treatment would most likely occur in the correctional system.

Psychotherapist-Patient Privilege Exception Overruled

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The Alabama Supreme Court Ruled That, in a Negligence Action Against a Residential Facility, the Psychotherapist-Patient Privilege Protected From Disclosure the Records of an Inpatient at a Mental Health Facility Who Assaulted Another Patient, Declining to Find a Public Safety Exception

In the case *Ex parte Nw. Ala. Mental Health Ctr.*, 68 So.3d 792 (Ala. 2011), the Alabama Supreme Court reversed the mandate of the trial court, declining to find a public safety exception to the psychotherapist-patient privilege. The court vacated the trial court's order authorizing the release of privileged psychiatric records in a civil liability case. The Alabama Supreme Court reviewed the statutory exceptions to the psychotherapist-patient privilege and held that the trial court erred in ordering the release of the records on the ground of relevancy.

Facts of the Case

In the fall of 2007, Lawrence Neil Broadhead was admitted for treatment of depression and drug abuse to Bryce Hospital, a state-operated mental health facility. On February 19, 2008, Mr. Broadhead was discharged to the Hope Residential Facility (HRF), a mental-health facility operated by Northwest, a public corporation. He remained at HRF until February 29, 2008. During that time, Dimoris Johnson, who was also a patient at the Northwest facility, allegedly assaulted Mr. Broadhead. Mr. Broadhead was severely injured and, at the time of the appeal, remained in a semicomatose state.

In October 2008, Mr. Broadhead, through his mother, Ms. Yaw, sued Northwest and several of its administrative staff. Ms. Yaw asserted that the defendants had negligently or wantonly breached certain duties allegedly owed Mr. Broadhead, including, among other things, the duty to take proper security measures to ensure Mr. Broadhead's safety; the duty to supervise Mr. Johnson properly; and the duty to train, monitor, and supervise Northwest's employees sufficiently. Mr. Johnson was not named as a party to the action.

During discovery, Ms. Yaw filed a request for the production of Northwest's records relating to Mr. Johnson. Northwest objected to the request, asserting that the records were subject to psychotherapist-patient privilege. Ms. Yaw responded with a motion seeking to compel production of the requested materials. The trial court requested a memorandum from Ms. Yaw detailing why she believed the records were discoverable. Ms. Yaw's response brief asserted, among other things, "Mr. Johnson's right to have his mental health records concealed" must yield to "the public interest in safety" (*Ex Parte Nw. Ala. Mental Health Ctr.*, p 794).

In September 2009, the trial court responded with a protective order requiring Northwest to submit the records at issue to the court for an *in camera* inspection. The trial court related that "they would designate which portions, if any, of said records are material and relevant to the issues of this cause, and are not otherwise available to [Ms. Yaw]" (*Ex Parte Nw. Ala. Mental Health Ctr.*, p 794). Then, in January 2010, after reviewing the records, the trial court stated that "all records are materially relevant to the issues pending herein" and required that Mr. Johnson's records be provided to Ms. Yaw (*Ex Parte Nw. Ala. Mental Health Ctr.*, p 794). Northwest then petitioned the Alabama Supreme Court for a writ of mandamus ordering a reversal of the trial court's January 2010 order.

Ruling and Reasoning

The Alabama Supreme Court focused its opinion on whether state statutory law recognizes the contended exceptions to the psychotherapy-patient privilege. The court's review first delineated the rationale for, and contours of, the privilege. The court then reviewed the Alabama statutory code as to exceptions to the privilege and related exceptions to the psychotherapist-patient privilege, such as proceedings for hospitalization, examination by order of a court, and

a criminal defendant who is raising the insanity defense (Ala. Code § 34-26-2 (1975); Rule 503(d), Ala. R. Evid.).

Ms. Yaw had argued that there should be a "public policy" exception to the privilege, based on protection of society from the dangerous mentally ill (*Ex Parte NWAMHC*, p 796). Northwest had argued that public policy actually supports the application of the privilege in a case such as this (*Ex Parte Nw. Ala. Mental Health Ctr.*, p 796). The court recognized both of these competing rationales as legitimate concerns as to the proper limits of the psychotherapy-patient privilege. The court quoted its opinion in *Ex parte United Serv. Stations*, *Inc*. (628 So.2d 504 (Ala. 1993)): "The strength of the public policy on which the statutory psychotherapist-patient privilege is based has been well recognized. . . . [T]he privilege is not easily outweighed by competing interests" (*Ex Parte Nw. Ala. Mental Health Ctr.*, p 797). The court opined that a "psychiatrist must have his patient's confidence or he cannot help him" (*Ex Parte Nw. Ala. Mental Health Ctr.*, p 797, quoting *Taylor v. United States*, 222 F.2d 401 (D.C. Cir. 1955)). However, the Alabama Supreme Court also recognized that a "mental patient's threat of serious harm to an identified victim is an appropriate circumstance under which the physician-patient privilege may be waived" (*Ex Parte Nw. Ala. Mental Health Ctr.*, p 798, quoting *Peck v. Counseling Service of Addison County*, *Inc*., 499 A.2d 426 (Vt. 1985)). Nonetheless, the court refused to "create an additional exception in the interest of 'public policy'. . . . Such creations are best left to the legislature" (*Ex Parte Nw. Ala. Mental Health Ctr.*, p 798).

Ms. Yaw also argued that Mr. Johnson's medical records should be released, since they were the only source of relevant information for her legal action and were thus necessary for the proper adjudication of her case (*Ex Parte Nw. Ala. Mental Health Ctr.*, pp 797–8). The court dismissed this argument relating a lack of "statute, rule, or precedent that recognizes, or impels us to recognize in this case, an exception to the privilege that would narrow those parameters by making the privilege inapplicable when a plaintiff establishes that privileged information is 'necessary' to proving a cause of action" (*Ex Parte Nw. Ala. Mental Health Ctr.*, p 798).

Finally, Ms. Yaw argued that Mr. Johnson had waived his privilege when he raised the defense of insanity in his criminal trial, but the court pointed out that he was currently hospitalized in a forensic setting for the purpose of determining his competency to stand trial. The court held that it had been presented "with no argument that an inquiry into the competency of a defendant to stand trial in a criminal proceeding has any bearing on the availability of the psychotherapist-patient privilege in a collateral civil proceeding" (*Ex Parte Nw. Ala. Mental Health Ctr.*, p 798).

Discussion

The majority opinion maintained an aloof attitude *vis-à-vis* the public-policy argument raised by Ms. Yaw. The case certainly hinted at points raised in *Tarasoff* (*Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976)). However, the *Tarasoff* case is never mentioned in *Ex Parte NWAMHC*. In reality, there are definite differences between this case and *Tarasoff*. There is never any indication that the defendants in *Ex Parte NWAMHC* were aware, before the assault, of an imminent threat posed by Mr. Johnson toward Mr. Broadhead. It is possible that there were indicators in Mr. Johnson's sealed record of prior assaultive behavior, suggesting that he posed a general risk toward other residents of the facilities where he resided. Less likely is the possibility that Mr. Johnson's record would have indicated that he posed a specific *Tarasoff* threat toward Mr. Broadhead. Subjective knowledge on the part of HRF of a specific threat posed by Mr. Johnson toward Mr. Broadhead could have grounded a *Tarasoff* duty.

Nevertheless, the idea that confidential mental health records should be opened *post hoc*, to ground liability for an untoward outcome, was rejected by the Alabama Supreme Court. The opinion in *Ex Parte NWAMHC* asserts that expanding exceptions to the psychotherapist-patient privilege could result in vitiation of the protective effects provided by the privilege. The privilege provides long-term, general, societal protection via diffusion of unresolved hostility within the confidentiality of therapy. Conversely, the *Tarasoff* exception provides a short-term remedy intended to protect the public against a more "acute" hostility. Whether "too much *Tarasoff*" actually saps or undermines the putative protective effects of the psychotherapist-patient privilege remains an open debate (Buckner F, Firestone M: "Where

the public peril. . . . J Leg Med 21:187–222, 2000)

Federal Sex Offender Registration and Notification Act (SORNA) and Intrastate Violations of the Registration Requirement

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It Is Valid to Apply the Federal Sex Offender Registration and Notification Act (SORNA) to Intrastate Sex Offender Violators

In *United States v. Kebodeaux*, 634 F.3d 293 (5th Cir. 2011), the Fifth Circuit Court of Appeals upheld the conviction and sentencing of a federally adjudged sex offender for moving within the state of Texas in violation of the registration requirements of the federal Sex Offender Registration and Notification Act (SORNA; 18 U.S.C § 2250(a) and 42 U.S.C § 16913 (2006)). The defendant appealed his conviction, arguing that the domain of Congress is to regulate interstate commerce, not intrastate activities.

Facts of the Case

In 1999, Anthony Kebodeaux, a 21-year-old member of the United States Air Force, was convicted under article 120 of the Uniform Code of Military Justice of carnal knowledge with a child (sex with a 15-year-old girl), sentenced to three months of confinement, and given a bad-conduct discharge.

In 2006, Congress passed SORNA with § 16913(a) requiring a sex offender to "register and keep the registration current at any jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student" and § 16913(c) requiring that the registration be updated no later than three days after a change in status. The Act is also known as the Adam Walsh Child Protection and Safety Act.

On August 8, 2007, Mr. Kebodeaux registered as a sex offender in El Paso, Texas, in compliance with SORNA. On January 24, 2008, El Paso police were unable to locate Mr. Kebodeaux at the address he had provided. On March 12, 2008, Mr. Kebodeaux was found in San Antonio, Texas, and arrested. On April 2, 2008, a federal grand jury indicted Mr. Kebodeaux on one count of violating SORNA 18 USC § 2250(a).

The Federal Government charged that Mr. Kebodeaux, a federal sex offender by reason of his conviction under the Uniform Code of Military Justice, had violated SORNA § 2250(a)(2)(A) when he moved intrastate and did not update his registration. He was convicted and sentenced to 12 months and one day in prison with a five-year term of supervised release. Mr. Kebodeaux's appeal focused exclusively on the constitutionality of SORNA § 2250(a)(2)(A) regarding his conviction for failing to update his registration after an intrastate relocation, asserting that this section of SORNA was an invalid attempt by Congress to regulate intrastate activities.

Ruling and Reasoning

The court of appeals ruled that Mr. Kebodeaux's argument was without merit because § 2250(a)(2)(A) is an integral part of SORNA, rather than a stand-alone provision, and upheld his conviction. SORNA gave the states primary responsibility for maintaining the SORNA requirement that sex offenders update their registration after an intrastate move. Failure to register properly remained a federal offense enforced by the federal government. Had Congress not criminalized federal sex offenders' nonregistration after an intrastate relocation, there would be no deterrence to their undocumented intrastate movements.

In *Carr v. United States*, 130 S.Ct. 2229 (2010), the U.S. Supreme Court explained that SORNA was passed to address the deficiencies in prior laws that permitted sex offenders to avoid the sex offender registration system. The Court said that SORNA's sections work together to further the joint state-federal goals of comprehensive identification and registration of all state and federal sex offenders and punishing those who do not update their registrations.

Mr. Kebodeaux claimed that there was no federal authority over his intrastate movement and registration because the federal government has jurisdiction only in interstate commerce. The court of appeals