

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.

4. Listed as aggravating factors were Mr. Zawada's 25 years of experience practicing law, prior known wrongful conduct, and his unwillingness to recognize his misconduct. In mitigation, Mr. Zawada had no prior record of discipline with the Bar.

Discussion

This case serves as an affirmation of the significance of mental health expert witness testimony. Much of the prosecutorial misconduct in this case occurred during cross-examination of the mental health expert. At one point during the trial, the prosecuting attorney stated, ". . . I know. . . a lot of people in the legal system think that these people [expert witnesses] have something to add to what's going on; I don't. . . ." Subsequently, the prosecuting attorney moved for a mistrial, a motion that was labeled by the court as "patently frivolous." By assigning sanctions and disciplinary review against the prosecuting attorney, the Supreme Court of Arizona acknowledged that mental health expert witnesses do play a vital role in a fair trial.

The trial process is an adversarial one. It is not uncommon for expert witnesses to feel defensive when their credentials or findings are challenged. In such scenarios, the expert witness' ability to maintain composure is important to the preservation of his or her credibility. During the court trial in this case, however, the expert witness' vocation itself was attacked. The Supreme Court of Arizona made it clear that such an attack falls outside the boundaries of ethical conduct in the adversarial process, as expert witnesses are important participants in the judicial system. The decision is notable in reminding forensic experts that they operate under the assurance that, even as they work in an adversarial context in which their findings may be held to scrutiny, the fundamental nature of their roles is afforded respect by the court. In keeping with the respect that has been afforded them, expert witnesses must also uphold their own ethical boundaries to assist triers-of-fact in a fair and effective manner.

Jennifer L. Farrell, MD
Resident in Psychiatry

Sharon M. Tisza, MD
Assistant Clinical Professor of Psychiatry
Forensic Psychiatry Program
John A. Burns School of Medicine
University of Hawaii at Manoa
Honolulu, HI

Death Row Inmates and Mental Health

Deliberate Indifference to Mental Health Conditions Poses a Substantial Risk of Serious Harm to Death Row Inmates

In *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004), the court considered whether the trial court erred in issuing a "Final Judgment" mandating that the Mississippi Department of Corrections (MDOC) comply with 10 detailed injunctions. These injunctions addressed Eighth Amendment violations for death row prisoners at the Mississippi State Penitentiary in Parchman, Mississippi (Parchman). This appeal was sought by Mississippi prison officials.

Facts of the Case

Willie Russell, a death row prisoner, brought suit against officials of the MDOC on behalf of himself and others similarly situated on death row, Unit 32-C, at Parchman. Mr. Russell alleged that inmates were knowingly and deliberately subjected to conditions that violated the Eighth Amendment's prohibition against cruel and unusual punishment. These conditions included unsanitary conditions, insect infestations, high temperatures, insufficient mental health care, and exposure to the noise of psychotic inmates.

In May 2003, a magistrate judge found that the conditions violated the Eighth Amendment and entered 10 injunctions for MDOC to address the conditions. When MDOC appealed the district court's decision, the Fifth Circuit Court of Appeals granted a stay of the injunctive order, pending appeal by the MDOC, which argued that the trial court's finding of facts was clearly erroneous.

Ruling and Reasoning

The court vacated three injunctions in their entirety, as they were found not to be justified by conditions that violated the Eighth Amendment. The remaining seven injunctions were affirmed, although some were affirmed only as they applied to Unit 32-C (death row inmates), as opposed to all of Unit 32. The injunction regarding requirements to alleviate problems stemming from allegedly inadequate mental health care afforded to inmates on death row was affirmed.

In reviewing the question of whether the conditions on death row violated the Eighth Amendment,