those standards in the courtroom. Experts (and retaining attorneys) must also be aware of the relevant case law in their jurisdiction regarding admission of expert scientific testimony, whether it be based on *Frye*, *Daubert*, or another standard. This case is a reminder that the onus is not only on judges to utilize their discretion appropriately in applying the relevant standard in cases involving expert testimony, but also on expert witnesses themselves to ensure that their testimony is carefully derived and able to withstand such scrutiny. Any other practice could result in the admission of expert testimony that is misguided and weak at best and biased and unfounded at worst.

Civil Commitment Based on Predicted Deterioration

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Montana Supreme Court Declines to Consider Constitutionality of Deterioration Standard in Civil Commitment Statute

In *The Matter of the Mental Health of A.S.B.*, 180 P.3d 625 (Mont. 2008), the Supreme Court of Montana declined to address whether it is unconstitutional to base civil commitment on a prediction that a mental disorder, if untreated, will deteriorate to the point where a person poses a danger to self or others. The court determined, however, that the district court did not err in its finding that a person's mental condition of paranoid schizophrenia would be likely to deteriorate if left untreated.

Facts of the Case

On August 30, 2006, A.S.B. (Mr. B.) was arrested for disorderly conduct after he threatened a police officer, Douglas Blalack, and yelled several profanities in the presence of a crowd of onlookers outside a grocery store. Officer Blalack alleged that Mr. B. had also thrown something at his patrol vehicle, an act that Mr. B. denied.

Over the three years preceding his arrest, Mr. B. had been living in his truck. He frequently parked outside local residences and businesses, prompting calls to the police that he was engaged in suspicious activity. During this period, Mr. B. had approximately 30 contacts with police, many involving Officer Blalack, who frequently found Mr. B. threatening and intimidating. On three occasions, Officer Blalack drew his weapon when Mr. B. refused to keep his hands in sight; once, Mr. B. followed Officer Blalack as he investigated a reported burglary; and, at one point Mr. B. told Officer Blalack that the police department was conspiring against Mr. B.

Following his arrest, Mr. B. allegedly told Officer Blalack that police officers were controlling him with a medical device planted in his body. After Mr. B. underwent a psychiatric examination by Brooks Baer, a certified mental health professional, a petition was filed for Mr. B.'s commitment to Montana State Hospital.

At Mr. B.'s district court commitment hearing, his treating psychiatrist testified that he had chronic paranoid schizophrenia and that his refusal to take medication would result in considerable deterioration in his mental health. She stopped short of saying he posed an imminent threat of harm to self or others. A psychologist for Mr. B. also testified that Mr. B. had schizophrenia and that he posed a threat of harm but could not opine whether that threat was imminent.

The district court ruled that Mr. B. did have a mental disorder and that, if it remained untreated, his mental condition "[would] continue to decline" such that he would "become a danger to himself and others." The district court found that due to Mr. B.'s mental condition, there was an imminent threat of injury to himself and others. He appealed the decision.

Ruling and Reasoning

In a four-to-one decision, the Supreme Court of Montana affirmed the district court's ruling. In its decision, the court considered the following four issues raised by Mr. B.: whether Montana's deterioration standard is unconstitutional because it allows for commitment based on a prediction that one's mental condition will deteriorate to the point where he poses

a danger to self or others; whether there was insufficient evidence that Mr. B.'s mental disorder, if untreated, would pose a threat to himself or others; whether there was insufficient evidence that he posed a risk of imminent harm; and whether the district court erred by including Mr. Baer's report because it contained hearsay.

The majority refused to address the constitutionality of the deterioration standard, arguing that because Mr. B. raised the issue only on appeal, it would be unfair to fault a lower court for failing to rule on that which it never had an opportunity to address. The majority agreed with the lower court's finding that, by clear and convincing evidence, Mr. B.'s mental condition would be likely to deteriorate to the point of dangerousness if left untreated. The state did not have to show that his mental condition would absolutely deteriorate to the point of dangerousness. Rather, it had to demonstrate only that his condition was likely to deteriorate, a conclusion supported by expert witness testimony.

While the majority acknowledged that two expert witnesses did not opine that Mr. B. posed an imminent risk, they argued the only reason for this "was their inability to predict when precisely circumstances in [Mr.] A.S.B.'s daily life would culminate into a threat that he felt he needed to act upon" (*A.S.B.*, p 632). A threat is imminent when "there is a present indication of probable physical injury which is likely to occur at any moment or in the immediate future" (*A.S.B.*, p 632, quoting *Matter of F.B.*, 615 P.2d 867 (Mont. 1980)). In other words, the threat of harm from his untreated condition was always imminent.

On the final issue raised on appeal, the Supreme Court found that while the district court erred by including Mr. Baer's report containing hearsay evidence in its ruling, the error was harmless because the testimony itself provided sufficient evidence for the finding.

Dissent

One justice first argued that the court should have addressed the matter of constitutionality because involuntary commitment involves the constitutional rights to freedom and due process. Had the court ruled on this, it should have deemed the deterioration standard unconstitutional and ruled that there was insufficient evidence that Mr. B. posed an imminent threat of harm. She cited a Ninth Circuit Court of Appeals holding (*Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980)) that Hawaii's commitment statute was unconstitutional because it failed to include that the risk of danger must be imminent. Similarly, she argued that Montana's statute is unconstitutional because a prediction of future deterioration is a lower standard than the presence of imminent danger. "People—mentally ill or otherwise—generally have a right to be left alone unless they are an imminent danger to those around them or are committing a criminal offense" (*A.S.B.*, p 634).

The dissenting justice further argued that none of the mental health witnesses testified that Mr. B.'s threat of injury was imminent and his only prior overt act on record, following Officer Blalack as he investigated a burglary, did not establish that he posed a threat of imminent danger to anyone.

Expressing concern that "Montana remains willing to involuntarily commit far too many people with mental disorders," she suggested that statutory and constitutional requirements were being sacrificed for the convenience of "remov[ing] people with mental illnesses from our midst for 90 days" (*A.S.B.*, pp 635–6).

Discussion

A central question in this case is whether it is unconstitutional to base civil commitment on an absolute prediction that deterioration of a person's mental illness will occur to the point of dangerousness. The majority reasoned that they were not obligated to rule on this, as the issue had been raised only on appeal. A single justice dissented, holding that the deterioration standard was unconstitutional because it did not require that risk of harm be imminent. This same justice suggested that involuntary commitment is an overutilized and inappropriate means of handling unreasonable public fears about, and trouble dealing with, persons with mental illness.

A critical question is how imminence ought to be defined. Currently, there is no legal or clinical consensus. The majority offered the definition of "fairly immediate" but also endorsed the idea that some persons with mental illness may always be in imminent risk of posing danger. The majority considered Mr. B.'s paranoia about the police, occasions when his actions led the police to investigate him, and his failure to comply with police instructions as examples of "overt acts" that supported the conclusion that he posed an imminent risk of harm. Based on

this interpretation, a person may still pose an imminent risk of causing harm even when the harm itself is not likely to occur within a defined period of time and the person has no history of violence.

Finally, although all states permit involuntary commitment based on dangerousness, other criteria vary considerably. A recent study found that 16 states allow involuntary commitment to rest on a prediction of future deterioration or relapse of mental illness, with only a portion of these requiring a further link to dangerousness (Brooks RA: Psychiatrists' opinions about involuntary civil commitment: results of a national survey. *J Am Acad Psychiatry Law* 35:219–28, 2007). In eight states, involuntary commitment can be based solely on alcohol dependence and in 11 states solely on drug dependence. In part, such a variety is reinforced by federal courts' tendency to offer states broad latitude in setting civil commitment standards. The success of any challenge to a state's existing commitment criteria, then, rests on a state court's willingness to reconsider the scope of *parens patriae* and police powers. As seen in the present case, this willingness will vary from one justice to another and over time, reflecting the evolving attitudes toward the treatment of persons with mental illness.

Diminished Capacity and the Right to Refuse Mental Examination

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In California, a Trial Court Cannot Order a Criminal Defendant Who Raises a Diminished-Actuality Defense to Submit to a Mental Examination by an Expert Retained by the Prosecution

In *Verdin v. Superior Court*, 183 P.3d 1250 (Cal. 2008), Jose De Jesus Verdin appealed the trial court's decision, requiring him, following his notice of intent to raise a diminished-actuality defense, to submit to a mental examination by an expert retained by the prosecution. The Court of Appeal (4th District) denied mandate relief. Mr. Verdin appealed to the California Supreme Court, which reversed and remanded the case to the Court of Appeal. The court concluded that the ordered examination violates California's criminal discovery statute (*Cal. Penal Code § 1054(e)*) and is not authorized by any other statute or mandated by the Constitution.

Facts of the Case

On January 12, 2004, at approximately 1:40 a.m., police responded to Mr. Verdin's home to find him naked and sitting on his front porch. He voluntarily stated that he had killed his daughter. The police found the home to be in disarray, and one of the officers noticed fresh blood in the bedroom. Police discovered Mr. Verdin's wife in the home, and she appeared to have been beaten up. She reported that her husband had thrown her around the house, and, when she escaped, she heard gunshots that she believed were directed at her. She was not shot. The police found a revolver containing six expended shells in the home. Mr. Verdin's two-year-old daughter was later found to be alive and staying with a neighbor. She appeared to have been beaten around her head and evidenced bruises around her neck as if she had been strangled.

Mr. Verdin was taken into custody, waived his *Miranda* rights, and admitted to assaulting his wife and daughter and attempting to shoot his wife. He stated that he assaulted his wife because he was "mad." In describing the assault on his daughter, he stated that he pressed his knee into the back of her neck, pushed her face into the bed, picked her up by the neck, pulled her hair, choked her, and struck her in the face with a closed fist. He stated that he attacked his daughter because "she wouldn't shut up" and described what he did as "evil." He was subsequently charged with premeditated and deliberate attempted murder, assault with a firearm, willful discharge of a firearm in a grossly negligent manner, corporal injury on a spouse, and felony child endangerment.

Mr. Verdin gave notice to the court of his intention to raise a diminished-actuality defense and he provided to the court a report of an evaluation conducted by a psychiatrist, Dr. Francisco Gomez. The