

management of speech. In the present case, the court found the MCTL's prohibition on administering conversation therapy to minors *via* talk therapy does not regulate expression. Rather, it regulates a medical treatment that incidentally involves speech and as such is an exception to the First Amendment. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court held that the practice of medicine is subject to license and regulation requirements by the state even if it incidentally involves speech.

In *Chiles*, the court discussed the difference between regulations on content-based speech versus specific professional practices. The court specified a mental health clinician may speak about conversion therapy but may not practice it. This delineates the difference between content-based speech management, which would require greater scrutiny, versus regulations addressing professional conduct incidentally involving speech.

The American Psychological Association (APA) submitted an *amicus* brief in the case for the position that conversion therapy is harmful and not supported by credible evidence. This illustrates another way that mental health clinicians can help courts to understand mental health concepts. The court cited work submitted by the APA and highlighted the lack of research demonstrating the practice's effectiveness. The court also discussed the risk of harm posed by conversion therapy by citing research showing an increased risk of suicide for individuals undergoing this practice. The MCTL was added to Colorado law because of a stated interest in ensuring mental health professionals complied with a standard of care based on updated scientific research. Various ethics codes in medical and mental health disciplines note clinicians should do no harm, and the practice of conversion therapy is contrary to that admonition. Additionally, in many cases, governmental agencies, laws, professional organizations, and licensing boards collaboratively work to guide professional conduct for the protection of society. These standards create different guidelines than would be expected for a lay person, which may ultimately include exceptions to First Amendment rights. The case has been appealed to the U.S. Supreme Court.

Independent Expert Witness Testimony in Sexually Violent Predator Trials

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In Sexually Violent Predator Act Proceedings, Evaluatees Cannot Be Compelled to Engage in Additional Evaluations Beyond State-Appointed Evaluations

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Key words: sexually violent predators (SVPs); Sexually Violent Predators Act (SVPA); expert testimony; independent forensic evaluations; prosecution experts

The California Supreme Court's decision in *Needham v. Superior Court of Orange County*, 550 P.3d 570 (Cal. 2024), addressed the scope of independent forensic evaluations under the state's Sexually Violent Predator Act (SVPA or the Act). The central question was whether the prosecution can present its own retained expert to testify on the defendant's sexually violent predator (SVP) status and, if so, under what conditions. The California Supreme Court held in a 5-2 decision that, although expert witnesses privately retained by the prosecution can testify, an SVP evaluatee cannot be compelled to undergo additional precommitment interviewing or testing beyond that which is done by state-appointed Department of State Hospitals (DSH) evaluators.

Facts of the Case

Nicholas Needham, a convicted sex offender, was referred by the District Attorney's office in Orange County for evaluation as a possible SVP under the SVPA. The Act specifies that individuals who meet SVP criteria may be civilly committed for treatment in a secure facility following completion of a prison sentence. The Act also lays out a stringent protocol for how potential SVPs are to be evaluated.

In accordance with the Act's protocol, Mr. Needham was referred to two state-appointed DSH evaluators for examination. Both evaluators initially opined Mr. Needham met SVP criteria. The District Attorney's Office thus petitioned to commit Mr. Needham as an SVP. But before the probable cause hearing, one of the evaluators submitted an updated evaluation indicating he no longer felt Mr. Needham qualified for

commitment. In accordance with the SVPA protocol, two additional evaluators were appointed by DSH to opine on the case. One evaluator concluded Mr. Needham qualified as an SVP, whereas the other concluded he did not. Based on these split opinions, the trial court concluded there was probable cause to believe Mr. Needham was an SVP and ordered a trial.

Following the probable cause hearing, another evaluator changed his opinion, indicating he no longer believed Mr. Needham qualified as an SVP. The prosecution subsequently retained an expert outside the purview of DSH to opine on whether Mr. Needham met criteria for commitment as an SVP. The prosecution sought discovery of Mr. Needham's DSH evaluations and records for the independent expert to review. This request was granted by the court despite objection from Mr. Needham. The privately retained expert interviewed Mr. Needham in addition to reviewing records and prior evaluations. Mr. Needham filed motions to preclude the privately retained expert from testifying at trial, arguing that the SVPA did not authorize privately retained experts to perform evaluations of potential SVPs. The court denied these motions.

Mr. Needham then filed a petition for writ of mandate or prohibition with the Fourth District Court of Appeal to prevent the prosecution's expert from conducting any further evaluation and from testifying at trial. The Fourth District Court of Appeal denied the petition. Mr. Needham then petitioned the California Supreme Court for review. The Supreme Court granted Mr. Needham's petition and instructed the court of appeals to review the case. On review, the appellate court granted the writ petition. Further, the court directed the trial court to exclude the testimony of the prosecution's privately retained forensic expert. The court concluded that the trial court's initial approval of the use of a privately retained expert was not authorized under the SVPA. The court reasoned that the SVPA specifically and "in great detail" laid out the details of the formal precommitment evaluation, including that evaluations be done by DSH evaluators. The prosecution petitioned the Supreme Court of California for review.

Ruling and Reasoning

Justice Carol Corrigan wrote the majority opinion. The court ruled that, although the prosecution could retain and present its own psychiatric expert in

SVP cases, it could not compel an evaluatee to undergo additional precommitment testing or interviews beyond what was already conducted by state-appointed evaluators from DSH. The majority went further in its reasoning to conclude that "precommitment evaluation may only be conducted by evaluators appointed by DSH" (*Needham*, p 585).

The court noted that the SVPA describes in great detail the procedure for evaluations in civil SVP proceedings. The Act specifically includes language indicating that DSH evaluators should be the ones to conduct psychological evaluations to determine whether a convicted sex offender meets SVP criteria. The court indicated that requiring an evaluatee to undergo additional evaluations was an undue burden to the evaluatee. Further, such a requirement could infringe on the individual's constitutional protections. The court indicated that any experts privately retained by the prosecution should rely on the evaluations and testing conducted by state-appointed DSH evaluators, as well as other admissible evidence.

Central to the court's ruling was the importance of safeguarding the rights of an individual subjected to SVP proceedings. At the same time, the court affirmed the prosecution's right to retain and present its own expert testimony in SVP proceedings. To balance this, the court said the prosecution's expert's opinion must be based on the existing record. Under these more limited conditions, the court would permit the prosecution's expert to testify at trial and offer an independent opinion on the defendant's SVP status.

Dissent

The dissenting opinion, authored by Justice Joshua Groban and joined by Justice Goodwin Liu, expressed concern with the majority's decision to disallow a forensic expert privately retained by the prosecution from conducting independent examination of an evaluatee while simultaneously allowing that expert to testify at trial. The view of the dissent was that the prosecution should not be allowed to retain independent experts in SVP cases. The dissent focused on the extreme caution that must be taken in SVP proceedings, given the question at hand is whether to deprive an individual of civil liberties on the basis of potential future crimes, not past crimes for which the person has already served a sentence. The dissent's justices reading of the SVPA was that the Act gives explicit rights to defendants to call their own testifying expert and provides no such right to the people.

To allow the prosecution to retain an expert outside the stringent requirements of the SVPA process goes beyond the intent of the SVPA. The dissenting justices emphasized the importance of preserving due process for the individual under evaluation. They raised concern that the majority's ruling may make it easier for the prosecution to prevail in SVP proceedings.

Discussion

The California Supreme Court's decision in *Needham* has significant implications for forensic psychiatrists and other psychiatric examiners working in SVP proceedings. One of the key outcomes of this case is the court's ruling that, although the prosecution may retain its own expert witnesses to testify about the defendant's SVP status, these experts may not require an evaluatee to participate in additional testing or interviews beyond what has been completed by state-appointed evaluators. This decision emphasizes the limitations on the role that forensic psychiatrists retained by the prosecution play in SVP proceedings. Forensic professionals working in such proceedings must now recognize that their ability to independently assess a defendant is constrained by the procedural framework established by the SVPA, meaning they must rely on the existing evaluations rather than conducting new or separate assessments.

For forensic psychiatrists and other examiners, the ruling creates a shift in how independent evaluations are conducted and presented in the context of SVP proceedings. Specifically, the court's ruling raises the question as to how, in California, the testimony of independent experts relying on others' evaluations to form their opinions will hold up to hearsay objections under *People v. Sanchez*, 374 P.3d 320 (Cal. 2016). In *Sanchez*, the California Supreme Court held that expert testimony relying on case-specific hearsay is inadmissible unless the hearsay is independently admitted into evidence or falls under an exception to the hearsay rule. The majority opinion in *Needham* references *Sanchez* and concludes that their present opinion does not conflict with the standard set forth in *Sanchez*. But the limitation of relying on others' evaluations could impact the perceived value of the independent forensic evaluators' opinions, as such evaluators will have less latitude to offer new insights. Forensic psychiatrists need to be aware of these requirements and consider them carefully before being retained in these matters.

Moreover, the *Needham* decision raises important questions about the balance between the state's interests in public safety and the constitutional rights of individuals facing SVP commitment. Forensic psychiatrists must navigate this delicate balance while providing expert testimony. The ruling emphasizes the need for psychiatric examiners to carefully consider the ethics and legal responsibilities involved in SVP evaluations. As the majority and dissenting opinions both emphasize, the rights of the defendant in these civil proceedings are of paramount importance. The court's decision emphasizes concerns with maintaining fairness and avoiding coercion in the proceedings. The challenges in preserving the balance between the people's interest in public safety and the defense's interest in due process will inevitably continue to unfold as future cases test the limits of the *Needham* decision.

Involuntary Psychiatric Treatment and Immigrant Protection from Removal

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Appropriate Involuntary Psychiatric Hospitalization and Treatment Is Not Considered Persecution or Torture Under U.S. Asylum Law

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The case of *Joshi v. Garland*, 112 F.4th 181 (4th Cir. 2024), addresses the question of whether involuntary psychiatric hospitalization and treatment are considered persecution or torture in the context of applications for protection from removal from the United States. Hanumant Joshi, an Indian national with a history of severe mental illness, asserted that he should be granted asylum, withholding of removal, and protection under the