

dant in the courtroom is one possible gauge of competence, but asking inappropriate questions of prospective jurors alone may not be enough to find a defendant incompetent. It is also important to remember that the U.S. Constitution requires that trials be fair and that defendants have a right to counsel, but not the right to the best counsel. Similarly, a defendant may fulfill this role as self-determined “counsel” if he is competent, even if he is not the best skilled person to do so.

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## Commitment of Sexually Dangerous Persons by the Federal Government

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### DSM Definitions Not Required for Mental Abnormality Under Sex Offender Civil Commitment

The First Circuit Court of Appeals held in favor of the government and remanded factual issues for further consideration in the case of *United States v. Carta*, 592 F.3d 34 (1st Cir. 2010). At issue was the government’s appeal of the district court decision that the defendant did not have the mental abnormality statutorily required for commitment as a sexually dangerous person. The defendant cross-appealed, claiming that the commitment statute is unconstitutional on its face.

#### *Facts of the Case*

Todd Carta pleaded guilty to federal child pornography charges in October 2002 and was sentenced to five years in prison followed by three years of supervised release. During his incarceration, he participated in an intensive sex offender treatment program for seven months, but withdrew before completion. While enrolled in the treatment program, Mr. Carta revealed details of his sexual and criminal history that later led the government to seek commitment under the Adam Walsh Child Protec-

tion and Safety Act, 18 U.S.C. § 4248 (2006). Among other provisions, this statute creates an avenue for the federal government to civilly commit sexually dangerous persons (hereafter, § 4248).

Mr. Carta’s sexual offending history included sexual acts with minors beginning when he was 11 years of age and lasting until he was 39. In prison, he displayed problematic behavior while enrolled in the treatment program, including reinforcing others’ deviant beliefs, inability to curb his sexual attraction to young treatment participants, and denial that such behavior was inappropriate. In March 2007, two days before Mr. Carta’s scheduled release date, the Bureau of Prisons certified that he was a sexually dangerous person, the first step in the federal commitment proceedings. The Massachusetts Federal District Court denied his motion for dismissal on constitutional grounds.

In February 2009, the district court held a bench trial to determine whether Mr. Carta met commitment criteria under § 4248. In a June 2009 ruling, the district court held that the government had not met its burden of proving that Mr. Carta was a sexually dangerous person. The district court’s finding hinged on the government expert’s reliance on a diagnosis of paraphilia not otherwise specified (hebephilia; paraphilia NOS), concluding that it was not a “serious mental illness, abnormality, or disorder,” as required by § 4248. The ruling also relied in part on Mr. Carta’s expert witness, who testified that hebephilia is not a generally accepted diagnosis among professionals, suffers from problems in its definition, and is further complicated by the fact that “normal adults” may be sexually attracted to adolescents. As such, the court did not reach a conclusion required by the second part of the commitment statute—namely, whether he would have “serious difficulty in refraining from sexually violent conduct or child molestation if released.” The government appealed the district court decision, and the defendant cross-appealed on whether the statute was constitutional.

#### *Ruling and Reasoning*

The First Circuit Court of Appeals held that the § 4248 statute is not unconstitutional on its face and that the district court erred in concluding that the government did not prove that Mr. Carta had a mental abnormality as defined by the statute. The case was remanded to determine the issue of dangerousness consistent with the § 4248 definition.

The First Circuit found that the district court erred in their assumption that a statutorily defined mental abnormality is limited to the consensus of the medical community. Not only does the mental abnormality not have to be a diagnosis in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR), but in this case, there was no conflict between the DSM and the government's position, in that Mr. Carta had received the DSM-listed diagnosis of paraphilia NOS. The court of appeals concluded that his history of sexual offending against minors, behavior while incarcerated, and attitude toward his offenses justified his paraphilia diagnosis. The only potential contradiction of the diagnosis was the DSM's use of the term children, which Mr. Carta's expert indicated was used by clinicians to refer to prepubescent youths only. However, the court of appeals concluded that this argument was not compelling, in that the descriptor children did not exclude young teenagers (i.e., as related to Mr. Carta's diagnosis indicating sexual fixation on adolescents).

The court of appeals also addressed the argument that sexual attraction to postpubescent adolescents (who could be included under hebephilia) is not entirely uncommon in the general population. The First Circuit dismissed this claim by differentiating between attraction to adolescents and the pathological nature of a paraphilia: "This does not mean that everyone sexually attracted to adolescents is mentally disordered; rather, it means that one whose urges are so strong as to produce the symptoms and consequences identified in the DSM and exhibited by Carta could be so classified in an appropriate case" (*Carta*, p 41).

The First Circuit also addressed Mr. Carta's claim that the statute was unconstitutional on its face, based on the lack of congressional authority to enact the statute (which would arise under the powers enumerated in the Commerce Clause of the Constitution) and violation of the Fifth Amendment due process and equal protection clauses. With regard to congressional authority to enact such a statute, the court of appeals noted the current discrepancy among the circuits, with the Fourth Circuit striking down the statute (*United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009)) and the Eighth Circuit (*United States v. Tom*, 565 F.3d 497 (8th Cir. 2009)) and First Circuit (*United States v. Volungus*, 595 F.3d 1 (1st Cir. 2010)) upholding it. The First Circuit relied on its own precedent in *Volungus*, upholding Congressional authority. (Subsequent to this decision, the United States Supreme Court upheld

the constitutionality of the statute in *United States v. Comstock*, 130 S. Ct. 1949 (2010)).

Mr. Carta's due process claims asserted that § 4248 commitment should require proof beyond a reasonable doubt and a jury verdict. These were rejected on the basis of the long history in civil commitment jurisprudence requiring a clear and convincing burden and no right to a jury trial. His other due process claims were similarly rejected; the court of appeals held that the statutory language was not too vague, that potential hearing delays could be handled through other remedies, and that adequate notice of the basis for commitment was addressed by the certificate filed by the government.

The First Circuit noted that the opposing experts disagreed as to whether failure to commit Mr. Carta would result in further sexually violent behavior, and so the issue was remanded to the lower court.

In a concurring opinion, Justice LaPlante noted his dissent in the court of appeals' recent *Volungus* opinion. Consistent with his concerns over congressional authority to enact the § 4248 statute, he suggested the court of appeals wait in remanding Mr. Carta's case until after the United States Supreme Court ruled on the issue in the appeal of *Comstock*.

#### Discussion

The central matter of interest to psychiatry and psychology in *United States v. Carta* is the use of DSM terminology within the context of a statutorily defined mental condition. The answer to the first question is straightforward: a DSM diagnosis is not dispositive of a legal definition of mental abnormality. Rather, the science and practice of psychiatry and psychology serve the purpose of informing the fact finder as to relevant clinical issues. This should be no surprise to clinicians familiar with the various legal definitions used in not guilty by reason of mental illness statutes in different jurisdictions.

Perhaps more interesting to clinicians is the use of paraphilia NOS to justify civil commitment. This use is arguably quite different from typical practice in which the major mental illnesses, such as schizophrenia and bipolar disorder, are common diagnoses underlying a petition for involuntary hospitalization. On the one hand, this observation clarifies only the ruling of the court, that, in constructing forensic opinions, we must follow the legal definition rather than a clinical one. For clinicians involved in commitment proceedings for sex-

ually dangerous persons, it is important to keep the definitions of the relevant jurisdiction in mind.

On the other hand, this may also raise ethics-related concerns on both sides of the argument. One clinician may have strong moral objections to the sexually offending behavior itself, while another may take issue with the use of paraphilia NOS to pathologize criminal behavior. On either side of the argument, clinicians involved in these evaluations must be aware of their biases and may need to decline such referrals in some circumstances.

For the general clinician, it is important to keep in mind the weight of reporting sexual offending behavior in the medical record. For this reason, careful attention should be paid to being clear about the source of the information cited in the record, as well as clearly describing any institutional behavior of a sexual nature in behavioral terms, without judgment or interpretation.

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## Duty to Warn or Protect

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### **Colorado's Professional Liability Statute Provides Support for Summary Judgment in Favor of a Psychologist Who Completed an Evaluation for the Colorado Probation Department**

Colo. Rev. Stat. § 13-21-117 provides liability protection and defines the responsibilities of mental health providers in cases involving duties to third parties. In *Fredericks v. Jonsson*, 609 F.3d 1096 (10th Cir. 2010), the U.S. Court of Appeals for the Tenth Circuit affirmed a summary judgment in favor of the defendant, a psychologist who completed an evaluation at the request of the Colorado probation department, holding that Colorado's mental health profes-

sional liability statute, Section 117, applied to and protected the defendant from the plaintiff's claims.

#### *Facts of the Case*

In January 2004, Troy Wellington was convicted of stalking the minor children of James and Brook Fredericks. Mr. Wellington was sentenced to eight years probation. One condition of his probation was that he complete a "mental health evaluation/counseling or treatment." The probation department asked a private forensic psychology clinic to complete a full mental health evaluation of Mr. Wellington. Mary Margaret Jonsson, PhD, completed the evaluation on May 12, 2004. During the evaluation Mr. Wellington told Dr. Jonsson that "he used to have frequent violent fantasies involving members of the Fredericks family, but that he no longer had violent thoughts directed" at the Fredericks family (*Fredericks*, p 1098). Dr. Jonsson did not convey any warnings to the probation department or to the Fredericks. On May 26, 2004, two weeks after the examination, Mr. Wellington, while intoxicated, stole a car and drove to the Fredericks' home. He broke a window at the home in an apparent break-in attempt, but was deterred by a security alarm and fled into a neighbor's yard and passed out. In May 2006, the Fredericks filed suit in United States District Court for the District of Colorado asserting that Dr. Jonsson negligently failed to warn them or the probation department of the danger posed by Mr. Wellington. Dr. Jonsson moved successfully for summary judgment on the ground that Section 117 (Colo. Rev. Stat. § 13-21-117) protected her from liability because Mr. Wellington had not made a threat against a specific identifiable party. The United States Court of Appeals, Tenth Circuit, affirmed the summary judgment of the district court.

#### *Ruling and Reasoning*

The U.S. Court of Appeals considered two major questions when formulating its decision. First, the court considered whether Section 117 applied in the case. The statute provides that "a mental health professional . . . shall not be liable for damages in any civil action for failure to warn or protect a person against a mental health patient's violent behavior, and any such person shall not be held civilly liable for failure to predict such violent behavior" (*Fredericks*, p 1099). However, it mandates that when a patient has communicated to the mental health care provider a serious threat of imminent physical violence against a