

Statutory Compliance in Petitions for Involuntary Treatment

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Petitions for Involuntary Treatment Shall Include Statutorily Required Information

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In *In Re Pima County Mental Health, No. 20200860221*, 533 P.3d 951 (Ariz. 2023), the Supreme Court of Arizona considered whether in a petition for court-ordered treatment, the affidavits filed by two physicians containing generic information without any details specific to the patient met statutory compliance. The Arizona Court of Appeals had vacated the treatment order because the physicians' affidavits failed to comply with the statute. The Arizona Supreme Court reversed. Although the physicians' affidavits and attachments did not comply with the statute, the court ruled that there was no prejudicial error in this case.

Facts of the Case

In February 2021, G.B., a 70-year-old female weighing around 83 pounds, was evaluated at St. Mary's Hospital in Arizona for gastrointestinal complaints. She was diagnosed with delusional disorder, malnutrition, and cachexia. G.B. thought the doctors were trying to harm her, and she insisted on being discharged. An application for an involuntary evaluation of G.B., alleging that she was "Persistently or Acutely Disabled (PAD)," was filed by the hospital. A prepetition screening evaluation and report concluded

that PAD standards were met, and the involuntary evaluation process should proceed. Subsequently, a petition for court-ordered evaluation of G.B. was filed and an order for evaluation was issued by the superior court. Pursuant to that order, G.B. was transferred to an inpatient psychiatric unit at University Medical Center South ("Banner"). At Banner, two psychiatrists, Dr. Madan and Dr. Colon, evaluated G.B. and Banner then filed a petition for court-ordered treatment.

The hospital attached to the petition two sets of three stapled-together documents, one set for each doctor. Included in the set were two generic signed and sworn fill-in-the-blank type forms with boilerplate language titled "Physician Affidavit" and "Addendum No. 1 - Persistently or Acutely Disabled" (*Pima County*, p 954). These forms referenced G.B. as the patient but did not discuss any specific examinations or evaluations conducted by the physicians, nor did they refer to any attached addenda, reports, or evaluations. Also included was a third document titled "Final Report," that contained the physicians' notes and findings of their evaluation of G.B.

At the petition hearing, G.B.'s counsel did not object to the admission of the affidavits, addenda, and final reports. Subsequently, the trial court found G.B. to be PAD and ordered treatment. G.B. then appealed, challenging the sufficiency of the physicians' documentation. Banner contended that the stapled-together documents fulfilled statutory requirements for the petition for treatment as stated in Ariz. Rev. Stat. § 36-533(B) (2022). In a split decision, the appellate court vacated the trial court's order with the majority finding that strict statutory compliance was required for involuntary treatment proceedings. The court noted that the affidavits of the two physicians failed to comply with the statute based on the lack of a personalized discussion of G.B. to support their conclusion of PAD due to mental illness. The appellate court also assumed but did not conclude that the stapled addenda to the physicians' affidavits were part of the statutorily required affidavits.

Ruling and Reasoning

The Supreme Court of Arizona noted that G.B.'s case was moot because G.B. was no longer subject to the court's order. But, the court made an exception to review the case on grounds of public importance because of the likelihood of repetition at the state level and the liberty interests inherent to court-ordered involuntary treatment. The court first delineated the

requirements of Ariz. Rev. Stat. § 36-533(B) (2022), which governs the petition for court-ordered treatment. The statute requires that two physicians must assess the patient and provide affidavits. These affidavits must contain details and evidence supporting the physicians' conclusions based on their observation and study of the patient's history, a summary of facts supporting their conclusion, and relevant patient exam information. The court then addressed the wording of the statute and guidance on compliance. The court noted that by using the word "shall" in reference to providing the necessary materials outlined in the statutory requirements, §36-533(B) makes compliance mandatory. In addition, the court highlighted that case law had suggested "strict compliance" in cases of involuntary treatment proceedings because of the serious deprivation of liberty involved. But, the court clarified that it did not favor "strict compliance" to be applied in the mental health setting. Instead, the court said that "complete compliance" of each statutory requirement is more appropriate since it allows for technical differences but not errors in compliance.

The court ruled that the physicians' affidavits in G.B.'s case did not comply with the statutory requirements as they lacked personalized information about G.B., including the physicians' detailed findings from her assessment and medical history, as required by statute. In addition, the court found that the addenda, although satisfying the statute by means of details contained, were nevertheless also insufficient because they were unsworn and not incorporated in the physicians' affidavits by reference. Being unsworn, the court noted, the additional documents were not affidavits themselves, and could not be included within affidavits without a reference. Although Arizona does not have case law on courts using documents attached to affidavits if they are included by reference in deciding a petition for involuntary treatment, the court noted that Arizona has established this use in other cases, such as with contracts and warrants. Additionally, the court noted that other state courts recognize incorporation by reference when considering a petition for involuntary treatment. Thus, the court said that if extrinsic documents are expressly referenced and are physically attached to the referencing affidavit, they are considered as incorporated into a § 36-533(B) affidavit and, accordingly, meet statutory requirements. The court underscored, however, that it remains best practice to provide all the statutorily required information

in the affidavit itself to aid efficiency. With this, the court looked at whether G.B. waived the matter of statutory compliance and found that she did, since G.B.'s attorney did not object to any statutory deficiency either in a pretrial motion or during the hearing. Moreover, the court noted that had G.B. brought up her concerns with the documentation in the trial court, the deficiencies would have been corrected.

Finally, the Supreme Court of Arizona assessed whether a fundamental error had been committed by the trial court in admitting the insufficient affidavits tendered by the hospital, since only the commission of a fundamental error would be grounds for overturning the trial court's decision. The court explained that a fundamental error goes to the foundation of the case and is prejudicial, deprives one of a right essential to one's defense and is prejudicial, or precludes the possibility of a fair trial. The court did not find convincing evidence of prejudice against G.B. or her case. G.B. was able to fairly oppose the petition for involuntary treatment by cross-examining Dr. Madan and presenting her own witnesses. In addition, the court noted that the trial court had enough evidence to support its ruling despite the deficiencies in the affidavits. The court found that the acceptance of the physicians' insufficient affidavits was not a prejudicial error and did not prevent G.B. from having a fair trial. Subsequently, the Supreme Court of Arizona vacated the court of appeals' opinion and affirmed the trial court's order.

Discussion

There are widespread differences in the way hospitals satisfy statutory requirements for civil commitment petitions. Many hospitals routinely do not provide all statutorily required information in the affidavits themselves and instead provide supplemental materials. The Supreme Court of Arizona took this into consideration in rendering its opinion. Here, the Supreme Court of Arizona emphasized the significant liberty interest at stake when hospitals are petitioning for court-ordered treatment. The court indicated that physicians and hospitals do not have license to overlook statutorily required documentation and the standards for provision of this information. Thus, the court allowed for only a degree of error in submitting the documents, underscoring that any further deviation from the statutory requirements, especially due to carelessness, was unacceptable.

This legal opinion highlights the need for incorporating the teaching of fundamental topics in forensic psychiatry to residents during the formative years of their training. Statutory requirements related to documentation for civil commitment and related matters should be required knowledge, since proper documentation emphasized and taught during residency training would likely reduce such errors in a clinician's practice later in life. Moreover, in cases where a physician might be faced with a malpractice lawsuit because of an adverse outcome, poor documentation could potentially create grounds for additional liability.

Competency for Self-Representation

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Defendants May Self-Represent When They Are Competent to Stand Trial and Their Waiver is Made Knowingly and Voluntarily, Even If This Waiver is Made Constructively

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In *United States v. Nichols*, 77 F.4th 490 (7th Cir. 2023), Samuel Nichols appealed his sentence of life imprisonment, arguing that he was not competent to proceed *pro se*, his waiver of counsel was not knowing and voluntary, and the court inappropriately applied sentencing guidelines. The Seventh Circuit Court of Appeals affirmed the district court's finding that Mr. Nichols was competent to proceed *pro se* and by dismissing his attorneys, he had constructively waived his right to counsel. The court held that even if a defendant does not waive counsel affirmatively, an unwillingness to work with counsel by a defendant deemed competent amounts to a constructive waiver.

Facts of the Case

In December 2015, Mr. Nichols was charged with sex trafficking and was appointed two experienced

attorneys. In September 2016, the relationship between the attorneys and Mr. Nichols began to break down when he asked them to file frivolous motions. By March 2017, he requested new counsel from the court. The court advised Mr. Nichols that he would not be getting new counsel, and if he did not want to proceed with the assigned counsel or did not obtain private counsel, he would be opting to proceed *pro se*. A month later, Mr. Nichols discharged his attorneys. The court confirmed his understanding that by discharging his attorneys, he would be proceeding without counsel.

In August 2017, while proceeding *pro se*, Mr. Nichols requested a competency evaluation. The district court ordered the evaluation and assigned Dr. Diana Goldstein to be the evaluator. After 14 hours of evaluating him, Dr. Goldstein opined that Mr. Nichols was competent to stand trial and to proceed *pro se* if he wished. She found no evidence of any significant psychiatric disorder. She noted his history of behavioral problems and learning difficulties but opined that these did not affect his ability to understand the proceedings. Mr. Nichols then requested a second evaluation, and Dr. Michael Fields was selected by standby counsel. Mr. Nichols was not cooperative with this second evaluation, so Dr. Fields was only able to complete a 90-minute interview without any testing. Dr. Fields opined that Mr. Nichols understood the proceedings and his competency was not affected by a severe emotional disorder, but it was "Dr. Fields's 'clinical sense' that Nichols' 'lack of willingness to work with legal counsel'" (*Nichols*, p 496) made him incompetent. During testimony, Dr. Fields conceded that "[b]eing unwilling is not the same as unable" (*Nichols*, p 497).

At a contested competency hearing, the government introduced recorded jail calls where Mr. Nichols spoke about his intention of delaying his trial and looking for loopholes to escape his charges. Both experts testified, and Mr. Nichols was found competent to stand trial. At trial in March 2018, Mr. Nichols was found guilty on all but one charge. He then accepted assistance of counsel and requested a third competency evaluation that could apply retroactively. The court allowed this evaluation but denied the retroactive application. He was again found competent and was sentenced to life in prison. He appealed, challenging the district court's ruling of his competence to proceed *pro se*, his waiver of his

right to counsel, and the application of sentencing guidelines.

Ruling and Reasoning

The Seventh Circuit Court of Appeals affirmed the district court’s ruling that Mr. Nichols was competent to proceed to represent himself. Mr. Nichols argued that *Indiana v Edwards*, 554 U.S. 164 (2008) required the district court to determine whether he was competent to represent himself. The court found that Mr. Nichols was incorrect, as *Edwards* created a rule of permission, not a requirement. The court explained that under *Edwards*, “Courts may restrict a defendant’s right to represent himself, if and only if, he falls into a ‘gray area’ of competence – where the defendant understands the proceedings against him but labors under serious delusions or suffers from otherwise debilitating mental infirmities” (*Nichols*, p 498). This narrow gray zone, the court elucidated, refers only to a person with mental illness “who cannot handle matters himself and who needs a lawyer almost in the capacity of a guardian.” (*Nichols*, p 499, citing *Jordan v. Hepp*, 831 F.3d 837 (7th Cir. 2016), p 845). The court found no evidence to support that Mr. Nichols experienced such delusions or was mentally ill. Of Dr. Fields’ conclusion regarding Mr. Nichols’ capacity to proceed, the court ruled that the vague “clinical sense” was not a legally cognizable standard since “an unwillingness to assist counsel is not an incapacity to do so” (*Nichols*, p 499).

The Seventh Circuit agreed with the district court’s finding that Mr. Nichols constructively waived his right to counsel by refusing to work with appointed counsel and by filing frivolous *pro se* motions. The court concluded that he did not have the right to indefinite delays while he attempted to find a lawyer he would like to work with. The court recognized that Mr. Nichols did not actually desire to represent himself but noted that as he had been “given several options, and turn[ed] down all but one, [he had] selected the one [he] didn’t turn down” (*Nichols*, p 500).

In considering whether Mr. Nichols’s waiver was intelligent, knowing, and voluntary, the court considered four factors: “(1) whether and to what extent the district court conducted a formal hearing into the defendant’s decision to represent himself; (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages

of self-representation; (3) the background and experience of the defendant; and (4) the context of the defendant’s decision to waive his right to counsel” (*Nichols* p 501, citing *United States v. Cooper*, 591 F.3d 582 (7th Cir. 2010), p 587).

The court noted that although the district court did not hold a formal hearing under *Faretta v. California*, 422 U.S. 806 (1975), the district court made numerous efforts to assess whether his waiver was knowing and voluntary. These included multiple hearings to assess his waiver of counsel, assessment of his phone conversations and statements to Dr. Goldstein that showed he understood the risks of self-representation, evaluation of his extensive criminal justice history, and his statements that he would prefer to work for himself rather than let somebody else send him to jail. The court also noted that a waiver is likely knowing and voluntary if it is part of a defendant’s strategy. The court added that Mr. Nichols “wanted to make baseless arguments rather than accept counsel’s help” (*Nichols*, p 502) and he was looking to find loopholes as part of his strategy. Therefore, the court concluded that Mr. Nichols’s waiver of counsel was intelligent, knowing, and voluntary and affirmed the district court’s ruling.

Discussion

Nichols demonstrates a point of tension between the right to counsel and the right to self-representation: that a defendant has a right to counsel but not a right to counsel of their choosing. This case also highlights the difference between a defendant affirmatively and constructively waiving their right to counsel. In an affirmative waiver, a defendant asserts the desire to proceed *pro se*. In a constructive waiver, as was the case for Mr. Nichols, a dismissal of counsel amounted to a default choice of self-representation.

Forensic psychiatrists are often called to evaluate a defendant’s competency to proceed *pro se* and therefore must be familiar with the different ways a defendant can waive the right to counsel. As in *Nichols*, when a defendant constructively waives this right, an evaluation of competency to proceed *pro se* requires an assessment of whether the dismissal of counsel was made intelligently and knowingly. In contrast to affirmative waivers, a forensic psychiatrist evaluating the voluntariness of a constructive waiver may need to rely not only on a defendant’s words, but also on the defendant’s conduct. This case highlights a

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potential pitfall for forensic evaluators in these evaluations where a defendant's unwillingness to work with counsel could mistakenly be equated with an inability to work with counsel. Constructive waivers of the right to counsel represent a particular tension

in the rights guaranteed to defendants by the Sixth and Fourteenth Amendments and pose a unique challenge for forensic psychiatrists called to evaluate competency for self-representation in those cases.