

Discussion

In *People v. Ovieda*, the Supreme Court of California addressed the legality of the police's ability to enter a residence without a warrant for the purpose of community caretaking. At the center of this case are the competing claims of civil rights and paternalistic and intrusive government. Mr. Ovieda argued his Fourth Amendment rights were infringed when the police entered his home without a warrant. On the opposing side, the state argued that police had an obligation to public safety to ensure that neither people nor property inside the residence needed protecting. The Supreme Court of California noted the facts of the case did not support a finding of exigent circumstances. Moreover, the court concluded the community caretaking claim is not a recognized exception to the residential warrant requirement, emphasizing the sanctity of the home and the need for protection against government intrusion. Thus, the Supreme Court of California upheld the stringent standards set forth by the Fourth Amendment.

A ruling in the other direction would have had significant implications because it would have broadened the avenues by which police could pursue entry into a home without a warrant. In the dissenting opinion in *Ray*, Justice Mosk argued just that. Moreover, as argued in the Brief for the American Civil Liberties Union Foundation of Southern California as *Amicus Curiae* (*Ovieda*, p 1038), there likely would have been unintended and dangerous consequences to such a broadening of police power. An important consideration for mental health services is that, had the court ruled in the other direction, people in crisis may be deterred from calling police for help out of fear that their homes and their privacy would be violated.

Prior Bad Acts in Affirmative Defense Cases

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Prior Bad Acts Ruled Inadmissible to Rebut Defenses of Extreme Mental and Emotional Disturbance and Lack of Penal Responsibility

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Key words: affirmative defense; prior bad acts; extreme mental and emotional disturbance

In *State v. Lavoie*, 453 P.3d 229 (Haw. 2019), the Supreme Court of Hawaii considered Marlin Lavoie's challenge of a trial court's decision to allow testimony on his prior bad acts and errors in jury instructions. The state supreme court ruled that the trial court erred in allowing testimony about prior bad acts because it was not relevant to rebut the defendant's affirmative defenses. It also ruled that a jury instruction about such testimony incorrectly allowed jurors to consider prior bad acts as they related to his intent to commit the alleged crimes, and that a jury instruction on the definition of extreme mental and emotional disturbance (EMED) was not prejudicial.

Facts of the Case

On March 20, 2013, following relationship conflict and a brief separation, Mr. Lavoie fatally shot his girlfriend, Malia Kahalewai. Mr. Lavoie was charged with murder in the second degree and weapons offenses. He raised affirmative defenses of EMED and lack of penal responsibility. Before trial, the court granted Mr. Lavoie's motion to preclude evidence and testimony related to his criminal history, prior bad acts, and allegations of violent crimes.

At trial, the defense counsel cross-examined Nicole Aea, a friend of Ms. Kahalewai. Ms. Aea testified that Ms. Kahalewai had previously left Mr. Lavoie after arguments. The state argued this line of questioning opened the door to ask about the nature of those arguments and moved to introduce evidence showing that "at least some of these arguments involved prior abuse" (*Lavoie*, p 235) and Ms. Kahalewai's subsequently leaving. The court allowed this evidence over the defense's objection. The prosecution sought to introduce testimony about additional prior instances of abuse. Defense counsel objected on the grounds that these incidents were not relevant to the crux of their defense (i.e., Ms.

Kahalewai's leaving Mr. Lavoie caused him to lose control). The court allowed the testimony, agreeing that the door had been opened and that it was relevant to the reasonableness of Mr. Lavoie's defense.

For the defense, three expert witnesses testified that Mr. Lavoie had various mental illnesses and a personality disorder, and two testified that Mr. Lavoie experienced a dissociative episode at the time of the shooting. All three testified that Mr. Lavoie was aware of the wrongfulness of his actions during the shooting but lacked substantial capacity to conform his conduct to the requirements of the law. Two experts testified that Mr. Lavoie was under the influence of EMED at the time of the shooting.

The state then recalled a witness to testify to additional incidences of abuse perpetrated by Mr. Lavoie against Ms. Kahalewai to show the shooting was a result of an abusive relationship, rather than mental illness. The court overruled the defense counsel's objection, ruling the prosecution could use this proposed testimony to rebut the EMED and lack of penal responsibility defenses. Two forensic psychologists testified for the prosecution that Mr. Lavoie did not lack substantial capacity to either appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. One expert gave a diagnosis of substance-induced mood disorder, and both opined he was over-reporting psychiatric symptoms.

Mr. Lavoie objected to a jury instruction on EMED that emphasized the importance of self-control (lack of it), arguing that this emphasis, in effect, created another element of the defense to prove. The court also instructed the jury that Mr. Lavoie's prior bad acts could only be considered with respect to his intent to commit the alleged offenses, and could not be considered for other purposes. Mr. Lavoie was found guilty on all counts. The Court of Appeals affirmed the trial court's judgment.

Ruling and Reasoning

The Hawaii Supreme Court ruled that the defense's cross-examination of Ms. Aea did not open the door for testimony of prior bad acts. The court reviewed the "opening the door doctrine," under which "when one party introduces inadmissible evidence, the opposing party may respond by introducing inadmissible evidence on the same issue." (*Lavoie*, p 242, citing *State v. Fukusaku*, 946 P.2d 32 (Haw. 1997), p 67). The court said that because the cross-

examination was about nonviolent incidents, it did not introduce inadmissible evidence of prior violence.

The Hawaii Supreme Court said that the testimony on prior bad acts was not admissible to rebut Mr. Lavoie's defense of EMED. The court noted that the testimony of Mr. Lavoie's prior bad acts had little probative value of his condition on the day of the offense because the bad acts were not directly linked to Ms. Kahalewai's leaving Mr. Lavoie, and they occurred as long as six years prior. Only one of the six instances of abuse was related to a separation between the couple. The court held that, in isolation, this instance did not speak to Mr. Lavoie's state of mind at the time of the shooting or whether his reaction was reasonable.

The court further ruled that the testimony was not admissible to rebut Mr. Lavoie's defense of lack of penal responsibility. The court noted prior bad acts may be admissible to challenge such a defense, and cited *State v. Morishige*, 652 P.2d 1119 (Haw. 1982), where such testimony was introduced to distinguish personality disorder from a mental disorder. In Mr. Lavoie's case, the evidence was not produced through expert testimony intended to speak to a diagnosis or lack of capacity. Absent the link between the testimony and the rebuttal of the defense of lack of penal responsibility, the prior bad acts were inadmissible.

On the issue of the jury instructions on prior bad acts, the court noted the evidence had been allowed to challenge Mr. Lavoie's affirmative defenses, which is not the same as his intent, and noted affirmative defenses are not to be considered until the state has proved beyond a reasonable doubt all elements of the offenses, including intent. The court ruled that the jury was wrongly instructed on the use of prior bad acts. For the jury instruction regarding the EMED defense, the court ruled that the lower court did not err. The court cited *State v. Haili*, 79 P.3d 1263 (Haw. 2003), in which they rejected the argument that courts must provide a definition of EMED because the Hawaii legislature had not yet defined EMED. The court noted that the self-control instruction had been given in past cases and served as an important factor in determining extreme emotional disturbance. The court vacated the conviction and remanded the case for further proceedings.

Discussion

This case underscores several important considerations involved in evaluations regarding criminal

responsibility (i.e., lack of penal responsibility) and diminished capacity (i.e., EMED). *Lavoie* highlights the nuances with which courts grapple regarding what data can be admitted or excluded to support or refute mental health defenses; it is an example of the struggles that occur when mental health and the law intersect. Clinicians gather a variety of data to form opinions, including data on violence history and psychiatric illness. Following rules of evidence, the courts have different guidelines on when they permit certain evidence, such as prior bad acts. Lack of penal responsibility and EMED assessments are uniquely challenging for clinicians in that they involve looking at a historical event and attempting to determine a defendant's mental state at that time. Clinicians are trained to look for historical data and patterns of acting, which undoubtedly includes historical acts of similar (and even prior bad) behavior.

Additionally, *Lavoie* demonstrates the challenges inherent in differentiating which acts are the result of mental illness versus extreme emotional disturbance. One such challenge involves the definition of extreme disturbance. In *Lavoie*, the court did not find it necessary to clearly define EMED and instructed the jury to understand the plain meaning of the phrase. This type of instruction poses a challenge to evaluators tasked with answering a legal question when the question is not well defined. EMED is already complicated to assess, given that evaluators must consider how an underlying mental illness, personality disorder, or lack thereof interacts with a specific situation to affect a defendant's mental state; absent a clearly articulated definition of EMED, this becomes even more challenging. The *Lavoie* case is a good example of the difficulties in using clinical information to answer a question about a legal construct. An additional consideration highlighted by this case is the selection and weighing of relevant data in coming to a forensic opinion. Historical data aids an evaluator in coming to a diagnosis and understanding the defendant's motivations and thought patterns at the time of the offense. In *Lavoie*, the court noted that evidence of past violence may be admissible to rebut an insanity defense; however, the court also cited *Morishige* to show that when such evidence was admissible, it was to dispute a diagnosis and not to demonstrate propensity for such acts. Thus, this case also underscores the importance of clinicians' understanding of how to use the data

they obtain to answer a temporally bound legal question.

Cruel and Unusual Confinement on Virginia's Death Row

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Virginia's Death Row Solitary Confinement Conditions Created a Substantial Risk of Serious Psychological and Emotional Harm

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In *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019), Virginia death row inmates claimed that the conditions of their confinement on death row constituted cruel and unusual punishment. The district court granted summary judgment to the plaintiffs. The U. S. Court of Appeals for the Fourth Circuit affirmed, ruling that the conditions on death row created substantial risk of serious psychological and emotional harm and the state defendants were deliberately indifferent to that risk.

Facts of the Case

Death row inmates Thomas Porter, Anthony Juniper, and Mark Lawlor (the plaintiffs) filed a lawsuit against Harold Clarke (Director of the Virginia House of Corrections) and David Zook (Warden of Virginia's Sussex I State Prison), collectively referred to as "state defendants" for the purpose of this article, challenging their conditions of confinement. The plaintiffs put forth evidence that on death row at Sussex I State Prison in Virginia, death row inmates were housed in separate, constantly illuminated 71-square-foot cells (i.e., the size of half a parking space). They were allowed one hour of outdoor recreation five days a week in small wire-meshed enclosures without use of exercise equipment. Other than to