

Forensic Psychiatry Program
 John A. Burns School of Medicine
 University of Hawaii at Manoa
 Honolulu, HI

Sexually Violent Predators

Miranda Warnings Not Required Prior to Psychological Evaluations to Determine Whether a Sexually Violent Person Petition Should Be Filed

In re Lombard, 684 N.W.2d 103 (Wisc. 2004), addresses the question of whether Fifth Amendment rights were violated when, at a jury trial to determine civil commitment proceedings based on a petition filed under a Sexually Violent Persons law, the state of Wisconsin introduced statements made during a pre-petition psychological evaluation. The Supreme Court of Wisconsin affirmed a lower appellate court's finding that, under Wisconsin's Sexually Violent Person (SVP) law, *Miranda* warnings are not required prior to a pre-petition psychological evaluation. At the time of trial to determine whether civil commitment under the Wisconsin SVP law should proceed, a person is entitled to the same rights available to a defendant in a criminal proceeding. However, these rights do not apply to encounters that take place before an SVP petition has been filed.

Facts of the Case

After serving about one-fourth of a 40-year prison sentence for multiple sexual assault convictions, Joseph Lombard was paroled in March 1992. Two and half years later, Mr. Lombard's parole was revoked, and he was returned to prison. Five years later, in 1999, Mr. Lombard's mandatory release date was approaching. The state sent Anthony Jurek, PhD, a psychologist from the Department of Corrections, to interview Mr. Lombard to determine whether a petition should be filed for a hearing under Chapter 980 of the Wisconsin State Statutes, concerning the commitment of sexually violent persons.

On December 1, 1999, the first of the three-day interview, Dr. Jurek presented Mr. Lombard a disclosure form, part of which stated the following: "You have the right not to participate in the examination or to answer any of the questions posed to you, but this refusal to answer will be used as part of the evaluation." Mr. Lombard signed and dated the

form. Dr. Jurek proceeded to examine Mr. Lombard. Based on the examination, Dr. Jurek recommended that Chapter 980 proceedings be pursued. Dr. Jurek assessed Mr. Lombard as a sexually violent person who met the diagnostic criteria for sexual sadism and who also had antisocial personality disorder.

The jury trial to determine whether Lombard should be committed as a sexually violent person began on October 16, 2000. Three expert witnesses testified for Mr. Lombard. Dr. Jurek was the only expert witness for the state and the only witness to conclude that Mr. Lombard was substantially likely to reoffend. On October 20, 2000, the jury found Mr. Lombard to be a sexually violent person, and he was committed to an institution.

Mr. Lombard filed a series of motions and appeals. The first set of motions claimed, among other things, that Mr. Lombard did not give informed consent to be interviewed by Dr. Jurek during the pre-petition evaluation. The court denied these motions. Mr. Lombard appealed the denial of his motions, the finding that he was a sexually violent person, and the subsequent commitment. The court of appeals remanded to the circuit court to determine whether Mr. Lombard received ineffective counsel at trial. Mr. Lombard filed a motion for a new trial on the basis of ineffective counsel at trial, because his counsel had not objected to the admission of Mr. Lombard's statements to Dr. Jurek. Mr. Lombard also asked for an evidentiary hearing.

Once again, Mr. Lombard's requests were denied. The circuit court held that Mr. Lombard's Fifth Amendment rights were not violated, because he had signed the advisement form prior to his interview with Dr. Jurek. The court noted that, as part of the form, Mr. Lombard was informed that Dr. Jurek would consider a refusal to participate when reviewing the evaluation.

Again, Mr. Lombard appealed the determination that he was a sexually violent person and the subsequent commitment under Chapter 980. Mr. Lombard asserted that his Fifth Amendment rights were violated because his statements to Dr. Jurek during the pre-petition psychological evaluation were used at trial. The Court of Appeals held that Mr. Lombard was not entitled to a *Miranda* warning during Dr. Jurek's evaluation. In its decision, the court referred to its previous holding in *State v. Zanelli (Zanelli II)*, 589 N.W.2d 687 (Wisc. Ct. App. 1998) that Chapter 980 "is a civil commitment proceeding, not a

criminal proceeding.” Because statements made during Chapter 980 proceedings do not subject an individual to future prosecution, *Miranda* warnings are not required.

In Mr. Lombard’s case, the lack of requirement for *Miranda* warnings was extended to pre-petition psychological evaluations used to determine whether Chapter 980 proceedings should be pursued. The court acknowledged that its decision “may appear contradictory” to its holding in *State v. Zanelli (Zanelli I)*, which acknowledged that, in a pre-petition evaluation for Chapter 980 proceedings, the respondent has the right not to participate and the state cannot comment on a respondent’s refusal at the time of trial. Dr. Jurek’s advisement form to Mr. Lombard had stated that “refusal to answer will be used as part of the evaluation.” However, the court held that, as Mr. Lombard was not entitled to *Miranda* warnings in a pre-petition evaluation in the first place, Mr. Lombard did not suffer any prejudice as a result of his counsel’s failure to object to Dr. Jurek’s testimony and report.

Mr. Lombard sought review of the court’s decision by the Supreme Court of Wisconsin.

Ruling and Reasoning

The court upheld the decision made by the court of appeals. The court concluded that Mr. Lombard was not entitled to *Miranda* warnings prior to his pre-petition evaluation and that his counsel’s failure to object to pre-petition evaluation findings introduced at trial did not constitute ineffective counsel.

Wisconsin Statute Chapter 980.05(1m) states that, “At the trial to determine whether the person who is the subject of a petition under § 980.02 is a sexually violent person, all rules of evidence in criminal actions apply.” In interpreting the statute, the court focused on the phrase “at the trial” to determine that *Miranda* warnings are not required for respondents prior to state evaluations whose purpose is to see whether a Chapter 980 petition should be filed.

The court concluded that a “reasonable interpretation of the plain language of the statute” would provide for constitutional rights, such as *Miranda* warnings, at the respondent’s trial, but not in the pre-petition phase before trial. Because Chapter 980 is a civil commitment process rather than a criminal proceeding, affording respondents the same consti-

tutional protections given to criminal defendants would undermine the intent of Chapter 980.

Although Mr. Lombard claimed that he felt compelled to speak because the advisement form indicated that failure to do so could be used against him, the court noted that, throughout the pre-petition evaluation, Dr. Jurek reminded Mr. Lombard of his right to participate or not to participate, and Mr. Lombard explicitly stated that he wished to continue. Thus, there was no finding of coercion.

Because Mr. Lombard was not entitled to *Miranda* rights during the pre-petition evaluation, failure to object to pre-petition evaluation findings introduced at trial did not constitute ineffective counsel.

Dissent

In a vigorous dissent, it was argued that individuals at a pre-petition examination have the right to remain silent and should be informed that their silence will not be used against them at any stage of the Chapter 980 commitment proceedings. The warning of a right to remain silent is necessary for fundamental fairness and for protection of the privilege against self-incrimination. By providing an incorrect and inherently coercive warning at a pre-petition evaluation that respondents’ silence may be used against them, the state in effect is free to mislead individuals to induce them to speak.

Discussion

The subject of consent is a cornerstone of the American Academy of Psychiatry and the Law (AAPL) Ethics Guidelines. The guidelines note that:

“[I]t is important to appreciate that in particular situations, such as court ordered evaluations for competency to stand trial or involuntary commitment, consent is not required. In such a case, the psychiatrist should so inform the subject and explain that the evaluation is legally required and that if the subject refuses to participate in the evaluation, this fact will be included in any report or testimony.”

The incorrect pre-petition warning in this case was not viewed as grounds for appeal. However, to maintain the highest ethical standards of practice, forensic examiners would be advised to be aware of the level of consent governing a particular evaluation.

This case follows in the tradition of other appellate cases over the past decade that have remarked on the rights of respondents facing commitment hearings under sexually violent predator laws. Because courts have held that sexually violent predator laws are civil

rather than criminal, respondents in SVP hearings are not afforded the same protections that apply in criminal proceedings. Given the high-profile cases surrounding reoffenses by individuals who have been convicted of sexually violent crimes, it is reasonable to foresee that the emphasis on police power in the civil commitment aspects of SVP laws will continue.

Eugene Wang, MD
Assistant Professor of Psychiatry
Forensic Psychiatry Program
John A. Burns School of Medicine
University of Hawaii at Manoa
Honolulu, HI

Forensic Ethics

Suspension and Other Sanctions Imposed on an Arizona State Prosecutor Who Showed Disrespect for and Prejudice Against Mental Health Experts During Trial

In re Zawada, 92 P.3d 862 (Ariz. 2004), involves a *sua sponte* review by the Supreme Court of Arizona of the adequacy of sanctions recommended by a Disciplinary Commission against a prosecuting attorney, Mr. Zawada, whose actions at trial were found to have the cumulative effect of depriving the defendant of a fair trial. Listed among the acts of misconduct were Mr. Zawada's disrespect for and harassment of mental health experts during trial.

Facts of the Case

In 1994, Alex Hughes was prosecuted for first-degree murder and other violent crimes after a shooting incident resulted in a death. Among Mr. Hughes' defense strategies was the presentation of an insanity defense, and although six mental health experts (including the state's) found him to be mentally ill, the jury found Mr. Hughes guilty rather than NGRI. On appeal, the convictions were reversed after the court found that misconduct by the prosecuting attorney, Thomas Zawada, in effect deprived him of a fair trial. The court had to dismiss charges against Mr. Hughes as per Arizona's constitutional double jeopardy clause, which bars retrial after intentional prosecutorial misconduct causes acquittal.

A Bar complaint was filed. A hearing ensued in which the hearing officer found ethics violations and

intentional misconduct on the part of Mr. Zawada. Specifically, Mr. Zawada showed "disrespect for and prejudice against mental health experts that led to harassment and insults during cross-examination." Mr. Zawada implied during cross-examination that a psychiatrist intentionally fabricated his diagnosis to be paid by the defense. Mr. Zawada also "...improperly argued that mental health experts in general create excuses for criminals."

A formal Disciplinary Commission modified the hearing officer's sanction. Eventually, the Supreme Court of Arizona decided to review and modify those sanctions in light of the objectives of lawyer discipline established by the American Bar Association.

Ruling and Reasoning

The court ruled that Zawada would be suspended, that he would be placed on probation after reinstatement, and that he would be required to complete 15 hours of continuing education that addresses the use of and response to psychiatric and psychological testimony. He was also referred to the Member Assistance Program with imposed conditions, and he was ordered to pay the costs of the disciplinary proceedings.

The American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991) lists four factors the court should consider when determining appropriate discipline: (1) the duty violated, (2) the lawyer's mental state in violating the rules, (3) the potential for injury or actual injury caused by the lawyer's misconduct, and (4) the existence of aggravating and mitigating factors. With regard to each of the above factors, the court found the following:

1. One of Mr. Zawada's violations of professional duty was his erroneous implication that mental health expert witnesses engaged in unethical conduct.

2. In terms of mental state, the hearing officer found that Mr. Zawada's conduct was intentional, and the court ruled, "...Zawada's rebuttal arguments and cross-examination of the experts were grossly improper and deliberate and thus in violation of the rule that protects the defendant's right to present the defense of insanity."

3. The court believed that the injury caused was serious, as Mr. Zawada's inappropriate accusations in essence deprived the defendant of a fair trial, and the defendant had to be acquitted under state law.