The Limits of Qualified Immunity

Dana M.C. Valdez, MD
Fellow in Forensic Psychiatry

Joseph R. Simpson, MD, PhD
Clinical Associate Professor

Institute of Psychiatry, Law, and Behavioral Science
Department of Psychiatry and Behavioral Science
University of Southern California
Los Angeles, California

Qualified Immunity Does Not Apply in the Case of Shooting an Armed but Secured Person

DOI:10.29158/JAAPL.210001-21

Key words: qualified immunity; police; shooting; Monell claim

In *Estate of Jones v. City of Martinsburg*, 961 F.3d 661 (4th Cir. 2020), the Fourth Circuit Court of Appeals considered whether a district court erred in granting qualified immunity to five police officers who shot and killed a man with schizophrenia after he was stopped for walking on a roadway. Wayne Jones, the decedent, was armed with a knife, but appeared subdued at the time he was shot. The court also addressed whether the city could be held liable under a *Monell* claim.

Facts of the Case

On the evening of March 13, 2013, Mr. Jones, a 50-year-old African-American man diagnosed with schizophrenia and experiencing homelessness, was walking on a roadway. Officer Paul Lehman of the Martinsburg Police Department stopped Mr. Jones, requesting identification and to search him for weapons. Mr. Jones noted that he had "something" on his person, prompting Officer Lehman to call for backup. Officer Daniel North arrived on scene as the situation escalated, with both officers discharging their Tasers on Mr. Jones as he fled. Officer William Staub arrived and placed Mr. Jones in a chokehold as two additional officers, Eric Neely and Erik Herb, responded. Tasers were deployed twice more, and then Mr. Jones was restrained by the five officers. Officer Staub felt a "sharp poke" and observed a knife in Mr. Jones's right hand. The officers withdrew from Mr. Jones, whose "left arm dropped lifelessly," drew their firearms, and ordered him to drop the knife. Mr. Jones laid motionless and did not respond, with Officer Lehman stating he "did not make any overt acts with the knife" (*Jones*, p 665). Three seconds after instructing Mr. Jones to drop his weapon, "[they] fired a total of 22 rounds at Jones . . . killing him where he lay" (*Jones*, p 665). Afterward, officers found a small knife in his right sleeve.

Mr. Jones's estate sued the City of Martinsburg and the involved officers in federal court under 42 U.S.C. § 1983 (1996), which allows individuals to bring suits against the state when their civil rights have been violated by a person acting on the state's behalf. The complaint alleged that officers violated the Fourth Amendment by using excessive force and the Fourteenth Amendment by killing Mr. Jones, and that the city could be held liable under the *Monell* claim (after *Monell v. Dept of Social Services*, 436 U.S. 658 (1978)) for various reasons, including a failure to train and discipline its officers. The Martinsburg Police Department policy on aggression response at the time was "to meet your aggression with the suspect's aggression . . . force must be necessary, objectively reasonable, and proportionate" (*Jones*, p 666). The Martinsburg Police Department did not have a policy regarding individuals with mental illness.

Two prior appeals were heard in this case, both regarding unintentional admissions during discovery by the Estate about Mr. Jones's actions during the incident. These resulted in remand to the district court, with the defense arguing that the officers were protected under qualified immunity. The lower court granted summary judgment in favor of the defense, holding that "qualified immunity applied because [Mr.] Jones was not 'secured' under clearly established law . . . [and] no *Monell* liability lay for a single incident" (*Jones*, p 667). The Estate appealed.

Ruling and Reasoning

The Fourth Circuit reversed the district court's holding that the officers were shielded by qualified immunity and affirmed the lower court's dismissal of the Estate's *Monell* claim. Qualified immunity protects police officers who violate constitutional rights if, under "clearly established law, they could reasonably believe that their actions were lawful" (*Jones*,

p 667). The Fourth Circuit stated that granting summary judgment on the grounds of qualified immunity is permissible only if defendants show "that there is no genuine dispute as to any material fact and [that they are] entitled to judgment" (*Jones*, p 667, citing Federal Rules of Civil Procedure 56(a) (2010)). The court utilized a two-step process to evaluate the applicability of qualified immunity: "whether a constitutional violation occurred; and whether the right was clearly established at the time of the violation" (*Jones*, p 667).

On a prior appeal, the court held that a jury could have deemed that Mr. Jones's Fourth Amendment rights were violated by use of excessive force. They noted two facts establishing these rights: that "Jones, although armed, had been secured by the officers immediately before he was released and shot," and that he "was incapacitated at the time he was shot" (*Jones,* p 668). They referenced precedent from *Kane v. Hargis*, 987 F.2d 1005 (4th Cir. 1993), establishing that an individual can be secured, despite lack of handcuffs, if pinned to the ground. The court noted that while Mr. Jones was armed with a knife, he was not able to wield it given his "physical state" and because he was restrained. While Officer Staub alleged he was injured by Mr. Jones, "a jury could reasonably find that Jones was secured . . . [and] they could have disarmed him and handcuffed him, rather than simultaneously release him" (*Jones*, p 669). In other words, if a jury deemed Mr. Jones secured, the officers would have breached his constitutional rights regarding deadly force by then releasing and shooting him. The court added that, in the event that Mr. Jones was not deemed secured, a jury could have found him incapacitated, as he was "tased four times, hit in the brachial plexus, kicked, and placed in a chokehold . . . [and officers] saw his left arm fall limply to his body" (*Jones*, p 669). Consequently, the Fourth Circuit ruled that the district court erred in granting protection by qualified immunity.

The court then addressed the Estate's argument that the city of Martinsburg was liable under a *Monell* claim, a method by which municipalities may be held liable for constitutional violations made by employees, if the employees' actions result from official municipal policy. In *Monell*, the U.S. Supreme Court held that cities qualify as "persons" for the purposes of 42 U.S.C. § 1983 suits. Generally, isolated incidents are not sufficient for *Monell* liability, though an exception was laid out in *City of Canton v. Harris*, 489 U.S. 378 (1989). In *Canton*, the Court stated that a municipality can be liable for constitutional breaches that occur secondary to inadequate training of its employees if the "failure to train amounts to deliberate indifference to the right of persons" (*Canton,* p 388). The court further noted that there could be circumstances in which the need for training may be "so obvious . . . [and] so likely to result in the violation of constitutional rights" (*Canton,* p 390) that a single breach can be grounds for liability; this has become known as the *Canton* exception.

The Estate asserted that Mr. Jones's death highlighted a lack of sufficient use-of-force training for officers. The Fourth Circuit held that Mr. Jones's shooting did not meet the *Canton* exception because the city of Martinsburg had an existing aggression policy, which the Estate did not adequately show as deficient. The "deliberate indifference" standard establishes that there must be notice that an existing policy is deficient before a city can be held liable. While Mr. Jones's death could be considered a violation of the Martinsburg Police Department's aggression policy, there was no earlier notice that the policy was deficient prior to the incident. Thus, the court held that there could be no *Monell* liability and affirmed the lower court's dismissal.

Discussion

In this ruling, the Fourth Circuit examined the limits of qualified immunity and the applicability of *Monell* in the shooting death of an African-American man with schizophrenia who was experiencing homelessness. They vacated the lower court's ruling granting summary judgment on the grounds of qualified immunity for the five officers involved in the death of Mr. Jones but affirmed that *Monell* liability cannot exist for single incidents without certain extenuating circumstances, i.e., the *Canton* exception. They held that a reasonable jury could have found that Mr. Jones, though armed with a knife, was secured and incapacitated, and that subjecting him to further force was a violation of his clearly established Fourth Amendment rights, voiding the officers' qualified immunity claims.

The court's opinion in this case comes amid a political climate of increasing scrutiny over the actions of police and the concept of qualified immunity. The "criminalization" of homelessness and mental illness increases the frequency of contacts between police

and individuals experiencing these conditions. These individuals, like Mr. Jones, are more likely to experience violence in encounters with police (Saleh AZ, *et al*: Deaths of people with mental illness during interactions with law enforcement. Int'l J L & Psychiatry 58:110-6, 2018). The topical nature of the proceedings was not lost on the court, which used the coda of its opinion to connect the instant case to some of these sociopolitical concerns. Referencing the death of George Floyd two weeks prior to the issuance of its opinion, the court stated: "Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives . . . . This has to stop. To award qualified immunity at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept" (*Jones*, p 673). It is conceivable to think, based on this commentary, that doctrines like qualified immunity will be reexamined over the coming years and may well have their boundary lines redrawn, either by legislation or court decisions.

Unlawful Entry into Residence

Alan W. Chen, MD
Fellow in Forensic Psychiatry

Gregory B. Leong, MD
Clinical Professor of Psychiatry

Institute of Psychiatry, Law, and Behavioral Science-Department of Forensic Psychiatry
University of Southern California
Los Angeles, California

History of Mental Illness Alone Is Not Probable Cause for Warrantless Forced Entry

DOI:10.29158/JAAPL.210001L1-21

Key words: unlawful entry; *Monell* claim; mental illness

In *Chamberlain v. City of White Plains*, 960 F.3d 100 (2d Cir. 2020), the U.S. Court of Appeals for the Second Circuit considered whether there was a plausible claim for unlawful entry and whether the officers involved were entitled to qualified immunity. The Estate of Kenneth Chamberlain, Sr., challenged the District Court's granting the defendants' motion to dismiss unlawful entry, excessive force, and supervisory liability claims regarding events that resulted in Mr. Chamberlain being killed by a White Plains police officer. The second Circuit Court of Appeals found that the appellant advanced a plausible claim for unlawful entry. The grant of summary judgment in favor of the defendants with respect to the claims of excessive force and supervisory liability was vacated and remanded to the district court for further proceedings.

Facts of the Case

Mr. Chamberlain, a 68-year-old African-American Marine Corps veteran, accidentally activated his Life Aid medical button early in the morning on November 19, 2011. The Life Aid operator responding to the alert was initially unable to communicate directly with Mr. Chamberlain and contacted the White Plains Department of Public Safety. A squad car and an ambulance were sent to Mr. Chamberlain's apartment by a White Plains police dispatcher. Responding units were advised that Mr. Chamberlain had been classified as an "emotionally disturbed person."

Upon arrival, officers banged loudly on Mr. Chamberlain's door and demanded entry. Mr. Chamberlain activated his Life Aid button and reported "an emergency" and that "the White Plains Police Department [is] banging on my door and I did not call them and I am not sick." The Life Aid operator informed the White Plains police dispatcher, who responded, "They're gonna make entry anyway . . . . They're gonna open it anyway."

Mr. Chamberlain continued to make repeated statements to the Life Aid operator and officers at his door that he had not called the police and that he did not need help. The officers continued attempts to gain entry forcibly and called for tactical reinforcements armed with handguns, a beanbag shotgun, Taser, riot shield, and pepper spray.

The officers opened Mr. Chamberlain's front door with an apartment master key but the door opened only a few inches due to an interior locking mechanism. Once the officers were in view of Mr. Chamberlain, he expressed belief that the officers were there to kill him and began experiencing delusions, hallucinations, and flashbacks to his time in the military. He began thrusting a knife through the partially opened door and repeatedly asked the officers to leave.

The officers "mocked and insulted" Mr. Chamberlain while continuing to attempt entry. They did not allow or facilitate communication between Mr. Chamberlain and his family members, including a niece who lived in the same building. After an hour of attempting entry, the officers removed Mr. Chamberlain's door from its hinges. The officers tased Mr. Chamberlain, which was not successful, fired several beanbag shots, and fired two handgun shots at him. One bullet hit Mr. Chamberlain, and he was killed.

The Estate of Kenneth Chamberlain, Sr., sued the officers from the White Plains Police Department who were involved and the City of White Plains Police Department, claiming unlawful entry and excessive force resulted in Mr. Chamberlain's death. The District Court for the Southern District of New York dismissed the unlawful entry claim as "failing to state a claim upon which relief can be granted" (a Rule 12(b)(6) motion, based on Fed. R. Civ. P. 12 (b)(6) (2019)) and ruled that some of the defendants were protected from suit due to qualified immunity. The plaintiff appealed this judgment, challenging these motions and the granting of summary judgment in favor of the defendants on supervisory liability claims, an excessive force claim, and a *Monell* claim against the city (after *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)).

Ruling and Reasoning

The U.S. Court of Appeals for the Second Circuit concluded that the initial grant of summary judgment made by the District Court in favor of defendants should be reconsidered because the claim of unlawful entry by the defendants was plausible. The Second Circuit affirmed that the *Monell* claim was properly dismissed on summary judgment. Under *Monell*, government entities may qualify and be subject to suits as "persons" for the purposes of 42 U.S.C. § 1984. The Second Circuit Court of Appeals noted that qualified immunity should be resolved at the earliest possible point in litigation (referencing *Pearson v. Callahan*, 555 U.S. 223 (2009)). As an affirmative defense, however, the question of qualified immunity cannot be answered before the truth of any plausible factual allegations is ascertained and thus cannot be presented for dismissal of claims under a Rule 12(b)(6) motion in place of a motion for summary judgment (Fed. R. Civ. P. 56(a) (2019)).

The court said that warrantless entry into a private dwelling is clearly unlawful without exigent circumstances, citing *Payton v. New York*, 445 U.S. 573 (1980), and that warrantless entry in response to a medical concern is unlawful without probable cause that the person inside is in immediate danger. Additionally, a report of a individual with mental illness in distress is insufficient support for probable cause of medical exigency (referencing *Kerman v. City of New York*, 374 F.3d 93 (2d Cir. 2004) and *Keeton v. Metro. Gov't of Nashville*, 228 F. App'x. 522 (6th Cir. 2007)). Because the emergency call from Mr. Chamberlain's apartment was not corroborated by Mr. Chamberlain or anyone else and it was later expressly retracted by the Life Aid operator, the court stated that there were sufficient facts to overcome an assertion of qualified immunity.

The previous dismissal and granting of summary judgment were vacated, and the claims were remanded to the district court for further proceedings to examine claims of unlawful entry, excessive force, and supervisory liability.

Discussion

Chamberlain reviews claims of unlawful entry and excessive force dismissed under qualified immunity. Such claims cannot be dismissed under qualified immunity, an affirmative defense, given the high standard required for a Rule 12(b)(6) motion in contrast to summary judgment or trial. On the basis of previous cases, warrantless entry into a private dwelling is only lawful under exigent circumstances where there is probable cause that the person inside is in immediate danger. Uncorroborated reports or reports of an individual with mental illness is not sufficient evidence to qualify as exigent circumstances. These claims and the affirmative defense of qualified immunity should be examined through summary judgment or trial where discovery and further briefing will allow for a more detailed examination of facts.

Police Response to Threat by Person with Mental Illness

Ferdows Ather, MD
Fellow in Forensic Psychiatry

Timothy Botello, MD, MPH
Clinical Professor of Psychiatry

USC Institute of Psychiatry, Law, and Behavioral Science
Keck School of Medicine, University of Southern California
Los Angeles, California

Police Use of Deadly Force in Response to Threat Made by Man with Mental Illness Does Not Violate the Fourth Amendment or the Americans with Disabilities Act

DOI:10.29158/JAAPL.210001L2-21

Key words: police; schizophrenia; force; killed; disabilities

In *King v. Hendricks Cnty. Comm'rs*, 954 F.3d 981 (7th Cir. 2020), the Seventh Circuit Court of Appeals considered whether the District Court for the Southern District of Indiana's decision to grant summary judgment in favor of police was correct. Matthew King, father and representative of the estate of decedent Bradley King, asserted that the police violated the decedent's Fourth Amendment rights by using excessive force; that the county failed to provide adequate training to police in how to de-escalate situations with persons with mental illness; and that the police violated the decedent's Americans with Disabilities Act (ADA) rights. The court upheld the defendant's grant of summary judgment on the Fourth Amendment claim and ruled that the training and ADA claims failed.

Facts of the Case

Bradley King, a 29-year-old man with schizophrenia, was killed at his home in Hendricks, Indiana, by police performing a welfare check after he called 911 requesting help. No other eyewitnesses were available; the only testimony was from the deputies involved.

Deputies Jason Hays and Jeremy Thomas testified that, upon their arrival to the house, Mr. King came out and walked toward them, pulling a 10-inch knife out of his shorts pocket. Despite drawing their firearms and yelling at Mr. King to stop and drop his knife, Mr. King kept moving forward and started to run at Deputy Hays. When Mr. King was approximately eight feet away, Deputy Hays fired one shot at Mr. King, killing him.

Bradley King's father (petitioner) brought the three federal civil rights claims described above against Deputy Hays, the Hendricks County Commissioners, the Sheriff's Department, and the Sheriff. The lower court granted summary judgment for the defense on all three claims.

Ruling and Reasoning

The Seventh Circuit affirmed the district court's summary judgment on all three of the petitioner's claims. Regarding the claim that the police's use of excessive force violated Mr. King's constitutional right against unreasonable seizure, the appeals court acknowledged that "the level of force that is constitutionally permissible in dealing with a mentally ill person . . . differs both in degree and in kind from the force that would be justified against a person who has committed a crime or who poses a threat to the community" (*King*, p 984 (quoting *Gray v. Cummings*, 917 F.3d 1 (1st Cir. 2019), p 11). Thus, the court agreed with the petitioner's assertion that officers should approach anyone suspected or known to have mental illness differently than those suspected of criminal activity. In the present case, Mr. King was reportedly known to police as having mental disabilities because they were involved with him during prior psychotic episodes.

The court also referred to a U.S. Supreme Court admonition that the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation" (*King*, p 984 (quoting *Graham v. Connor*, 490 U.S. 386 (1989), pp 396-7). The court explained:

> When addressing the use of deadly force, the court considers whether a reasonable officer in the circumstances would have probable cause to believe that the [person] poses an immediate threat to the safety of the officers or others" (*Sanzone v. Gray*, 884 F.3d 736, 740 (7th Cir. 2018)). If the person of interest threatens the officer with a weapon, deadly force may be used, because the risk of serious physical harm to the officer has been shown. (*Ibid.*) This is so even if a less deadly alternative is available to the officers (*Plakas v. Drinksi*, 19 F.3d 1143, 1149 (7th Cir. 1994)). And this is so whether or not the targeted person suffers from a mental illness—the critical consideration is whether he or she poses an immediate threat to the officers or others (*King*, p 985).

Thus, given the evidence available in the case, the court said that Mr. King posed an imminent threat to the officers and deadly force was reasonable. The appeals court, however, did appreciate the challenge Mr. King faced in countering the officers' testimony (the only available eyewitness evidence in the case) and that, unfortunately, "the person most likely to rebut

the officers' version of the events—the one killed—can't testify" (*King*, p 985 (quoting *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014), p 1079).

Finally, the court deliberated on the petitioner's third claim, that the police violated Mr. King's rights under Title II of the ADA, which states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity" (42 U.S.C. § 12132 (1990)). The petitioner claimed Mr. King's rights were violated by arguing that the police should have acted differently given Mr. King's mental illness.

In its decision, the appeals court separated this claim into two components. First, it addressed whether Title II applies to law enforcement investigations and arrests, Second, if it does apply, it addressed whether law enforcement violated Mr. King's Title II rights. With regard to the first question, the court acknowledged that other circuit courts were split on the matter but ultimately assumed, without deciding, that Title II did apply to the deputies' response to Mr. King. The appeals court also assumed that the county could be held vicariously liable under Title II for the deputies' actions using the "deliberate indifference standard" to judge their actions. Thus, for the petitioner's claim to succeed, he was required to "show that 'but for' [Mr. King's] disability, he would have been able to access the services or benefits desired" (*King*, p 989 (quoting *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006), p 754).

The court stated that, because the police responded quickly to Mr. King's call and there were no available facts to contradict the deputies' testimony that their lives were in danger from Mr. King running at them with a knife, the deputies' response was not discriminatory given their response would have been identical even if Mr. King did not suffer from mental illness, and there was nothing they could have done in this specific scenario to accommodate for his mental illness. The court concluded that "if the decedent was denied access to medical services it was because of his violent, threatening behavior, not because he was mentally disabled" (*King*, p 989).

In conclusion, the Seventh Circuit unanimously concluded that the police officer's use of deadly force in response to Mr. King's threat to use a knife did not violate his rights under the Fourth Amendment or the ADA, regardless of the fact that Mr. King was mentally ill.

Discussion

With the recent social upheaval in the wake of the killing of George Floyd and others by police, there has been increased attention to events in which police utilize force in the commission of their duties. Encounters with people in mental health crisis are particularly challenging given the added complexity of such encounters and often limited police training in managing these situations.

In *King*, the court of appeals judged the reasonableness of the police officer's use of deadly force against Mr. King on the basis of what the court of appeals thought would be a reasonable police response to a person without mental illness. In doing so, however, the decision raises the question of why the law takes mental illness into account when someone is the perpetrator of deadly force (e.g., the insanity defense or sentence mitigation), but not when someone is the victim of deadly force. We might also consider whether, had Bradley King survived and been able to testify, the appeals court's treatment of his testimony would have been the same as that of the testimony of someone without mental illness.

Although the law may not require police to respond differently to individuals with mental illness who threaten them with a deadly weapon, some public agencies recognize a need to provide specialized emergency response services for those experiencing a mental health crisis. In Los Angeles County, requests for assistance managing a situation potentially involving mental health concerns are often triaged to teams specializing in mental health crises, such as the Department of Mental Health's Psychiatric Mobile Response Team (PMRT) or mental health clinicians directly integrated into the sheriff police force (Systemwide Mental Assessment Response Team). As police departments are forced to re-evaluate their missions and funding (e.g., the City of Los Angeles recently announced a $150 million redirection of next year's police budget toward community initiatives), legislative bodies may consider how to support mental

health programs in law enforcement to minimize risk of events like the killing of Bradley King from happening again.

Liability for Suicide Attempt of Pretrial Detainee

Ariel Schonfeld, MD
Fellow in Forensic Psychiatry

John Chamberlain, MD
Clinical Professor of Psychiatry

Department of Psychiatry
University of California San Francisco
San Francisco, California

Officer Denied Qualified Immunity for Failure to Summon Medical Care for Pretrial Detainee

DOI:10.29158/JAAPL.210002-21

Key words: qualified immunity; pre-trial detainee; medical care; suicide

In *Horton v. City of Santa Maria*, 915 F.3d 592 (9th Cir. 2019), the Ninth Circuit Court of Appeals reviewed the district court's denial of summary judgment to a police officer, reversing the denial on one charge but upholding it on a second charge. Officer Brice was responsible for a pretrial detainee, Shane Horton, at the time Mr. Horton made a suicide attempt. In this case, the first claim was for violation of the due process clause of the Fourteenth Amendment, and the second claim was for failure to provide medical care to Mr. Horton. The Court of Appeals found there was a genuine issue of fact regarding whether Officer Brice acted appropriately.

Facts of the Case

In December 2012, 18-year-old Shane Horton was arrested by Officers Brice and Schneider for misdemeanor vandalism in Santa Maria, California. The circumstances leading to the arrest involved a physical altercation between Mr. Horton and his girlfriend. She drove away with a friend. Mr. Horton slashed the tires of the friend's car. Officer Brice interviewed Mr. Horton's girlfriend at the scene. She disclosed that Mr. Horton had previously hit her several times, chased her with a knife, stabbed a friend in the leg, and made statements about killing police and feeling sympathetic toward perpetrators of recent mass homicides. Officer Schneider placed Mr. Horton in a holding cell, leaving on his belt. Mr. Horton expressed feeling anxious and told him that he had had a difficult three weeks, describing recent drug use, having been assaulted, and his dislike of the jail cell. Officer Schneider stated he would "[p]robably do a psych" and instructed Mr. Horton to wave at the security camera if he needed anything.

About 90 minutes later, Officer Brice visited Mr. Horton, letting him know that his girlfriend was granted a restraining order and that he was being charged with felony domestic violence. Officer Brice asked if he had any medical problems. Mr. Horton stated he did not. Mr. Horton called his mother, who told him she would not bail him out and requested to speak privately to Officer Brice. She disclosed to Officer Brice that her son had been using drugs, extinguished cigarettes on himself, punched his fist through a window, cut his wrist with broken glass, and held a kitchen knife pointed at his throat. Two weeks before, he was held overnight at the emergency room as a suicide risk. The doctors suspected the problem was "mostly drugs" and discharged him in the morning due to his not being suicidal. Ms. Horton told Officer Brice she disagreed with the conclusion that he could be safely discharged. She believed he was depressed and suicidal and that he could be helped in the judicial system.

The phone call lasted 10 to 15 minutes. Officer Brice went to complete paperwork and returned to Mr. Horton's cell after a total of 27 minutes. Mr. Horton was hanging by his belt, which he had affixed to his cell door. Only his lower body was visible on the security camera, so the injury had not been apparent. Officer Brice called for assistance, administered cardiopulmonary resuscitation, and waited for paramedics to arrive. Mr. Horton survived, but suffered prolonged anoxia and severe irreversible brain damage.

With his mother acting as guardian *ad litem*, Mr. Horton sued Officer Brice, other officers, the City of Santa Maria, and the Santa Maria Police Department. They made claims that his Fourteenth Amendment due process rights under 42 U.S.C. § 1983 (1996) and his state right to medical care while in custody were violated, alleging that Mr. Horton should have received medical care. There was an additional negligence claim that will not be addressed

here. The defendants moved for summary judgment on the basis of qualified immunity. The district court denied summary judgment to Officer Brice, the City, and the Police Department on both claims. All other defendants were granted summary judgment.

Ruling and Reasoning

Qualified immunity serves to protect government officials from liability unless their conduct violates a clearly established standard that a reasonable person would have known. The first claim was for violation of 42 U.S.C. § 1983, which states that a person who knowingly causes another person to be deprived of their constitutional rights is liable to the injured party; here, that right was access to medical care. The Court of Appeals pointed out that a reasonable officer would not have known that failing to check on Mr. Horton and summon medical attention immediately would be unconstitutional; therefore, this right was not clearly established. Thus, the district court erred in denying summary judgment to Officer Brice on this charge.

California state law (Cal. Gov't Code § 845.6 (1970)) dictates that a public employee cannot be held liable for failing to provide medical care to a prisoner unless the employee knows or should know that the prisoner requires immediate medical attention. The plaintiff must establish the public employee knew (or should have known) there was an immediate need for medical care and failed to summon that care. The Court of Appeals noted that Mr. Horton clearly required medical attention. Officer Brice knew Mr. Horton was recently suicidal, had been hospitalized, and was displaying erratic behavior. The court noted that, if Officer Brice had requested a prompt psychiatric evaluation, Mr. Horton might have been discovered sooner and might have suffered a briefer period of anoxia. The Court of Appeals indicated these were matters of fact and it could not be determined only as a matter of law whether Officer Brice's shortcomings proximately caused injury to Mr. Horton. The court thus upheld the decision to deny summary judgment to Officer Brice on this charge.

Dissent

On the claim under California Government Code § 845.6, Judge Bybee favored granting summary judgment to Officer Brice. Judge Bybee acknowledged Officer Brice's checking on Mr. Horton sooner might have limited the extent of brain damage; however, Judge Bybee said this would not have prevented the suicide attempt because, when the phone call concluded, Mr. Horton was already hanging. The plaintiff posited immediate medical care was needed as Mr. Horton was at risk of hurting himself but did not specify the type of medical care indicated. By the time Officer Brice found Mr. Horton, he required resuscitation, but this could not have been predicted. A psychiatric evaluation might have been appropriate but would not have prevented his injury. Judge Bybee contended that while Officer Brice's decision not to immediately check on Mr. Horton may not have been prudent, it did not constitute a failure to summon medical care.

Discussion

The court noted that the claim raised important points about the duty of the police department toward detainees, but that it lacked jurisdiction to review the claim against the municipal defendants. The court (both the majority and the dissent) focused their analysis on questions related to liability and immunity from liability. While the case primarily focused on the rights of prisoners to medical care, it is clear that Mr. Horton's suicide attempt occurred in the setting of system-based shortcomings that transcended the role of a single officer. For example, it is not clear whether emergency psychiatric evaluation would have been available if Officer Brice had requested one. While there was a camera monitoring the cell, it did not provide staff with a full view of the cell and Mr. Horton. While the department had a policy of removing jackets, belts, and shoes from detainees, the court found the policy was widely regarded as optional.

This case highlights the important role of psychiatrists in educating jail staff, law enforcement personnel, and the courts about suicide and suicide prevention. In this case, perhaps if officers had had more education about suicide, risk factors for suicide, and strategies to prevent suicide, there would have been more measures in place to mitigate the risk of suicide. In addition, officers might have been more willing to follow policies that reduce suicide risk if they had more training and education on the rationale for the policies. Psychiatrists are subject matter experts who can help jail staff and law enforcement personnel understand these problems and thereby help minimize suicide risk in correctional settings.

Psychiatrists also have the training, education, and experience to help courts understand these challenges and to analyze cases when there is an adverse outcome such as in the present case.

Second and Fourth Amendment Considerations in Warrantless Seizure and Seizure and Retention of Firearms during a Mental Health Crisis

Takeo Toyoshima, MD
Fellow in Forensic Psychiatry

John Chamberlain, MD
Professor of Psychiatry

Program in Psychiatry and the Law, Department of Psychiatry
University of California, San Francisco
San Francisco, California

In a Mental Health Crisis, Warrantless Seizure and Retention of Firearms Do Not Impermissibly Violate Constitutional Rights

DOI:10.29158/JAAPL.210002L1-21

Key words: warrantless seizure; firearms; mental health crisis; Fourth Amendment

In *Rodriguez v. City of San Jose*, 930 F.3d 1123 (9th Cir. 2019), police officers seized firearms without a warrant after detaining an individual for a mental health evaluation at the request of his wife. The City of San Jose subsequently retained these firearms on public safety grounds, pursuant to state law despite the wife's petition for their return. After judgments against her in state trial and appellate courts, the wife sued in federal district court (and later appealed) on Second, Fourth, Fifth, and Fourteenth Amendment and state law grounds. The U.S. Court of Appeals for the Ninth Circuit entered summary judgment in favor of the City of San Jose.

Facts of the Case

In January 2013, San Jose police officers conducted a welfare check on Edward Rodriguez at the request of his wife, Lori Rodriguez. Mr. Rodriguez was known to have a mental illness and own firearms. Upon officers' arrival, he was ranting about the CIA, the army, others watching him, "shooting up schools," and firearms that he had in a safe. He was deemed to be in a mental health crisis. Pursuant to California Welfare & Institutions Code (WIC) § 5150 (2013), he was detained for a mental health evaluation. Under WIC § 5150, qualified personnel may involuntarily detain an individual deemed at risk of danger to self or others for up to 72 hours for the purpose of psychiatric evaluation and treatment.

Police officers spoke with Mrs. Rodriguez, and, without a warrant, confiscated 12 firearms from the household pursuant to WIC § 8102 (2014). When an individual is detained pursuant to WIC § 5150, WIC § 8102 requires law enforcement personnel to confiscate firearms and other deadly weapons owned, possessed, or controlled by that individual. Mrs. Rodriguez provided the keys and combination code to the safe. One handgun was registered to her alone. The other eleven were registered to Mr. Rodriguez or were unregistered. Mr. Rodriguez was psychiatrically hospitalized for one week. One month later, the City of San Jose petitioned to the California Superior Court pursuant to WIC § 8102 that the guns be forfeited. The city argued returning these would endanger Mr. Rodriguez or other members of the public. Mrs. Rodriguez objected, claiming ownership of her personal handgun, and community property ownership of the others, and that forced forfeiture violated her Second Amendment right to keep and bear arms.

The California Superior Court granted the city's petition. The state trial court reasoned that, given public safety concerns, the city could seize the "low hanging fruit" of firearms owned by the Rodriguez couple. This did not preclude Mrs. Rodriguez's ability to buy and possess new firearms. Thus, it did not ignore or violate her Second Amendment right. Mrs. Rodriguez appealed, but the California Court of Appeal affirmed the trial court's decision. The appellate court held that Mrs. Rodriguez had "other viable options" such as selling or storing the guns outside of the home, and she could follow procedure outlined in California Penal Code § 33850 et seq. (2010) for return of her firearms.

Mrs. Rodriguez followed the procedure outlined under California Penal Code § 33850 et seq. and sought return of the firearms. She reregistered all firearms under her name only. She obtained a gun release clearance from the California Department of

Justice. She again petitioned the city to return the firearms but was denied. She sued the City of San Jose, the San Jose Police Department, and an officer from the initial incident in the U.S. District Court for the Northern District of California. Joined by Second Amendment Foundation, Inc., and Calguns Foundation, Inc., Mrs. Rodriguez argued that the seizure and retention of her firearms violated her Second, Fourth, Fifth, and Fourteenth Amendment rights, and that she was entitled to the return of her firearms under state law. The plaintiffs additionally sought compensatory damages and "injunctive and declaratory relief to prevent future violations of Lori's rights and the rights of the organizations' members" (*Rodriguez*, p 1129). The district court rejected these arguments and granted summary judgment for the defendants. Mrs. Rodriguez appealed.

Ruling and Reasoning

The Ninth Circuit reviewed *de novo* the federal district court's summary judgment. Mrs. Rodriguez argued that interim developments such as reregistering of her firearms and the Department of Justice firearms clearance merited reconsideration of her Second Amendment claim. The Ninth Circuit found that her arguments had not materially changed. The state courts had already considered her ownership interest in the firearms and applicable state laws in their analysis. The Ninth Circuit barred reconsideration of Mrs. Rodriguez's Second Amendment claim. The organizational plaintiffs were found to lack standing to bring suit.

The Ninth Circuit agreed with the California Court of Appeal that Mrs. Rodriguez was not prohibited from acquiring or possessing firearms. Therefore, her Second Amendment right was not violated. The court affirmed that the Second Amendment does not extend to keeping and bearing particular firearms confiscated from an individual with mental illness. The Second Amendment does not confer "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose" (*Rodriguez*, p 1132, citing *McDonald v. City of Chicago*, 561 U.S. 742, p 786 (2010)).

The Ninth Circuit considered Mrs. Rodriguez's argument that a warrantless seizure of her firearms violated the Fourth Amendment. There are limited exceptions to the search and seizure requirements under the Fourth Amendment. The U.S Supreme Court recognized "community caretaking function" as a necessary police activity for protection of public health and safety in *Cady v. Dombrowski*, 413 U.S. 433 (1973). The Ninth Circuit held that "(1) the public safety interest; (2) the urgency of that public interest; and (3) the individual property, liberty, and privacy interests [. . .] must be balanced, based on all of the facts available to an objectively reasonable officer, when asking whether such a seizure of a firearm falls within an exception to the warrant requirement" (*Rodriguez*, p 1138). Two cases involving warrantless search and seizure of firearms for public safety purposes were referenced (*Mora v. City of Gaithersburg*, 519 F.3d 216 (4th Cir. 2008) and *Corrigan v. District of Columbia*, 841 F.3d 1022 (D.C. Cir. 2016)).

The court found the seizure of Mrs. Rodriguez's firearms was appropriate given significant public safety interests despite her private interest in her personal property. The court made particular note of Mr. Rodriguez's concerning behavior and statements, including "shooting up schools" and reference to the firearms at home. The circumstances were deemed urgent and justified a warrantless seizure because Mr. Rodriguez, who was detained pursuant to WIC § 5150, could have been held up to 72 hours, but the hospital staff had discretion to prematurely release him. Mrs. Rodriguez argued she could mitigate the urgency by changing the combination key to the gun safe, but the court reasoned, "Edward . . . could have overpowered her to gain access to the guns" (*Rodriguez*, p 1140). She also argued a telephonic warrant could have been obtained prior to her husband's release but provided no evidence to support this claim.

The warrantless seizure of Mrs. Rodriguez's firearms did not impermissibly violate her Fourth Amendment right, with the caveat that such a ruling was "limited to the particular circumstances here" (*Rodriguez*, p 1140). The court also affirmed summary judgment on the Fifth and Fourteeenth Amendment and state law claims in a concurrent memorandum.

Discussion

Rodriguez adds to an evolving legal standard for the warrantless seizure and retention of firearms in psychiatric emergencies. Public safety interests must be carefully weighed against Second and Fourth Amendment rights. Each clinical scenario requires thoughtful consideration, and the mere involvement

of firearms in a mental health crisis does not allow indiscriminate warrantless seizure and retention of those firearms. In *Mora v. City of Gaithersburg*, the particulars of the case led the Fourth Circuit to rule in favor of officers who seized dozens of firearms without a warrant in a mental health crisis. In *Corrigan v. District of Columbia*, however, the facts led the D.C. Circuit to hold that the warrantless search of the plaintiff's home was unconstitutional in the absence of an "imminently dangerous hazard." In *Rodriguez*, the Ninth Circuit specifically opined that the analysis and ruling was "limited to the particular circumstances" of the case (*Rodriguez*, p 1140). Likewise, psychiatrists should critically evaluate each situation before declaring a psychiatric emergency and be cognizant of the legal and clinical ramifications of doing so. Significant public and professional attention is given to mental health, suicide, gun violence, and gun ownership rights. As stakeholders continue this dialogue, psychiatrists can provide invaluable insight to educate the public and guide creation of sound policy while advocating for further necessary research into the intersection of mental health and firearms access.

Firearm Restrictions for Individuals Previously Involuntarily Committed

Evan Vitiello, MD
Fellow in Forensic Psychiatry

Reena Kapoor, MD
Associate Professor of Psychiatry

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, Connecticut

Court Upheld Federal Prohibition on Possession of Firearms by Individuals Who Were Previously Involuntarily Committed

DOI:10.29158/JAAPL.210003-21

Key words: firearms; Second Amendment; gun violence; civil commitment

In *Mai v. United States*, 952 F.3d 1106 (9th Cir. 2020), the U.S. Court of Appeals for the Ninth Circuit upheld the federal prohibition on possession of firearms by individuals who have been involuntarily committed to a psychiatric facility, even those who were committed years ago and are now psychiatrically stable. The court concluded that, although these individuals pose less risk of violence than when they were involuntarily committed, scientific evidence shows that they remain at elevated risk compared with the general population. The court held that prohibiting firearm possession by these individuals comports with Congress's interest in preventing gun violence and does not violate the individuals' Second Amendment rights.

Facts of the Case

In October 1999, Duy Mai was involuntarily committed for psychiatric treatment by a court in King County, Washington, after he appeared to be a threat to himself and others. He was 17 years old at the time and remained in the hospital for over nine months. After his release, he enrolled in Evergreen Community College, where he earned his GED and ultimately a bachelor's degree in microbiology from the University of Washington. Mr. Mai then enrolled at the University of Southern California, earning a master's degree in microbiology in 2009. He was subsequently employed at various research institutes, which required successfully passing an FBI background check (*Mai v. United States*, No. C17-0561 RAJ (W.D. Wash. Feb. 8, 2018)). He married and had two children.

In 2014, Mr. Mai tried to purchase a firearm, but both state and federal law prohibited him from doing so. He petitioned the King County Superior Court for relief from disability (RFD), or restoration of his right to own firearms. His petition was granted after he underwent medical and psychological examinations, but a federal statute, 18 U.S.C. § 922(g)(4) (2012), still prevented Mr. Mai from purchasing a gun because he had previously been committed to a psychiatric hospital. The federal statute outlined two avenues for such individuals to apply for RFD. The first avenue, in which a federally funded program would investigate a person to determine if they were no longer dangerous, was defunded by Congress and eliminated in 1992. The second avenue was through a state program for RFD that was recognized at the federal level. Thirty states had qualifying RFD programs, but Washington did not. Thus, Mr. Mai had no avenue to overcome the federal prohibition on his firearm possession.

On April 11, 2017, Mr. Mai filed a complaint against several government agencies involved in restricting his firearm possession, arguing that continued application of the federal prohibition many years after he was involuntarily committed violated his Second Amendment and Fifth Amendment rights. The U.S. District Court for the Western District of Washington dismissed Mr. Mai's Fifth Amendment claim and analyzed his Second Amendment claim. The district court found that Mr. Mai's Second Amendment rights were not violated by the federal prohibition on his gun possession. Mr. Mai then appealed the decision to the U.S. Court of Appeals for the Ninth Circuit.

Ruling and Reasoning

Like the district court, the Court of Appeals for the Ninth Circuit considered whether the Second Amendment required that Mr. Mai be permitted to possess firearms. The court ultimately upheld the federal prohibition on the purchase and possession of firearms by individuals whom a state has found to be mentally ill and dangerous during civil commitment proceedings. In reaching its decision, the Ninth Circuit relied on both previous court holdings and scientific evidence to support Congress's interest in preventing gun violence.

The court cited precedents including *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), in which the U.S. Supreme Court affirmed that prohibitions on possession of firearms by certain classes of individuals, including those with mental illness, are permissible under the Second Amendment. The court also noted that individuals other than those with mental illness also face firearm bans. These groups include domestic violence misdemeanants (*United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) and felons (*United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010)).

The Ninth Circuit noted that the Third and Sixth Circuit appellate courts encountered similar challenges to firearm prohibitions involving plaintiffs who had been civilly committed and later regained their mental wellbeing. These two courts came to opposite conclusions. In *Beers v. Att'y Gen. United States*, 927 F.3d 150 (3d Cir. 2019), the Third Circuit ruled that 18 U.S.C. § 922(g)(4) did not place a significant burden on Second Amendment rights, and therefore the court affirmed that the firearm prohibition was constitutional. [Note: The *Beers* case has since been vacated.] The Sixth Circuit heard a similar complaint in *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016). In that case, the court overturned a lower court's prohibition on firearm possession, concluding that 18 U.S.C. § 922(g)(4) placed a significant burden on Second Amendment rights and that the government had not offered sufficient justification for the necessity of a lifetime ban.

Finally, the Ninth Circuit evaluated the available scientific evidence regarding the relationship between mental illness and gun violence. One cited study, a meta-analysis of suicide risk in individuals released from involuntary commitment, followed subjects for 8.5 years after release from the hospital and found a risk of suicide that was 39 times the expected rate (Harris EC, Barraclough B: Suicide as an outcome for mental disorders: a meta-analysis. Br J Psychiatry 170:205-28, 1997). Although the follow-up period in that study was significantly shorter than the approximately two decades since Mr. Mai's release from civil commitment, the court extrapolated that his risk for suicide would not have returned to zero in the subsequent years. The court stated that scientific evidence provides strong justification for prohibiting previously involuntarily committed individuals from obtaining firearms. Thus, the Ninth Circuit concluded that the ban on Mr. Mai's possession of firearms was a reasonable fit for the government's important interest in reducing gun violence and suicide. The district court's decision was affirmed.

Discussion

Mai v. United States continues the heated societal debate about the relationship between mental illness and gun violence. Public opinion is clear, with 85.4 percent of surveyed Americans supporting a requirement that states report involuntarily committed psychiatric patients to a background check system (Barry C, McGinty EE, Vernick JS, Webster DW: After Newtown—public opinion on gun policy and mental illness. New Eng J Med 368:1077–81, 2013). Furthermore, 89 percent of adults are in favor of preventing individuals with mental illness from purchasing firearms (Igielnik R, Brown A: Key takeaways on Americans' views of guns and gun ownership. Washington, DC: Pew Research Center Fact Tank. June 22, 2017. Available at: https://www.pewresearch.org/fact-tank/2017/06/22/key-takeaways-on-americans-views-of-guns-and-gun-ownership. Accessed August 3,

2020). Despite the strength with which these opinions are held, the scientific evidence supporting them is mixed. There is clearly an increased risk for suicide in individuals with mental illness, particularly when firearms are involved. Data relating to violence against others are not as clear, and show at most a modest increase in violence risk in individuals with mental illness (Swanson *et al.*: Mental illness and reduction of gun violence and suicide: bringing epidemiologic research to policy. Ann Epidemiol 25:366–76, 2015).

Given the limited evidence available about mental illness and violence risk in general, the question raised in *Mai* about long-term violence risk in individuals who have been civilly committed is very difficult to answer. The *Mai* court affirmed firearm restrictions on this group on the basis of the court's interpretation of scientific evidence, but scholars have noted previously that restrictions on the basis of involuntary commitment may not be narrow enough, prohibiting many individuals who do not pose a serious risk of harm from owning firearms (Felthous A, Swanson J: Prohibition of persons with mental illness from gun ownership under *Tyler*. J Am Acad Psychiatry Law 45:478–84, 2017). There is a clearly expressed important governmental interest in reducing gun violence, and certain states already look to mental health providers for assistance in determining individual risk. Many practitioners, however, are unlikely to feel comfortable performing an assessment of what amounts to a capacity assessment to own and possess firearms.

Guidance for mental health professionals who are asked to conduct firearms risk assessments is sparse. An American Psychiatric Association Resource Document on the subject does exist, but it cautions that "no one-size-fits-all rule applies" to the assessments (American Psychiatric Association Official Actions: Resource Document on Mental Health Issues Pertaining to Restoring Access to Firearms. Washington, DC: APA, 2020, p 2. Available at https://www.psychiatry.org/psychiatrists/search-directories-databases/library-and-archive/resource-documents. Accessed August 3, 2020). The document recommends that general psychiatrists refer patients to a forensic psychiatrist for evaluation, reasoning that forensic psychiatrists possess greater expertise in violence risk assessment and will therefore feel more comfortable with such assessments. This is not necessarily the case, as an evidence-based framework to inform forensic evaluations of firearms risk does not currently exist (Gold L, Vanderpool D: Psychiatric evidence and due process in firearms rights restoration. J Am Acad Psychiatry Law 46:309–21, 2018). Should forensic psychiatrists increasingly be called to assess competency to own and possess firearms, incorporating education on this topic within fellowship training programs would be beneficial. The current Accreditation Council for Graduate Medical Education (ACGME) program requirements for forensic psychiatry make no mention of guns or firearms (ACGME Program Requirements for Graduate Medical Education in Forensic Psychiatry, revised June 13, 2020. Available at: https://www.acgme.org/Portals/0/PFAssets/ProgramRequirements/406_ForensicPsychiatry_2020.pdf?ver=2020-06-19-130837-917. Accessed August 3, 2020); these requirements may need revision as more forensic psychiatrists are asked to offer opinions in RFD proceedings.

Reversing Guilty but Mentally Ill in Favor of NGRI

Lauren Marino, MD
Fellow in Forensic Psychiatry

Tobias Wasser, MD
Assistant Professor of Psychiatry

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, Connecticut

Demeanor Evidence Outweighed by Unanimous Expert Opinion and a Defendants History of Mental Illness

DOI:10.29158/JAAPL.210003L1-21

Key words: insanity defense; NGRI; guilty but mentally ill; GBMI; expert opinion

The Supreme Court of Indiana in *Payne v. State*, 144 N.E.3d 706 (Ind. 2020), determined that the trier of fact must consider demeanor evidence in the context of all other evidence; ultimately, its probative value is effectively negated in the context of a well-documented history of mental illness and unanimous

expert opinion of insanity. Accordingly, the Supreme Court of Indiana reversed a guilty but mentally ill conviction and found the defendant not guilty by reason of insanity.

Facts of the Case

In 2005, Jesse Payne was charged with two counts of arson, accused of burning down two historic landmark bridges and attempting the arson of another. According to medical records, Mr. Payne had a long and well-documented history of mental illness since age 13, including diagnoses of delusional disorder, schizophrenia, polysubstance abuse, and antisocial personality disorder. Mr. Payne's psychiatric history was notable for repeated hospitalizations, medication nonadherence, chronic delusions, and hallucinations. He spent 11 years undergoing competency restoration prior to standing trial. All three court-appointed experts (two psychiatrists and a psychologist) did not substantively differ in their diagnoses, as each expert diagnosed Mr. Payne with schizophrenia and delusional disorder. The experts also agreed in their opinion of Mr. Payne's legal insanity, although one expert, Dr. Mahmood, testified that he did not have "a very strong opinion" of whether Mr. Payne "appreciated the wrongfulness of his conduct" at the time of the 2005 arson (*Payne*, p 711 (citing Tr. Vol. 5, pp 92–3)). At trial, Mr. Payne testified to his belief in a conspiracy of government officials aimed at stopping him from exposing their "misdeeds" by abusing and "terrorizing" him.

The prosecutor introduced demeanor evidence aimed at showing "consciousness of guilt," including Mr. Payne's acting late at night, telling police that he had purchased the fuel in his car for camping, and attempting to establish an alibi by providing convenience store receipts (*Payne*, p 711 (Tr. Vol. 5, pp 199, 202–4)). Rejecting the insanity defense, the jury found Mr. Payne guilty but mentally ill on all counts. Mr. Payne was sentenced to 90 years in total: 20 years for each count with a 30-year enhancement for his habitual-offender status, the maximum sentenced allowed by statute. The Indiana Court of Appeals affirmed, holding that demeanor evidence of Mr. Payne's deliberate and premeditated conduct was sufficient to support the jury's conclusion of his sanity at the time of the offenses.

Ruling and Reasoning

In Indiana, as in other states, the insanity defense is an affirmative defense, and a defendant has the burden of proof by a preponderance of the evidence. The Indiana Supreme Court referenced *Barcroft v. State*, 111 N.E.3d 997 (Ind. 2018), for the position that a factfinder may consider all relevant evidence to reach a verdict, including expert testimony, a defendant's history of mental illness, and demeanor evidence. When expert testimony is unanimous and the defendant has a well-documented history of mental illness, the court found that the probative value of demeanor evidence "effectively dissolves." Hence, the Supreme Court of Indiana reversed the guilty but mentally ill conviction, found the defendant not guilty by reason of insanity, and remanded the case back to the trial court to hold a hearing on the state's petition for Mr. Payne's commitment to an appropriate treatment facility.

The court based its ruling on several factors. It acknowledged that the demeanor evidence in Mr. Payne's case could, on its own, lead to the inference that Mr. Payne appreciated the wrongfulness of his conduct at the time of the offense. The court was clear, however, that demeanor evidence "must be considered as a whole, in relation to all the other evidence" (*Payne*, p 712 (citing *Galloway v. State*, 938 N.E.2d 699, p 714 (Ind. 2010)). The court emphasized that to do otherwise would give factfinders "carte blanche" and make appellate review "virtually impossible."

The other evidence the court cited in this case was Mr. Payne's documented psychiatric history and the unanimous expert opinions. The court commented on the consistency of Mr. Payne's diagnosis of schizophrenia, and resulting symptoms of delusions and hallucinations, over time. As there was no conflict in expert testimony regarding Mr. Payne's mental state, the court deemed that Mr. Payne's extensive psychiatric history "clearly supports a finding of insanity" (*Payne*, p 710).

In this case, the court found no fault with the psychiatric or psychological experts. Although the court noted that expert testimony is "purely advisory" and that a factfinder may discredit or disregard it in favor of alternative probative evidence, it nonetheless said that experts are "central to a determination of

insanity" (*Payne*, p 710 (citing *Barcroft*, p 1003)). The Indiana Supreme Court directly compared Mr. Payne's case with *Barcroft*, a similar case in which a guilty but mentally ill verdict was reached and later upheld despite unanimous expert testimony of the defendant's legal insanity. In *Barcroft*, the court found "flaws" and "inconsistencies" in the experts' opinions, including lack of agreement with respect to diagnosis and insufficient record review. Problems with the expert opinion in *Barcroft* helped support the court's finding that the factfinder was justified in rejecting the defendant's insanity defense and finding the defendant guilty but mentally ill, given the demeanor evidence in the case from which to infer the defendant's sanity. In *Payne*, the court asserted, there were no problems with expert opinion. Although one expert could not form a strong opinion regarding Mr. Payne's sanity at the time of the 2005 arson, the court did not construe this as a conflict between the experts.

Taken together, Mr. Payne's well-documented psychiatric history and the credible, unanimous expert opinions of insanity outweighed the probative value of demeanor evidence and led to the court's finding of not guilty by reason of insanity instead of guilty but mentally ill.

Discussion

The insanity defense remains controversial, despite the fact that it has existed in some form or another for centuries. As the Indiana Supreme Court stated, mental health professionals play a key role in the factfinders' determination of insanity, but they often cannot opine regarding the ultimate legal question. As in *Barcroft*, the court in *Payne* evaluated the experts' opinions as a component of determining whether the lower court erred in its reliance on demeanor evidence in finding the defendant guilty but mentally ill. Ultimately, Mr. Payne's extensive, well-documented psychiatric history and expert consensus were sufficiently persuasive to the court, and both outweighed the probative value of the demeanor evidence in this case.

In addition to the defendant's extensive documented psychiatric history and consistency of expert opinions, the court also noted the thoroughness of the expert evaluations in this case as influential factors in its ruling. This contrasts with *Barcroft*, in which insufficient record review by the expert witnesses was cited as a determining factor in upholding the lower court's decision. These variable outcomes highlight for forensic psychiatrists that the process by which we reach our opinions is just as important to the court as our ultimate recommendations.

Notably, Mr. Payne spent 11 years undergoing competency restoration prior to standing trial. Significant variability exists regarding states' approach to competency restoration, including the maximum time allowed by statute for restoration or, after an initial finding of incompetence to stand trial, the maximum time a defendant can be hospitalized thereafter (Parker GF: The quandary of unrestorability. J Am Acad Psychiatry Law 40:170–6, 2012). Recent research, however, suggests that the majority of defendants are restored to competence within a year, and restoration becomes rare after three years (Morris DR, DeYoung NJ: Long-term competence restoration. J Am Acad Psychiatry Law 42:81–90, 2014).

Length of Emergency Department Confinement for Psychiatric Patients

Pratik Jain, MD
Fellow in Forensic Psychiatry

Hassan M. Minhas, MD
Assistant Clinical Professor of Psychiatry

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, Connecticut

Prolonged Involuntary Confinement of Psychiatric Patients in the Emergency Department Is Not a Constitutional Violation, Provided the Period of Confinement Is No Longer than Necessary

DOI:10.29158/JAAPL.210003L2-21

Key words: appeal; confinement; emergency department; EPIA; involuntary; detention period

In *Massachusetts General Hospital v. C.R.*, 142 N. E.3d 545 (Mass. 2020), the Massachusetts Supreme Judicial Court reversed the decision of the Appellate Division of the Boston Municipal Court. The appeal

pertained to two separate provisions under Mass. Gen. Law ch. 123 § 12 (2018). The first provision in the statute deals with the initial commitment to an emergency department (ED) for purposes of evaluation, stabilization, and disposition. The second provision deals with commitment for a more thorough evaluation of the patient after being admitted from the ED to an inpatient unit. Under the statute, the initial ED commitment does not have a defined time limit, whereas the initial commitment to an inpatient unit does (i.e., three days). The municipal court ruled that the clock on the three-day time period should start running when the patient is initially detained in the ED. The supreme judicial court disagreed and ruled that the three-day time period should begin only once the patient has been admitted to the inpatient facility, regardless of the length of time the patient may have been held in the ED.

Facts of the Case

On August 10, 2018, C.R. was found to be exhibiting signs of mental illness at Logan Airport in Boston. Police were summoned, and they found C.R. in an agitated state, which led them to restrain and transport her to the Massachusetts General Hospital (MGH) ED. In the ED, C.R. was administered intramuscular antipsychotic medications and placed in seclusion in four-point restraints. On the basis of her mental state, physicians decided to seek a single-occupancy room for psychiatric admission. C.R. was held at the MGH ED until August 15, 2018, when an appropriate bed was located at a licensed inpatient unit at MGH (i.e., Blake 11). C.R. was transferred to Blake 11 for admission the same day. On August 16, MGH filed for a petition for commitment under Mass. Gen. Law ch. 123, § 12(b) (2018), which allows a three-day commitment for thorough psychiatric evaluation. MGH's reasoning for commitment stated that "because of her florid mania and delusional thinking, [C.R.] appears unable to take care of her basic needs in the community" (*MGH*, p 548).

C.R. filed a *pro se* petition on August 16 for an emergency hearing challenging her commitment, which was denied without a hearing. A second request for a hearing was filed by C.R.'s counsel the following day. At the hearing on August 20, the lower court denied her request for immediate release due to concerns of substantial risk of harm to others. On August 23, C.R. petitioned for dismissal of MGH's petition for lack of jurisdiction due to the petition having been filed outside of the three-day period. During the hearing, Dr. Stuart Beck from Blake 11 testified about the frequent question of ED boarding. He testified that patients are often kept for extended periods of time awaiting appropriate placement. Following the hearing, C.R.'s motion to dismiss MGH's petition was denied, and the judge granted an order for civil commitment for a period of up to two weeks. On August 29, C.R. appealed both the denial of motion to dismiss and the order of involuntary commitment. On September 5, 2019, the Appellate Division of the Boston Municipal Court reversed the lower court's denial to dismiss the petition for lack of jurisdiction. The Appellate Division also acknowledged the statute's lack of clarity about the start of the three-day detention period. The municipal court ruled that the three-day period "begins when a patient arrives at an emergency department or a psychiatric facility" (*MGH*, p 549) and that MGH had failed to file the petition in a timely manner because it was filed after the three-day period had elapsed. Following this verdict, MGH filed an appeal with the Massachusetts Supreme Judicial Court.

Ruling and Reasoning

Mass. Gen. Laws ch. 123 § 12 (2018) governs the emergency restraint, evaluation, care, and potential hospitalization of persons posing risk of serious harm by reason of mental illness. This section has five further subsections, of which the two relevant to this case are § 12(a), which allows ED confinement of a patient deemed to present with imminent risk, and § 12(b), which allows inpatient confinement of a patient for a period of three days for purposes of thorough evaluation. The Massachusetts Supreme Judicial Court noted that, unlike § 12(b), § 12(a) does not have a defined time limit. The court stated that the time spent in the ED for evaluation under § 12(a) is crucial for accurate assessment and is required "to make a valid clinical determination of a patient's need for continued psychiatric hospitalization" (*MGH*, p 552). The court acknowledged that because the statute is silent on the maximum time period allowed to hold a patient in the ED, a patient may theoretically be indefinitely held should appropriate disposition not be available. The court discussed the current reality of lack of inpatient resources and weighed the downside of a lengthy ED stay with various alternatives (such as potentially

being taken into police custody to mitigate imminent risk). The court referred to *Pembroke Hosp. v. D.L.*, 122 N.E.3d 1058 (Mass. 2019) and *Matter of a Minor*, 148 N.E.3d 1182 (Mass. 2020), which both discuss the laws relating to conditions of prolonged confinements as requiring narrow tailoring to serve legitimate governmental interest and the least restrictive means to vindicate that interest.

In the ruling, the court held that the five days of confinement that C.R. experienced were justified, given that the period of confinement was no longer than necessary to find a clinically appropriate placement. The court refrained from defining a set time period for ED confinement and deferred the question of length of ED confinement to the state legislature.

Discussion

Massachusetts, similar to other states, has a distinct set of laws governing involuntary mental health treatment. Mass. Gen. Laws ch. 123 § 12 (2018) allows for confinement for purposes of evaluation at a psychiatric facility for a three-day period. The statute, however, is silent on the length of time of confinement in the ED prior to placement at a psychiatric facility. It is possible that this is because, at the time the statute was written, the legislature did not anticipate patients being held for significant periods of time in the ED. Currently, however, it is not surprising for patients to be held in the ED for extended periods of time, due largely to a lack of available inpatient resources.

In stating that MGH was reasonable in holding the patient for as long as they did, the Massachusetts Supreme Judicial Court highlighted the theoretical possibility of a patient's being held indefinitely in the ED should appropriate inpatient placement not be available. This raises a practical concern that affects all psychiatric patients, especially those in the most vulnerable psychiatric patient populations, such as children and individuals with low baseline levels of functioning (e.g., those with autism spectrum disorder or intellectual disability). It is unfortunate that the populations of patients most negatively affected by being confined to an ED are the same ones who are most likely to be confined for a longer period of time.

As a second topic, this case highlighted that the right to appeal involuntary commitments under the Mass. Gen. Laws ch. 123 § 12 is applicable only from a psychiatric facility (i.e., a patient in the ED cannot petition the court). The court noted that EDs are not incentivized to prolong confinement of patients and that any delays in confinement would therefore be required for accurate assessment and stabilization. The court also cited the Expedited Psychiatric Inpatient Admission Protocol 2.0 (EPIA 2.0) of the Massachusetts Office of Health and Human Services, which has laid out clear steps for managing cases of individuals who are difficult to place. The court stated that the question of setting a time limit would be better addressed by the legislature, which was "diligently working" on situations of prolonged ED confinements. Enforcing a time limit on ED stays would also run the risk of premature discharges of patients with a level of psychiatric instability that would put them at risk for negative consequences to their mental health and safety or for endangering the public. This would disproportionally affect high-risk populations such as intellectually disabled or autistic children who already have limited options.

Balancing autonomy and civil liberty with paternalism (i.e., the need for mandated confinement or treatment for those severely ill) is not an uncommon challenge in psychiatric practice. Defining the time period that a patient may be held in the ED may be logical from a liberty perspective given the reality of limited resources, but such a time limitation is not practical. The utopian health system would have more beds than required, limited ED stays, and prompt treatment. In the absence of such a utopian system, both the legislature and the health care systems and providers need to continue to focus on addressing the challenges raised in this case, not by imposing time limits on ED confinement but rather by increasing available resources.

A Reasonable-Time Standard for Identifying and Evaluating Students with Suspected Disability

Cara Struble, MA
Predoctoral Fellow in Clinical Psychology

Alexander Westphal, MD, PhD
Associate Professor of Psychiatry

Law and Psychiatry Division
Department of Psychiatry

Yale University School of Medicine
New Haven, Connecticut

Compliance with a Child-Find Duty Inferred a Reasonable-Time Standard Based upon Proactive Steps Rather than Length of Delay

DOI:10.29158/JAAPL.210003L3-21

Key words: children; emotional disturbance; IDEA law; child find; evaluation

In *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d 781 (5th Cir. 2020), the U.S. Court of Appeals for the Fifth Circuit affirmed the decision by the U.S. District Court for the Southern District of Texas that Spring Branch Independent School District violated a child-find duty, a requirement of school districts to identify, locate, and evaluate children with suspected disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1412(a) (2015)).

Facts of the Case

The parents of O.W. registered their minor son in the fifth grade at Nottingham Elementary School in the Spring Branch Independent School District for the 2014–2015 academic year. Prior to this, O.W. had attended kindergarten at Nottingham, followed by four years of private school enrollment. While enrolled at a therapeutic private school, O.W. received daily counseling and was under the care of a psychiatrist. O.W. had a history of exhibiting behavioral and social and emotional difficulties dating back to kindergarten. He was identified as having above-average intellectual capabilities and being gifted in mathematics.

From the start of fifth grade, O.W. was regularly interrupting class, warranting his removal due to inappropriate behaviors including acts of physical aggression and property destruction, disruption, and use of vulgar language. These behaviors violated the student code of conduct. Ms. W. made frequent contact with school officials from the beginning of the academic year due to the aforementioned behavioral difficulties. She provided letters from O.W.'s prior health providers stating that O.W. had received a diagnosis of attention deficit/hyperactivity disorder. Ms. W. described mood and anxiety symptoms as well as a diagnosis of oppositional defiant disorder.

In September 2014, Ms. W. provided consent for an initial evaluation and submitted a family history form and a prior evaluation to document O.W.'s behavioral problems. Section 504 of the Rehabilitation Act of 1973 protects individuals with disabilities from discrimination in programs that receive federal funding, including public schools (Pub. L. No. 93-112, 87 Stat. 394 (1973)). In contrast to IDEA requirements, § 504 does not require an individual education plan (IEP) on the basis of a student's unique needs. In October 2014, it was determined that O.W. qualified for accommodations under § 504. A behavior intervention plan (BIP) was put in to place with limited effect in reducing O.W.'s disruptive behaviors. O.W.'s grades declined through the semester. After he assaulted his fifth-grade teacher in January 2015, the school held another § 504 meeting where O.W. was referred for a special education evaluation. O.W. was transferred to the school district's Turnaround Opportunities through Active Learning (TOTAL) program while a Full Individual Evaluation (FIE) was completed.

The results from the FIE completed on February 24, 2015 concluded that O.W. "'was a student with poor emotional and behavioral regulation' who suffers from an Emotional Disturbance" (*Spring Branch Indep. Sch. Dist.*, p 787). An Admission, Review, and Dismissal Committee (ARDC) developed an IEP for O.W in March 2015; it included steps to reduce inappropriate behaviors (such as aggression and property destruction) using positive approaches, including redirection and choice offering. O.W. was enrolled at Ridgecrest Elementary School where the IEP was implemented.

At Ridgecrest, O.W. was given "take-desk" directions to have a seat at his desk in an area free of distractions following inappropriate behaviors after unsuccessful redirections and warnings. He was physically restrained as a result of aggression on eight occasions. The school called for police assistance to de-escalate on four occasions. Following an instance on May 5, 2015, school officials and Ms. W. agreed in writing that O.W. would begin his school day 1.5 hours after the official start time. On May 18, 2015, officials and Ms. W. discussed via email shortening O.W.'s school day to three hours and holding an ARDC meeting. On the basis of O.W.'s increasing behavioral difficulties and poor school performance, his parents removed him from school during the final week of the academic year.

Mr. and Ms. W. enrolled him in a private institution, Fusion Academy, for the 2015–2016 academic year after O.W. demonstrated improvements in a summer tutoring program. O.W. attended Fusion for the 2016–2017 academic year but was removed after setting fire to a trash can on school premises. Following this incident, he was enrolled in a residential school, Little Keswick, in Virginia.

An administrative complaint was filed on October 28, 2015 by O.W.'s parents seeking tuition reimbursement. A hearing officer decided in favor of O. W., finding that the school district did not comply with child-find requirements due to delay in referral for a special education evaluation, thus failing to provide O.W. with free appropriate public education (FAPE). The hearing officer found that O.W.'s IEP was not fully implemented because of his reduced school day and use of time-outs, restraints, and police involvement, as these interventions were not addressed in O.W.'s IEP. On the basis of these violations, O.W. was entitled to a tuition reimbursement of $50,250 and a compensatory education award. The school district appealed the hearing officer's decision to the U.S. District Court for the Southern District of Texas on August 30, 2016, which the district court upheld on March 29, 2018. The school district then appealed to the U.S. Court of Appeals for the Fifth Circuit.

Ruling and Reasoning

U.S. Court of Appeals for the Fifth Circuit upheld the district court's decision that a child-find violation did occur as there was an unreasonable delay between the school district's notice of suspected disability and subsequent evaluation of O.W., thus violating the IDEA obligation regarding a child-find requirement. Though 20 U.S.C. § 1412(a)(3) (2015) does not specify timeliness in identification, location, or evaluation of students with a suspected disability, the court used two cases to decide on reasonableness in delay of child find, *Krawietz ex rel. Parker v. Galveston Indep. Sch. Dist.*, 900 F.3d 673 (5th Cir. 2018) and *Dallas Indep. Sch. Dist. v. Woody,* 865 F.3d 303 (5th Cir. 2017). The court stated that "the reasonableness of a delay is not defined by length of time but by the steps taken by the district during the relevant period" (*Spring Branch Indep. Sch. Dist.*, p 793), and that a reasonable delay involves a district's "proactive steps to comply with its child-find duty" (*Spring Branch Indep. Sch. Dist.*, p 793). The court stated that § 504 accommodations do not absolve a school district of child-find duties and may not necessarily qualify as an appropriate intermediate step, particularly when the behavior is severe and not age-appropriate.

The court of appeals affirmed that the school district failed to implement O.W.'s IEP fully due to the use of time-outs, which must be designated on a child's IEP per 19 Tex. Admin. Code § 89.1053(g) (2015). In addition, O.W.'s IEP improperly modified O.W's school day to three hours without written documentation or subsequent ARDC meeting, which does not satisfy the requirements of 34 C.F.R. § 300.324(a)(4) (2015). The court reversed the district court's decision that the use of physical restraints and police involvement constituted violations to O.W.'s IEP. In light of these decisions, the court of appeals remanded reimbursement and compensatory decisions back to the district court for reconsideration.

Discussion

This case raises several points of interest to forensic mental health professionals working with school-aged children with mental health or behavioral difficulties. First, the reasonableness in delay between identification and evaluation of a student with a suspected disability may be determined, not by length of time, but by proactive steps taken by the district to fulfill a child-find requirement. It remains unclear, however, what constitutes a proactive step in complying with a child-find duty. Though § 504 accommodations may be an appropriate intermediate step prior to a comprehensive special education evaluation in certain situations, this must be assessed in each case on the basis of developmentally appropriate behaviors, severity of behavioral difficulties, and response to intervention. This decision highlights the variety of considerations that one must make in deciding a child-find violation. One of the questions that remains is who determines what constitutes a proactive step and makes decisions on the basis of the nuanced impact of individual characteristics: mental health professionals, school districts, or the court.

Second, school districts across the country vary with regard to availability of mental health resources to identify and evaluate students suspected of disability. Thus, this decision could lead to increases in time to initial evaluation, whereby school

districts could instead use cost-effective but potentially inappropriate intermediate steps to justify compliance with a child-find duty via these unclearly defined "proactive steps." This could enhance disparities in access to mental health resources and accommodations for students in under-resourced districts. In particular, delays in evaluation and subsequent intervention can have a devastating impact on a child's development, socio-emotional functioning, and prognosis. Additionally, at the current time, the ruling must be interpreted within the context of the coronavirus pandemic, which has amplified limitations in identifying, evaluating, and implementing an IEP for students with mental health difficulties qualifying for special education services.

Admissibility of Statements Made in Forensic Interviews

Kathryn A. Thomas, JD, MEd
Fellow in Forensic Psychology

Paul A. Bryant, MD
Assistant Professor of Psychiatry

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, Connecticut

Statements Made by a Defendant During a Forensic Interview Are Not Admissible for the Truth of the Matter

DOI:10.29158/JAAPL.210003L4-21

Key words: hearsay; expert testimony; psychiatric forensic evaluations

In *Commonwealth v. Rodriguez*, 484 Mass. 677 (Mass. 2020), Christian Rodriguez appealed his conviction of murder in the first degree to the Massachusetts Supreme Judicial Court on the theory of extreme atrocity or cruelty for the beating death of his roommate, Roosevelt Harris. Mr. Rodriguez argued that the trial court erred in ruling that explanations he gave during the forensic interviews were not admissible for the truth of the matter asserted. The court affirmed his conviction, ruling that while a forensic expert may use an individual's statements in forming conclusions, these statements are not themselves admissible.

Facts of the Case

At trial, the Commonwealth presented the following evidence. Mr. Rodriguez, the victim, and three others resided together in a rooming house in Boston. Mr. Rodriguez and the victim had a history of arguments while living together, including both verbal and physical altercations in which Mr. Rodriguez was the aggressor.

Two of the roommates testified that, on February 9, 2012, they heard noises coming from the victim's room, including the sound of someone falling, eight to ten banging noises, and the victim grunting. They also testified that they heard someone run out of the apartment, and they discovered the victim lying face up with significant head trauma, barely breathing. Around the same time, a woman was parking her car and saw Mr. Rodriguez running toward her with a baseball bat. She recognized him from the neighborhood due to a scar on his face. She saw him place the bat in a garbage can, where she later returned to find a bloody metal bat. She also identified Mr. Rodriguez from a photo array.

Subsequently, Mr. Rodriguez's jacket, shirt, and shoes tested positive for blood. A sample from his pants also matched the victim's DNA profile. At trial, Mr. Rodriguez admitted that he used the baseball bat to kill the victim. The cause of death was determined to be blunt trauma to the head with associated skull fractures and brain injuries.

During the trial, the defense argued that Mr. Rodriguez lacked criminal responsibility for the victim's murder. They presented evidence that Mr. Rodriguez was arrested in the early morning hours following the murder after unsuccessfully attempting to steal a car. A probation officer who met with Mr. Rodriguez hours after his arrest found him washing his hair in urine and his cell was smeared with feces. She observed him put his head in the toilet, but noted that he was redirectable when she told him to stop.

Also during the morning following the alleged murder, a state forensic psychologist evaluated Mr. Rodriguez to determine whether he was competent to stand trial. She described him as having brown liquid dripping from his face and noted a brown puddle in his cell. He was agitated, moving rapidly, speaking

rapidly, and his eyes were "looking around." Mr. Rodriguez told the psychologist that he had been diagnosed with bipolar disorder at 8 years old, that he stopped taking his medications, and that he had a history of a significant head injury. He also reported hearing voices, some of which commanded him to do dangerous things. The psychologist concluded that he was psychotic at the time of the evaluation (i.e., the day after the murder), and she made a diagnosis of schizoaffective disorder.

An expert forensic psychiatrist hired by the defense also interviewed Mr. Rodriguez and diagnosed schizoaffective disorder, polysubstance use disorder, neurocognitive disorder, and posttraumatic stress disorder. The psychiatrist noted a history of suicide attempts, family history of mental illness, and no record of malingering in the state hospital records. Mr. Rodriguez described command hallucinations to the forensic psychiatrist, as well as use of heroin, cocaine, and marijuana 30 to 60 minutes prior to the victim knocking on his door requesting to purchase drugs for a friend. Mr. Rodriguez went to the victim's room, and the victim did not have the money to pay for the drugs. When Mr. Rodriguez turned to walk away, the victim allegedly hit him with a baseball bat. Mr. Rodriguez reported that he was afraid for his life and heard voices telling him to hit the victim because he was an enemy. Mr. Rodriguez testified that he had no memory of the attack itself.

In rebuttal, the state called a forensic psychiatrist who opined that Mr. Rodriguez did not show true symptoms of a psychotic disorder. The state's expert gave Mr. Rodriguez a diagnosis of antisocial personality disorder and substance use.

The judge instructed the jury that Mr. Rodriguez's statements to the psychologist and psychiatrists were not admissible for their truth and could be considered only as information on which the experts relied in reaching their opinions. The jury convicted Mr. Rodriguez of first degree murder on the theory of extreme atrocity or cruelty.

Ruling and Reasoning

In affirming Mr. Rodriguez's murder conviction, the Massachusetts Supreme Judicial Court ruled that the trial court did not err in determining that statements Mr. Rodriguez made to the doctors during the forensic interviews were not admissible for the truth of the matter asserted. The court reviewed the previous case law and rules of evidence in Massachusetts, including *Commonwealth v. Comtois*, 506 N.E.2d 503 (Mass. 1987) and Mass. G. Evid. § 803(4), which established that there is a hearsay exception that physicians may testify as to statements of past pain, symptoms, and conditions made to them for the purposes of diagnosis or treatment. The court also described *Commonwealth v. Piantedosi*, 87 N.E.3d 549 (Mass. 2017), which held that "[a]lthough an expert may formulate an opinion based on facts or data not admitted in evidence, but that would be admissible with the proper witness or foundation, 'the expert may not testify to the substance or contents of that information on direct examination'" (*Rodriguez*, p 683).

The court rejected Mr. Rodriguez's argument that they should overturn previous case law and rule that the psychiatrist "should have been permitted to recite the defendant's statements of 'past pain, symptoms, and conditions' that were made to him and other doctors" (*Rodriguez*, p 683) during the course of their diagnosis of the defendant and that the statements should have been admitted for the truth of the matter. The court's reasoning for denying Mr. Rodriguez's argument was that the hearsay exception for statements made for the purposes of medical diagnosis or treatment did not apply where a defendant made the statements during a forensic interview to determine criminal responsibility.

The court summarized its logic in ruling that statements made during forensic evaluations are not admissible for the truth of the matter as follows: "The reason for these forensic interviews is to assess the defendant for a legal purpose: to determine whether the defendant meets the legal definition of a 'mental illness or mental defect' and therefore cannot be held criminally responsible for the crime charged. Therefore, the statements made during the course of these assessments do not carry the same inherent reliability as statements made to a professional for purposes of medical treatment or diagnosis" (*Rodriguez*, p 684).

Discussion

While psychiatrists are often in the role of gathering information from clients for the purposes of treatment or diagnosis, forensic evaluations present unique ethics challenges for the practice of psychiatry and psychology. Forensic evaluations often involve a potential secondary gain by the subject of the evaluations; therefore, the information gathered should be subject to additional scrutiny in a courtroom. In

Rodriguez, the Massachusetts Supreme Judicial Court clarified that information gathered during forensic evaluations cannot be admitted to prove the truth of that information; rather, the information can be admitted for the sole purpose of explaining how the expert reached an opinion. In making its decision, the court emphasized that forensic interviews are inherently less reliable than clinical interviews, as defendants may be motivated by secondary gain in their legal case. Forensic interviews, however, are often more thorough than clinical interviews and often involve testing for malingering and a particularly heavy reliance on collateral information to inform the final opinion. Despite these practices designed to assess for potential deception in forensic interviews, the court ruled that information gathered during forensic interviews cannot be used to prove the truth of that information. The court's ruling serves as an important reminder that the potential for secondary gain by defendants may limit the admissibility of the information gathered in forensic interviews, no matter the safeguards put in place to assess for malingering.

Retroactive Application of Diversion Statute

Piali Samanta, MD
Fellow in Forensic Psychiatry

Catherine Burke, PsyD
Clinical Instructor in Psychiatry

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, Connecticut

Retroactive Application of Diversion Eligibility Is Acceptable When Applied to a Class of Persons and for Ameliorative Benefit

DOI:10.29158/JAAPL.210003L5-21

Key words: diversion; eligibility; ameliorative; forensic assessment; court-mandated treatment

In *People v. Frahs*, 466 P.3d 844 (Cal. 2020), the Supreme Court of California upheld the decision of the California Court of Appeal to retroactively apply Cal. Penal Codes § 1001.35 and § 1001.36 (2018) to Mr. Frahs's case. This conditionally reversed his conviction and sentence and remanded his case to the trial court for an eligibility hearing for pretrial diversion.

Facts of the Case

In March 2016, Eric Jason Frahs was asked to leave a market by the storeowner, who recognized him from a previous attempt to steal cigarettes. Mr. Frahs left the store and began throwing rocks at passing cars, striking and shattering a windshield. Mr. Frahs reentered the store and "grabbed a can of beer and an energy drink" (*Frahs*, p 846). When the storeowner and his son attempted to block his exit, Mr. Frahs "punched the owner in the head" (*Frahs*, p 846) and ran into the parking lot, where the owner and son detained him until police arrived. Mr. Frahs was "charged with two counts of second degree robbery and one felony count of throwing a substance at a motor vehicle with intent to cause injury" (*Frahs*, p 846).

Mr. Frahs testified about his mental health at his trial that same year. He described experiencing hallucinations and delusions since his early twenties, endorsed multiple psychiatric hospitalizations, and identified several months during which he required an appointed conservator. Mr. Frahs explained that, at the time of his arrest, he had not taken his psychiatric medications for four days and was experiencing severe hallucinations and delusions. He described specifically "he thought an angel flew by on a horse and talked to him just before he entered the market" (*Frahs*, p 846).

A clinical forensic psychologist who evaluated Mr. Frahs testified at the trial. He asserted that Mr. Frahs had a diagnosis of schizoaffective disorder, "was very ill and unstable" (*Frahs*, p 846), and was experiencing a psychotic episode that resulted in a disconnect from reality in the days preceding the incident. The psychologist testified that Mr. Frahs's behavior at the market was a result of a psychotic episode.

The jury found Mr. Frahs "guilty of two counts of second-degree robbery and [a] misdemeanor offense of throwing a substance at a motor vehicle without intent to cause injury" (*Frahs*, p 847). During a subsequent bench trial prior to sentencing, the court found Mr. Frahs had previously been convicted of a "strike" felony (under Cal. Penal Code § 667 (2012), a defendant convicted of a felony after a previous serious felony conviction is imposed a sentence double that for the provided crime) and thus imposed a nine-year sentence.

Mr. Frahs appealed; in 2018, while his appeal was pending, the legislature passed a bill that became effective immediately, Cal. Penal Code § 1001.36 (2018), which "gives trial courts the discretion to grant pretrial diversion for individuals suffering from certain mental health disorders" (*Frahs*, p 847).

The court of appeal determined that "§ 1001.36 applies retroactively to all nonfinal judgments" (*Frahs*, p 847) and that Mr. Frahs is "entitled to a limited remand because his case was not yet final on appeal and his record demonstrates that he appears to satisfy at least one of the statute's threshold eligibility requirements, a diagnosed and qualifying mental disorder" (*Frahs*, p 847). The court conditionally reversed Mr. Frahs's conviction and sentence and remanded the case to the trial court to conduct a mental health diversion eligibility hearing under § 1001.36.

Ruling and Reasoning

The Supreme Court of California affirmed the opinion of the court of appeal and upheld the decision to reverse conditionally the conviction and sentencing of Mr. Frahs to remand his case to the trial court for a diversion eligibility hearing under § 1001.36.

The court referenced *In re Estrada*, 408 P.2d 948 (Cal. 1965), in which it held that "an amendatory statute lessening punishment for a crime was presumptively retroactive and applied to all persons whose judgments were not yet final at the time that statute took effect" (*Frahs*, p 846). The court further referenced two additional cases in which the *Estrada* holding was applied. In *People v. Superior Court (Lara)*, 410 P.3d 22 (Cal. 2018), the court "applied the *Estrada* rule to legislation that mitigated the possible punishment for a class of persons" (*Frahs*, p 846). The court reasoned that § 1001.36 provides possible ameliorating benefit for a class of persons "by offering an opportunity for diversion and ultimately the dismissal of charges" (*Frahs*, p 846) for persons with a mental illness. The court also referenced *People v. Francis*, 450 P.2d 591 (Cal. 1969), in which the court inferred legislative intent of an amendment to apply retroactively in sentencing discretion and held that, although the statute in question did not guarantee a lighter sentence, it granted the trial court discretion to impose lighter sentences, and thus § 1001.36 met the ameliorative benefit standard of the *Estrada* rule.

The court further reasoned that, without the legislature's explicit statements that § 1001.36 would apply solely prospectively or that the *Estrada* rule would not apply to this diversion program, the court can reasonably assume that the "legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply" (*Frahs*, p 848). The court also reasoned that the legislature was aware of existing laws and judicial decisions, and only months prior to the passage of § 1001.36 the *Lara* decision was made in which the court determined "that a statute that reduced the possible punishment for a class of persons applied retroactively" (*Frahs*, p 853). The court ruled that the cited case law clarified that if the legislature intended to rebut the *Estrada* rule for ameliorative statutes, it must do so with "sufficient clarity."

Upholding the court of appeal grant of a limited remand of Mr. Frahs's case for a mental health diversion eligibility hearing, the court held that Mr. Frahs met at least one eligibility criterion, a qualifying mental disorder and that some evidence indicated that mental illness contributed to the offense. The court, however, did not rule on whether Mr. Frahs will be able to demonstrate full eligibility or whether the trial court should grant diversion if it determines that Mr. Frahs meets eligibility.

Discussion

The court's decision in *People v. Frahs* signals its understanding of the importance and necessity of mental health treatment for defendants who have a mental disorder. It also recognizes the potentially ameliorative benefit of mental health diversion, both for treatment of mental illness and reduction of recidivism. One point for consideration is understanding where the responsibility for evaluation and treatment lies and what resources are required to assure defendants the best chance to "perform satisfactorily in diversion" (*Frahs*, p 848), a necessity for successful diversion and dismissal of charges.

Through clinical experience, psychiatrists are aware that engaging a client in treatment can be a challenge to successful treatment. The eligibility requirements as written in § 1001.36 address some of these concerns by specifying that defendants must consent to diversion and agree to comply with treatment. We also know from clinical practice that consent to treatment is not the only barrier to engagement and successful treatment. This statute and the diversion programming do not take into

account the other factors that may affect a client's ability to connect with treatment, such as transportation, housing, substance use, social supports, case management, and the like. A defendant who may be unable to address all of these other factors may struggle to participate fully in the court diversion program. The salient point then becomes understanding how those factors influence "successful" completion of diversion programming and allow for eligibility of dismissal of charges. The diversion bill does not mandate explicitly the provisions for programming needed to adequately address factors that may contribute to or exacerbate mental illness or pose barriers to treatment. These provisions are necessary to ensure that all defendants are given equal opportunities to be successful.

The most concerning dilemma for providers is understanding the burden of responsibility for "satisfactory" completion of treatment. A defendant may lack the resources to resolve treatment barriers adequately and these resources may not be addressed through the court diversion program (which they often are not). Such cases present the question of whether the defendant is responsible for an unsatisfactory treatment program or the system is responsible for failing to provide necessary resources to ensure success. An ethics dilemma emerges in which the clinician responsible for reporting to the court must either determine success by factoring in individual barriers or must use the same standard of successful treatment for all defendants, regardless of circumstance. In this case, the court highlights the cost-savings of providing treatment to defendants versus incarcerating them, but the statute lacks language that guarantees adequate resources to address all components of a defendant's mental illness. It merely specifies that treatment can be court funded or privately funded.

Sex Discrimination in the Workplace

David Mancini, MD
Fellow in Forensic Psychiatry

Charles Dike, MD, MPH
Associate Professor of Psychiatry
Associate Program Director, Law and Psychiatry Fellowship Program
Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, Connecticut

An Employer Who Fires an Individual Merely for Being Gay or Transgender Violates Title VII of the Civil Rights Act of 1964

DOI:10.29158/JAAPL.210003L6-21

Key words: sex; homosexuality; transgender; gay; Title VII

In three consolidated cases, under *Bostock v. Clayton County, Board of Commissioners*, 140 S. Ct. 1731 (2020), the U.S. Supreme Court considered the question of sex discrimination in the workplace and held that an employer who fires an individual for being homosexual or transgender effectively violates Title VII of the Civil Rights Act of 1964.

Facts of the Cases

In the first case, *Gerald Lynn Bostock v. Clayton County, Georgia*, Gerald Bostock, who had worked as a child welfare advocate for Clayton County, Georgia for a decade and was recognized as a model employee, was fired by the county for conduct "unbecoming a county employee" (*Bostock*, p 1738) soon after joining a gay recreational softball league. In *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), Donald Zarda, a skydiver instructor with Altitude Express in New York, was fired within days of mentioning that he was gay to a female tandem skydiving client, after she complained about his homosexual status. In *Equal Employment Opportunity Commission (EEOC) v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E. D. Mich. 2016), Aimee Stephens, who was hired and had worked for years as a man, was fired after six years of employment at the company when she notified them she planned to transition to "live and work full-time as a woman" (*Bostock*, p 1738).

Though each employee brought suit under Title VII alleging "unlawful discrimination on the basis of sex" (*Bostock*, p 1738), each case had a different outcome in the lower courts. In *Bostock*, the U.S. District Court for the Northern District of Georgia dismissed the suit, siding with the county that Title VII does not apply to discrimination on the basis of sexual orientation, and the Eleventh Circuit Court of Appeals upheld the decision. In *Zarda*, the U.S.

District Court for the Eastern District of New York granted summary judgment to the employer, but the Second Circuit Court of Appeals reversed the decision, holding that sex discrimination due to sexual orientation in fact does violate Title VII because such discrimination "is a subset of sex discrimination" (*Zarda*, p 116). Finally, in *R.G. & G.R. Harris Funeral Homes Inc.*, the U.S. District Court for the Eastern District of Michigan ruled in favor of the employer, stating that Title VII did not extend to transgender people, but the Sixth Circuit Court of Appeals disagreed and reversed the decision. The cases were appealed and consolidated for consideration by the U.S. Supreme Court.

Ruling and Reasoning

In the majority opinion by Justice Gorsuch, the U.S. Supreme Court held that an employer who fires an individual on the basis of sex, namely for being either homosexual or transgender, violates Title VII.

Taking a textualist approach, the Court affirmed its role to interpret the statute in line with the "ordinary public meaning" of its terms and not what might have been the intentions of the legislators at the time of the law's creation. From the outset of the proceedings, there was dispute over the meaning of "sex." According to the employers collectively, sex referred to the status of male and female as determined by reproductive biology; for the employees, however, sex went beyond anatomy. The Court later adopted the employers' definition but noted that the question before the Court was not about what sex meant, but what Title VII says about it.

The Court recalled its previous interpretation of Title VII and reaffirmed that "because of," as written in the statute, meant "by reason of" or "on account of" (*University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013)). This interpretation thus introduced a "but for" causation standard, i.e., an event would not have happened but for a particular cause. In these cases, as long as the employees' sex was a "but for" cause for the firing decision, Title VII was violated. The Court said that Congress deliberately did not state that discrimination must be "solely" or "primarily because of" sex, which would have narrowed the meaning to biological sex. On the contrary, Congress broadened the definition in 1991 by stating that plaintiffs needed only to show that a "protected trait like sex was a 'motivating factor'" (*Bostock*, p 1739) in their termination to prevail in court.

Acting on their interpretation that termination of employment must show sex discrimination to violate Title VII, the employers asserted that, because the terminations were based upon the plaintiffs' homosexual or transgender status, groups comprising male and female genders, it did not constitute sex discrimination. The Court disagreed, noting that treatment of a homosexual or transgender individual worse than other similarly situated individuals does violate Title VII because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual on the basis of sex" (*Bostock*, p 1741). In addition, the Court noted that Congress intended Title VII to focus on the affected individual and not on societal subgroups.

The Court said that an employer cannot escape liability from sex-based discrimination simply by stating other factors besides sex as the reason for adverse action against an employee, or by demonstrating that they treat men and women similarly as a group. For example, in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), the Court held that Title VII was violated when the company did not hire women with children but hired men with children. The Court concluded that the company discriminated on the basis of female sex and not motherhood as was claimed by the company, because fatherhood was not discriminated against. Likewise, in *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), where women were required to make larger pension fund contributions than men on the grounds that women generally lived longer than men, the Court concluded this was not discrimination on the basis of life expectancy as was claimed by the company, but in fact, discrimination on the basis of sex. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court affirmed that Title VII's protection against workplace sex discrimination extended to situations where an employee was harassed by members of his own sex.

The Court was not impressed by the employers' argument that Congress intentionally left out sexual orientation and transgender status on the list of protected characteristics under Title VII. Noting that legislative history of the statute had no bearing on the current case, the Court emphasized that "many, maybe most, applications of Title VII's sex provision

were 'unanticipated' at the time of the law's adoption" (*Bostock*, p 1752).

Dissent

In dissent, Justice Alito (supported by Justice Thomas, and in part by Justice Cavanaugh) stated that Title VII was never meant to include LGBTQ protections because, despite multiple opportunities to do so, Congress has been unwilling or unable to extend the statute to LGBTQ individuals. They argued that the case should have been referred back to Congress for amendment, and that interpretation of a statute should be context- and period-specific, because at the time of the statute's enactment in 1964, sex would not have included homosexuality and transgender status, an argument undercut by subsequent court filings by gay and transgender individuals soon after the statute's enactment. They worried that the Court's decision could impinge on religious convictions and could expand to other workplace topics, including sex-segregated bathrooms, locker rooms, and dress codes.

Discussion

The case of *Bostock* raises many points of discussion and implications for psychiatry, law, and social justice. Although the words of the statute have remained unchanged since its passage, the Court's recent interpretations to include discrimination on the basis of sex appear to reflect society's (including psychiatry's) evolving understanding of sex and gender. In 1964, psychiatrists considered homosexuality a form of mental illness classified over the years as a paraphilia or a disorder of sexual orientation, until 1987 when the disorder was discarded altogether (Drescher J: Out of DSM: depathologizing homosexuality. Behav Sci (Basel) 5:570–1, 2015). The inclusion of gender dysphoria diagnosis in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, may leave the unfortunate impression, however, that transgender status is a psychiatric condition. This shows that, although psychiatry has evolved in its understanding of sex and sexuality, there is still room for growth and clarity on these topics.

Elimination of homosexuality from the Diagnostic and Statistical Manual of Mental Disorders does not equate to elimination of stigma against LGBTQ and transgender individuals in the practice of psychiatry, especially on inpatient units. Questions about placement in co-ed, biological-gender, or preferred-gender units; appropriate bathrooms; and payment for transitional medications and surgeries are a few challenges that transgender patients continue to face and that *Bostock* does not address. Without universal consensus on the treatment of transgender persons in institutions, the risk of ongoing discrimination against these individuals in psychiatric hospitals will remain unacceptably high. *Bostock* reminds psychiatrists that we have an ethics obligation to ensure equal treatment and opportunity for all patients regardless of sex.

Relevance and Reliability in Admitting Forensic Expert Witness Testimony

Laura A. DiCola, MD, MSPH
Fellow in Forensic Psychiatry

Marina Nakic, MD, PhD
Assistant Professor of Psychiatry

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, Connecticut

Forensic Expert Testimony Must Not Be Excluded On the Basis of the Experts Opinion Alone

DOI:10.29158/JAAPL.210003L7-21

Key words: testimony; admissibility; reliability; relevance; insanity defense

In *U.S. v. Ray*, 956 F.3d 1154 (9th Cir. 2020), the U.S. Court of Appeals for the Ninth Circuit ruled that the U.S. District Court for the Central District of California had abused its discretion in excluding expert testimony offered as part of an insanity defense. The Ninth Circuit found that the district court erred by focusing on the proposed expert's opinion rather than considering whether the expert's testimony would have helped the trier of fact make its own decision.

Facts of the Case

In October 2016, Patrick Bacon and Daniel Ray, inmates at the Victorville Federal Prison in California, coordinated an assault of a fellow prison

inmate. Mr. Bacon used a knife concealed within a book provided by Mr. Ray to inflict nonfatal stab wounds to the inmate's chest and head. The assault and its preparation were recorded by prison security cameras. Mr. Bacon and Mr. Ray were charged with assault with a deadly weapon with intent to do bodily harm and assault causing serious bodily injury.

Prior to trial, Mr. Bacon notified the court of his intent to present an insanity defense. In support of the defense, he submitted a report by a forensic psychologist who evaluated Mr. Bacon in December 2017. In his report, the psychologist documented a history of Mr. Bacon's behavioral problems and treatment starting in 2003. He opined that Mr. Bacon experienced "myriad" mental health problems, that at the time of the assault there were "elements of a downward spiral of isolation, depression, paranoia, and anxiety that resulted in a dissociative state" (*Ray*, p 1157), and that, as a result, Mr. Bacon would have had "difficulty understanding the nature and quality of his action at the time of the offense conduct" (*Ray*, p 1157).

The government moved to preclude the psychologist's testimony on the grounds that it was unreliable and irrelevant. They argued that the psychologist did not opine that Mr. Bacon had a specific severe mental disease or defect at the time of the offense and that his opinion about a dissociative state was not supported by medical literature. They also noted that the psychologist did not explain the tests he administered, their results, or their relationship to his conclusions.

The district court granted the motion to preclude the psychologist's testimony, holding that under Fed. R. Evid. 702 (2016), the psychologist's opinion was not relevant. The court found the psychologist's conclusion unhelpful to the trier of fact in facilitating understanding of the evidence or determining the question of sanity because the psychologist did not opine that Mr. Bacon was "unable, as opposed to had difficulty understanding or appreciating the nature and quality" (*Ray*, p 1158) of the assault. Mr. Bacon was unable to present an insanity defense. A jury found Mr. Bacon and Mr. Ray guilty of their charges. Mr. Bacon was sentenced to 10 years in prison and Mr. Ray to eight years and four months. Mr. Bacon appealed.

Ruling and Reasoning

The U.S. Court of Appeals for the Ninth Circuit considered whether the district court had abused its discretion in precluding the defense's expert testimony and whether the exclusion of the expert's testimony was harmless. The court ruled that the district court had abused its discretion in excluding the expert and that doing so was not harmless. The court vacated Mr. Bacon's conviction and remanded the case to the district court for a new trial.

With respect to the abuse of discretion, the appellate court found that the district court had applied the wrong standard in barring the expert witness testimony. The court wrote that the district court's focus on the relevance of the psychologist's "bottom-line opinions" was erroneous (*Ray*, p 1159). Instead, the district court should have considered the relevance of the psychological evaluation in aiding the trier of fact.

The court ruled the exclusion was not harmless because the expert's testimony might have supported an insanity defense for Mr. Bacon and might have changed his verdict. In addition, the court clarified that the district court did not have to admit the psychologist's testimony in the new trial.

Concurring Opinion

In a concurring opinion, three judges expressed concern about the requirement for a new trial. They stated that if the district court were to find the psychologist's opinion inadmissible again under a different rationale, a jury would hear the same evidence as during the first trial. The second trial would therefore be "wasteful of judicial resources" (*Ray*, p 1161). A potential solution, that the district court first rule on whether the disputed testimony was admissible before requiring a new trial, previously proposed by Judge Nguyen in her dissent in *Estate of Barabin v. AstenJohnson Inc.*, 740 F.3d 457 (9th Cir. 2014), was prohibited on the basis of existing precedent.

Discussion

This case revisits fundamental questions about the admissibility of expert testimony. The federal rules of evidence require that expert testimony be the product of "reliable principles and methods" that are "reliably applied" (Fed. R. Evid. 702 (2016)). The nonexclusive list of criteria for reliability articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) offers some guidance for judges and experts; for example, whether the methodology used to form an opinion is accepted by a professional community. Psychiatric expert opinions, however,

are not individually testable nor subject to peer review, and no known error rates exist. Reasonable practitioners can and do disagree. There are also no standards controlling how to answer the wide variety of forensic questions that an expert may encounter. Although the American Academy of Psychiatry and the Law publishes practice documents for forensic psychiatric assessments in general and for common consultation questions, these guidelines makes clear that the recommendations "do not set a standard of practice" and highlight the importance of other training, research, and experience (AAPL Practice Guideline for the Forensic Assessment. J Am Acad Psychiatry Law 43:S3–53, 2015, p S3). Therefore, courts' discretion is tempered by the expectation that "shaky but admissible" evidence be evaluated by the trier of fact with cross-examination and contrary evidence (*Daubert*, p 596).

Some parameters of reliable examination methodology have been articulated in the literature on forensic assessment quality improvement. Accepted metrics for assessment methodology include the use of data sources other than the interview or review of prior medical and psychiatric records. Essential components of written reports are the inclusion of both a clearly stated opinion and explanatory text linking the assessment findings to these conclusions. If some aspects of forensic methodology were codified as indicative of reliable practice, the court may be more easily able to identify helpful testimony.