Ruling and Reasoning

The Alaska Supreme Court held that expert witness testimony given by Ms. Oxford qualified under section 1912(e) of the ICWA because knowledge of the minor's specific Native culture was not directly relevant to the determination of present danger to herself or others as the result of a serious mental illness. The court examined the ICWA and its regulations, the BIA Guidelines, and prior Alaska case law. ICWA identifies the requirements for child custody proceedings involving Indian children. It states that any removal of an Indian child from the parent must be in settings where "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" (25 U.S.C. § 1912(f)).

The ICWA regulations also outline requirements for expert witness testimony. Though ICWA regulations indicate a qualified expert witness is someone who has knowledge on "the prevailing social and cultural standards of the Indian child's Tribe" (25 C.F.R. § 23.122(a) (2019)), the BIA has published further guidelines for interpreting the requirements. These guidelines indicate that knowledge of Alaska Native culture "may not be necessary if such knowledge is plainly irrelevant to the particular circumstances at issue in the proceeding" (BIA, U.S. Department of the Interior, Guidelines for Implementing the Indian Child Welfare, p 54 (2016)). Additionally, the Alaska Supreme Court identified the holding in *Eva H.* as precedent that "a qualified expert witness under ICWA need not always have knowledge of Native culture" (*In re April S.*, p 1099).

On the basis of the above reasoning, the Alaska Supreme Court agreed with the superior court's analysis and affirmed the ruling. They found Ms. Oxford was qualified as an expert witness under ICWA even though she had little knowledge of the Alaska Native culture.

Discussion

This case further outlines who may qualify as an expert witness under the ICWA. In the past several years, we have seen continued regulation of how to interpret and apply the ICWA. For instance, in 2016, the BIA formalized their prior recommended guidelines for interpreting the ICWA into regulations and stated that "a qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe" (25 C.F.R. § 23.122(a)).

The Alaska court system has also ruled previously on when someone may not qualify as an expert witness (*Bob S. v. State,* 400 P.3d 99 (Alaska 2017)) and noted instances where cultural knowledge may not be required to qualify as an expert witness (*Oliver N. v. State,* 444 P.3d 171 (Alaska 2019)).

It will be important to monitor whether this ruling, and the reasoning supporting it, is used as precedent in future cases involving the ICWA. In particular, given the recent emphasis on inherent bias within a variety of systems in our society, it may be useful to track cases that are recognized as the "limited exception" to the requirement that an expert witness have knowledge of Native culture when considering a Native child's needs. Broadly speaking for expert witnesses, it may be prudent to consider asking questions about a potential evaluee's identified culture, the potential impact of culture on the matters relevant to the case, and whether the expert can assess relevant cultural factors prior to accepting a case. For example, when considering whether to work on a case involving Native children, experts should have knowledge of the ICWA and be able to discuss with attorneys and courts whether it applies to a particular case. In addition, experts should have the ability to discuss exceptions to ICWA and when they apply with attorneys and courts. The development of continuing medical education courses focused on the application of cultural formulation and cultural competency in the forensic settings would be valuable in assisting experts in such cases.

Lack of Adequate Mental Health Treatment for Prisoners Constitutes Cruel and Unusual Punishment

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Failure to Provide Mental Health Treatment and Inappropriate Use of Solitary Confinement for Seriously Mentally Ill Prisoners Violates Eighth Amendment

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Key words: Eighth Amendment; cruel and unusual punishment; serious mental illness; solitary confinement; deliberate indifference

In *Disability Rights Montana, Inc. v. Batista*, 93 F.3d 1090 (9th Cir. 2019), the U.S. Court of Appeals for the Ninth Circuit reversed the district court's dismissal of a 42 U.S.C. § 1983 claim by Disability Rights Montana, Inc., that alleged the Montana Department of Corrections defendants violated the Eighth Amendment rights of all prisoners with serious mental illness incarcerated at the Montana State Prison. The court remanded the case for further proceedings and reassigned the case to a different district court judge.

Facts of the Case

Disability Rights Montana, Inc. (DRM), is a nonprofit organization authorized by the Protection and Advocacy for Individuals with Mental Illness Act to advocate for and protect the rights of mentally ill individuals in Montana. DRM filed a 42 U.S.C. § 1983 suit in the U.S. District Court for the District of Montana alleging that Mike Batista, the director of the Montana Department of Corrections, and Leroy Kirkegard, the warden of the Montana State Prison (known collectively as the Department of Corrections defendants) violated the Eighth Amendment rights of all inmates with serious mental illness who are incarcerated at the Montana State Prison. DRM alleged that policies and practices in place at the prison amounted to cruel and unusual punishment, and that the Department of Corrections defendants were aware of and deliberately indifferent to these practices.

DRM outlined nine specific policies and practices that they alleged violated prisoners' rights. These policies primarily involved the excessive and inappropriate use of solitary confinement with prisoners with serious mental illness, failure to properly diagnose and treat prisoners with serious mental illness, failure to consider prisoners' mental illness when deciding their housing and custody levels, and failure to review and evaluate prisoners' mental health care treatment plans adequately to identify and fix potential problems.

DRM supported their claim that the use of solitary confinement in seriously mentally ill inmates is cruel and unusual by citing statements from two national organizations and an amicus brief that inmates with serious mental illness should not be subjected to prolonged periods of extreme isolation. DRM went on to detail how placing a prisoner in solitary confinement limits their access to mental health treatment. They also alleged that the defendants failed to respond appropriately to reports of suicidal ideation from prisoners, which resulted in an increased risk of suicide among prisoners with serious mental illness.

To illustrate how the above policies and practices directly affected inmates, DRM described the care of nine prisoners who had at one point received a diagnosis of a serious mental illness. They alleged that these prisoners, all of whom spent time in various forms of solitary confinement, received inadequate mental health care. This led to a worsening of their mental illness, as well as an increase in self-harm. Three of the nine prisoners died from suicide while incarcerated.

Finally, DRM alleged that the Department of Corrections defendants were aware of the constitutionally suspect practices as they were involved in at least two previous lawsuits related to the prison's provision of mental health care to prisoners and the inappropriate use of solitary confinement with prisoners with serious mental illness. They also noted that prisoners frequently submitted requests for and grievances about their mental health care, and that DRM themselves sent a letter to Mr. Batista detailing many of these above complaints. Despite being aware of the concerns, the Department of Corrections defendants failed to remedy their practices.

In response to the suit, the Department of Corrections defendants filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion to dismiss, and DRM appealed.

Ruling and Reasoning

The U.S. Court of Appeals for the Ninth Circuit reversed the district court's ruling and remanded the

case to a different district court judge for further proceedings. The court of appeals noted that there is a well-established U.S. Supreme Court precedent that applies the Eighth Amendment's prohibition against cruel and unusual punishment to prisoners' right to receive mental health care that meets "minimum constitutional requirements." In *Brown v. Plata*, 563 U.S. 493 (2011), the Court held that prisoners' Eighth Amendment rights are violated when they are exposed to a substantial risk of serious harm and prison officials are deliberately indifferent to this risk.

The court of appeals further relied on a two-prong test for cruel and unusual punishment described in *Farmer v. Brennan*, 511 U.S. 825 (1994). Under the first, objective prong, the plaintiff must show that prison conditions posed a "substantial risk of serious harm" to inmates. The court of appeals held that DRM's complaint contained sufficient factual allegations and, if true, that the policies and procedures of the prison may have posed a substantial risk of serious harm to inmates with serious mental illness. Specifically, DRM named nine system-wide practices that they allege were constitutionally deficient. They also described in detail the treatment of nine prisoners who were alleged to have serious mental illness. DRM's allegations of a substantial risk of serious harm were further supported by common sense and expert evidence presented in an amicus brief.

Next, the court of appeals discussed the second, subjective prong. Under the subjective prong, the plaintiff must show that the defendants were deliberately indifferent to the risk of harm. To demonstrate deliberate indifference, the plaintiff must show that the defendants were "aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists" (*Farmer*, p 837), that the defendants drew the inference of risk, and that they were indifferent to the risk by failing to act. The court of appeals held that DRM satisfied this subjective prong by detailing the numerous complaints that the Department of Corrections defendants had received about harmful prison practices and deficient mental health treatment. This included two lawsuits against the prison, multiple grievances from prisoners, and letters to the Department of Corrections defendants from DRM itself. Despite being aware of the risks to prisoners, the Department of Corrections defendants failed to act and chose to maintain the damaging policies.

On remand, the court assigned the case to a different district court judge to "preserve the appearance of justice" (*Batista*, p 1100). The court concluded that the first judge acted without ill will but had confused the case with another case.

Discussion

This case outlines several matters that are relevant to mental health providers, particularly those working in a correctional setting. Citing *Brown*, the court of appeals stated that there are "clear connections between mental health treatment and the dignity and welfare of prisoners" (*Brown*, p 501). While this case focused on the harm that placing prisoners with serious mental illness in solitary confinement can cause, there were also allegations about inadequate mental health treatment. In particular, the plaintiffs described accounts of prisoners who at some point had a serious mental illness diagnosis. These prisoners were allegedly subjected to various forms of solitary confinement, often for punishment or control of behaviors that may be attributed to symptoms of a mental illness. Additionally, it was noted that prisoners rarely saw mental health providers while in solitary confinement, if at all. Most commonly they would meet with a mental health technician for a few minutes once a week at the door of their cell, without any accommodations for privacy.

There were allegations that mental health providers, including the prison psychiatrist, failed to diagnose serious mental illness in prisoners or to provide them with medications for their reported mental illness. These allegations were based on reports that prisoners who at one time had a diagnosis of a serious mental illness and were treated with psychotropic medications were later determined to not have a major mental illness or to be malingering their symptoms and were subsequently taken off of their psychotropic medications. Another common complaint was mental health providers' failures to respond to threats of suicide from prisoners. It was noted in the original suit that mental health providers often attributed threats of suicide, including self-injurious behaviors, to manipulation on the part of the prisoner. At times the staff responded to these threats by placing the prisoner in solitary confinement. The

suit alleged that this dismissal of self-harm and suicidal thoughts led to an increase in deaths from suicide in prisoners with serious mental illness. Another main complaint was the lack of routine review of prisoners' mental health care treatment plans, leading to an inability to identify major concerns or inadequacies.

While this case did not address the actual factual nature of the specific allegations themselves, it is relevant that the claims about mental health practices, taken as factual for the purpose of this appeal, were found to be sufficiently plausible to constitute cruel and unusual punishment on the part of the prison administration. This case highlights potential caveats that psychiatrists should be aware of when working in the correctional system, particularly when diagnosing and treating mental illness and working with the correctional staff to determine how a prisoner's mental illness should affect their housing and custody status.

Legal Standard for Emergency Mental Health Seizure by Law Enforcement

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Law Enforcement Can Seize Individuals for an Emergency Mental Health Evaluation Only If There Is Probable Cause That the Individual Poses an Emergent Danger to Self or Others

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Key words: emergency mental health seizure; probable cause

In *Graham v. Barnette*, 970 F.3d 1075 (8th Cir. 2020), Teresa Graham appealed the district court's granting of summary judgment for Sergeant Shannon Barnette, Officer Mohamed Noor, Officer Amanda Sanchez, and the City of Minneapolis (herein referred to as City) after the above-mentioned officers entered Ms. Graham's home without a warrant, seized her, and transported her to a hospital for a mental health evaluation. The Eighth Circuit Court of Appeals affirmed.

Facts of the Case

Around 10 a.m. on May 25, 2017, Ms. Graham called 911 to report an unknown man was smoking marijuana on a retaining wall behind her home. A City police officer went to Ms. Graham's home later that morning, did not see a man, and left without speaking to her. She called 911 several hours later to complain that officers had not responded to her initial call.

Around 6 p.m., a police officer called Ms. Graham and informed her that they had investigated her earlier report. Shortly thereafter, an individual claiming to be Ms. Graham's cousin called 911 to report that Ms. Graham had threatened him and his family; the dispatcher passed this comment to the responding officers. This caller told the 911 dispatcher that "this is not an emergency" and that he did not believe she would "do anything." He requested a "welfare check" because he believed Ms. Graham had a history of mental illness.

Two hours later, Officers Noor and Sanchez went to Ms. Graham's home; this encounter was recorded on Officer Sanchez's body camera. Ms. Graham answered the door, accused the police of harassing her, and demanded they leave. The officers left; they noted in their incident report that she "appeared to be AOK" although they were unable "to check on her welfare" due to her insistence that they leave. Within one hour, a 911 operator reported Ms. Graham had called three more times. The 911 operator described Ms. Graham as agitated, aggressive, and "not making sense." Sergeant Barnette called Ms. Graham to address her concerns. Ms. Graham then called 911 two more times.

Sergeant Barnette ordered Officers Noor and Sanchez to bring Ms. Graham into custody for a mental health evaluation under Minnesota's Civil Commitment and Treatment Act (MCCTA), Minn. Stat. § 253B.05 (2)(a) (2017), on the basis of the officers' interactions with Ms. Graham throughout the day. This Act authorized an officer to seize a