

not create “an unreasonable risk of serious damage” to an inmate’s future health. Thus, Mr. Vasquez’s allegations that the lighting and stagnant air caused him to suffer adverse effects and that prison officials were made aware and yet did not remedy the conditions, were sufficient to survive screening. The Seventh Circuit vacated the district court’s dismissal and remanded the claims for further proceedings. In all other respects, the decision of the district court was affirmed.

Discussion

The case deals chiefly with the claim that a correctional facility subjected an inmate to inhumane conditions (constant illumination and poor ventilation of his cell) and that these negative conditions caused the prisoner numerous psychological and medical problems. The alleged systemic violation of Mr. Vasquez’s rights continued for three years, despite his numerous attempts to point out his symptoms and have his conditions of confinement changed.

The decision to overturn the district court’s dismissal hinges on the possible violation of an Eighth Amendment right for an incarcerated psychiatric patient. The move by the Seventh Circuit to protect Mr. Vasquez from cruel and unusual punishment indicates that the court gave credence to the possibility that environmental factors such as lighting and air quality play a role in physiologic and mental well-being and also that mental patients require protection from conditions set by the facility that may directly influence the severity and course of their illnesses. Whether the lighting or air quality truly exacerbated Mr. Vasquez’s symptoms was not the central issue of the appellate opinion. Instead, the Seventh Circuit focused on the right of an inmate to state a reasonable claim that his rights had been violated via deliberate indifference of prison officials to conditions that may have exacerbated an underlying mental illness. This alleged indifference could constitute a legitimate 42 U.S.C. § 1983 (2003) claim.

The Seventh Circuit cited its own ruling in *Scarver* as supporting the idea that continuous lighting and other harsh confinement conditions could worsen an inmate’s mental illness. But the Seventh Circuit was only using *Scarver* to point out the plausibility of such a claim, since their ruling in *Scarver* was that the prison conditions did not constitute cruel and unusual punishment and that the behavior of the prison

officials did not meet the deliberate indifference standard.

Vasquez signifies federal appellate court recognition of the potentially deleterious effects of severe confinement conditions on underlying medical and psychiatric conditions. The Seventh Circuit makes it clear that such claims (even those that appear “fantastical”) will not henceforth be dismissed *per se*. Psychiatrists (and other physicians) working in correctional facilities should be aware that medical claims based on indifference to prison confinement conditions can form the basis of a constitutional rights violation.

Constitutional Challenge to Grave Disability

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Supreme Court of Alaska Examines the Constitutionality of Gravely Disabled Criteria for Involuntary Civil Commitment

In the case of *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371 (Alaska 2007), the Supreme Court of Alaska considered whether the gravely disabled criteria utilized in involuntary hospitalization in Alaska is constitutional. The defendant, Roslyn Wetherhorn, appealed the orders approving her civil commitment for 30 days under Alaska Stat. § 47.30.915(7)(B) (2007), which governs part of the criteria for involuntary hospitalization of a gravely disabled individual. On appeal, the Court held that the commitment statute involving grave disability was constitutional so long as it indicated a level of incapacity so substantial that the respondent was incapable of surviving safely in freedom.

Facts of the Case

On April 4, 2005, Dr. M. Lee of Valley Hospital submitted an application for the formal psychiatric evaluation of Roslyn Wetherhorn. Dr. Lee’s application stated that Ms. Wetherhorn was mentally ill and

gravely disabled, and she was subsequently taken into custody for purposes of psychiatric evaluation pursuant to Alaska Stat. § 47.30.705 (2007). On April 5, 2005, Dr. John McKean, who performed the psychiatric evaluation, filed an *ex parte* petition for initiation of civil commitment to the Alaska Psychiatric Institute (API). In supporting his claim that Ms. Wetherhorn was in need of involuntary hospitalization, Dr. McKean wrote that she was in a “manic state, homeless, and non-medication compliant × 3 months.” A superior court judge granted the petition the same day. Later that day, Dr. McKean and Dr. Laurel Silberschmidt filed for a 30-day commitment, stating that Ms. Wetherhorn was mentally ill, was “likely to cause harm to herself or others,” and was “gravely disabled.” Their supporting facts mirrored those listed on the commitment papers: “manic state, homeless, and no insight and non med[ication] compliant × 3 months.” The commitment hearing was held the same afternoon. On April 27, 2005 the judge issued orders approving involuntary hospitalization in API on the basis of grave disability, as well as involuntary administration of psychotropic medication.

Ms. Wetherhorn appealed, contesting the constitutionality of Alaska statutes governing civil commitment; specifically, she contested language in Alaska Stat. § 47.30.915(7)(B), the part of the gravely disabled criteria that states that a person

... will, if not treated, suffer or continue to suffer severe and abnormal mental, emotional, or physical distress, and this distress is associated with significant impairment of judgment, reason, or behavior causing a substantial deterioration of the person’s previous ability to function independently.

Ms. Wetherhorn argued that the criteria of Alaska Stat. § 47.30.915(7)(B) (2007) fell below the constitutional standard necessary for the “massive curtailment of liberty” associated with involuntary hospitalization.

Ruling and Reasoning

The Alaska Supreme Court ruled (in an opinion modified later, in which the original introductory passage and conclusion were withdrawn and replaced with modified versions, hereafter referred to as *Wetherhorn II* when modified sections are quoted), “We conclude that the definition of ‘gravely disabled’ in Alaska Stat. § 47.30.915(7)(B) is constitutional if construed to require a level of incapacity so substantial that the respondent is incapable of surviving

safely in freedom” (*Wetherhorn II*, p 384). The Court ruled that because Ms. Wetherhorn had already been released from API, it was moot for them to consider whether the facts of the case actually warranted her commitment on the basis of grave disability.

In their original opinion, the Court noted that Alaska Stat. § 47.30.915(7)(B) was added to the Alaska Statutes in 1984 to expand the scope of civil commitment standards. Before 1984, Alaska’s gravely disabled criteria included only language involving the need for “complete neglect . . . as to render serious accident, illness, or death highly probable if care by another is not taken.” The Court noted that the broader criteria outlined by Alaska Stat. § 47.30.915(7)(B) was added at a time when the intent was “to allow a person to be committed before it’s too late” (*Wetherhorn*, p 377).

The Court stated, “The dispute between Wetherhorn and API is whether API must wait until the danger caused by a person’s mental illness rises to the level indicated by [the narrower, former grave disability statute] before a person may be involuntarily committed” (*Wetherhorn*, p 377). While API relied on language in *Addington v. Texas*, 441 U.S. 418 (1979) which states that a person need only pose “some danger” (*Addington*, p 426) to self or others to argue that the commitment standard was properly expanded in 1984, the Court reasoned that this position ignored the United States Supreme Court’s repeated admonition that, given the importance of the liberty right involved, persons may not be involuntarily committed if they “are dangerous to no one and can live safely in freedom.”

Discussion

Practically, this ruling vacates Alaska’s addition of statutes intended to broaden the scope of civil commitment on the basis of grave disability, moving away from a need-for-treatment model based on deterioration from a previous level of functioning to a level of grave disability indicating incapacity to survive safely in freedom. Going forward, it seems that Alaskan patients must be closer to imminent harm as a result of self-neglect than the lawmakers had intended when the definition of “gravely disabled” was expanded in 1984. In a state with frequent, severe, freezing temperatures, where self-neglect leading to homelessness may in fact be a dangerous proposition for mentally ill patients, perhaps Alaskan lawmakers had all the best intentions in relation to

the homeless mentally ill when they expanded the definition of grave disability. In fact, Ms. Wetherhorn was noted to be homeless in Alaska for 3 months (during most of January, February, and March) and that alone may be more dangerous than homelessness in most states in the contiguous United States.

Penile Plethysmography Testing for Convicted Sex Offenders

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Plethysmography Testing Requirements for Supervised Release of Sex Offenders Deemed an Undue Deprivation of Liberty When Less Invasive Testing Methods Are Available

Penile plethysmography tests a man's level of sexual arousal and "involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, in determining his level of sexual attraction by measuring minute changes in his erectile responses" (Odeshoo JR: Of penology and perversity: the use of penile plethysmography on convicted child sex offenders. *Temp Pol Civ Rights Law Rev* 14:1, 2004). American sex offender treatment programs utilize this test widely, and U.S. courts mandate plethysmography frequently as a term of supervised release. Penile plethysmography, polygraph, and Abel tests are utilized to monitor whether a supervised-release sex offender is at increased risk of reoffending.

In *U.S. v. Weber*, 451 F.3d 552 (9th Cir. 2006), Matthew Henry Weber filed an appeal for relief from his terms of supervised release mandated by the U.S. Central District of California. The court required that on release from prison, Mr. Weber could be compelled to submit to penile plethysmography evaluation if his probation officer deemed such testing

warranted. The defendant petitioned the Ninth Circuit Court of Appeals to remove this supervised-release condition, arguing that penile plethysmography was not "reasonably related to deterrence, rehabilitation, or public safety, and even if one of these interests was met, penile plethysmography was an unreasonable and unnecessary deprivation of liberty."

Facts of the Case

In May 2001, Mr. Weber brought his personal computer to an electronics store for servicing. Store staff discovered several child pornography photographs on the hard drive and reported the discovery to the FBI. The FBI interviewed Mr. Weber and seized his computer. He denied knowing that these photographs were on his computer. Upon detailed inspection, the FBI discovered hundreds of sexually explicit images involving children on the computer's hard drive. Subsequent investigation revealed that Mr. Weber possessed a second computer that also contained child pornography.

On January 17, 2003, Mr. Weber was indicted in U.S. Federal District Court on one count of possession of child pornography. He subsequently pleaded guilty to the charge. On March 4, 2005, the Central District of California sentenced Mr. Weber to 27 months in prison with 3 years of supervised release. He completed his prison term and enrolled in a sex offender treatment program required under his supervised release, which mandated that he participate in all psychological testing deemed necessary by his probation officer, including polygraph, Abel testing, and penile plethysmography.

Ruling and Reasoning

The U.S. Ninth Circuit Court of Appeals ruled in this case that penile plethysmography was an unreasonable and unnecessary deprivation of a defendant's liberty. The court held that while Mr. Weber had not yet been ordered to submit to plethysmography testing, his case was ripe for judicial review. The court ruled that, although a district court is normally allowed wide latitude in setting conditions of supervised release, these conditions "are permissible only if they are reasonably related to the goal of deterrence, protection of the public, or rehabilitation of the offender" (*Weber*, p 558). Terms of supervised release must be related to at least one of these goals and not involve any "unreasonable and unnecessary" deprivation of liberty.