Ruling and Reasoning

The Ninth Circuit agreed with the lower court that Mr. Hernandez's trial attorney was "constitutionally deficient" in failing to investigate and consider a diminished capacity defense based on the contention that Mr. Hernandez was mentally ill (and thus could not form the requisite specific intent). The court ruled, however, that Mr. Hernandez had not shown that his "counsel's errors were so serious as to deprive the defendant of a fair trial" (*Strickland v. Washington*, 466 U.S. 668 (1984), p 687); in other words, the court ruled that he had not met the "reasonable probability . . . of reasonable doubt" standard established by *Strickland*. Consequently, the Ninth Circuit ruled that Mr. Hernandez was not entitled to relief and affirmed the district court's ruling.

The Ninth Circuit based its ruling on the fact that "the strength of the evidence for Mr. Hernandez's intent to rape and kill contrasts with the relatively weak . . . evidence that his mental condition rendered him incapable of forming the requisite intent" (*Chappell*, p 554). The court systematically critiqued the testimony of each of the defense's mental health experts as failing to demonstrate that Mr. Hernandez was incapable of forming the requisite intent. The court relied extensively on Mr. Hernandez's own statements from his confession to support the notion that he had formed the required specific intent for both first-degree murders. For example, the court noted that the clinical psychologist's "suggestion . . . that Hernandez was in a dissociative state and 'had no subsequent actual recollection' of his crimes is totally contradicted by his detailed confession" (*Chappell*, p 555).

Discussion

In this ruling, the Ninth Circuit considered the merits of a *habeas* petition based on ineffective assistance of counsel for failure to consider and investigate a diminished capacity defense based on a defendant's history of mental disease or defect. As established by *Strickland*, it is not automatic that a deficiency of counsel at trial has prejudiced the defendant. For a failure to consider a diminished capacity defense due to mental disease or defect to have been prejudicial, the Ninth Circuit ruled, there must be strong evidence that the alleged mental disease or defect directly affected the defendant's ability to form the requisite specific intent.

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

Claim of Unconstitutional Discrimination Against Transgender Individuals

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Department of Defense Policy Uses Gender Dysphoria and Gender Transition as Basis for Excluding Military Service by Transgender Individuals

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In *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019), plaintiffs challenged as unconstitutional discrimination a 2017 memorandum precluding military participation by transgender individuals (additionally naming the Acting Secretary of Defense and officials of the Department of Defense and Department of Homeland Security). The District Court for the Western District of Washington issued a preliminary injunction in favor of the plaintiffs. After the suit was filed, President Trump revoked the 2017 memorandum and authorized a 2018 policy precluding persons with gender dysphoria from participation in the military. In a motion to dissolve the preliminary injunction, the district court rejected the defendants' arguments, ruling that triable arguments exist as to whether the policy violates First and Fifth Amendment protections.

The defendants appealed to the Ninth Circuit and to the U.S. Supreme Court for an expedited decision. The Supreme Court stayed the preliminary injunction issued by the district court pending ultimate determination of the arguments. With the preliminary injunction lifted, the defendants enacted criteria of gender dysphoria and transgender transition as factors in determining eligibility for military service.

The Ninth Circuit issued a *per curiam* opinion vacating the court's order striking the defendants' motion to dissolve the preliminary injunction and remanding the case to the district court for further consideration.

Facts of the Case

The Department of Defense historically did not permit transgender individuals to serve openly in the military. In 2015, Secretary of Defense Carter commissioned a study by the RAND Corporation to determine the impact, if any, of openly serving transgender individuals on the effectiveness and readiness of the U.S. military. RAND, utilizing its National Defense Research Institute, determined negligible impact on military readiness and little impact on the total health care that would be provided to military personnel. The resulting "Carter Policy" allowed transgender individuals to serve openly in the military subject to the same standards as all other members.

On July 26, 2017, President Trump issued a statement on Twitter that the United States would no longer accept or allow transgender individuals to serve in the military. Following his statement, he issued the 2017 memorandum stating that U.S. policy prior to the Carter Policy prohibited transgender individuals from serving openly and criticizing the Carter Policy for failing to identify a basis for overturning historic policy. The Twitter announcement and the 2017 memorandum are collectively known as the "Ban." The 2017 memorandum halted the use of Department of Defense or Department of Homeland Security funds for sex-reassignment procedures on military personnel and indicated that full implementation would be in effect by February 21, 2018, with no action taken against currently serving transgender people.

The plaintiffs filed a complaint in the District Court for the Western District of Washington, arguing that that the Ban discriminates against the ability of transgender individuals to serve in the military. Specifically, the Ban was described as violating Fifth Amendment guarantees to equal protection and due process and First Amendment free speech protections. The district court agreed and issued an injunction.

In September 2017, Secretary of Defense Mattis directed the formation of a panel to include experts, senior members of the Department of Defense, and combat veterans, among others, to objectively review military participation by transgender individuals. The resulting 44-page report was used to develop a new policy, which President Trump presented in March 2018 when he revoked the 2017 memorandum. The 2018 policy disqualifies transgender individuals with a history or diagnosis of gender dysphoria unless they meet certain exceptions and disqualifies transgender persons who require or have undergone transition.

The defendants filed a motion for the dissolution of the injunction on the grounds that the 2018 policy replaced the 2017 memorandum, thus making the memorandum and the injunction against it moot. The district court denied the defendants' motion because the 2018 policy threatened the same rights at the earlier memorandum. The court also stated that transgendered individuals constitute a suspect class and as such the Ban would have to survive a level of strict scrutiny. In July 2018, the district court ruled in favor of the plaintiffs' request for discovery of the defendants' justification for the Ban (over the defendants' objection based on privilege).

The defendants appealed to the Ninth Circuit. To expedite a decision, they also appealed to the U.S. Supreme Court. The Supreme Court stayed the preliminary injunction, resulting in implementation of the 2018 policy by the Department of Defense.

Ruling and Reasoning

On June 14, 2019, the Ninth Circuit in a *per curiam* opinion vacated the order of the district court striking the motion of the defendants to dissolve the preliminary injunction and remanded to the district court for reconsideration. The Ninth Circuit ruled that the burden to establish a change of circumstances had been demonstrated by the differences between the 2018 policy and the 2017 memorandum. The court recognized the stay issued by the Supreme Court and extended it through the district court's reconsideration.

The court further ruled that on its face the 2018 policy treats transgender persons differently than other persons. Citing *U. S. v. Virginia*, 518 U.S. 515 (1996), pp 532-3, the court stated that the level of scrutiny required in such cases must be more than rational review but it does not require strict scrutiny; interemediate scrutiny is required.

The court also granted a writ of *mandamus* vacating the order for discovery of documents and other information that the plaintiffs sought from the defendants. The court remanded a question of privilege regarding the discovery request for consideration by the lower court.

Discussion

In staying the preliminary injunction invoked by the district court, the Ninth Circuit ruling permits the Department of Defense to implement criteria for military service by transgender people. The Ninth

Circuit Court stated, however, that the Ban does discriminate against transgender people; this was contested by the administration, which insisted that the policy only discriminated against people with gender dysphoria. The court stated that discrimination based on transgender status constitutes sex-based discrimination and is therefore subject to intermediate scrutiny, meaning that policies must be supported by an "exceedingly persuasive justification," one not "hypothesized or invented" in response to litigation (*Virginia*, pp 532-33). Thus, this test must now be applied in the Ninth Circuit to any law that differentially affects transgender people. It serves to provide increased protections against discrimination in that circuit.

Current Department of Defense policy reflects the 2018 policy, which does not specifically define or provide criteria for determining gender dysphoria or gender transition. There is no reference to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition criteria or requirements for circumstances in which this diagnosis may occur. The policy does not ban transgender individuals (unless they are diagnosed with gender dysphoria), provided they meet all military standards, including the standards associated with their biological sex. Those individuals with gender dysphoria who have undergone medical treatment for transition or are unable or unwilling to meet the standards associated with their biological sex are currently disqualified. Service members who joined in their preferred gender or were diagnosed with gender dysphoria prior to the 2018 policy implementation are exempt from the new policy and may continue to serve in their preferred gender.

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

Shackling Convicted Prisoners During Civil Trial Proceedings

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When Dangerousness and Credibility Are Central Issues to a Civil Case, Shackling Without Specific Justification Violates Due Process

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In *Claiborne v. Blauser*, 928 F.3d 794 (9th Cir. 2019), the Ninth Circuit Court of Appeals reversed a district court's denial of a California prisoner's motion for a new trial in a 42 U.S.C. § 1983 lawsuit. The plaintiff argued for a new trial because he was shackled without justification during his three-day trial about two corrections officers' alleged use of excessive force. The appellate court held that the district court erred in allowing the plaintiff to be shackled based solely on his status as a convicted prisoner, without considering the specific risks that he posed in the courtroom.

Facts of the Case

On May 3, 2010, Dennis Claiborne, a 63-year-old man serving a sentence of 60 years to life at High Desert State Prison in California, was admonished by corrections officers for socializing with other inmates while waiting in line for his medication. When Officers Blauser and Martin ordered Mr. Claiborne to stay in his cell for the remainder of the day, Mr. Claiborne asked to speak with their supervisor to contest his punishment. The officers agreed to transport him to the sergeant's office.

The parties gave substantially different accounts of what happened next. Mr. Claiborne, who had mobility limitations and had previously undergone a knee replacement, claimed that he was acting respectfully when he was asked to "cuff up." He immediately complied with the request but asked for waist chains because he would have difficulty using his cane with handcuffs. Instead, the two officers supported Mr. Claiborne by holding him up at his arms and transported him across the prison yard. Because the terrain of the yard was uneven and the officers were moving too quickly, Mr. Claiborne's leg hyperextended, causing him to become unsteady. At first the officers told Mr. Claiborne not to resist. When this occurred a second time, he was pulled to the ground. He claimed the officers jumped on his right side and knee, pulled his hair, and punched him in his face. In the years following the event, he suffered additional injuries to his knee, including a failed right knee arthroplasty.