent danger exists. The majority opined that a pattern of violations, which is typically used to evaluate whether a municipality could be held liable in such cases, was not the only approach to determining culpability if there was an element of obviousness. The majority wrote that Washoe County's practice of removing children without warrants or regard to imminent bodily harm was highly likely to result in constitutional violations,

to such a degree that a jury could reasonably find liability. "Accordingly, a question of material fact exists regarding whether Washoe County maintained an unconstitutional, unofficial policy. Summary judgment on this claim is inappropriate" (*Kirkpatrick*, p 797). The court also ruled that there was enough evidence to suggest a direct causal link (a requirement of a 42 U.S.C. § 1983 claim against a municipality) between the lack of policies in Washoe County and the Fourth Amendment violations by the social workers, giving further reason for them to remand this portion of the ruling.

Discussion

This case provides important guidance for forensic psychiatrists who are in the role of advising municipalities or are involved in the analysis of custody disputes. It clearly lays out that warrantless removal of children must be undertaken only in cases of very clear imminent danger. If a social worker has removed a child or children without attempting to get a warrant first, or if a municipality fails to train its social workers on the necessity to do so, they are likely to be exposed to Fourth and Fourteenth Amendment challenges. In addition, in the Ninth Circuit, they can no longer rely on qualified immunity based on the second prong of the analysis of whether the right was clearly established at the time of the violation. That a warrant is necessary in nonexigent circumstances is now beyond debate.

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

Considerations Related to Psychologist–Patient Privilege in Requests for Reverse-Transfer Hearings

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The Colorado Supreme Court Ruled That a Trial Court Does Not Have Authority to Compel a Juvenile to Produce Mental Health Records or Undergo a State-Administered Psychological Assessment When the Juvenile Requests a Reverse-Transfer Hearing to Have His Legal Case Heard in Juvenile Versus Adult Criminal Court

In *People v. Johnson*, 381 P.3d 316 (Colo. 2016), the Colorado Supreme Court found error in a previous decision that allowed the district attorney to compel a juvenile defendant to produce privileged mental health records and submit to a state-administered psychological assessment after the juvenile requested a reverse-transfer hearing (to have her case transferred from adult court to juvenile court). The court decided that the reverse-transfer statute allowed the trial court to consider only existing mental health records that are made available by the defendant, and the defendant can only make such privileged records available by waiving the psychologist–patient privilege, either explicitly or implicitly. In this case, it was determined that the juvenile did not make such a waiver, and she could not be forced to do so or participate in a new psychological assessment, the results of which would not be privileged. In the decision, the Colorado Supreme Court discussed the importance of the psychologist–patient privilege and remanded the case to the trial court with a ruling to show cause as to why its original ruling should not be vacated in light of this new decision.

Facts of the Case

The juvenile defendant, Sienna Johnson, was charged with two counts of conspiracy to commit first-degree murder. The district attorney's criminal complaint stated that Ms. Johnson should be tried as an adult. In response, Ms. Johnson made a request pursuant to the Colo. Rev. Stat. Ann. § 19-2-517(3) (2010), for a reverse-transfer hearing to have her case transferred to juvenile court. The request was granted, and the district attorney argued that the trial court was required to evaluate Ms. Johnson's mental health based on § 19-2-517(3)(b)(VI). The district attorney filed a motion to request records pertaining to Ms. Johnson's mental health and to request a court-ordered mental health evaluation. In response, Ms. Johnson claimed that she did not waive her psychologist–patient privilege and therefore should not be compelled to produce any records regarding her mental health. She also asserted that, under the