

The criteria for possessing testamentary capacity are conceived of as lying at a low level, perhaps the lowest level, of any legal demands on an individual.

As testamentary capacity frequently arises in cases of organic brain dysfunction (e.g. dementia and delirium), the testator may possess capacity during a lucid interval; incompetence (intestacy in this case) refers to a current condition and does not necessarily imply an enduring status. In the case of an individual with a chronic mental illness, that individual may possess testamentary capacity so long as the signs and symptoms of that mental illness do not materially affect the abilities required for such capacity.

Forensic psychiatrists conducting an examination on testamentary capacity are advised to be aware that collateral information in the postmortem examination may be biased, given the often heated nature of contested wills. It is also advisable to consider testamentary capacity as a functional ability that may or may not be influenced by a given diagnosis or diagnostic finding. As with other competencies (although with a lower standard), it is the particular manifestation of an illness that is relevant and not the illness itself. If a testamentary capacity evaluation is requested at the time that an individual is executing a will, it is useful to make a video recording of the evaluation. A video recording can present compelling information that may be relevant to a court's effort in the future to determine if the person possessed testamentary capacity at the time of writing the will.

Disclosures of financial or other potential conflicts of interest: None.

Sexually Violent Predator

Guillermo Portillo, MD
Fellow in Forensic Psychiatry

J Richard Ciccone, MD
Professor of Psychiatry
Director, Psychiatry and Law Program

University of Rochester Medical Center
Rochester, NY

Defendants Undergoing a Commitment or Recommitment Trial Under the Sexually Violent Predators Act in California Are Not Required to be Mentally Competent as Part of Due Process

In *Moore v. Supreme Court*, 237 P.3d 530 (Cal. 2010), the Supreme Court of California reversed

the California Court of Appeal's ruling that the defendant had a constitutional right not to be tried as a sexually violent predator while mentally incompetent.

Facts of the Case

Ardell Moore was convicted twice for violent sexual offenses that included forcible oral copulation in 1978 and kidnapping and sexual assault in 1984. He was released from prison in 2000 and committed to Atascadero State Hospital as a sexually violent predator (SVP) under the Sexually Violent Predator Act. This case arose from his SVP recommitment hearing in which Mr. Moore was denied a motion to determine his mental competence to proceed by the Superior Court of Los Angeles County.

As a result of the 1978 charges, he was found to be a "mentally disordered sex offender" who was unamenable to treatment and was sent to prison to complete his sentence. In 1984, he was declared incompetent to stand trial and committed to Atascadero State Hospital, but later he was sentenced to 25 years in prison. During the commitment at Atascadero that started in 2000, he had many violations for sexual misconduct and rule violations that were outlined in the recommitment evaluations performed in January 2005 by Shoba Sreenivasan, PhD, and Elaine Finnberg, PhD. Their evaluations noted that Mr. Moore declined to participate in any of the five phases of intensive treatment that comprised the Sex Offender Commitment Program. Furthermore, Mr. Moore resisted taking medications that would decrease his sexual impulses. Both evaluators opined that he would be likely to engage in sexually violent criminal acts in the future without recommitment and treatment.

On February 5, 2007, Mr. Moore, through counsel, asked the county court judge to order an evaluation of his competence to participate in the recommitment proceedings and postpone the recommitment proceedings until a determination of competency could be made. Included in the defendant's request was an evaluation letter by Vianne Castellano, PhD, an evaluation not ordered by the court, in which Dr. Castellano opined that Mr. Moore "could not understand the nature and purpose of the proceedings, or cooperate in a rational matter with counsel or mental health experts" (*Moore*, p 535). The request for an evaluation and hearing regarding Mr. Moore's competence to pro-

ceed in his recommitment hearing was denied on April 9, 2007. The trial court acknowledged that the Sexually Violent Predators Act (SVPA) covers sexually violent offenders who have a mental illness that can affect their competence to stand criminal trial. However, allowing defendants to delay an SVP trial while incompetent would interfere with the intent of the SVPA to protect the public from “mentally disordered sexual dangerousness.” The interests of the defendant, in this component of due process, were outweighed by the public interest of safety.

The California Court of Appeal heard oral arguments in September 2007 and subsequently vacated submission in July 2008 to await a decision in *People v. Allen*, 187 P.3d 1018 (Cal. 2008), which was pending before the California Supreme Court. The court relied heavily on the *Allen* decision which held that an SVP defendant has the right to testify at trial, even upon the objection of his own counsel, and ultimately ruled that an SVP has a constitutional right not to be tried while mentally incompetent. The court supported its decision by stating that the liberty interest in an SVPA proceeding was significant and that proceeding against an incompetent individual presented too great a risk of depriving him of liberty erroneously. Furthermore, the court opined that competency determinations would not severely burden the government’s interest in protecting its citizens. The People petitioned the California Supreme Court to review the appeals court’s decision on this constitutional issue. The petition was granted on September 17, 2009.

Ruling and Reasoning

The California Supreme Court reversed the court of appeal’s decision. In reaching its decision, the court had first to analyze the relevance of the decision in *People v. Allen* to this case. Mr. Moore contended that *Allen* could be interpreted to mean that a defendant in an SVP hearing had the right to “meaningfully participate” in a trial by virtue of testifying on his own behalf. Meaningful participation would thus require a defendant to be competent to stand trial. The court disagreed with this interpretation of *People v. Allen*, as it made clear that Mr. Allen did not have “the same fundamental right as a criminal defendant to testify over counsel’s objection” (*Moore*, p 541). Furthermore, *People v. Allen* implemented a four-part balancing test to weigh the competing interests in establishing if a due process violation had occurred.

The first part of this test includes the protection of private interests such as liberty. The court agreed that significant liberty interests were at stake, given the severe restrictions of SVP commitment. Second, the *People v. Allen* ruling considers the consequences of not allowing a defendant to testify. It concludes that a due process violation had occurred when Mr. Allen was not allowed to testify, because the possibility exists that “a defendant testifying against counsel’s advice might ‘raise a reasonable doubt concerning the facts underlying the experts’ opinions’” (*Moore*, p 542). The third factor takes into account the “dignitary interests in informing individuals of the grounds and consequences of the action and in enabling them to present their side of the story before a responsible government official” (*Moore*, p 548). Again, the court found that Mr. Allen’s testimony was necessary no matter how “strategically misguided.” Finally, *People v. Allen* considers the government’s interests, including public safety and the administrative and fiscal burdens of adding an additional procedural requirement.

The question of public safety was minimal in *People v. Allen*, but it was of great importance in *People v. Moore* because of concerns that SVPs would not be confined in facilities specifically dedicated to treat and handle persons whose mental disorders predispose them to commit violent sexual crimes. The California Supreme Court focused on the government’s interests in this case as the critical reasons against allowing SVPs to “avoid being tried or committed while mentally incompetent.” *People v. Allen* did not address this question, and the court found both a risk to public safety and a potential substantial burden in having competency hearings for sexually violent predators. The court argued that these hearings could prohibit the determination of SVP status at all and found this possibility counter to the intended goal of the SVPA, which is to protect the public by committing SVPs to treatment in a supervised setting.

Dissent

In this case, the dissenting opinion focused on deprivation of liberty as the central aspect of the four-part balancing test established in *People v. Allen*. Judge Moreno opined that the public safety concerns and administrative burdens were exaggerated in the majority opinion. He argued that the rate of incompetent SVPs would be low, given that they had to be

competent in the criminal courts to get convicted and sentenced before appearing in an SVP hearing. He also highlighted the fact that SVPs who are found to be incompetent would be transferred to a civil hospital for restoration of competency and not simply “unleashed” on the public.

Discussion

This case once again highlights the ambiguous nature of sexually violent predator laws. At the root of the matter lies the question of where to delineate the defendant’s civil and criminal rights. In *Allen v. Illinois*, 478 U.S. 364 (1986), the U.S. Supreme Court argued that providing some procedural “safeguards applicable in criminal trials cannot itself turn [SVP proceedings] into criminal prosecutions” (*Allen*, p 372). By law, sexually violent predator proceedings are civil proceedings; however, the substantial restrictions of liberty give rise to questions such as the one addressed by the California Supreme Court in *People v. Moore*. In their majority opinion, the justices emphasized the rights already granted to these defendants—rights that include the right to counsel, the right to have expert assistance, and the heightened standard of proof (beyond a reasonable doubt). In *People v. Moore*, the court contended that these rights, coupled with annual recommitment hearings, could “mitigate the effects of any ‘error’ in the commitment proceeding attributable to the reduced participation of a mentally incompetent SVP” (*Moore*, p 544).

The decision also elaborates on the nature of a defendant’s role in an SVP hearing. As stated in *People v. Otto*, 26 P.3d 1061 (Cal. 2001), SVP hearings allow details of predicate offenses to be proven by documentary evidence and allow “the use of multiple-level hearsay to prove the details of the sex offenses for which the defendant was convicted” (*Otto*, p 1066) without violating a defendant’s right to due process. Combined with expert testimony and perhaps the defendant’s own testimony, the decision in *Moore* concludes “findings in an SVP proceeding prevent *any* defendant from playing much more than a supporting role” (*Moore*, p 543; emphasis in the original). This conclusion, in the majority’s opinion, attenuates any chance that the defendant’s incompetence in an SVP proceeding would significantly impair his defense.

Disclosures of financial or other potential conflicts of interest: None.

Can a Witness Be Required to Produce Mental Health Records or to Submit to a Psychiatric Examination?

Tara Collins, MD, MPH

Fellow in Forensic Psychiatry

John R. Chamberlain, MD

Associate Clinical Professor of Psychiatry

Psychiatry and the Law Program

Department of Psychiatry

University of California

San Francisco, CA

Refusal to Require a Witness to Produce Mental Health Records, to Submit to Questioning Regarding Her Refusal, and to Undergo a Psychiatric Evaluation Did Not Violate the Sixth Amendment Confrontation Clause

In *United States v. Hargrove*, 382 Fed. Appx. 765 (10th Cir. 2010), the United States Court of Appeals for the Tenth Circuit considered Demetrius Hargrove’s appeal of a guilty verdict from the United States District Court for the District of Kansas. In his appeal, Mr. Hargrove argued that his Sixth Amendment Confrontation Clause rights were violated because the district court refused to require a trial witness to produce mental health records or submit to questioning before the jury regarding her refusal.

Facts of the Case

Demetrius Hargrove and Christopher Trotter were friends who together sold drugs in Kansas City, Kansas. In February 1998, Mr. Hargrove and Mr. Trotter drove to meet one of Mr. Hargrove’s customers, Mr. Berg, who had not paid his \$1,500 bill. While Mr. Trotter remained in the car, Mr. Hargrove killed Mr. Berg and Mr. Berg’s sister, Ms. Castor. A few months later, Tyrone Richards, after telling people that Mr. Hargrove committed the murders, was kidnapped by Mr. Hargrove and Mr. Trotter in an effort to keep him quiet. Shortly after the kidnapping, they were pulled over by police, and Mr. Hargrove escaped while Mr. Trotter was arrested; Mr. Richards was unharmed. Mr. Richards agreed to testify against Mr. Trotter regarding the kidnapping, but was later found murdered, presumably by Mr. Hargrove. Mr. Hargrove also attempted to have a witness to the kidnapping murdered.