

Discussion

This case is an important addition to *Tarasoff* and its progeny. A central issue is the degree to which a threat must be specifically communicated to a mental health provider. Kachigian and Felthous (*J Am Acad Psychiatry Law* 32:263–73, 2004) classify duty-to-warn statutes into one of four categories. The first includes those statutes that appear to create a definite duty, such as those in Idaho and Michigan. The second includes states that prohibit liability except under specified circumstances such as New Jersey and Arizona. The third includes those states with permissive statutes such as Florida and Mississippi. Permissive statutes contain language such as “The psychiatrist may disclose . . .,” and the fourth contains states that define unique approaches.

The Colorado statute that was applicable in *Fredericks* represents an example of a statute that falls into the second category, in that it “prohibits liability” under certain circumstances. Colorado’s Section 117 is based on the APA model law published in 1987. The APA model law recommended that states draft duty-to-protect laws containing language that indemnifies psychiatric practitioners unless the patient makes “an explicit threat to kill or seriously injure a clearly identified or reasonably identifiable victim or victims.” In the APA’s model law, practitioners who fail “to take such reasonable precautions to prevent the threatened harm” would not be indemnified.

Peterson v. State, 671 P.2d 230 (Wash. 1983), is an example in which the “reasonably identifiable victim” aspect was not considered in the final decision. In *Peterson*, an entire class of potential victims (i.e. all road users) were owed protection according to the court. In *Lipari v. Sears, Roebuck & Co.*, 497 F.Supp. 185 (D. Neb. 1980), the court did not require an explicitly identified victim. The *Fredericks v. Jonsson* decision is an addition to the *Tarasoff* progeny, where not only is imminent dangerousness a necessary condition, but a reasonably identifiable victim is a required element for the duty to protect and possibly warn third parties. This case reduces the ambiguity facing Colorado mental health practitioners when faced with a patient who expresses violent intent toward a third party. In addition, it supports the practice that nontraditional patient-health professional relationships, such as occur in forensic evaluations and independent medical examinations, fall in the category of special relationships. Therefore, in Colorado and jurisdictions with similar statutory law, there is a duty to

third parties when the specific criteria defined in the APA Model Code (1987) are met.

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Mental Health Evaluation/ Counseling as a Special Condition of Supervised Release

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A Court Rules That a Defendant Must Comply With Special Conditions of Supervised Release, Including a Mental Health Evaluation, After Serving the Custodial Sentence

In *United States v. Wayne*, 591 F.3d 1326 (10th Cir. 2010), the U.S. Court of Appeals for the Tenth Circuit affirmed a U.S. district court ruling that required that the defendant undergo a mental health evaluation to determine the potential need for counseling and treatment as a condition of supervised release following completion of the custodial sentence.

Facts of the Case

Jacqueline Wayne was indicted in the U.S. District Court for the Western District of Missouri on five counts of wire fraud in February 2008. She pleaded guilty to Count 1 of the indictment. Ms. Wayne received a sentence of 37 months’ imprisonment, followed by three years’ supervised release. As a special condition of supervised release, the court ordered Ms. Wayne to participate in a mental health evaluation, as directed by the probation office, for the purpose of determining if mental health counseling was needed. Ms. Wayne raised no objection to the initial supervised-release condition at the sen-

tencing hearing. She also failed to file a direct appeal challenging the conditions of supervised release.

Ms. Wayne began her term of supervised release in April 2008. She was instructed by her probation officer to attend a mental health evaluation at Correctional Psychology Associates (CPA). Although Ms. Wayne reported to the scheduled evaluation, she refused to sign a release authorizing the probation office to receive the evaluation results. Without this release, CPA declined to perform an evaluation.

The sentencing court transferred jurisdiction over Ms. Wayne's supervision to the U.S. District Court for the District of Colorado in September 2008. The probation office requested that the district court conduct a compliance review hearing because of Ms. Wayne's refusal to participate in the mental health evaluation. In December 2008, the district court held a hearing regarding Ms. Wayne's alleged failure to comply with the initial supervised-release condition. At the initial hearing, the court ordered Ms. Wayne to participate in the evaluation and to sign the necessary release for the probation office. The court also modified the conditions of supervised release to authorize the probation office to provide a copy of the presentence report to the mental health evaluator. The court ordered Ms. Wayne to cooperate with the mental health evaluator and to sign a release authorizing the evaluator to have access to her prior mental health records, if they were necessary to complete the evaluation, while assuring Ms. Wayne that the probation office would not have access to any medical records that preceded the mental health evaluation. The court ultimately stated that if the mental health evaluator determined that she needed mental health treatment, the probation office could request a modification of the supervised condition of release and could then make a determination as to whether treatment was necessary. Ms. Wayne appealed the court's order.

Ruling and Reasoning

In its decision, the U.S. Court of Appeals for the Tenth Circuit affirmed the decision by the U.S. District Court for the District of Colorado. The Tenth Circuit held that district courts have broad discretion to prescribe conditions of release, provided that such conditions are reasonably related to the nature of the offense, the history, and characteristics of the defendant; do not involve a greater deprivation of liberty than is reasonably necessary; and are consistent with

policy statements issued by the Sentencing Commission. The sentencing guidelines address the requirement for the imposition of special conditions. A special condition must be reasonably related to the nature or the circumstances of the offense and the characteristics and history of the defendant. The Sentencing Guidelines also require that there be at least one of three possible purposes served by the condition: to afford deterrence of criminal conduct; to protect the public from further crimes of the defendant; or to provide the defendant with vocational or educational training, medical care, or other correctional treatment.

Ms. Wayne argued that the district court abused its discretion when it ordered her to sign a release authorizing the submission of her mental health evaluation to the probation office. In addition, she claimed that the initial supervised-release condition required only a mental health evaluation, not counseling. She argued that the sentencing court lacked a factual and legal basis to require mental health counseling as a special condition.

Ms. Wayne claimed a deprivation of liberty. She also raised the argument that a mental health evaluation is not reasonably related to factors referenced in statutes or is inconsistent with the pertinent policy statements in the sentencing guidelines. She asserted that the federally contracted provider performing the mental health evaluation would have a pecuniary interest in recommending treatment because it would ultimately provide such treatment.

These arguments had been raised for the first time in her reply brief and were waived on appeal. The Tenth Circuit court cited *Bronson v. Swensen*, 500 F.3d 1099 (10th Cir. 2007), and noted that courts had typically not considered arguments that were not raised or were not adequately presented in an appellant's opening brief. Concerning her claim that the district court's order unreasonably deprived her of liberty, the court cited *United States v. Barajas*, 331 F.3d 114 (10th Cir. 2003), and determined that the district court did not deprive her of liberty more than was necessary to provide the needed medical care or other correctional treatment. The Tenth Circuit ruled that the district court did not abuse its discretion in concluding that the probation office needed the mental health evaluation report to determine whether Ms. Wayne should have mental health counseling during her supervised-release term. The court noted that the district court had limited its

order to the release of the evaluation and did not order the release of her preceding medical records to the probation office.

With regard to her assertion that the district court had no basis for its order, merely because four years had elapsed since her sentencing, the Tenth Circuit rejected that claim and responded that conditions of supervised release always follow the person's release from incarceration and that those individuals who serve lengthy prison terms are necessarily subject to conditions of release that were first imposed many years before the completion of their incarceration.

Discussion

The ruling in *Wayne* supports a court's authority to require a mental health evaluation and potential treatment where issues of liberty and privacy potentially clash with a court order for special conditions in a supervised release. The case reveals how the state can compel a parolee to undergo a mental health evaluation and treatment at the expense of the defendant's liberty interests. It leaves unanswered the question of what standards are necessary for such an override of a defendant's interests. While the Tenth Circuit supported the position that the district court did not abuse its discretion, the decision did not provide guidance on the question of what sort of "history and personal characteristics" of the defendant justify court-ordered mental health evaluation and possible treatment. In this case, Ms. Wayne had a diagnosis of depression and a conviction for wire fraud. One could reasonably challenge a decision of forced treatment for depression as having no relationship to the crime of wire fraud. However, this case involved an order that created a mechanism for the court to ascertain whether mental health treatment was indicated in light of the nature of the crime. The district court concluded that a mental health evaluation was necessary to properly weigh the interests of justice, including rehabilitation, versus the liberty interests of the defendant. The Tenth Circuit supported the sentencing court's decision. While the case contained possible consideration of a potential conflict of interest where the court-ordered evaluator could become the eventual treater, the Tenth Circuit did not consider this concern, on the technicality that it was not raised in her initial brief to the court of appeals.

In summary, this case serves as a reminder that, to ascertain the potential benefits of court-ordered

treatment, courts can require a mental health evaluation as a condition of supervised release. Clinicians, probation officers, and the courts involved in such evaluations should strive to ensure that the rights and the clinical needs of the individuals involved in such evaluations are taken into consideration in a sensitive and professional manner, while weighing the needs and interests of society.

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Due Process Violation When Prosecutors Failed to Provide Mental Health Evidence

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A Due Process Violation Occurred When Prosecutors Failed to Provide Mental Health Evidence Regarding Two Key Eyewitnesses

In *Wilson v. Beard*, 589 F.3d 651 (3d Cir. 2009), the U.S. Court of Appeals for the Third Circuit considered the decision by the U.S. District Court for the Eastern District of Pennsylvania, in which the district court affirmed that the Commonwealth violated Zachary Wilson's right to due process as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). The district court concluded that a *Brady* violation had occurred, granted Mr. Wilson's request for *habeas* relief, vacated his conviction, and allowed the Commonwealth 180 days in which to retry him. The court of appeals affirmed the judgment of the district court.

Facts of the Case

On August 3, 1981, a man entered a Philadelphia bar, pulled a gun from his coat, walked past several other patrons to the rear of the bar, and aimed the gun at Jamie Lamb. After shooting Mr. Lamb four times, the man fled the scene. Mr. Lamb later died of the gunshot wounds. Two eyewitnesses, Jeffery Rahming and Edward Jackson, identified Mr. Wilson as