

involuntarily if they are not dangerous and can live safely in freedom. In the present case, the reverse circumstance was under consideration, as the statute allowed commitment of non-mentally ill persons who were deemed to be dangerous.

Although the specific circumstances under which a state could confine a dangerous individual were not addressed in *O'Connor v. Donaldson*, implicit in the decision was a consideration of the balance between police power and *parens patriae* (concepts that were distinguished four years later within the context of mental health commitment by the Court in *Addington v. Texas*, 441 U.S. 418 (1979)). That is, states have a legitimate interest under their *parens patriae* powers to provide care to mentally ill individuals who cannot care for themselves, but they also have authority under their police powers to protect the community from potentially dangerous individuals.

More analogous to the present case is *Foucha v. Louisiana*, 504 U.S. 71 (1992), in which the Court ruled that potential dangerousness is not justification for retaining a person found not guilty by reason of insanity if no mental illness is present. That is, insanity acquittees, as well as all convicted persons in general, must be both mentally ill and dangerous for involuntary commitment to be continued, implying that commitments of persons nearing the end of a penal term cannot be distinguished from commitments under other circumstances. In contrast, in the juvenile case of *Schall v. Martin*, 467 U.S. 253 (1984), the Court upheld a New York statute that provided for preventive detention of youths charged with a crime who presented a “serious risk” of committing another crime before trial for their current charges, indicating that a juvenile could be detained solely on the basis of the perceived likelihood of committing a crime (as determined by the judge).

In *Kenniston*, the SJC did not comment on the (in)adequacy of the state’s procedural protections, given its finding of substantive due process violation. It can be anticipated, however, that for a revised statute to be acceptable, the legislature will have to include significant protections in light of the fundamental liberty interest at stake, such as appropriate predeprivation proceedings and a trial focused on the question of commitment. In Massachusetts, it has been held that a defendant in an extended commitment proceeding should be afforded the same procedural safeguards as in a criminal trial (*Department of Youth Services v. A Juvenile*, 429 N.E.2d 709 (Mass.

1981)). Moreover, procedural protections under the Fourteenth Amendment’s Due Process Clause also were raised by the court in the context of relevance to the present case (e.g., in *Vitek v. Jones*, 445 U.S. 480 (1980), in which the involuntary transfer of a prisoner to a mental hospital was held to implicate a liberty interest under the clause’s protection).

The SJC’s holding that “physically dangerous” is an unconstitutionally vague term, and the implicit mandate that language outlining the contours of such dangerousness be included in the statute’s revision present an opportunity to the legislature to draft a statute reflective of scientific advancements in the fields of adolescent decision-making and violence risk assessment. Statutory language that calls for contextualization of risk, such as the nature of the anticipated dangerousness (e.g., likely targets, imminence), its estimated likelihood, and the level of certainty associated with the assessment, could be valuable. Provisions pertaining to how such determinations should be reached could also influence the boundaries of discretion held by triers of fact who review extended-commitment petitions.

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Capacity to Consent to Sexual Acts: Understanding the Nature of Sexual Conduct

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Competence to Consent to Sexual Intercourse Requires Not Only an Understanding of the Physical Act but Also of Some of Its Potential Consequences

In *North Dakota v. Mosbrucker*, 758 N.W.2d 663 (N.D. 2008), the Supreme Court of North Dakota

affirmed a conviction of gross sexual exploitation on the grounds that the victim, due to a mental disease or defect, was incapable of understanding the nature of engaging in sexual intercourse. The court ruled that such an understanding requires not only an appreciation of the physical act but also its possible risks and consequences, including sexually transmitted diseases and pregnancy.

Facts of the Case

In August 2006, Jane Doe, an 18-year-old with an intellectual disability, had sexual intercourse with Jeff Mosbrucker. Dr. Craig DeGree, Ms. Doe's psychiatrist, reported the incident to the police because he believed Ms. Doe was not able to give consent due to a "lack of mental capability" and because Ms. Doe informed him that she had not intended to have sex with Mr. Mosbrucker.

In July 2007, Mr. Mosbrucker was tried for gross sexual imposition on the grounds that he forced Ms. Doe to have intercourse with him or had reason to believe that she was incapable of understanding the nature of her conduct.

At trial, Dr. DeGree testified that Ms. Doe had a mental age of between 9 and 11 years and that she would "not understand the implications of [sexual intercourse], having sexually transmitted diseases, being pregnant, having consenting sex with somebody who may not be a good partner" (*Mosbrucker*, p 666). Mr. Mosbrucker, who had been living with Ms. Doe and her family on and off for the prior two years, testified that he was not aware of any mental impairment apart from Ms. Doe's attention deficit hyperactivity disorder. Detective McClure, who questioned Ms. Doe about the incident, testified that she demonstrated "obvious signs of [intellectual] deficit." A jury found Mr. Mosbrucker guilty of gross sexual imposition, acquitting him only on the allegation that he had forced Ms. Doe to have intercourse with him, but finding that he knew or had a reasonable cause to believe that she "suffered from a mental disease or defect rendering her incapable of understanding the nature of the conduct" (*Mosbrucker*, p 665).

Mr. Mosbrucker requested a new trial on the grounds that the greater weight of the evidence did not support a guilty verdict. When the trial court denied the motion, he appealed.

Ruling and Reasoning

In a four-to-one decision, the Supreme Court of North Dakota affirmed the district court's ruling. In

its decision, the court considered several arguments made by Mr. Mosbrucker. First, he argued that Dr. DeGree's testimony that Ms. Doe did not understand the implications of having sexual intercourse was irrelevant because she had only to understand the physical act to be capable of consenting. Second, even if relevant, Dr. DeGree's testimony was misleading and unfairly prejudiced the jury against him. Third, the evidence presented at trial was insufficient to sustain a guilty verdict.

The majority acknowledged that jurisdictions differ in their interpretation of "understanding of the nature" of sexual conduct. The court noted that the legislative history is silent as to its meaning, and case law within North Dakota jurisdictions was lacking to help delineate it. Although there is general agreement that consent implies knowing, intelligent, and voluntary agreement, various courts differ as to how to weigh these factors. The court therefore examined other jurisdictions with similar statutory language and identified three definitions that courts have used to define the specific capacity to understand the nature of sexual conduct. In doing so, the court rejected what it called the "limited position," such as that taken in New Jersey that one need only understand the physical nature of sexual intercourse and voluntarily engage in it (*State v. Olivio*, 589 A.2d 597 (N.J. 1991)). It also declined to adopt a broad interpretation favored by several states that a person must understand the moral, social, and medical consequences of sexual intercourse to be capable of consenting (e.g., *People v. Easley*, 364 N.E.2d 1328 (N.Y. 1977)). Instead, the court argued that the language in the North Dakota statute was just "broad enough to encompass knowledge of the practical consequences of sexual intercourse such as unwanted pregnancy and sexually transmitted diseases . . ." (*Mosbrucker*, p 668) and thus accepted the more widely utilized intermediate standard that did not require the additional understanding of the moral and societal consequences of participation in the act (e.g., *Jackson v. State* 890 P.2d 587 (Alaska Ct. App. 1995)). Because Dr. DeGree opined that Ms. Doe could not understand the intermediate standard's practical implications, his testimony was relevant.

The majority also rejected Mr. Mosbrucker's claim that Dr. DeGree's testimony should be excluded because it misled the jury into believing that Ms. Doe could not legally consent to the physical act of sexual intercourse. To exclude this testimony, the

court would have to find that Mr. Mosbrucker's failure to raise this objection at trial was an obvious error that affected his substantial rights and that the threat of unfairly prejudicing the jury substantially outweighed the probative value of the testimony. However, Dr. DeGree did not answer the legal question of whether Ms. Doe could consent to the act of sexual intercourse, but only stated that, due to her mental impairment, she would have difficulty consenting, because she could not understand the implications of the act. The court thus found that the probative value of the testimony outweighed any prejudicial effect that his testimony may have had on the jury.

The court further held that the evidence presented at trial, viewed in a light most favorable to the prosecution, supported Mr. Mosbrucker's conviction. Evidence that supported this finding included testimony of Dr. DeGree that Ms. Doe could be subject to exploitation, especially by a person like Mr. Mosbrucker whom she would view as an authority figure who would be difficult to refuse, as well as testimony of Ms. Doe indicating to the jury that her knowledge of pregnancy seemed to come only from her parents, leading to a reasonable inference that she lacked capacity.

Concurrence

One justice supported the conviction but argued for the narrower interpretation of what an understanding of the nature of sexual intercourse entails, emphasizing, however, that the New Jersey standard also involved an inquiry into whether a person could "appreciate the inviolability of her person and that others could not, without her consent, invade her person for carnal gratification" (*State v. Olivio*, 568 A.2d 111 (N.J. Super. Ct. App. Div. 1989), p 431). In a subsequent case, the Supreme Court of New Jersey articulated a further delineation of mentally defective into component parts involving cognitive capacity, wherein understanding "extends only to the physical or physiological aspect of sex; it does not extend to an awareness that sexual acts have probable serious consequences [such as pregnancy and disease]" and a volitional or consensual capacity that involves "knowing that one's body is private" and one has the "right and ability to refuse to engage in sexual activity" (*State v. Olivio*, 589 A.2d 597, p 604). Nevertheless, Mr. Mosbrucker was guilty, even under this interpretation, because Ms. Doe did not

have the capacity to understand that she could say no to him.

Dissent

One justice agreed with the concurring opinion that understanding the nature of sexual intercourse should be interpreted in a narrow sense, but held that Ms. Doe was capable of consenting to the physical act. The justice wrote that the majority erred by failing to recognize that "the nature" of sexual intercourse refers only to its essential character, in this case "the mechanics of the act" (*Mosbrucker*, p 671). Under this narrow interpretation, Dr. DeGree's testimony about whether Ms. Doe could consent to sexual intercourse is irrelevant because it revolved around whether Ms. Doe understood the possible consequences of the act rather than the act itself. Moreover, Ms. Doe's testimony indicates that she not only understood the physical nature of the act but also that she could refuse, which she did not do. Therefore, under North Dakota law, she could not have been a victim of gross sexual imposition.

Discussion

Whether the capacity to consent to sexual intercourse requires an understanding of the physical act as well as the myriad potential consequences is the central question in this case. The answer to this question varies widely by jurisdiction. In some, one must comprehend a broad range of outcomes that may follow having sex, ranging from the physical, to the psychological, to the social, and other. Other states maintain that an understanding of the physical act is sufficient. In this case, two justices agreed with this narrow requirement, whereas three held that one must also appreciate the risks of pregnancy and sexually transmitted disease. As noted in the concurrence, of equal import to the capacity to consent to sexual intercourse is an understanding that one has the right to refuse to engage in the act.

The actions of the treating psychiatrist are also noteworthy, given that the justices also disagreed on whether the victim consented to sexual intercourse. Cases involving an assessment of capacity to consent to sexual relations, when raised in clinical contexts, often present the challenge of separating personal morals from professional ethics and legal standards. The psychiatrist testified that the victim "may agree to have sex. . .without thinking whether this person is someone you should have a sexual relationship with" (*Mosbrucker*, p 673). Presumably, he was mo-

tivated to report the incident to the police out of a sense of professional obligation, although this testimony was questioned in the dissent.

The state has competing interests to respect the privacy and sexual rights of its citizens on the one hand and to protect persons whose intellectual disabilities make them vulnerable to sexual predation on the other. As this case demonstrates, however, states and judges have yet to reach consensus on the point at which protection should override sexual freedom. Forensic clinicians involved in these cases should therefore be mindful of local legal standards, if they exist, and of the relevant literature on this complex subject.

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Procedures Governing the Disclosure of Psychological Reports and Evidence in a Pretrial Competency Hearing

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The Supreme Court of Tennessee Adopts Temporary Procedures Governing the Discovery and Disclosure of Psychological Records in Pretrial Competency Proceedings in Criminal Cases

In *State v. Harrison*, 270 S.W.3d 21 (Tenn. 2008), the state obtained a judicial subpoena directing the defendant's forensic evaluator to produce "[a]ny and all records" related to his examination of the defendant for competency to stand trial, on the basis of a statute governing law enforcement authority to subpoena records. The defendant moved to quash the subpoena. The trial court denied the motion, but granted the defendant an interlocutory appeal to the Court of Criminal Appeals. The court held that the trial court erred by issuing a subpoena under this statute, but went on to characterize the competency hearing as civil in nature and ordered the production

of the records sought in accordance with civil statutes in Tennessee. The defendant then appealed to the Supreme Court of Tennessee, which affirmed in part and reversed in part. In particular, the court concluded that the rules of civil procedures do not apply to pretrial competency hearings in criminal cases and adopted a temporary procedure for the disclosure and use of psychological evidence related to competence to stand trial in criminal cases, based primarily on existing rules of criminal procedures.

Facts of the Case

In June 2005, a grand jury in Chester County indicted Robert Jonathan Harrison on three counts of rape, one count of rape of a child, one count of attempt to commit rape, and one count of incest. His attorney requested a forensic psychological evaluation through the state's court evaluation system, which concluded that Mr. Harrison was competent to stand trial and that "a defense of insanity cannot be supported." Mr. Harrison's attorney then requested and received funding for an independent evaluation to be conducted. The psychologist, Dr. Dennis Wilson, opined that Mr. Harrison was not competent to stand trial because he did not understand the functions of the prosecutor, the judge, or the jury, and he was only marginally able to assist in his defense.

The state then obtained a judicial subpoena in accordance with Tenn. Code Ann. § 40-17-123 (2006) directing Dr. Wilson to produce "[a]ny and all records" related to his examination of the defendant. Soon afterward, Mr. Harrison, later joined by Dr. Wilson, moved to quash the subpoena, but the trial court denied the request. The trial court, however, did grant the defendant permission to seek an interlocutory appeal to the Court of Criminal Appeals and ordered Dr. Wilson's records sealed pending the appeal's resolution. On appeal, Mr. Harrison argued that judicial subpoenas under Tenn. Code Ann. § 40-17-123 were not intended to allow the state to compel the production of confidential records of an expert retained in a criminal case and that reciprocal discovery requirements in the Tennessee Criminal Code did not require the production of Dr. Wilson's records because he did not intend to call Dr. Wilson as a witness or rely on his records as evidence in his case in chief at trial. The Court of Criminal Appeals held that the state was not authorized to issue a subpoena, because the district attorney does not have the authority to do so. The court