

DEVELOPMENTS IN MENTAL HEALTH LAW

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Mental Health Law Reform Commission To Hold Final Meeting June 24th

The Commonwealth of Virginia’s Commission on Mental Health Law Reform will hold its final meeting on Friday, June 24, 2011 at the Richmond Marriott West. The Marriott is located at 4240 Dominion Blvd, Glen Allen, Virginia 23060. A block of rooms has been reserved at a government rate for the meeting and will be held until May 24, 2011. The telephone number for the hotel is 804-965-9500. The Court will be able to pay for rooms for Commission members and advisors. Please let Joanne Rome at the Supreme Court of Virginia know if you will be able to attend this final meeting to wrap up the Commission's work. Joanne may be contacted at (804) 225-3756 or jrome@courts.state.va.us.

US Supreme Court Allows VOPA to Sue DBHDS

In a 6-2 decision written by Justice Antonin Scalia, the United States Supreme Court held on April 19, 2011 that the Virginia Office for Protection and Advocacy (“VOPA”), an independent state agency, can sue on its own behalf the Virginia Department of Behavioral Health and Developmental Services (“DBHDS”) under the *Ex parte Young* exception to the doctrine of sovereign immunity as embodied in the Eleventh Amendment to the United States Constitution. *Virginia Office for Protection and Advocacy v. Stewart, Commissioner, et al.* 563 U.S. __ (Docket No. 09-529), slip opinion found at: <http://www.supremecourt.gov/opinions/10pdf/09-529.pdf>. Agreeing that VOPA could bring suit on behalf of other individuals, DBHDS had argued that VOPA itself could not sue another state agency or its officials to enforce its federally created rights.

In upholding the right of VOPA to sue, the Court reversed the decision of the Fourth Circuit Court of Appeals that decided such a suit would offend the sovereignty and dignity of the State. *Virginia v. Reinhard*, 568 F.3d 110 (4th Cir. 2009). The case will now return to the United States District Court in Richmond for a decision on the merits of whether VOPA may access privileged “peer review” information when investigating allegations of abuse. The case will be assigned presumably to Judge Robert E. Payne

who originally determined that VOPA could sue another state agency's officials under *Ex parte Young*.

History of the Case

This case began in 2006 when VOPA sought peer review records involving the deaths of two individuals, one a patient at Central State Hospital and the other a resident of Central Virginia Training Center, and the serious injury of another resident at CVTC, in order to investigate whether abuse had occurred. CSH and CVTC provided the medical records but refused to provide peer review records concerning the incidents. VOPA sought access to the records under the federal authority that created it, the Developmental Disabilities and Bill of Rights Act (DD Act), 42 U.S.C § 15001 *et seq.*, and the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), 42 U.S.C. § 10801 *et seq.* The DD and PAIMI Acts provide federal funding to states to establish a protection and advocacy agency to protect and advocate for the interests of person with disabilities. 42 U.S.C. § 15043(a)(1); 42 U.S.C § 10803(2)(A). The state may appoint either a state agency or a private nonprofit entity to serve as its P&A system, 42 U.S.C. § 15044(a) and 42 U.S.C § 10805(c)(1)(B), but the system must have the authority to pursue all appropriate remedies, including litigation, 42 U.S.C. § 15043(a)(2)(A)(i) and 42 U.S.C § 10805(a)(1)(B), and be independent of any state agencies that provide services. 42 U.S.C. § 15043(a)(2)(G).

The Decision

The decision itself is very narrow and technical in its scope – “whether *Ex parte Young*, 209 U.S. 123 (1908), allows a federal court to bar a lawsuit for prospective injunctive relief against state officials brought by another agency of the same state.” Slip Opn. at 1. The Eleventh Amendment to the United States Constitution prohibits a suit by a private citizen against a state in federal court absent the consent of the state. In certain circumstances, Congress may abrogate a State's sovereign immunity through appropriate legislation, but it did not do so in the DD and PAIMI Acts. In *Ex parte Young*, the Supreme Court created a very limited exception to the sovereign immunity principle to permit federal courts to uphold federal rights. It permitted a railroad shareholder to obtain an injunction against the Minnesota Attorney General prohibiting him from enforcing an unconstitutional state law reducing freight rates that a railroad could charge. The Court held that when a federal court commands a state official to do nothing more than refrain from violating federal law, the state official is not the State for sovereign immunity purposes.

Here the Court determined that all it needed to decide was whether VOPA's complaint alleges an ongoing violation of federal law, i.e. the refusal to provide the requested records to VOPA in violation of the DD and PAIMI Acts, and whether the relief sought could be characterized as prospective in nature. The Court thus held that it could order the Commissioner and other defendants to comply with federal law and provide the records. It deemed irrelevant to the *Ex part Young* analysis whether VOPA was a private party or state entity. The criterion is not the characteristic of the plaintiff,

but the nature of the relief sought. The Court went on to state “we do not understand how a State’s stature could be diminished to any greater degree when *its own agency* polices its officers’ compliance with their federal obligations, than when a *private person* hales those officers into federal court for that same purpose – something everyone agrees is proper.” Slip Opn. at 9.

In countering the concern posed by the dissent described below that this decision would permit scores of state agencies to sue other state officials, the Court set out limited conditions under which one state agency can sue state officials in another state agency. A state agency must have 1) a federal right that it possesses against its parent state, and 2) the authority to enforce that right, free from any internal veto wielded by state government. Slip Opn. at 12. The Court stated: “It was the Virginia law that created VOPA and gave it the power to sue state officials.” Slip Opn. at 13. Noting this is the first instance of an action in which one state agency sues other state officials, the Court believed that these limited circumstances would seldom converge in the future.

Justice Anthony Kennedy joined in the decision of the Court and wrote a concurring opinion, with Justice Clarence Thomas joining him, emphasizing the novel nature of the lawsuit and its intrusion upon the dignity and respect due a State. But Justice Kennedy highlighted that Virginia itself elected the alternate course of designating a state agency as its P&A system rather than a private entity, thus significantly diminishing the affront. Chief Justice John Roberts dissented, with Justice Samuel Alito joining him, noting the complete lack of historical precedent for such a suit and worrying that recognizing such independent litigating authority would confer authority upon scores of state entities to sue other state officials. Justice Elena Kagan took no part in the decision because she was the Solicitor General at the time the Department of Justice reviewed and decided to intervene in this case in the Supreme Court. In fact, the Solicitor General shared oral argument with VOPA before the Court.

History of VOPA

Virginia is one of eight states that currently have designated a state agency to serve as its P&A Agency. Alabama, Connecticut, Indiana, Kentucky, New York, North Dakota and Ohio are the others. Virginia first accepted federal funds through Executive Order in 1977 to protect and advocate for the rights of people with disabilities. The Dalton administration withdrew Virginia from the federal program in 1981, but Governor Robb again began accepting federal funds in 1982. The Office was formalized through legislation in 1984 and the Department for the Rights of Virginians with Disabilities (“DRVD”) was established in 1985. During that time, DRVD was housed within the Health and Human Resources Secretariat and its Director and governing board were appointed by the Governor. In order to bring a lawsuit against either public or private entities, the Governor first had to approve any lawsuit brought by the agency. The Attorney General approved the employment of DRVD’s attorneys and provided it with legal advice and representation.

In 1991, the federal government expressed concern with Virginia's oversight of the program, primarily the Governor's authority to veto lawsuits, and threatened to cut off funding. As a result, the General Assembly repealed the Governor's authority. In 2002, following a decade of investigations at five Virginia mental health facilities and training centers by the Department of Justice under the Civil Rights of Institutionalized Persons Act, and the highly publicized death of an individual in seclusion at CSH and other serious incidents, the General Assembly established the Virginia Office for Protection and Advocacy as an independent state agency. The Governor now only appoints three members of its 11-member governing board that hires the director; the remaining board members are appointed by the General Assembly. Any hiring approval authority and responsibility for legal representation on the part of the Attorney General was removed. For additional information on the history of the P&A system in Virginia, see the Brief for Petitioner at 11-20 in *VOPA v. Stewart* found at: http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_529_Petitioner.authcheckdam.pdf

Impact of the Case

Under the DD and PAIMI Acts, VOPA has the authority to access "all records" of individuals whom it determines it has probable cause to believe may have been abused. 42 U.S.C. § 15043(a)(2)(I)(iii)(II); 42 U.S.C. § 10805(a)(4)(B)(iii). Federal regulations, based upon Congressional legislative history, on the other hand, prohibit the system's access to peer review records. 42 C.F.R. § 51.41(c)(4). In addition, Virginia Code § 51.5-39.4(4) prohibits VOPA from accessing "privileged communications pursuant to § 8.01-581.17" (peer review records), but the DD and PAIMI Acts preempt state law related to access to records. Nevertheless, four federal Courts of Appeal deciding this very issue have held the federal regulation invalid as *ultra vires* and in violation of the plain language of the DD and PAIMI Acts. *Pennsylvania Protection and Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3rd Cir. 2000); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10th Cir. 2003); *Missouri Protection & Advocacy Services v. Missouri Department of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Protection and Advocacy for Persons with Disabilities v. Mental Health and Addiction Services*, 448 F.3d 119 (2nd Cir. 2006).

It is unlikely that a federal court in Virginia will deny VOPA access to peer review records in light of these four cases with only one state Supreme Court case deciding to the contrary. *Disability Rights Center, Inc. v. Commissioner, New Hampshire Department of Corrections*, 732 A.2d 1021 (N.H. 1999). This is especially true when two of the federal appeals court cases favoring VOPA were authored by now sitting Supreme Court Justices, Justice Alito writing for the Third Circuit, and Justice Sotomayor writing for the Second Circuit. DBHDS and other licensed behavioral health care providers must plan for VOPA to begin seeking access to their peer review records in the not too distant future.

Even should VOPA gain access to peer review records, it is required under both federal and state law to maintain the confidentiality of records to the same extent as is

required of the provider of services. 42 U.S.C. § 10801(a). As then Judge Alito wrote in the Third Circuit decision, the protection and advocacy system is not seeking to discover reports or introduce them into evidence, but to fulfill its advocacy and investigative functions under the PAIMI Act. The purpose of peer review statutes on the other hand is to prevent disclosure to outside parties seeking to hold professional health care providers liable for negligence. *Pennsylvania Protection and Advocacy, Inc. v. Houstoun*, at 428. Arguably therefore VOPA cannot disclose the contents of the peer review reports to the subjects of the reports, their families or their attorneys. Nor may VOPA use the reports in discovery or introduce them into evidence in a lawsuit absent a court order issued for their disclosure “after a hearing and for good cause arising from extraordinary circumstances being shown.” Virginia Code § 8.01-581.1.

Virginia law similarly requires VOPA to maintain all information it receives in connection with specific complaints or investigations confidential. Once cases are closed, however, the records become subject to the Virginia Freedom of Information Act but in a manner that does not identify any complainant or person with mental illness or intellectual or other disability without their consent. FOIA though does not protect the identity of individual employees or providers. The statute also requires that access be provided to one’s own records “unless otherwise prohibited by state or federal law.” Virginia Code § 51.5-39.8. Whether this provision opens the door for individuals to access peer review records about incidents involving them is unclear. In addition, subsection C.1 permits VOPA to issue public reports of the results of its investigations of founded complaints provided they do not identify any complainant or individual with disabilities without their consent. VOPA typically posts its reports on its website, to the chagrin of many health care providers who have been investigated. Providers fear that VOPA will use their own opinions against them as a source to develop leads and information to fuel malpractice lawsuits. VOPA posits that it will be in a position to assist behavioral health care providers to perform more objective and better quality analyses of serious incidents. The impact of this decision on the future quality of peer review activities and patient care remains to be seen.

General Assembly Budget Update

Additional Funding for ID and MH Services

The Governor signed HB 1500 on May 2, 2011 accepting all behavioral health items included in the reenrolled version enacted by the General Assembly following its April veto session. Among items of interest, the General Assembly added 275 new intellectual disability waiver slots and 150 new developmental disability waiver slots effective July 1, 2011. (Item 297.ZZ.4 and .5 found at: <http://lis.virginia.gov/cgi-bin/legp604.exe?111+bud+21-297>). The General Assembly also appropriated \$30 million for deposit to the Behavioral Health Services and Developmental Services Trust Fund effective July 1, 2011 to transition individuals from state training centers to community-based settings. (Item 305.W found at: <http://lis.virginia.gov/cgi-bin/legp604.exe?111+bud+21-305>.) In addition, the General Assembly has appropriated

\$5 million to establish community crisis intervention services in each region for individuals with intellectual disabilities and co-occurring mental health or behavioral disorders (Item 305.T) and \$7.125 million to address staffing ratios at training centers. (Item 314.F found at: <http://lis.virginia.gov/cgi-bin/legp604.exe?111+bud+21-314>.) On the mental health side, \$1.9 million in new funds has been provided to expand community-based services in Health Planning Region V (Tidewater) for services designed to delay or deter placement or provide discharge assistance for individuals in a state mental health facility, and \$2 million to expand crisis stabilization and related services statewide to delay or deter placement in a state mental health facility. (Item 305.U and V.)

Budget Language: ID and DD Waivers

The General Assembly also often utilizes budget language, rather than black letter law, to establish public policy and the method in which it wants state agencies to expend appropriated funds. Establishing the direction in which it wants to see the ID and DD waivers developed and implemented in the future, the General Assembly is mandating through budget language that the Department of Medical Assistance Services and the Department of Behavioral Health and Developmental Services, in consultation with stakeholders, improve and/or develop Medicaid waivers for individuals with intellectual disabilities and developmental disabilities “that will increase efficiency and cost effectiveness, enable more individuals to be served, strengthen the delivery of person-centered supports, enable individuals with high medical needs and/or high behavioral support needs to remain in the community setting of their choice, and provide viable community alternatives to institutional placement.” As a result, the General Assembly is requiring a review of the current Intellectual Disabilities (ID), Day Support and Individual and Family Developmental Disabilities Supports (IFDDS) waivers to identify any improvements to these waivers to achieve these outcomes and report back to the General Assembly by October 1, 2011. (Item 297.BBBBB found at: <http://lis.virginia.gov/cgi-bin/legp604.exe?111+bud+21-297>.) The Department of Justice should be pleased with this language.

Budget Language: Care Coordination

As a cost containment and efficiency move, the General Assembly is also requiring the Department of Medical Assistance Services to expand the principles of managed care or care coordination to all geographic areas, populations, and services under the programs it administers, including behavioral health care. Specifically, DMAS and the Department of Behavioral Health and Developmental Services, in collaboration with the community services boards and in consultation with appropriate stakeholders, must develop a blueprint for the development and implementation of a care coordination model for individuals receiving behavioral health services not currently provided through a managed care organization. The goal is to improve the value of behavioral health services purchased by the Commonwealth without compromising access to behavioral health services for vulnerable populations. Targeted case management services will continue to be the responsibility of the community services boards. The plan must: “(i)

describe the steps for development and implementation of the program model(s) including funding, populations served, services provided, timeframe for program implementation, and education of clients and providers; (ii) set the criteria for medical necessity for community mental health rehabilitation services; and (iii) include the following principles:

1. Improves value so that there is better access to care while improving equity.
2. Engages consumers as informed and responsible partners from enrollment to care delivery.
3. Provides consumer protections with respect to choice of providers and plans of care.
4. Improves satisfaction among providers and provides technical assistance and incentives for quality improvement.
5. Improves satisfaction among consumers by including consumer representatives on provider panels for the development of policy and planning decisions.
6. Improves quality, individual safety, health outcomes, and efficiency.
7. Develops direct linkages between medical and behavioral services in order to make it easier for consumers to obtain timely access to care and services, which could include up to full integration.
8. Builds upon current best practices in the delivery of behavioral health services.
9. Accounts for local circumstances and reflects familiarity with the community where services are provided.
10. Develops service capacity and a payment system that reduces the need for involuntary commitments and prevents default (or diversion) to state hospitals.
11. Reduces and improves the interface of vulnerable populations with local law enforcement, courts, jails, and detention centers.
12. Supports the responsibilities defined in the Code of Virginia relating to Community Services Boards and Behavioral Health Authorities.
13. Promotes availability of access to vital supports such as housing and supported employment.
14. Achieves cost savings through decreasing avoidable episodes of care and hospitalizations, strengthening the discharge planning process, improving adherence to medication regimens, and utilizing community alternatives to hospitalizations and institutionalization.

15. Simplifies the administration of acute psychiatric, community mental health rehabilitation, and medical health services for the coordinating entity, providers, and consumers.
16. Requires standardized data collection, outcome measures, customer satisfaction surveys, and reports to track costs, utilization of services, and outcomes. Performance data should be explicit, benchmarked, standardized, publicly available, and validated.
17. Provides actionable data and feedback to providers.
18. In accordance with federal and state regulations, includes provisions for effective and timely grievances and appeals for consumers.”

(Item 297.MMMM.1.e found at: <http://lis.virginia.gov/cgi-bin/legp604.exe?111+bud+21-297>.)

Budget Language: Criminal Justice Formulary

The General Assembly is also requiring the Department of Behavioral Health and Developmental Services, in conjunction with the Department of Corrections, the Department of Juvenile Justice, the Virginia Sheriff’s Association, and the Virginia Regional Jail Association, to develop a formulary for dispensing of medications to inmates who have been released from prisons, juvenile correctional centers and jails in order to provide treatment consistency as offenders move from incarceration in the criminal justice system to community behavioral health services. Development of such a formulary should assist in providing more consistent and efficacious treatment for individuals in the criminal justice system, which is greatly needed. (Item 304.O found at: <http://lis.virginia.gov/cgi-bin/legp604.exe?111+bud+21-304>)

Other Pending and Decided Cases

US Supreme Court Declines to Review Seventh Circuit Decision Authorizing Indiana Protection and Advocacy Services to Sue Indiana to Obtain Peer Review Records

On April 25, 2011, the Supreme Court denied the petition for Writ of *Certiorari* filed by the Indiana Family and Social Services Administration seeking review of the *en banc* decision of Court of Appeals for the Seventh Circuit that authorized Indiana Protection and Advocacy Services to sue to obtain peer review records from its mental health agency (Docket No. 10-131). This case set up the conflict between the circuits prompting the Supreme Court to hear *VOPA v. Stewart* described above. *Indiana Family and Social Services Administration v. Indiana Protection and Advocacy Services*, 603 F.3d 365 (7th Cir. 2010) *pet. for cert. denied* April 25, 2011).

US Supreme Court Upholds Death Penalty Where Defendant's Attorney Made Strategic Decision not to Present Evidence of Bipolar Mood Disorder

On April 4, 2011, the United States Supreme Court reversed the *en banc* decision of the Ninth Circuit Court of Appeals that granted habeas corpus relief to a petitioner convicted on two counts of first degree murder, and reinstated the death penalty recommended by the jury and imposed by the California trial court. *Cullen, Acting Warden v. Pinholster*, (Docket No. 09-1088), slip opinion found at: <http://www.supremecourt.gov/opinions/10pdf/09-1088.pdf>.

The petitioner alleged that his trial counsel was ineffectual for failing to adequately investigate and present mitigating evidence during the penalty phase of the trial to support his mental health claim that school, medical and legal records, and declarations from family members and another psychiatrist had diagnosed him with a bipolar mood disorder and a seizure disorder. The prosecution presented eight witnesses testifying to the defendant's threatening and violent behavior. The petitioner's trial counsel unsuccessfully sought to exclude the aggravating evidence on the grounds that the prosecution had not given the petitioner proper notice under California law. The petitioner therefore only called his mother as a witness in mitigation. The petitioner's counsel had consulted a psychiatrist who had diagnosed him with antisocial personality disorder, but did not call him as a witness.

The California Supreme Court twice reviewed the defendant's claim, unanimously denying and dismissing the allegations each time. The United States District Court, however, heard evidence on the petitioner's claim and granted *habeas* relief. The Ninth Circuit reviewing the federal district court's decision *en banc*, considered the new evidence from the federal district court hearing and upheld the decision on the grounds that the State court had violated clearly established federal law.

Justice Thomas writing for the Court, held that review of *habeas* cases under 28 U.S.C. § 2254 is limited to the record that was before the state court that adjudicated the claim on the merits. Under the Antiterrorism and Effective Death Penalty Act of 1996, a claim adjudicated on the merits in state court cannot be granted unless 1) the decision was contrary to or involved an unreasonable application of clearly established federal law, or 2) was based on an unreasonable determination of facts in light of the evidence presented in state court. The Supreme Court held that the record under review is therefore limited to the record in existence at that time. The Court determined that the state court record supported the idea that the petitioner's counsel acted strategically to get the prosecution's aggravation witnesses excluded for lack of notice. The Court noted that the petitioner was also an unsympathetic client who boasted about his criminal history during the guilt phase, leaving trial counsel with limited mitigation strategies. The Court held that there was no reasonable probability that the additional evidence would have changed the verdict. Justices Sotomayor, Ginsburg and Kagan dissented. The other justices joined in the decision of the Court, but wrote multiple concurring opinions.

US Supreme Court Declines to Hear Missouri Supreme Court Finding of Ineffective Counsel for Failure to Call Mental Health Expert

The United States Supreme has refused to hear the State of Missouri's request for review of the Missouri Supreme Court's determination that defense counsel was ineffective at the penalty phase of the trial for failure to present mental health evidence for no strategic reason. *Missouri v. Vaca*, 314 SW3d 331, (Mo. 2010), *pet. for cert.* denied February 22, 2011. The defendant had been charged with a series of armed robberies. Defense counsel had obtained a mental health evaluation that revealed the defendant was schizophrenic and evidence indicated he had suffered from this condition most of his life. The prosecutor was successful in excluding the defendant's mental health evidence during the guilt phase of the trial. During deliberations, the jury sent questions back to the judge asking among other things whether there had been any evaluation of the defendant's mental condition. Knowing the defendant suffered from mental illness and that the jury had questions regarding his mental state, defense counsel failed to call a mental health expert as a witness during the penalty phase of the trial. The Court held that while a defense attorney has flexibility to make strategic decisions about whether to introduce mental health evidence, the evidence revealed that the defense counsel did not even think about it. Missouri had just changed its law to provide for bifurcated guilt and penalty phase trials in noncapital cases and this was defense counsel's first such trial. The Court thus held that a new sentencing hearing was required.

Arkansas Denies Insanity Acquittee Appeal

The Arkansas Supreme Court has held that a defendant who was acquitted of a criminal offense as a result of mental disease or defect and committed to a mental health facility could not appeal his acquittal because the Court only has jurisdiction to hear appeals of criminal "convictions." *Hughes v. State of Arkansas*, 2011 Ark. 147; 2011 Ark. LEXIS 134 (April 7, 2011). The defendant in this case was charged with the offense of terroristic threatening by threatening to cause death or serious physical injury to the congregation of Harvest Time Tabernacle Church. Upon questioning by police, the defendant threatened to kill himself, asked for a gun and cried like a baby. The prosecution moved the trial court for an evaluation of the defendant's competency to stand trial, which the court ordered. Upon receipt of the evaluation report, the defendant moved to exclude the evaluation. The trial court denied the motion and proceeded to hear evidence on the underlying charge. After hearing the evidence, the trial judge found the defendant had committed the offense but suffered from a mental disease or defect and did not have the capacity to conform his conduct to the requirements of the law. He therefore acquitted the defendant, but committed him to a mental health facility. The defendant appealed on the grounds that the court erred by finding he committed the offense of terroristic threatening and by compelling him to use the affirmative defense of mental disease or defect, thereby depriving him of his constitutional right of trial by jury.

US Supreme Court Declines to Hear Appeal of Fifth Circuit's Dismissal of Lawsuit for State Endangerment in Death of Mother of Man Whom Police Attempt to Detain for Mental Illness

The United States Supreme Court has declined to review an unpublished Fifth Circuit opinion that granted qualified immunity to police officers who put the mother of a man with mental illness in the line of fire when attempting to subdue him for civil commitment. *Saenz et al. v. City of McAllen, Texas, et al.*, 396 Fed. Appx. 173, (5th Cir. 2010), *pet. for cert.* denied April 4, 2011. The estate and surviving relatives of an elderly woman sued the City of McAllen, Texas and individual police officers in a § 1983 action for allegedly violating her substantive rights under the due process clause. Police had summoned the elderly mother to the scene after they had tried and failed to extricate her adult son for mental health commitment from the house in which he had barricaded himself. The police knew he had a gun, was agitated, had made death threats to family members that day and was not taking his medications. He had previously killed his wife with an ax. Police allegedly took the mother who could not walk unassisted out of the car and placed her in front of the door, instructing her to urge her son to come out while police, wearing bullet proof vests, hid behind her with guns ready. When the son emerged, police opened fire. The mother was caught in the middle and was shot multiple times.

The Supreme Court has held that as a general rule state officials have no constitutional duty to protect an individual from private violence. Where, however, the state through affirmative exercise of power acts to restrain individual liberty, the state creates a “special relationship” which imposes a constitutional duty to protect the individual from danger, including private violence. The Fifth Circuit held that the “state-created-danger” theory of liability was not clearly established in that circuit at the time of this incident and therefore the individual defendants were entitled to qualified immunity. The United States Supreme Court declined to review this decision.

Ex Parte Communications of Judge to Determine Whether Defendant Is Competent to Stand Trial or Malingering Requires New Trial

The Vermont Supreme Court ordered a new trial for a defendant charged with lewd or lascivious conduct with a child and a habitual offender after the presiding judge talked *ex parte* with a pharmacist and two deputies who transported the defendant to court to determine whether he was malingering. *State of Vermont v. Gokey*, 2010 Vt. 89, 2010 LEXIS 90 (October 8, 2010).

On the second day of trial, the defendant appeared in court but complained of being ill and did not look well. At the defense attorney’s request, the case was continued for the day and he was transported to the emergency room where he was administered anti-seizure medications for an existing seizure disorder. The following day the defendant appeared in court but was still groggy and sleeping at counsel table. His attorney asked for a continuance on the grounds that the defendant was unable to assist her with his defense and was incompetent to proceed. The court granted a 30 minute continuance while the defense attorney attempted to obtain medical information from defendant’s physicians and the emergency room treatment providers. The judge in the meantime

called a pharmacist at Walgreens to determine what the side-effects of the medication might be and then, without informing the defendant's counsel or the prosecutor, questioned the transporting deputies in her chambers to determine defendant's behavior in their presence. Determining on that basis that the defendant was malingering, the judge proceeded with the trial with the jury returning a guilty verdict that afternoon. The Supreme Court ordered a new trial stating that the judge had stepped out of her role as an independent arbiter and become a witness in the case which severely prejudiced the case and impaired any appearance of neutrality.

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