Ruling and Reasoning

Relying on the clearly erroneous standard of review, the Fourth Circuit Court affirmed the ruling of the district court that Mr. Wooden was no longer diagnosed with pedophilic disorder, and thus could not be classified as a sexually dangerous person under the Walsh Act. Furthermore, the Fourth Circuit affirmed Mr. Wooden's unconditional release. Relying on their own precedent in *United States v. Hall*, 664 F.3d 456 (4th Cir. 2012), the court defined a lower court ruling as clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (p 462). The Fourth Circuit, after hearing the opposing theories of the case, held that the findings of the district court represented "a permissible and reasonable interpretation of the evidence" (*Wooden*, p 610). The Fourth Circuit agreed that Mr. Wooden now failed to meet the criteria of commitment under the Walsh Act because he lacked "a serious mental illness, abnormality, or disorder" that could serve as the basis for a "serious difficulty in refraining from sexually violent conduct or child molestation if released" (*Wooden*, p 609).

The Fourth Circuit Court agreed with the district court that Mr. Wooden's "age and health issues" reduced the chances of reoffense if he were discharged. The circuit court noted that Mr. Wooden was then 60 years old and that male sex drive declines with age. The circuit court noted that Mr. Wooden "generally used a wheelchair" and planned to live with his sister on release. Mr. Wooden's sister testified concerning the measures she would take to reduce the chances that Mr. Wooden would reoffend.

Dr. Malinek had testified that persons with IDD were more likely to be the victims of sexual abuse. Dr. Malinek further argued that Mr. Wooden's "forward, aggressive" sexual conduct, evident in his early offenses, was not consistent with a diagnosis of IDD. Dr. Malinek also noted that Mr. Wooden had refused to participate in sex-offender treatment at Butner. In their appeal, the government argued that Dr. Malinek's opinions were not adequately considered by the district court. The circuit court disagreed, mentioning that the circuit court had summarized Dr. Malinek's testimony concerning violent crimes and IDD, but had found Dr. Winsman's testimony "to be more persuasive."

Discussion

In *Wooden*, the courts accepted a reformulation of a sex offender's case, in which the offender's prior misconduct was attributed to cognitive deficits and emotional immaturity rather than pedophilia. In essence, the defense argued that the prior sex crimes against children were secondary rather than primary. The experts for the defense argued that Mr. Wooden's immaturity and not a specifically pedophilic arousal pattern was responsible for his misconduct toward children. Necessary to this theory was the idea that, if the cause of the original misconduct was immaturity, the offender could progress out of said immaturity; otherwise the risk may not sufficiently diminish over time to allow a reasonably reliable recommendation that the offender's risk was now low enough to safely allow community placement. Interestingly, if a court accepts a defense's case theory that the etiology for the sexual misconduct is cognitive immaturity, and not the "abnormality" of pedophilic arousal, then a risk assessment would not be required because the "but for" first prong of the civil commitment statute would have then been eliminated. Because the authors of legislation such as the Walsh Act are probably not that concerned about the etiologic determinants of sexual misconduct against minors, revisions of such legislation may be in the offing.

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Court Rules on Acceptable Use of Professional Titles in Political Campaigns

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The Fifth Circuit Court of Appeals Considers whether Potentially Misleading Use of Professional Titles in a Political Campaign Merits Constitutional Protection

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In *Serafine v. Branaman*, 810 F.3d 354 (5th Cir. 2016), Dr. Mary Louise Serafine filed an appeal after

the United States District Court for the Western District of Texas denied her claims that the Texas Psychologists' Licensing Act violated her First and Fourteenth Amendments by preventing her from using the title "psychologist" in her campaign for public office. The Fifth Circuit Court of Appeals accepted the appeal and considered whether potentially erroneous statements concerning one's profession are, in fact, protected political speech.

Facts of the Case

Mary Serafine ran as a candidate for Texas State Senate in 2010. On her campaign website, she described herself as an "Austin attorney and psychologist." Mary Serafine is an attorney, with a degree from Yale Law School, but she does not have a doctoral degree in psychology, nor is she licensed to practice as a psychologist in Texas. She did, however, earn a PhD in education and complete a four-year postdoctoral fellowship at Yale in psychology. Her PhD dissertation was included in *Genetic Psychology Monographs*. She also taught psychology courses as a professor in the psychology departments of Yale University and Vassar College. She was a member of the American Psychological Association for multiple years. Prior to campaigning for Texas State Senate, she conducted seminars and counseling sessions aimed at personal growth and relationships.

In September 2010, the Texas State Board of Examiners of Psychologists informed Dr. Serafine that she was violating the Psychologists' Licensing Act (PLA; Tex. Occ. Code Ann. §§ 501.001-501.505 (1999)). The Board ordered her to stop using the title "psychologist," including on her campaign website. They also informed her that she could not offer or provide "psychological services" in Texas. She was contacted again two weeks later and informed that she had 30 days to comply or face legal action. In January 2011, the Attorney General's office threatened prosecution for Dr. Serafine's use of "psychologist" in public records.

Dr. Serafine deleted the word "psychologist" from her campaign website and informed *Who's Who in America* to no longer refer to her as a "psychologist." Subsequently, she sued claiming that the PLA infringed her political speech, commercial speech, equal protection rights, and right to earn a living. Furthermore, she alleged the PLA was vague, overbroad, and constituted a "prior restraint."

The equal protection, right to earn a living, speech, vagueness, and prior restraint claims were dismissed by the federal district court. The district court held a bench trial regarding the political speech, overbreadth, and commercial speech claims. The court rejected those claims and found that the PLA is a legitimate use of the state's police power and that it is reasonably tailored to further the state's interest in guarding the public from the unauthorized practice of psychology. Dr. Serafine then appealed to the United States Court of Appeals for the Fifth Circuit.

Ruling and Reasoning

The Fifth Circuit held that the "candidate's campaign statements referring to herself on her political campaign internet website as a psychologist were entitled to full First Amendment protection" (*Serafine*, p 362). The circuit court noted that the Board argues that the power to restrict the use of "psychological," "psychologist," or "psychology" is permissible under the "professional speech doctrine." The circuit court noted that while the Supreme Court has never officially endorsed the professional speech doctrine, some circuits have embraced it given Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181 (1985). Justice White suggested a distinction be drawn between speech by a professional to a client and speech by a professional to the general public, the latter being subject to full First Amendment protection. The circuit court found that Dr. Serafine's speech on her campaign website was communication with voters at large and not with any particular client. Thus, the professional speech doctrine is inapplicable and her campaign statements are entitled to full First Amendment protection.

The Fifth Circuit also held that a "candidate's campaign statements" could not be considered "commercial speech." The circuit court asserted that Dr. Seraphine's political communications were "for votes" and not for clients. The circuit court further stated that the professional speech doctrine did not apply given that Dr. Serafine's "speech was far removed from [the] context of professional speech in that she was not providing advice to any particular client but communicating to voters at large" (*Serafine*, p 360).

The district court had found the PLA restriction on Ms. Serafine's use of the title "psychologist" as a legitimate use of state police power. The district

court also found that the PLA was "reasonably tailored" to protect the public from the "unauthorized practice of psychology." The Fifth Circuit disagreed on both counts. The circuit court held that the PLA was not "narrowly tailored" because Dr. Serafine was not practicing psychology through her campaign website; rather, she was campaigning for public office. The circuit court opined that the way to protect the state's interest would be to bring an enforcement action against Dr. Serafine for actually engaging in the practice of psychology, when she is treating clients, and not to suppress her political speech. The circuit court referenced the Supreme Court's opinion in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), asserting that erroneous statements are unavoidable in political debate and that such statements must be protected for freedom of expression to have the "breathing space" it needs to survive. The circuit court rejected the claim that the Board had an important interest in preventing the mistaken belief that a candidate was licensed to practice psychology by the state. Because the potential mistake would occur because of her campaign's attestation that she was a "psychologist," the circuit court held that the Board's approach was not actually "narrowly tailored."

Finally, the circuit court held that the Board's licensing scheme was overbroad because it "affected speech beyond purview of state's interests or power, such as Alcoholic Anonymous (AA), Weight-Watchers, various self-help groups, life-coaches, and yoga teachers" (*Serafine*, p 367). The circuit court held that the scheme was an overbroad restriction on free speech that could even limit "the ability of individuals to dispense personal advice about mental or emotional problems, based on knowledge gleaned in a graduate class, in practically any context" and that it "chills and prohibits protected speech" (*Serafine*, p 370).

Discussion

Psychiatrists reading the fact pattern of *Serafine* might be mystified, or even angered, by a holding that protects a political candidate's right to assert that she is a "psychologist," when she, in fact, lacked the degree requirement necessary to be licensed as a psychologist in the state in which she was campaigning. The circuit court noted that Dr. Serafine had taught psychology at prestigious colleges and had even published an article in a respected psychology journal. The circuit court noted that "although she may not be able to practice as a psychologist under Texas law, that does not bear on whether she is a psychologist by reputation or training" (*Serafine*, p 362). Given her educational and occupational background, the circuit court did not consider her campaign declaration that she was a "psychologist" to be a "bald-faced lie."

Even so, the circuit court was not going to readily countenance any abridgement of political free speech. Free speech, in particular political speech, is a fundamental right, and limitations on it are strictly scrutinized by federal courts. The circuit court asserted that the Board's goal of preventing deception can be served by other means, namely "the vigorous public debate and scrutiny that accompany political campaigns" (*Serafine*, p 362). The court noted, paraphrasing Justice Brandeis, "the remedy" for misleading speech is "more speech, not enforced silence" (citing *Whitney v. California*, 274 U.S. 357 (1927), p 377).

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Denial of *Habeas* Relief in Filicide Case

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The Fifth Circuit Court of Appeals Considers Claims of Ineffective Assistance of Counsel in Jury Selection and Whether the Jury Erred in Reaching Their Verdict

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In *Hebert v. Rogers*, 890 F.3d 213 (5th Cir. 2018), the Fifth Circuit Court of Appeals considered the recommendations of the Eastern District Court of Louisiana in denying a *habeas* relief plea for Amy Hebert. In a series of appeals, Ms. Hebert had contended that she had received ineffective assistance as evidenced by her attorney's failure to object to the state's allegedly gender-discriminatory, peremptory jury strikes. The circuit court reviewed the lower court's finding that there were valid gender-neutral