

provided the exculpatory evidence that had never before been provided to the court.

Following a 2002 *Atkins* hearing, Mr. Bies was determined to have an intellectual disability, and his death penalty was vacated. His 2000 federal *habeas* claims proceeded to the U.S. District Court for the Southern District of Ohio on the *Brady* claim, the custodial confession, and ineffective assistance of counsel. The district court granted a conditional writ of *habeas corpus* related to *Brady* only, and Mr. Bies filed an appeal to the Sixth Circuit Court of Appeals.

Ruling and Reasoning

On review, the Sixth Circuit affirmed Mr. Bies' *Brady* claim. In *Brady*, the Supreme Court advanced the principle of prosecutorial responsibility and the importance of fairness in criminal trials. The circuit court quoted the Supreme Court, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly" (*Brady*, p 87). The Court further noted in *Brady* that prosecutors are charged with seeking justice, not "with winning trials" (*Brady*, pp 87–8). There are three considerations in a *Brady* violation: the evidence withheld must be favorable to the accused, whether it is exculpatory or impeaching of others; the evidence must have been suppressed by the state, whether willfully or inadvertently; and prejudice must have ensued because of the absence of the evidence. The court of appeals concluded that the first two conditions were not disputable. It then analyzed the ways in which evidence pertaining to other suspects undermined the state's original theory of the case, which led to Mr. Bies' conviction, and concluded with a discussion of why Mr. Bies' custodial statements were inadmissible.

The court discussed the admission of Mr. Bies' custodial statement, and the language in *Atkins* is referenced. The Sixth Circuit quoted from *Atkins* describing people with intellectual disabilities. Individuals with intellectual disability "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" (*Atkins*, p 318). The court was particularly concerned about the possibility of false confessions with such defendants:

Under the circumstances, the officers' uninhibited use of leading questions, off-the-record "fact-feeding", failure to adequately explain Bies' *Miranda* rights, and alleged failure to re-advise Bies of his rights after long breaks in questioning heighten the risk that Bies' confession was false or coerced, and call into question the admissibility of his custodial statements [*Bies*, p 404].

The circuit court stated strongly that Mr. Bies' confession and custodial statements would infringe upon his due process rights if admissible at trial. The Sixth Circuit affirmed the district court's *habeas* relief on the *Brady* claim and declined to rule on the remaining claims, given the court's decision to grant Mr. Bies a new trial.

Discussion

The *Bies* decision is a reminder of the vulnerability of those with intellectual disabilities during police interrogation. Within the Sixth Circuit's discussion, the court cites not only *Atkins*, but also Welsh S. White in *What is an involuntary Confession Now?* (Rutgers L. Rev 50:2001, 1998) and Richard A. Leo and other experts on false confession, who have contributed to our understanding of how those with intellectual disabilities are susceptible to the wishes and suggestions of authority figures and often strive to please the authorities. In addition, the Sixth Circuit strongly criticized the interrogation practices of the police who questioned Mr. Bies and reached a decision that stands for the proposition that a fair justice system must embrace full and transparent disclosure of all evidence, especially exculpatory evidence that raises doubts about the prosecutorial theory of a case and may actually exonerate a defendant with an intellectual disability who is vulnerable to making a false confession.

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Sex Reassignment Surgery in a Correctional Setting

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Withholding Sex Reassignment Surgery for Gender Identity Disorder Did Not Constitute Inadequate Medical Care and Deliberate Indifference to an Inmate's Serious Medical Needs

In *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014), the First Circuit Court of Appeals reversed the finding of the U.S. District Court for the District of Massachusetts, and the finding of a three-judge panel of the court of appeals, which had granted an injunction requiring the Massachusetts Department of Corrections (DOC) to provide male-to-female sex reassignment surgery (SRS) to inmate Michelle Kosilek to treat gender identity disorder (GID). On rehearing *en banc*, the court of appeals held that the DOC's decision not to provide SRS was not sufficiently harmful to constitute a violation of the Eighth Amendment and that the DOC's refusal was not deliberately indifferent.

Facts of the Case

Ms. Kosilek was convicted of first-degree murder and sentenced in 1992 to life imprisonment without parole in Massachusetts for the 1990 strangulation of her wife, Cheryl McCaul. Although Ms. Kosilek was natively male, she identified as female and had a diagnosis of GID, included in the Diagnostic and Statistical Manual of Mental Disorders (DSM), Third and Fourth Editions, in an earlier iteration of the current diagnosis of gender dysphoria. In 1992, she initially sought damages and injunctive relief requiring the Massachusetts Department of Corrections (DOC) to provide any treatment recommended by a GID specialist, including sex reassignment surgery (SRS). She alleged that the DOC's "freeze-frame" policy, wherein she could receive supportive psychotherapy and antidepressants but could not initiate prescribed hormonal treatment or obtain SRS was inadequate in treating her GID and preventing the serious potential harm of suicide, in violation of the Eighth Amendment. The district court concluded in 2002 that Ms. Kosilek had a serious medical need and that her treatment at the time was inadequate. However, it did not grant the injunction or rule that the DOC was in violation of the Eighth Amendment, because it found that the DOC was unaware that failing to provide additional treatment could cause serious harm, and its failure to provide additional treatment was

rooted in part in "sincere security concerns" (*Kosilek*, p 69).

The Massachusetts DOC responded to the ruling by advancing its policy for GID treatment such that prisoners could receive treatment recommended as medically necessary by providers from the University of Massachusetts Correctional Health Program (UMass), including hormonal treatment beyond that prescribed when entering prison. The DOC Commissioner and DOC Director of Health Services would monitor whether changes in treatment could create increased security concerns. Ms. Kosilek met with a gender-identity specialist and in 2003 began receiving additional treatment, including gender-appropriate clothing and personal effects, electrolysis, and hormonal treatments. After a year of hormonal treatment, the specialist recommended that Ms. Kosilek be considered for SRS, in accordance with the Harry Benjamin Standards of Care (subsequently renamed the "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People"), published by the group now known as the World Professional Association on Transgender Health (WPATH). The Standards of Care recommend a "triadic sequence" of treatment for GID, involving hormone therapy, then a real-life experience of living in the identified gender role, and then SRS.

The UMass Mental Health Program Director recommended consultation with the Fenway Community Health Center (a facility based in Boston focusing on the lesbian, gay, bisexual, and transgender community), and the DOC Director of Mental Health and Substance Abuse Services recommended consultation with Cynthia Osborne, an outside gender identity specialist who had consulted with other DOCs regarding GID treatment. The Fenway doctors evaluated Ms. Kosilek and submitted a report to the DOC describing the partial relief she had attained from her gender dysphoria as a result of her present treatment. They noted that she had progressed through all other stages of the triadic sequence in the Standards of Care, and they expressed the opinion that SRS would decrease her future suicidal ideation. Ms. Osborne reviewed their report and critiqued several aspects of it, in particular emphasizing that completion of the triadic sequence is only one of a variety of therapeutic options in GID, that there is not presently a consensus in the medical community about what constitutes medical necessity

in GID care, and that Ms. Kosilek's suicidal ideation should be seen as a contraindication, rather than an indication, for SRS.

The DOC Commissioner reviewed how Ms. Kosilek's potential SRS would affect security. Postsurgical housing was of particular concern. If Ms. Kosilek were housed at the all-male facility, she was likely to be at increased risk of sexual assault after SRS. If she were housed at the all-female facility, there was concern that she could increase distress among inmates who had experienced trauma from male partners. The DOC decided not to provide SRS to Ms. Kosilek, citing both security matters and Ms. Osborne's reported concerns about the appropriateness of SRS. Ms. Kosilek sought injunctive relief in hearings, which began on May 30, 2006.

Experts for Ms. Kosilek asserted that, although her dysphoria had markedly improved with the ameliorative treatment already offered, she continued to have an ongoing markedly elevated long-term risk of suicide if denied SRS. The DOC's expert emphasized her positive adaptation with the help of the present therapy and indicated that her dysphoria would be likely to fluctuate over time and could be managed appropriately with psychotherapy and medications. Much of the disagreement among the experts centered on the application of the Standards of Care to a correctional setting, including whether the "real-life experience" in the identified gender role could ever be adequate in the correctional setting, where the range of social and vocational experiences are greatly narrowed. The court appointed an expert who had helped to author the fifth version of the Standards of Care and who explained that there is flexibility in individuals' treatment options for GID and that the field of GID treatment is evolving, with a variety of approaches used by prudent physicians. The court-appointed expert also pointed out that there is limited knowledge of the relationship between SRS and suicidality in GID. The two DOC commissioners over the course of the trial testified regarding their safety and security concerns in considering Ms. Kosilek's future housing, if she were to receive SRS. They also noted concerns about setting an example for other prisoners of the use of suicidal threats to obtain desired outcomes.

On September 4, 2012, the district court concluded that Ms. Kosilek had a serious medical need

that could be treated adequately only with SRS. It further indicated that the DOC's decision to withhold SRS was based primarily on concerns of public opinion and political pressure and that its stated security concerns were merely pretext, such that its stance amounted to deliberate indifference. The court ruled that the DOC's actions were in violation of the Eighth Amendment and granted an injunction requiring the DOC to provide Ms. Kosilek with SRS. The DOC appealed the decision, and a three-judge panel of the First Circuit Court of Appeals affirmed. The court of appeals reheard the appeal *en banc*.

Ruling and Reasoning

The First Circuit Court of Appeals *en banc* reversed the district court's order of injunctive relief and remanded the case to the district court with instructions to dismiss it.

Justice Juan Torruella, writing for the three-judge majority, explained that allegations of cruel and unusual punishment violating the Eighth Amendment should satisfy both an objective prong of a serious medical need and a subjective prong of deliberate indifference to that need. The court of appeals did not dispute that Ms. Kosilek had a serious medical need as a consequence of her GID. However, it concluded that the district court erred in determining that exclusion of SRS as a treatment option is necessarily medically imprudent based on expert testimony regarding the variety of acceptable treatments for GID in the medical community. The court of appeals found the DOC's treatment plan adequate, if not ideal.

The court of appeals also concluded that the district court erred by not deferring to the expertise of prison administrators in assessing safety and security concerns surrounding SRS. The court found the DOC's concerns reasonable and concluded that they should not be discounted as merely pretextual. The court also held that the district court erred in considering the attitudes of the past rather than only the current DOC Commissioner for the purpose of ordering injunctive relief. Two judges dissented.

Discussion

Ms. Kosilek's legal saga in seeking care for GID has highlighted the evolving approach to gender identity treatment in correctional settings and in the community. With GID and gender dys-

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phoria constituting a serious medical need, prisons are obligated to provide ameliorative treatment for the disorder itself. However, even outside of correctional settings, there is ongoing disagreement about the necessity for SRS, as supported by the expert witnesses in this case. Correctional settings are subject to further heightened concerns due to often starkly delineated single-gender housing. In this case, the Massachusetts DOC asserted security

concerns that are broadly applicable in many prisons. Therefore, until there is a marked change in either the state of medical practice regarding SRS or the structure of prison housing, this ruling makes it unlikely that an inmate in the First Circuit jurisdiction will successfully obtain access to SRS through the court system in the near future.

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