

DEVELOPMENTS IN MENTAL HEALTH LAW

The Institute of Law, Psychiatry & Public Policy — The University of Virginia

Volume 35, Issue 1

March 2016

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I. Article

Armstrong v. Village of Pinehurst, et al: the Fourth Circuit establishes constitutional “excessive force” standards for taser use, placing new limits on officers’ use of force when responding to individuals in mental health crisis

John E. Oliver

A three judge panel of the Fourth Circuit Court of Appeals has set a constitutional “reasonable use of force” standard for law enforcement officers’ use of tasers (and other forms of “serious injurious force”). The decision has sparked a range of reactions in the law enforcement community, and has particular implications for the management of police encounters with individuals experiencing a mental health crisis.

Background: The case involved a suit by the estate of Ronald Armstrong claiming that Pinehurst Village police officers had used excessive force when taking Mr. Armstrong into custody under the authority of an order for involuntary psychiatric hospitalization.

On April 23, 2011, Mr. Armstrong, who suffered from bipolar disorder and schizophrenia, went to the hospital voluntarily with his sister, who was concerned about his need for inpatient care after he had stopped taking his medication for days and started poking holes in his own skin “to let the air out.” While at the hospital, Mr. Armstrong apparently became frightened and fled. The examining doctor completed papers for Mr. Armstrong’s involuntary hospitalization, finding him to be mentally ill and a danger to himself (but not to others).

The Pinehurst police department was called as soon as Mr. Armstrong left the hospital, and three officers arrived before an involuntary commitment order had been entered. They found Mr. Armstrong wandering around an intersection of the hospital driveway and a public street. The officers were successful in persuading Mr. Armstrong to move away from the street, but he continued to behave strangely, eating grass and dandelions and extinguishing cigarettes on his tongue. As soon as the commitment papers authorizing the officers to take custody of Mr. Armstrong were complete, the officers surrounded him and moved toward him. He reacted by “sitting down and wrapping himself around a four-by-four post that was supporting a stop sign.”

The officers, with two hospital security staff and Mr. Armstrong’s sister also present, tried but were unable to pry Mr. Armstrong loose. That effort lasted less than a minute before the lieutenant in charge directed one of the officers to prepare to tase Mr. Armstrong, who was duly warned that he would be tased if he refused to let go. Mr. Armstrong refused, and was then tased five separate times over the course of two minutes, which resulted in Mr. Armstrong’s resistance *increasing*. The hospital security staff then joined the officers in a renewed effort to pry Mr. Armstrong from the post. This effort worked, but as Mr. Armstrong was left face-down in the grass, his hands

cuffed behind his back and his legs shackled (because of his kicking at the officers), he stopped breathing. Immediate efforts were made to revive him, but he was pronounced dead shortly after admission to the hospital. Six and one-half minutes passed from the time that the officers were advised that Mr. Armstrong's commitment papers were final to the time that the officers requested emergency medical services to revive him.

Decision in the District Court: The federal district court granted the officers' motion for summary judgment, finding it "highly doubtful" that the officers' conduct, even as alleged by the plaintiff, violated the Fourth Amendment's prohibition against the use of excessive force. Further, the court found that, even if the conduct did present a violation, the officers were entitled to qualified immunity because, under existing law, the officers "could reasonably believe that their actions were lawful." Because the officers' qualified immunity defense resulted in summary judgment in their favor, the district court did not make a ruling on whether the officers' conduct violated the Fourth Amendment. The plaintiff appealed.

Holding by the Court of Appeals: The three judge panel agreed that the officers were entitled to qualified immunity, but two of the panel members went on to specifically find that the officers' conduct *did* constitute excessive force in violation of the Fourth Amendment, and they made clear their intention to establish a standard of conduct for officers so that officers who engaged in similar conduct in similar circumstances in the future would not be entitled to a qualified immunity defense. The third judge expressed strong disagreement with the finding of a constitutional violation.

The Court's excessive force analysis: The Court noted that it would view all evidence in the light most favorable to the plaintiff (here, the estate of Mr. Armstrong), as required when reviewing a defendant's summary judgment motion. To assess whether the officers' conduct constituted excessive force, the Court applied the "objective reasonableness" standard set out in *Graham v. Connor*, 490 U.S. 386, 388 (1989), which provides a three pronged test for weighting "the nature and quality of the intrusion on the individual's Fourth Amendment's interests" against "the countervailing governmental interests at stake." Additionally, the Court included a fourth prong that was informed by the first three. Those prongs, and the Court's analysis under each, were:

(1) "The severity of the crime at issue" – Mr. Armstrong had *not* committed a crime. "The government's interest in seizing Armstrong, "the Court wrote, "was to prevent a mentally ill man from harming himself. The justification for the seizure, therefore, does not vindicate any degree of force that risks substantial harm to the subject."

(2) "The extent to which the subject poses an immediate threat to the safety of the officers or others" – Although Mr. Armstrong's fleeing from this hospital, his wandering along a street while in a psychotic state, and his physical resistance to being taken into custody provided justification for some use of force to prevent harm, the "justified degree of force" would have been the force "reasonably calculated to prevent Armstrong's flight."

(3) Whether the suspect “is actively resisting arrest or attempting to evade arrest by flight” – Although Armstrong clearly was resisting being taken into custody, he was “stationary, non-violent, and surrounded by people willing to help him return to the Hospital.” This was neither an urgent nor dangerous situation, but rather a “static impasse.”

(4) The “proportionality” of the force applied “in light of all the circumstances” to determine its “reasonableness” – The Court found that the situation these officers faced here involved “few exigencies” and that, under the *Graham* factors, justified “only a limited degree of force.” “Immediately tasing a non-criminal, mentally ill individual, who seconds before had been conversational, was not a proportional response,” the Court ruled.

Standard for “proportional use” of tasers: After noting that tasers are widely recognized as causing “excruciating” pain and that the officers’ tasing of Mr. Armstrong violated well-recognized national standards on taser use (including the taser company’s own guidelines), the Court set out its “precedent” on taser use:

...tasers are proportional force only when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the taser.

Standard for proportional use of “serious injurious force”: After then reviewing and discussing prior excessive force cases involving tasers and other forms of non-lethal force, the Court noted that it had consistently “declined to equate conduct that a police officer characterized as resistance with an objective threat to safety entitling the officer to escalate force.” The Court then expanded the precedent it set regarding the standard for the use of tasers to the following standard on the use of any serious injurious non-lethal force:

Our precedent, then, leads to the conclusion that a police officer may only use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force. At bottom, “physical resistance” is not synonymous with “risk of immediate danger.”

The Court also concluded, however, that “Armstrong’s right not to be tased while offering stationary and non-violent resistance to a lawful seizure was not clearly established” by case law existing at the time of the incident. Accordingly, summary judgment was granted to the officers based upon qualified immunity.

Law enforcement officers now “on notice” regarding when taser use is excessive force: The Court observed that the current state of uncertainty over when taser use constitutes excessive force should not continue, and it ended its decision by setting out the following standard of conduct for police officers to “clarify when taser use amounts to excessive force in, at least, some circumstances”:

A taser, like "a gun, a baton, . . . or other weapon," Meyers, 713 F.3d at 735, is expected to inflict pain or injury when deployed. It, therefore, may only be deployed when a police officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser. The subject of a seizure does not create such a risk simply because he is doing something that can be characterized as resistance -- even when that resistance includes physically preventing an officer's manipulations of his body. Erratic behavior and mental illness do not necessarily create a safety risk either. To the contrary, when a seizure is intended solely to prevent a mentally ill individual from harming himself, the officer effecting the seizure has a lessened interest in deploying potentially harmful force.

Where, during the course of seizing an out-numbered mentally ill individual who is a danger only to himself, police officers choose to deploy a taser in the face of stationary and non-violent resistance to being handcuffed, those officers use unreasonably excessive force. While qualified immunity shields the officers in this case from liability, law enforcement officers should now be on notice that such taser use violates the Fourth Amendment.

Reactions to the decision:

The Court's decision has sparked a wide range of reactions from the law enforcement community. Those reactions are well summarized in an article by Baltimore Sun reporters Doug Donovan and Mark Prunte, whose prior investigation into taser use by Maryland police officers had found that 60% of taser use by officers between 2012 and 2014 had been on individuals described by the officers as "non-compliant and non-threatening." The reporters also found widespread failure of officers to use tasers in compliance with recommendations for proper use.

As reported in an article in the *Virginian Pilot*, the Norfolk Police Department suspended officers' use of tasers until new guidelines were written, while the Virginia Beach Police Department placed temporary restrictions on taser use until new guidelines were issued. The Baltimore Sun article also noted that the Virginia Association of Chiefs of Police has been working actively with departments statewide in reviewing the implications of the decision for local departmental practice.

In North Carolina, the law enforcement training academy housed in the North Carolina Attorney General's office sent out an advisory to law enforcement agencies that was highly critical of the *Armstrong* decision and that provided a broad guideline for police conduct with tasers: "Effective immediately, TASER use as a pain compliance tool against a resisting subject is prohibited by the Fourth Amendment unless the police can articulate "immediate danger" to the officer apart from the fact of resistance alone. This is true whether the TASER is used in probe deployment or drive stun mode."

In contrast, several jurisdictions, including Charlotte, North Carolina and Baltimore County, Maryland, reported that departmental policies on use of force already complied with the Court's decision. The action of the Fourth Circuit Court of Appeals panel, then, may result in more consistent, as well as more nuanced, police responses across local jurisdictions to individuals in mental health crisis in the future.

II. Updates

2016 General Assembly Session: Mental Health Related Actions

The Budget:

The 2016 General Assembly, although still declining to adopt Governor McAuliffe's call for Medicaid expansion for uninsured adults under the Affordable Care Act, did include a number of budget provisions of importance to persons with mental illness. The maximum income for eligibility for Medicaid coverage under the Governor's GAP program for persons with serious mental illness was raised (from 60% of the federal poverty level to 80%), making over 3,000 additional persons eligible for GAP coverage. (More information about the GAP program is available on the [DMAS website](#).) As described further in a budget report by [NAMI Virginia](#) [<http://namivirginia.org/general-assembly-2016/>] other key budgetary decisions affecting mental health care included the following:

- The General Assembly's approved budget includes a directive that the Administration develop a comprehensive plan for the publicly funded geropsychiatric system of care in Virginia. That plan is to be presented to the Governor and to the Chairs of the House Appropriations and Senate Finance Committees and to the Joint Subcommittee to Study Mental Health Services in the Commonwealth in the 21st Century (SJ 47). The directive accompanies a decision by the General Assembly not to include in the budget a \$1 million appropriation requested by Governor McAuliffe to fund an administration plan for the closure of Catawba Hospital, a state mental health facility that includes 60 beds for geriatric patients. An article describing this issue in more detail can be found [here](#).
- Funding for permanent supportive housing for persons with serious mental illness was doubled, from just over four million dollars to over eight and one-half million dollars.
- Four million dollars in additional funding was provided for PACT (Programs of Assertive Community Treatment).
- Funding for crisis services for children and adolescents was increased by 50%, from \$6,650,000.00 to over \$10,000,000.00.

- Funding was provided for mental health specialist positions in probation and parole offices, and for six pilot programs in local and regional jails to address the needs of inmates with mental illness.

Behavioral Health Courts:

Although all of the bills introduced in the 2016 session that provided for the creation of behavioral health courts, “special problem solving courts,” and other special courts failed, the General Assembly included as a budget amendment a directive to the Department of Behavioral Health and Developmental Services that it review “mental health dockets” used by courts in Virginia and in other states and complete a report by December 1, 2016 with recommendations for a model program in Virginia. As part of the directive, DBHDS is to look specifically at specialty veterans mental health dockets.

Changes to the Virginia Code:

HB293 (Herring) - **Prescription Monitoring Program; changes to requirements for prescribers of opioids.** Before this bill, Virginia Code Section 54.1-2522.1 required that persons licensed to prescribe medications must check the Prescription Monitoring Program before prescribing a benzodiazepine or opiate for an anticipated treatment of more than 90 days, to determine whether the patient was already receiving other “covered drugs.” The section also authorized the Secretary of Health and Human Services to identify benzodiazepines and opiates for which this requirement would *not* apply due to low abuse potential. HB293 brings these changes: (1) this requirement now applies only to prescriptions for opioids, with the trigger being a treatment period exceeding 14 days (instead of 90); (2) instead of the HHS Secretary listing drugs that are excepted from this requirement, the General Assembly lists the following specific exceptions to the requirement: (a) the opioid is prescribed to a patient currently receiving hospice or palliative care; (b) the opioid is prescribed to a patient as part of treatment for a surgical or invasive procedure and such prescription is not refillable; (c) the opioid is prescribed to a patient during an inpatient hospital admission or at discharge; (d) the opioid is prescribed to a patient in a nursing home or a patient in an assisted living facility that uses a sole source pharmacy; (e) the Prescription Monitoring Program is not operational or available due to temporary technological or electrical failure or natural disaster; or (f) the prescriber is unable to access the Prescription Monitoring Program due to emergency or disaster and documents such circumstances in the patient's medical record.

The bill also amends Section 54.1-2523.2 by broadening the group of employees to whom a prescription provider may delegate the authority to access patient information in the Prescription Monitoring Program.

HB523 (Le Munyon) - **Higher education; student mental health policies.** Virginia Code Section 23-9.2:8(B) requires the governing body of each public four-year institution of higher education in the state to have a memorandum of understanding with the area community services board (or behavioral health authority) and local hospitals and other facilities to “expand the scope of services available to students seeking treatment.” The section has also required this MOU to designate a school “contact person” who would be notified when a student was involuntarily committed. HB523 modifies this notification provision to state that such notice of involuntary commitment will be provided “to the extent allowable under state and federal privacy laws.” The effect of this change is that,

in almost all cases, authorization by the student (or the student's "personal representative") will be required before such notice can be provided. (Identical bill from Senate: SB 425)

HB582 (Yost) - **Criminal defendants; evaluation for insanity or competence.** This bill amends Virginia Code Sections 19.2-168.1, 19.2-169.1 and 19.2-169.5 to provide uniform, and more exacting, requirements for the qualification of psychiatrists and clinical psychologists to perform both evaluations of a criminal defendant's competency to stand trial and evaluations of a criminal defendant's sanity at the time of the offense. It also introduces a mechanism for maintaining "quality control" in the work of these evaluators. In addition to requiring that the appointing Court must select an evaluator who is on a list of approved evaluators maintained by the DBHDS Commissioner, the bill requires evaluators to send a copy of each of their completed evaluations (redacted to remove references to the defendant's name, date of birth, case number, and court of jurisdiction) to the DBHDS Commissioner for "peer review to establish and maintain the list of approved evaluators." DBHDS has stated that, if or when a peer review determines that an evaluator is not meeting "minimum standards," then DBHDS will "attempt to provide remediation training." Evaluators who cannot meet the minimum standards will not be included on the list of approved providers.

HB583 (Yost) - **Certification of peer providers.** This bill amends Virginia Code Section 37.2-304 by adding to the list of duties and powers of the Commissioner of the Department of Behavioral Health and Developmental Services (DBHDS) the duty and power to "certify individuals as peer providers in accordance with regulations adopted by the Board of Behavioral Health and Developmental Services." This provision enables DBHDS to move forward with a planned certification process that will facilitate incorporation of peer providers into reimbursable treatment and service programming in a comprehensive manner statewide.

HB616 (Bell) - **Discharge from involuntary admission; advance directive.** This bill amends Virginia Code Sections 37.2-817, 37.2-837 and 37.2-838 to require that, if a person is about to be discharged from involuntary psychiatric hospitalization or mandatory outpatient mental health treatment, and that person does not have an advance health care directive, the person in charge of the hospital (or designee), or (in the case of mandatory outpatient treatment) the person's treating physician (or designee) "shall give to the individual a written explanation of the procedures for executing an advance directive in accordance with the Health Care Decisions Act (§ [54.1-2981](#) et seq.) and an advance directive form, which may be the form set forth in § [54.1-2984](#)." Although this provision is an important step forward in helping and encouraging people to engage in advance care planning, it must be noted that research has shown that when people are given an advance directive form and explanatory information, without also being provided assistance in completing the advance directive form, only a very small percentage of these individuals actually complete an advance directive. It is hoped that, as part of the discharge planning process, individuals leaving the hospital or a mandatory outpatient program will be offered direct assistance in completing their advance

directives, as a tool to help them avoid involuntary commitment in the future. (For more information on advance directives and access to advance directive forms, go [here](#).)

HB645 (Leftwich) - **Criminal defendants; orders for competency and sanity evaluations and hospitalization.** This bill adds Section 19.2-169.8 to the Virginia Code. It requires that a copy of any court order for evaluation of a defendant for sanity, competency to stand trial, or competency restoration shall be provided by the court clerk to the appointed evaluator or hospital as soon as practicable but no later than the close of business on the next business day following entry of the order. The evaluator or hospital must acknowledge receipt of the order to the clerk on a form developed by the Office of the Executive Secretary of the Supreme Court of Virginia. The bill also requires the same verification of receipt procedures for an order for psychiatric hospitalization of an inmate.

This bill was enacted in the wake of the death of Jamycheal Mitchell, a young man with serious mental illness who was charged with petty larceny (stealing \$5 of food items from a convenience store in Portsmouth) and trespassing and was found incompetent to stand trial, and who later died in the Hampton Roads Regional Jail (HRRJ) after weeks of steady deterioration while awaiting transfer to Eastern State Hospital for treatment to restore him to competency. As noted in a report by the Virginian Pilot, a DBHDS internal audit investigation determined that the Portsmouth General District Court Clerk apparently failed initially to send the competency restoration order to Eastern State Hospital (ESH) when it was first entered on May 21, 2015, and that when a copy of the order was eventually faxed to the hospital, following a second court hearing on July 31, the person receiving the order placed it in a drawer and never added Mr. Mitchell to ESH's list of persons needing admission for competency restoration services. Mr. Mitchell died while still an inmate at the jail on August 19, 2015, without ever making it onto the ESH list for admission. The medical examiner found the cause of death to be "probable cardiac arrhythmia accompanying wasting syndrome of unknown etiology".

The DBHDS audit found that Mr. Mitchell was one of a number of inmates in different local jails for whom competency restoration orders had been entered and sent to Eastern State Hospital but whose names had not appeared on the hospital's competency restoration treatment list. The audit report's recommendations focused on improving mailroom practices at ESH and establishing protocols between the local courts and ESH to ensure that orders from the local courts are properly sent and documented by the courts and ESH.

A separate investigation by the Office of the State Inspector General confirmed the factual findings of the DBHDS internal audit investigation report, but criticized the report as doing nothing to identify the "root causes" of the system failures that contributed to Mr. Mitchell's prolonged incarceration, his delayed admission to ESH and his death at the jail. The OSIG's recommendations called for the adoption of protocols and practices among the various agencies involved in managing criminal defendants with mental illness to ensure proper support and management of those individuals, and for implementation of the "substantive" recommendations of the DBHDS "Transformation Team of the Justice Involved" that had been established by former DBHDS

Commissioner Ferguson. (The Team’s recommendations are included in the OSIG report.) The OSIG report also recommended greater oversight by the HRRJ over the actions of its contract provider of medical and mental health services, and noted that the OSIG did not have authority to investigate the jail or the contract medical services provider, and did not have access to the internal review of the medical provider’s actions in regard to Mr. Mitchell.

HB675 (Peace) - **Auxiliary grants; supportive housing.** This bill amends Virginia Code Section 51.5-160 and adds Section 37.2-421.1 to establish “supportive housing” as a new category of housing available to persons receiving “auxiliary grants.” Currently, individuals who are unable to live on their own but do not have sufficient income to obtain housing services are eligible for “auxiliary grants” through the Virginia Department of Social Services to help pay for their placement in “assisted living facilities” and “adult foster homes.” HB675 adds a new category of “supportive housing” that is aimed specifically at helping individuals with serious mental illness and other disabilities. Providers of supportive housing must be able to provide a range of support services and must enter into an agreement with DBHDS regarding the level of care and support that will be provided in these settings.

HB1110 (Bell) - **Temporary detention; notice of recommendation; communication with magistrate [for involuntary commitment of adults and minors].** This bill amends Virginia Code Section 16.1-337 (regarding the inpatient psychiatric treatment of minors), and Sections 37.2-804.2 and 37.2-809 (addressing the involuntary psychiatric hospitalization of adults) by providing the following:

1. Notice to the family: Section 16.1-337 currently provides that health care providers treating a minor “who is the subject of proceedings under [The Inpatient Psychiatric Treatment of Minors Act]” “may” notify the minor’s parent of information directly relevant to that provider’s involvement with the child, which may include the child’s location and general condition. HB 1110 turns that “may” into a “shall,” requiring the provider to make “reasonable efforts” to inform the parent. The requirement does not apply if the provider knows that the parent already has this information. Also: the provider is *not* to provide this information if the provider has actual knowledge that the parent is prohibited by court order from having contact with the child.

For adults subject to proceedings under Chapter 8 of Title 37.2 (“Emergency Custody and Voluntary and Involuntary Civil Admissions”), health care providers also are now *required* to make a reasonable effort to inform the person’s family member or “personal representative” (including the person’s health care agent in their advance directive) of information regarding the person, including the person’s location and condition. They must also inform the person involved that they are providing this information to others. The requirement does not apply if the provider knows that this information has already been provided.

NOTE: This change is not quite as simple and straightforward in practice as it might appear. The affirmative duty now placed on providers to attempt to notify family about

the individual's situation must still be carried out "in accordance with" subdivision D(34) of Virginia Code Section 32.1-127.1:03 (Virginia's Health Records Privacy Act). Subdivision D(34) sets out that, if the individual has the capacity to make health care decisions, then the individual must first be told that the provider is going to notify the family member (or agent), and that the provider can go forward with attempting that notification only if the individual agrees to it, or at least does not object (or the provider can "reasonably infer" from the circumstances that the individual does not object). If the opportunity to object to notification of the family member (or agent) is precluded by the individual's incapacity or an "emergency circumstance," the provider can contact the family member or agent if the provider determines, based on "professional judgment," that such would be in the individual's best interests. (If the provider knows there is a court order prohibiting contact, then notice to that person is not allowed.) *Bottom line:* Giving notice to family (or agent) is not automatic, but there is now an affirmative duty to address the issue of notice (and document that you have carried out that duty).

2. *Input into Magistrate's TDO decision:* HB 1110 amends Section 37.2-809 by adding the following requirements:

- In making a TDO decision, the magistrate is now required to consider (if available) information provided by the individual who "initiated emergency custody" of the person.
- If the community services board evaluator, after examining a person reported to be in crisis, recommends against entry of a TDO, the evaluator must a) inform i) the petitioner (if a petition for involuntary commitment has been filed), ii) the person who initiated emergency custody, and iii) any on-site treatment provider, of the evaluator's recommendation *and* b) if requested, arrange for the person who initiated emergency custody to communicate with the magistrate before the TDO decision is made *if* the person disagrees with the evaluator's recommendation. The person must remain in custody until these individuals have had a chance to make that communication and the magistrate has made the TDO decision. (Identical Senate Bill: SB 567)

SB79 (Wexton, Favola and McPike) - **Fire or rescue volunteers; mental health treatment; funding by locality.** This bill amends Virginia Code Section 15.2-1517 by authorizing any locality to "fund the cost of a volunteer's participation in a mental health treatment and counseling program that is offered to individual members of approved volunteer fire or rescue companies and is comparable to an employee assistance program offered to paid employees of the locality."

SB350 (Deeds) - **Prisoners unable to give consent for medical or mental health treatment.** This bill amends Virginia Code Section 53.1-40.1 by adding licensed professional counselors and licensed clinical social workers to the list of providers who are required by court order to inform the court and the prisoner's attorney of any change in the prisoner's condition resulting in restoration of the prisoner's capability to consent to treatment.

SB556 (Weston) - **Opiate addiction treatment; exceptions from some licensing requirements for certain nonmethadone opioid replacement treatments.** This bill

amends Virginia Code Section 37.2-406 by *removing* certain restrictions for licensure of a provider who provides treatment for persons with opiate addiction using nonmethadone opioid replacements that have been approved for treatment of opioid addiction by the U.S. Food and Drug Administration. (Such restrictions include prohibition on such providers being located within a half-mile of a public or private school or day care center, and community notice requirements.)

SB566 (Barker) - **Involuntary psychiatric admission from local correctional facility.** This bill adds a provision (subsection I) to Virginia Code Section 19.2-169.6 to clarify that, for the purposes of petitioning for the involuntary psychiatric treatment of an inmate in a local correctional facility, the petition shall be filed by the sheriff or other officer in charge of the local correctional facility where the inmate is incarcerated.

III. ILPPP Data Corner

Use of Court-Ordered Alternatives to Law Enforcement for Transporting People during Mental Health Emergencies

Providing safe transportation in the least restrictive manner for individuals under an emergency custody order (“ECO”) or temporary detention order (“TDO”) is a continuing challenge in Virginia. Historically, this responsibility has fallen to law-enforcement, although neither police departments nor sheriffs’ departments receive funding specifically for providing this transportation. For policy and safety reasons, law enforcement officers generally must use restraints and a police vehicle to transport individuals experiencing a mental health crisis, which can make people feel stigmatized, traumatized, and criminalized. In 2009, legislation was passed that gave magistrates the ability to issue an Alternative Transportation Order (“ATO”) that designates someone other than law enforcement, such as a family member, friend, or agency to transport individuals under an ECO or a TDO provided that the alternative transportation provider is willing and able to do this in a safe manner (Va. Code §§ 16.1-340, 340.2, 37.2-808, 810).

The Office of Executive Secretary of the Supreme Court of Virginia (SCV) has collected data on issued ATOs since the ATO legislation was enacted on July 1, 2009. In Vol. 30, Issue 1 of *Developments in Mental Health Law*, Jane Hickey and Amy Askew wrote about the early use of ATOs, from fiscal year (FY)10-FY11¹. This issue’s *ILPPP Data Corner* presents a summary of available ATO data and contextual information that sheds light on the findings.

Data Source

ATO data from FY10-FY16 were obtained from the SCV’s eMagistrate System. The eMagistrate System is used by magistrates in all thirty-two judicial districts to issue arrest

¹ <http://www.ilppp.virginia.edu/PublicationsAndPolicy/DownloadPDF/15>

processes, bail processes, and other orders including ECOs, TDO, and ATOs. Each time an ATO is issued, it is entered into the eMagistrate System. The eMagistrate System stores information about the date of issuance, whether the ATO was issued for ECO or TDO transport, whether the individual being transported was an adult or a minor, and the type of transportation provider used.

Results

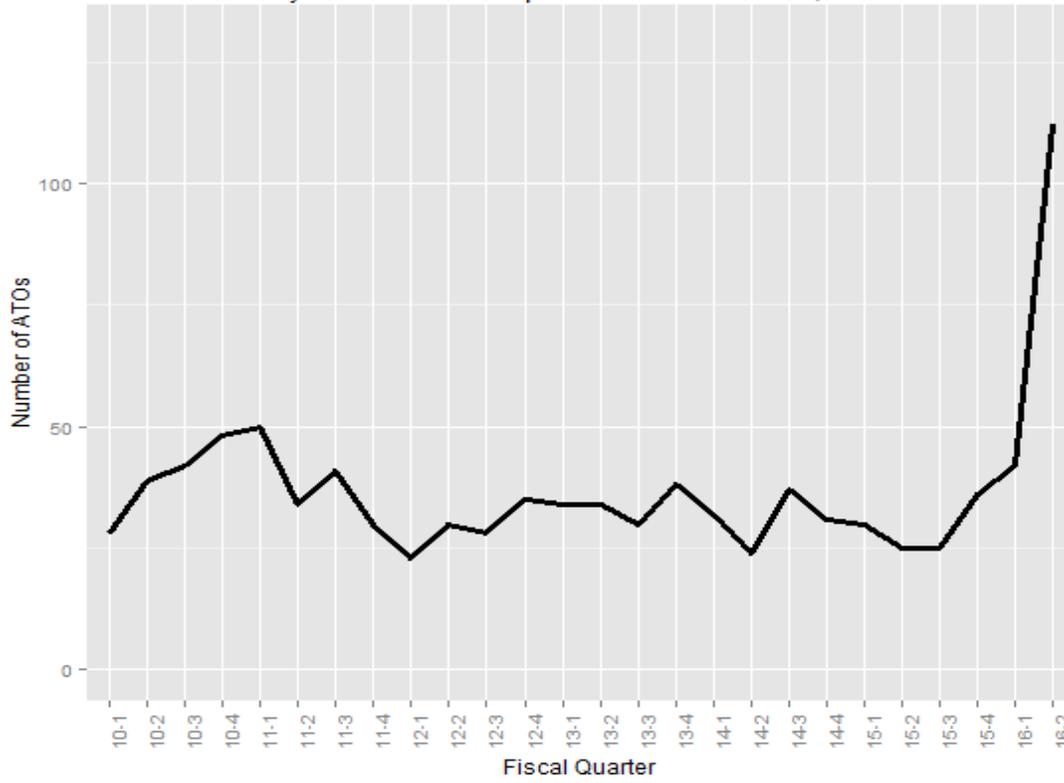
Shortly after ATO legislation was enacted, the number of ATOs issued quarterly was rising (Figure 1). This growth gradually leveled off, however, and the number of ATOs issued decreased annually from FY10-FY11 to FY15. Magistrates issued 134 ATOs in FY10 and 108 ATOs in FY15. The volume of ATOs issued began to rise considerably in November 2015 (Figure 2). Note that although many more ATOs were issued, ATOs were issued for only about 2.5% of the total TDOs issued from November 2015-January 2016. Over half of the ATOs issued for TDOs in this time period were issued in localities served by Mt. Rogers Community Services Board (CSB). This elevated concentration of issued ATOs is due to a pilot project that is described later in this article.

Across FY10-FY15, the most common alternative transportation provider was medical transport (Table 1). Beginning in November 2015, the most common alternative transportation provider was a certified driver². Reasons for these shifts are explained below. Table 2 displays the number of ATOs issued for adults under ECOs and TDOs (denoted “ECO” and “TDO”) and minors under ECOs and TDOs (denoted “ECOJ” and “TDOJ”) from FY10-FY16.³ Very few ATOs were issued for minors. Additionally, few ATOs were issued in order to transport an individual under an ECO, with about 95.4% of ATOs in FY16 issued for an individual under a TDO (Table 2).

² The “certified driver” variable code was created in FY16 in order to accommodate the Alternative Transportation Pilot. It is possible that some ATOs that should have been coded as certified driver were coded as “unknown” during FY10-FY15.

³ Note that counts for FY16 include data from only the first 7 months of FY16.

Quarterly Alternative Transportation Order Trends, FY10-FY16



Monthly Frequency of ATOs Issued, FY16

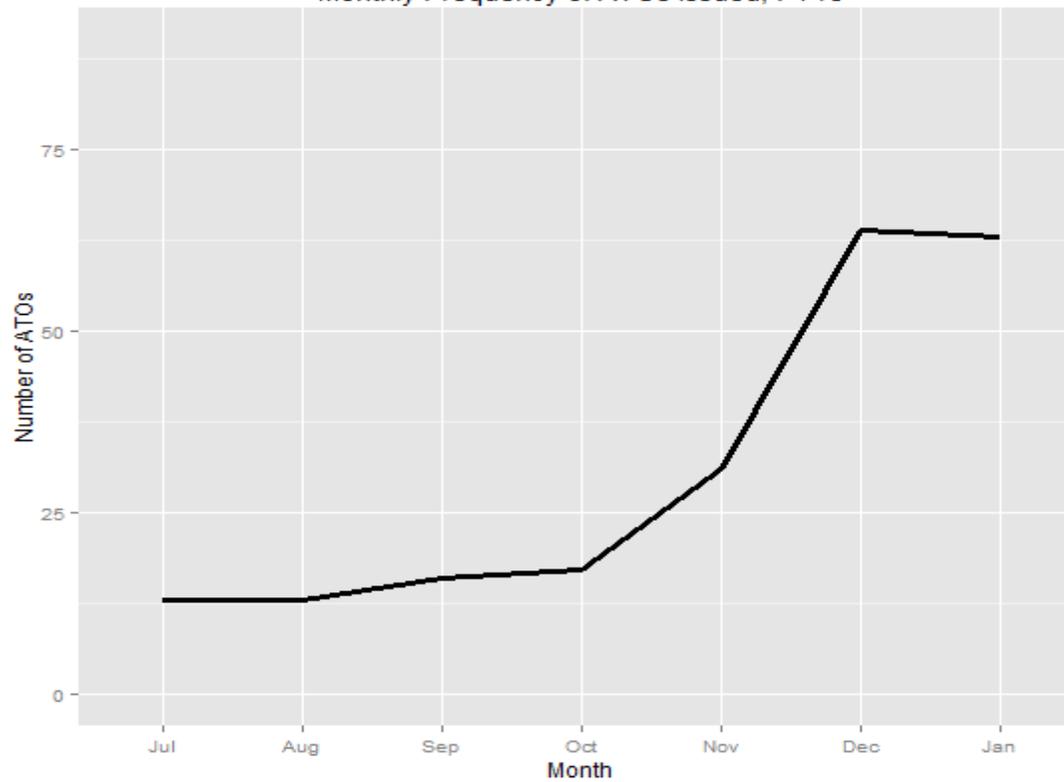


Table 1: Annual Frequency of ATOs Issued, by Transportation Provider, FY10-FY16

Transportation Provider	FY10	FY11	FY12	FY13	FY14	FY15	FY16
Certified Driver	NA	NA	NA	NA	NA	NA	110
Family	84	79	45	35	31	17	20
Friend	8	6	2	4	7	0	2
Healthcare Provider	16	10	10	10	9	9	7
Law Enforcement	9	9	9	8	6	7	30
Medical Transport	35	41	37	60	41	59	35
Unknown	5	10	13	19	30	24	13
Total	157	155	116	136	124	116	217

Table 2: Annual Frequency of ATOs Issued, by Type

Type	FY10	FY11	FY12	FY13	FY14	FY15	FY16
ECO	7	6	3	4	11	9	4
ECOJ	2	1	0	0	2	0	0
TDO	127	136	100	117	102	99	207
TDOJ	21	12	13	15	9	8	6

Policy and Practice Changes Influencing the Use of ATOs

In 2008, the Virginia Association of Chiefs of Police and the Virginia Sheriffs’ Association conducted a series of studies of Police Departments and Sheriffs’ Departments that were designed to determine which agencies provide transportation and to quantify the staffing required by Sheriffs’ Departments to provide civil commitment related services.⁴ These studies were conducted prior to enactment of ATO legislation. The Police Survey found that for 87.5% of respondents’ jurisdictions, no other means of transportation were used besides law enforcement. Approximately a quarter of respondents reported that they typically provide transportation to facilities located outside of a 50-mile radius of their jurisdiction. The Sheriffs’ Study found that at the time of the study, sheriffs’ departments reported requiring an additional 26.3 full-time equivalent positions across the state in order to provide civil commitment related services. Although there is interest in collecting up-to-date analogous data, these studies have not been repeated. Given the under-utilization of ATOs, however, it is likely that these practices have not changed much for most localities since the studies were conducted in 2008.

In 2015, the statutes governing ATOs were revised to ensure that, “no person who provides alternative transportation pursuant to this section shall be liable to the person being transported for any civil damages for ordinary negligence in acts or omissions that result from providing such alternative transportation.” This eliminated an important barrier to the use of ATOs. However, we have heard reports that some stakeholders, such

⁴ Results of the studies were provided by Arlington County Chief of Police M. Jay Farr (personal communication, March 16, 2016).

as the facility from which an individual is transferred, have remaining concerns about liability.

The large increase in ATOs issued beginning in November 2015 can be attributed to the start of the Alternative Transportation Pilot, which is sponsored by DBHDS and began in the Mount Rogers Community Services Board area. The pilot creates another alternative transportation resource that can be used instead of law enforcement, when appropriate; DBHDS contracts with Steadfast Investigations and Security, LLC, to provide “secure cabs” to transport individuals under a TDO issued under § 37.2-810. DBHDS officials indicate that the drivers are well-trained to provide safe transportation without the use of restraints. Note, though, that the pilot cannot and is not intended to replace all transportation by law enforcement.⁵

From November 2015 through January 2016, an ATO was issued for over one-quarter (27.7%, n=82) of TDOs issued in localities served by the pilot. In localities not served by the pilot, ATOs were issued for only 1.3% of TDOs issued.

In Closing

It appears that without financial support and coordination between various stakeholders, ATOs are rarely used. However, in localities where a concentrated effort is made to use alternative transportation, there is acceptance and use of this service, as evidenced by the increased number of ATOs issued from November 2015-January 2016. DBHDS officials noted that if the pilot proves successful, it may be expanded to other parts of Southwestern Virginia. The number and type of ATOs issued will continue to be monitored as the Alternative Transportation Pilot progresses. Of particular interest will be how various stakeholders react to the project, including law enforcement officers and consumers who are transported.

IV. Case Law Developments

United States Fourth Circuit Decisions

Firearms Regulation: Claims that a state regulation of the possession and use of firearms violates the Second Amendment must pass a “strict scrutiny” review.

[Editor Note: This case does not discuss mental illness, but it appears that the standard would apply to firearms restrictions on persons with mental illness.]

***Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016) reh'g en banc granted, No. 14-1945, 2016 WL 851670 (4th Cir. Mar. 4, 2016)**

⁵Information about the pilot was obtained from a fact sheet authored by Jim Martinez of DBHDS. (Obtained March 22, 2016).

Background: The Firearm Safety Act ([FSA] passed by Maryland in 2013) banned even law-abiding citizens, except for retired law enforcement officers, from buying or possessing most kinds of semi-automatic rifles. Plaintiffs challenged several provisions of the FSA on the theory that its restrictions on “assault weapons” and larger-capacity detachable magazines (LCMs) entrenched upon core Second Amendment rights. Further, plaintiffs alleged that the exception for retired law enforcement officers violated the Equal Protection Clause. The district court upheld the constitutionality of the FSA under the intermediate scrutiny standard and denied the plaintiffs’ Equal Protection claims.

Holding: On appeal, the Fourth Circuit held that Maryland’s FSA implicated “the core protection of the Second Amendment” as articulated in *District of Columbia v. Heller*, 554 U.S. 570 (2010). Because the Fourth Circuit found that the FSA placed a substantial burden on a core constitutional right, it vacated the lower court opinion and announced strict scrutiny as the applicable standard for review of the plaintiffs’ Second Amendment Claims. The Fourth Circuit affirmed the denial of the plaintiffs’ Equal Protection challenge, as well as the lower court’s finding that the FSA was not unconstitutionally vague.

Notable Points:

Strict scrutiny is the proper standard for challenging firearm restrictions under the Second Amendment: The lower court erred in applying intermediate scrutiny to the challenged firearm restriction. Strict scrutiny is the proper standard because the FSA ban on semi-automatic rifles and larger-capacity magazines restricts the availability of a class of arms used for “self-defense in the home.” That restriction implicates the “core” of the Second Amendment. Because the challenged provisions of the FSA substantially, rather than incidentally, burden that core right, strict scrutiny, rather than intermediate scrutiny, is the proper standard.

The FSA’s exception for retired law enforcement officers did not violate the Equal Protection Clause: Because retired police officers were not similarly situated with the public at large under the FSA, the grant of certain rights to those retired officers did not violate the Equal Protection Clause. Specifically, the court found that retired police officers (1) possess unique training and experience related to firearms and (2) are granted a “special degree of trust” that instills them with “an unusual ethos of public service.” These two factors make them not similarly situated with the public at large for Equal Protection purposes, and justify the exceptions and special provisions available to them under the FSA.

Other Federal Circuit Court Decisions

Liability of Public Entities in Caring for Persons during Involuntary Commitment Process: Estate of mentally ill person, who was taken into involuntary custody due to mental health crisis and later died in County Sheriff Department’s custody, failed to meet requirements for claims against hospital and County under 42 USC § 1983, as evidence did not demonstrate that defendants had a policy or practice amounting to deliberate indifference, as required under *Monell*.

Anderson v. Marshall Cty., Miss., No. 15-60051, 2016 WL 143303 (5th Cir. Jan. 12, 2016) (per curiam)

Background: After Princess Anderson arrived at a hospital in Marshall County Mississippi, she became increasingly agitated and physical with emergency room staff. Anderson tested positive for marijuana and opiates, and was diagnosed with acute psychosis. After a mental health evaluation, it was determined that Anderson required psychological care, but she refused voluntary admission. The chancery court granted the doctors' request to have Anderson involuntarily committed and ordered the DeSoto County sheriff to take custody of her. Because Anderson was a resident of Marshall County, she was transported from DeSoto to Marshall County jail on Tuesday, February 8th. On arrival, DeSoto deputies told the Marshall County jail officer that Anderson had become agitated during the transport requiring that she be restrained. The Marshall jail officer did not review Anderson's medical records (believing she was not entitled to view Anderson's health information), and Anderson was placed in a cell. Although other inmates reported that Anderson needed emergency medical attention, she was not taken to a hospital until Friday, February 11th when Anderson's mother arrived at the jail to take her to a hospital for follow-up tests. Shortly after arriving there, Anderson died of multisystem organ failure. Her mother, Angela Anderson, sued Marshall County and the Sheriff for violations of Princess Anderson's rights under 42 U.S.C. § 1983. The district court determined that there was no § 1983 violation.

Holding: The Fifth Circuit held per curiam that Angela Anderson did not meet "the high bar required for *Monell* liability" under § 1983 and upheld the district court's grant of summary judgment against her. On the failure to train claim, the Court held that the plaintiff failed to establish that Marshall County acted with deliberate indifference to the constitutional rights of inmates when adopting its training procedures. The Court also found the single incident exception to *Monell's* general requirement of a pattern of unconstitutional conduct was not applicable given the evidence presented by the plaintiff.

Notable Points:

Plaintiff did not show evidence of a pattern of deliberate indifference: Anderson came forward with no evidence to show or allege a pattern of deliberate indifference to the constitutional rights of prisoners in Marshall County's training, policies, or procedures. Without evidence of a pattern, Marshall County could not be found to have been on notice that its current training was producing unconstitutional results. Absent a pattern, the plaintiff must show deliberate indifference through the single incident exception.

Plaintiff's evidence was not sufficient to meet § 1983's single incident exception: The single incident exception would require that Marshall County's training be so inadequate that the county was on notice that an untrained officer would have neglected a prisoner in the way Marshall jail officer was alleged to have done. The Fifth Circuit reiterated that "it is not enough to say that more or different training or supervision would have prevented Princess's injuries." It is almost always the case

that more or better training could have prevented a poor outcome, so that cannot be enough to subject a county to governmental liability. Specifically, the Court said that, given the training provided, Marshall County “could not have anticipated that Officer Anderson and other correctional officers would ignore Princess’s litany of obvious ailments.”

Liability of Public Officials for Care of Mentally Ill Inmates in Correctional Setting: Claim by jail inmate with mental illness against jail doctors and staff under 42 USC § 1983 did not establish deliberate indifference required under the Eighth Amendment to establish liability. Summary judgment granted to all defendants based upon qualified immunity.

Saylor v. Nebraska, 812 F.3d 637 (8th Cir. 2016), as amended (Mar. 4, 2016)

Background: James Saylor sued the State of Nebraska, the Nebraska Department of Correctional Services (“NDCS”), Correct Care, LLC, and several individuals alleging violations of his First, Eighth, and Fourteenth Amendment rights under 42 U.S.C. § 1983. Saylor alleged that defendants acted with deliberate indifference to his serious medical needs by failing properly to treat him for PTSD. He claimed that his level of care at Nebraska State Prison was so low as to constitute cruel and unusual punishment. The district court dismissed Saylor’s claims against the State of Nebraska and the NDCS and the claims for monetary relief against the individual defendants in their official capacities. The district court then denied the remaining defendants’ motions for summary judgment on the basis of qualified immunity.

Holdings: On appeal, the Eighth Circuit reversed, holding that there were not genuine disputes concerning “the predicate facts material to the qualified immunity issue.” Because the Court found that the record showed that all defendants “met Saylor’s medical needs beyond the minimum standard required,” there was no deprivation of Saylor’s Eighth Amendment rights. Thus, defendants were entitled to qualified immunity.

Notable Points:

Qualified immunity for non-medical defendants: In order to overcome a defense of qualified immunity for the non-medical defendants, a plaintiff must show that supervisors had direct responsibility for the alleged violations, had actual knowledge of the violation, or gave tacit authorization for the violation. The Court held that the non-medical prison supervisors who approved Saylor’s transfer were not indifferent to his PTSD in violation of the Eight Amendment because Saylor provided “no specific evidence that they were involved in, or directly responsible for, his allegedly insufficient medical care.”

Qualified immunity for medical defendants: In order to overcome a defense of qualified immunity for the medical defendants, a plaintiff must show that defendants were personally responsible for violations, or were responsible for a systematic condition that violated Constitution. Here, the Court held that the State prison’s

medical staff was not deliberately indifferent to Saylor's PTSD even though Saylor argued that he received treatment that rose to the level of cruel and unusual punishment after his original treating physician left. Records showed that medical staff provided beyond the minimum standard required after his previous treater left, first providing Saylor with another physician at the same facility and then ultimately a psychiatrist at a different facility. They also continued his medication consistent with their independent medical judgment. The staff also granted Saylor's request for a private cell and sought his agreement for certain deviations from his original treatment plan.

Criminal Sentencing: Special condition of sentence requiring mental health treatment under supervised release agreements failed to meet statutory standards for probation conditions.

***United States v. Garcia*, No. 15-40252, 2016 WL 386141 (5th Cir. Feb. 1, 2016) (per curiam)**

Background: After receiving a sentence from the trial court that included a requirement to participate in a mental health treatment program, Ruben Garcia appealed his sentence to the Fifth Circuit. Garcia contended that the district court had committed reversible error by failing to explain "how the mental health condition was reasonably related to the pertinent statutory factors." Additionally, he argued that the record did not justify an inference that such a condition was reasonable.

Holding: Because Garcia did not challenge the mental health condition in the trial court, the appellate court's review was limited to plain error. Even under this standard, the Fifth Circuit vacated the condition of Garcia's supervised release that required him to participate in mental health treatment, and remanded the case to the district court for reconsideration. According to the Fifth Circuit, the district court abused its discretion by failing to explain how the special condition (i.e. mental health treatment) was reasonably related to all statutory factors. Without any clear explanation for the imposition of a special condition and a lack of implied justification in the record, the Fifth Circuit held that it was "incumbent upon [them] to vacate [the judgment below]." Because it was not obvious from the record that there was a basis for the mental health condition (and because such a condition affects Garcia's substantial rights), the Fifth Circuit held that the lower court had committed plain error.

Criminal Sentencing: Conditions of supervised release were procedurally unreasonable because they were vague and lacked explanation.

***United States v. Poulin*, 809 F.3d 924 (7th Cir. 2016), reh'g denied (Feb. 22, 2016)**

Background: After pleading guilty to receipt and possession of child pornography, Matthew Poulin was sentenced to two concurrent 115-month terms of imprisonment and

two concurrent life terms of supervised release. Poulin appealed, contending that the district court had erred by not providing reasons for imposing the maximum term of supervised release and that the record lacked justification for the imposition of special conditions (including the requirement of mental health treatment). The Seventh Circuit vacated the original sentence and remanded to the district court for resentencing. On remand, the district court resentenced Poulin to concurrent 84-month terms of imprisonment and a 10-year term of supervised release, including nine standard conditions and seven special conditions. Poulin brought a successive appeal challenging several of the conditions.

Holdings: The Seventh Circuit again vacated the standard conditions of supervised release imposed below, basing its reasoning largely on a line of cases decided after the district court had issued its resentencing judgment. While acknowledging that the district court did not “have the benefit of guidance provided by [the more recent cases],” the Court held that the disputed conditions were not “properly-noticed, supported by adequate findings, and well-tailored to serve the purposes of deterrence, rehabilitation, and protection of the public” (citing *United States v. Kappes*, 782 F.3d 828 (7th Cir. 2015)).

Application of Section 504 of the Rehabilitation Act: Section 504 authorizes employment discrimination suits by independent contractors.

***Flynn v. Distinctive Home Care, Inc.*, 812 F.3d 422 (5th Cir. 2016)**

Background: After Congress enacted the Americans with Disabilities Act (“ADA”) in 1990, the Senate Subcommittee on Disability Policy held a hearing out of concern over potential inconsistencies between the Rehabilitation Act and the ADA. In response to the “need to include the philosophies embodied in the ADA in the Rehabilitation Act,” Congress added subsection (d) to Section 504 of the Rehabilitation Act. Subsection (d) incorporated by reference parts of the ADA, for example: the standards used to determine whether Section 504 has been violated in a complaint alleging employment discrimination “shall be the standards applied under title I of the Americans with Disabilities Act of 1990.” Most federal circuit and district courts agree that, under Title I of the ADA, a plaintiff may sue a defendant only if the plaintiff is an employee, not an independent contractor. In *Flynn*, the central question was whether Section 504(d) incorporated this limitation. The district court held that it did, and thus *Flynn*—an independent contractor with Distinctive Healthcare staffing—could not proceed with her employment discrimination claims.

Holding: The Fifth Circuit vacated the judgment of the district court and concluded that Section 504 of the Rehabilitation Act authorizes employment discrimination suits by independent contractors.

Notable Points:

The Rehabilitation Act adopts only the substantive standards of Title I of the ADA, not the definition of who is covered under the Rehabilitation Act: The Fifth Circuit held that Section 504(d) of the Rehabilitation Act does not incorporate Title I of the ADA in its entirety. Specifically, the Rehabilitation Act uses the ADA’s standards only to determine whether the Rehabilitation Act has been violated. The Rehabilitation Act does not, however, state that the ADA standards determine whether an employer is subject to the Rehabilitation Act. The Court held that the definition of “employer” under the Rehabilitation Act is “far broader” and covers “all of the operations of covered entities, not only those related to employment.” Thus, the Rehabilitation Act adopts only the substantive standards for determining “*what* conduct violates the Rehabilitation Act, not the definition of *who* is covered” (emphasis in original).

Excessive Force: Qualified immunity denied to officers who tased a man who was agitated but not armed, actively resisting arrest, or making threats of physical harm against the officers and EMTs seeking his compliance.

***Kent v. Oakland Cty.*, 810 F.3d 384 (6th Cir. 2016)**

Background: Claudio Lopez and Christina Maher—both Oakland County Sherriff’s Deputies—responded to the natural, at-home death of Michael Kent’s father. When EMTs attempted to attach an Automated External Defibrillator to Kent’s father, Kent objected on the grounds that his father had not wished for life-sustaining procedures. Kent became increasingly agitated, yelling at the deputies and EMTs and refusing to calm down. One of the EMTs asked the deputies for assistance and told one deputy that he felt he could not perform his duties for fear of Kent intervening. After additional commands by the deputies to calm down, Deputy Lopez stated pulled out his taser and told Kent that he would deploy it, to which Kent reported that he replied, with his hands in the air, “Go ahead and Taze me, then.” It was at this point that Deputies Lopez and Maher tased Kent. Kent brought an action pursuant to 42 U.S.C. § 1983 and the deputies moved for summary judgment on the grounds of qualified and governmental immunity. Finding that the deputies’ use of the taser under the circumstances was clearly unreasonable, the district court denied the motion for summary judgment. The deputies appealed.

Holding: The Sixth Circuit affirmed the district court’s denial, holding that there was no combination of facts that would have made the officers’ use of force reasonable. Especially important to the Court was the fact that Kent’s resistance to the officers’ directions was only verbal and generally non-threatening. The Court found that, while Kent did not address the officers in a polite manner, his conduct did “not resemble the ‘continued resistance and hostility’ often present in our active resistance cases...”

Notable Points:

Kent did not pose an immediate threat to the safety of others: Even though Kent may have prevented EMTs from doing their duties, his conduct did not “resemble the physical and immediate safety threat” found in other cases in which tasing was justified. Examples of threats that warrant tasing include: a suspect who is armed, a

suspect reported to be armed reaching into a bag, or a suspect whose violent resistance endangers responders.

Kent was not continuously resistant and hostile in a way that warranted use of force against him: The Sixth Circuit noted that active resistance of arrest, which would support use of a stun gun or taser by police, includes physically struggling against, threatening, or disobeying officers. It could also include refusing to allow police to handcuff a person or fleeing from police. Although Kent was not compliant with all orders given to him by police, he was not *actively resisting* them in a way that would have authorized use of a stun gun against him. Additionally, the Court found it important that there was “no evidence that Kent was aware that he would be detained until Deputy Lopez instructed him that he would be tased if he failed to comply with commands.”

Use of Expert Mental Health Testimony in Criminal Cases: In a case of illegal gun possession that rested almost exclusively on defendant’s replies to police questioning that the gun in question was his, testimony by an expert that the defendant’s admission was unreliable due his low IQ, mental illness and high suggestibility should not be excluded.

United States v. West, No. 14-2514, 2015 WL 9487929 (7th Cir. Dec. 30, 2015)

Background: Antonio West was indicted for possessing a firearm as a felon in violation of 18 U.S.C. § 922(g). The gun was found in the attic of the family home during a consensual search for a stolen television. No fingerprints were recovered from the gun, and there was conflicting evidence regarding whether West actually lived in the home in which the gun was found. As such, the case for possession rested on West’s admission to police that the gun was his. West’s attorney moved to suppress his statements to police based on expert testimony that West had a low IQ, suffered from mental illness, and scored highly on the Gudjonsson Suggestibility Scale. The district court denied the motion, finding that West had competently and voluntarily waived his *Miranda* rights. West’s attorney then moved to admit the expert testimony at trial to (1) assist the jury in assessing the reliability of the confession, (2) negate the intent element of the offense, and (3) explain West’s demeanor should he testify. The judge excluded the evidence on all three grounds and the jury found West guilty.

Holding: On appeal, the Seventh Circuit reversed the decision of the district court and remanded for a new trial. The Court agreed with West that the exclusion of expert testimony regarding West’s IQ was reversible error. Because the government’s case relied heavily on the jury’s acceptance of West’s confession, the district court’s decision to exclude expert testimony regarding the potential reliability of that confession could not have been harmless error.

Notable Points:

The expert's testimony regarding West's IQ was relevant to the question of the reliability of the confession: The Seventh Circuit held that expert testimony explaining that a defendant's low IQ and mental illness could have influenced his responses to officers' questions was certainly relevant and admissible where the major issue at trial was the reliability of the defendant's confession. The expert testimony was highly relevant to the jury's consideration of the defendant's personal characteristics, and the government's objection to the testimony went properly to its weight, not admissibility.

Erroneous exclusion of expert testimony warranted a new trial: Because the government's case depended on whether the defendant knowingly possessed a firearm as a felon, and that determination rested largely on the defendant's confession, the expert should have been allowed to testify. If he had, the jury might have discounted the defendant's statement admitting that the gun was his. Given that, a new trial was required.

State Court Decisions

Psychiatric Hospital Liability in Patient's Suicide: Hospital's affirmative defenses of comparative negligence and assumption of risk in the case of a minor admitted to the psychiatric hospital as a "known suicidal patient" rejected based on finding that the hospital's "professional duty of care encompasses, and is shaped by, the plaintiff-patient's medical condition" as it is known to the hospital.

P.W. v. Children's Hosp. Colorado, 364 P.3d 891 (Co. 2016)

Background: P.W. sued Children's Hospital Colorado ("the Hospital") for negligence when his son, K.W., attempted to kill himself by hanging while at the Hospital. When K.W. was first transferred to the psychiatric unit, notes stated that he was admitted for treatment of depression and suicidal ideation—specifically mentioning cutting and hanging—and was placed on "high suicide precautions." These precautions included the requirement that patients remain in staff sight at all times except for when using the bathroom. When in the bathroom, however, staff should communicate with the patient every 30 seconds. K.W. was allowed use of the bathroom at 9:55 p.m., and at 10:15 p.m., he was discovered to have hanged himself with his scrub pants. K.W. was diagnosed with severe, permanent anoxic brain injury and not expected to recover. P.W., K.W.'s father, sued the Hospital individually and on behalf of his son for negligence, and the Hospital asserted affirmative defenses of comparative negligence and assumption of risk. P.W. moved to dismiss the defenses, and, treating the motion as one for summary judgment, the district court granted the motion.

Holding: The Supreme Court of Colorado affirmed, holding that the Hospital could not assert either a comparative negligence or assumption of risk defense as a matter of law. Although the Hospital had also petitioned for an order to gain access to K.W.'s pre-incident mental health records, the Supreme Court did not address the trial court's discovery order.

Notable Points:

The Hospital assumed an affirmative duty to protect K.W. from self-harm: When admitting a suicidal patient to a psychiatric in-patient unit, a hospital assumes an affirmative duty of care, which subsumes a patient's own duty of self-care. Thus, a patient cannot be found comparatively negligent for a suicide attempt. In this case specifically, the Hospital agreed to use reasonable care to prevent a known suicidal patient from attempting to commit suicide. That duty cannot be overcome by a comparative negligence or assumption of the risk defense.

A capacity-based theory of comparative negligence does not apply: A hospital's duty of care encompasses a patient's individual characteristics—including known medical conditions—and the duty of care can be continually shaped by those characteristics. As such, the capacity for negligence of a sixteen-year-old patient, known to be suicidal, was not relevant to determining whether he could be held comparatively at fault for injuries sustained in a suicide attempt. While in the Hospital's care, the hospital had a duty to protect him from foreseeable harm, and when he was known to be suicidal at intake, that foreseeable harm included harm from a possible suicide attempt.

Administration of Psychotropic Medication over Objection of NGRI Patient: In the case of a person who is a hospitalized NGRI acquittee and currently receiving anti-psychotic medication that is preventing further deterioration of the person but is insufficient to improve person's condition, the Colorado Supreme Court rules that the person's objection to increased medication must be honored despite state's claim that more medication is needed for any improvement.

People v. Marquardt, 364 P.3d 499 (Co. 2016)

Background: After being found not guilty by reason of insanity and being diagnosed with schizoaffective disorder, bipolar type, with prominent paranoia, Larry Marquardt was committed to the Colorado Mental Health Institute at Pueblo ("CMHIP"). Marquardt, at first, took ten milligrams of antipsychotic medication daily, and refused to take more. Because his attending psychiatrist felt that a dose of ten milligrams was only partially effective, the State petitioned to have the dosage increased to the maximum of twenty milligrams daily. The trial court found that an increased dosage was "necessary to prevent a significant long-term deterioration in [Marquardt's] mental condition." Because the court determined that Marquardt would not be released from the institution unless his condition improved, and that that was unlikely without an increased medication, the trial court ordered Marquardt to submit to the increased dose. Marquardt appealed, arguing that the trial court had misapplied the controlling case law, *People v. Medina*, 705 P.2d 961 (1985).

Holding: The Supreme Court of Colorado found that the trial court had applied the incorrect legal test—misapplying *Medina* by relying on evidence that Marquardt was not improving on the lower dose. Rather, the court explained, *Medina* required that a court

must find a patient to be deteriorating in order to justify increased medication against the patient's wishes.

Notable Points:

Deterioration, not just lack of improvement, is required for an order of forced medication: *People v. Medina*, 705 P.2d 961 (1985) sets forth a test to determine whether non-consenting treatment by antipsychotic medication may be administered to an involuntary committed mental patient. The test is one that involves mixed questions of law and fact, and is a four-factor test. The State must show: “(1) that the patient is incompetent to effectively participate in the treatment decision; (2) that treatment by antipsychotic medication is necessary to prevent a significant and likely long-term deterioration in the patient's mental condition or to prevent the likelihood of the patient's causing serious harm to himself or others in the institution; (3) that a less intrusive treatment alternative is not available; and (4) that the patient's need for treatment by antipsychotic medication is sufficiently compelling to override any bona fide and legitimate interest of the patient in refusing treatment. To determine whether a patient is “in danger of long-term deterioration” it is not enough to show that a patient will not likely *recover* without an increased dose of medication—the State must show that there is a danger of long-term *deterioration* in the patient's condition. Although the state has a legitimate interest in institutional security, that interest is not sufficient to expose those in its care to increased or nonconsensual medication “solely for the purpose of alleviating the risk of some possibility of future injury or damage to the patient or others.”

Intellectual Disability and the Death Penalty: Inability of defendant to show manifestation of intellectual disability before age 18 does not, alone, result in failure of *Atkins* claim; *Hall v. Florida* requires a court to analyze all three prongs of the intellectual disability diagnostic standard, and requires a different legal analysis of the onset prior to age 18 prong than was undertaken by the trial court.

***Oats v. State*, 181 So. 3d 457 (Fla. 2015), *reh'g denied* (Mar. 15, 2016)**

Background: Sonny Boy Oats, Jr., was tried and convicted of robbery and first-degree murder in 1979 and his conviction was affirmed on appeal. In 1994, he sought post-conviction relief but was denied. Post-*Atkins*, he filed a motion to vacate his death sentence on the grounds that he was intellectually disabled. The circuit court held an evidentiary hearing and denied the motion, concluding that Oats had not been able to establish that his intellectual disability had manifested prior to age 18 as required by Florida's statutory test for determining intellectual disability.

Holding: The Florida Supreme Court reversed, giving three reasons for its decision. First, it noted that the Supreme Court's decision in *Hall v. Florida* indicated that the lower court should have addressed all three prongs of the intellectual disability diagnostic standard and not denied the claim based on the apparent failure to meet one of the prongs. Second, the Court held that the lower court failed to consider all of the testimony presented, including evidence from prior postconviction proceedings. Third, the Court

found that the lower court erroneously conflated “manifested” with “diagnosed,” an error upon which it based its conclusion that Oats failed to establish his intellectual disability.

Notable Points:

Hall v. Florida requires a circuit court to address all three prongs of the intellectual disability test rather than finding one factor to be dispositive: One of the three prongs of the intellectuality disability test is manifestation of the condition before age 18, but that determination is not dispositive. The Florida Supreme Court held that it was reversible error for the trial court not to consider all three prongs of the intellectual disability test, and to rely solely on the third prong of the test in denying Oats’s claim. The Court, however, was careful to say that, although this was reversible error here, failure to consider all three prongs should not constitute per se reversible error. Nonetheless, all three prongs must be considered because they are interdependent and, even when one is not satisfied, “a finding of intellectual disability may still be warranted based on the strength of the other prongs.”

The circuit court erred in making its conclusion without weighing all testimony presented by defendant: The Florida Supreme Court also held that it was error for the circuit court not to consider all the testimony that Oats presented. The parties stipulated to consideration of the mental health evidence presented in a previous proceeding, and the circuit court did not require the parties to recall all witnesses who testified previously. In its decision, however, the circuit court stated that it was “not in a position to reevaluate the credibility of the witnesses who testified or the evidence” considered in those prior proceedings and simply accepted the postconviction court’s ruling. The Florida Supreme Court held that the lower court should have permitted the parties to recall the witnesses in a new proceeding and submit evidence so that it could be considered and weighed.

Legal standard for analyzing whether intellectual disability manifested before age 18: The Florida Supreme Court noted that the manifestation prong is used to ensure there was evidence of intellectual disability during the developmental period, and that to require evidence of diagnosis before age 18 would render the first two prongs of the standard moot. The Court pointed to the U.S. Supreme Court’s analysis in *Hall* as demonstrative of how evidence of manifestation, without affirmative diagnosis, can lead to a clear finding that the prong was established.

Mitigation Evidence and Ineffective Assistance of Counsel: In a first degree murder case in which the defendant received a death sentence, the failure of defense counsel to investigate and present mitigation, including evidence regarding the defendant’s traumatic childhood and low intellectual functioning, sufficiently “undermined” “confidence in the outcome” so as to warrant remand for new hearing.

Salazar v. State, No. SC13-1233, 2016 WL 636103 (Fla. Feb. 18, 2016)

Background: After a jury trial, Neil Salazar was convicted of first-degree murder and related crimes and sentenced to death. The Supreme Court of Florida affirmed both the

conviction and the death sentence. Salazar appealed and petitioned for a writ of habeas corpus. The basis of the appeal was that Salazar's trial counsel was deficient and had failed to investigate his background and intellectual functioning and present mitigation evidence at the penalty phase.

Holdings: The Supreme Court of Florida denied Salazar's habeas petition, but they remanded the case for a new penalty phase, holding that Salazar's trial counsel had provided ineffective assistance at the penalty phase. The court held that Salazar had demonstrated both deficiency and prejudice in regard to his trial counsel's performance at the penalty phase. Specifically, the court found that there was a reasonable probability that the result would have been different if trial counsel had presented evidence regarding Salazar's low IQ, adaptive deficits, head injury, and family history.

Notable Points:

Because the known evidence would lead a reasonable attorney to investigate further, counsel's failure to do so was objectively unreasonable: Salazar's trial counsel was deficient—an element of the ineffective assistance claim—in failing at the penalty phase to investigate Salazar's background and intellectual functioning. Specifically, a psychologist's report from the defendant's preliminary evaluation had directly informed trial counsel of defendant's mental health problems and possible brain damage. Given this information, it was objectively unreasonable for Salazar's trial counsel not to investigate further.

Counsel's failure resulted in prejudice at the penalty phase: The Supreme Court of Florida also held that Salazar had been prejudiced by his trial counsel's failures in the penalty phase. Considering the additional mitigation evidence relating to Salazar's intellectual functioning, low IQ scores, adaptive deficits, childhood head injuries, and family history, there was a reasonable probability that hearing this additional evidence at the penalty phase would have led to a result other than the imposition of a death sentence.

Insanity Defense and Double Jeopardy: A criminal defendant can present an insanity defense without providing prior notice to the prosecution if the defense calls no medical experts, and the decision of the trial court to declare a mistrial, over defendant's objection, when defendant reveals at trial that an insanity defense will be pursued, must result in dismissal of the charge against the defendant, as a re-trial would subject defendant to double jeopardy.

Otis v. State, No. S15A1717, 2016 WL 462657 (Ga. Feb. 8, 2016)

Background: Geary Otis was charged with malice murder and other offenses arising out of the assault of one victim and the death of another. After a jury was impaneled and the State presented opening statements, the defense revealed, at the end of its opening statement, its intent to pursue an insanity defense. The defense had not given prior notice to the State, and the State objected—out of the presence of the jury—to the raising of the insanity defense on the basis of this lack of prior notice. At a hearing on the following

day, the trial court declared a mistrial (over Otis's objection) and rescheduled the case for trial in two weeks. Otis then filed a plea in bar on the grounds of double jeopardy, and the trial court denied the plea in bar. Otis appealed, asserting that the trial court had erred both in declaring a mistrial and in denying his plea in bar.

Holdings: The Supreme Court of Georgia agreed with Otis and reversed the circuit court's denial of his plea in bar. The Court further held that the circumstances of the case did not demand entry of a mistrial order, and that the trial court had erred in entering that order over the defendant's objection. Because the mistrial was improperly declared, double jeopardy prevented Otis from being tried again.

Prior notice of intent to pursue an insanity defense is required only when the defendant intends to rely on expert testimony: In *Abernathy v. State*, 462 S.E.2d 615 (Ga. 1995), the Georgia Supreme Court stated that the purpose of notice of an insanity defense was to "give the State an opportunity to obtain an independent expert mental health evaluation" and that a defendant "need not provide notice pretrial if he intends to present evidence of mental illness solely through lay witnesses." This decision was made in the context of interim review of a death penalty case, but the Georgia Supreme Court clarified that the holding and reasoning were not limited to that context, and applied in all cases in which a defendant intends to assert an insanity defense.

Competency to Stand Trial and the Right to Self-Representation: It is not a violation of due process to make a retroactive determination, on remand, of a defendant's competency at the time of the original trial where there is a sufficient record to support that finding. When raising an *Edwards* challenge for the first time on appeal, the burden is on the defendant to show fundamental error.

State v. Hawkins, 363 P.3d 348 (Idaho 2015)

Background: Faron Hawkins was convicted of two counts of robbery. At trial, he admitted to robbing the banks, but contended that he did so under duress from previous involvement with agencies (including the Central Intelligence Agency and Defense Intelligence Agency). The Court of Appeals vacated Hawkins' conviction, holding that the district court had erred by not ordering a psychiatric evaluation and holding a competency hearing. At the competency hearing on remand, two experts determined that Hawkins was competent during the course of his legal proceedings. The state filed an interlocutory appeal based on the Court of Appeals previous language that suggested a retrospective competence hearing was disallowed. The Court of Appeals clarified that a retrospective competence hearings are permissible. On remand for the second time, the district court set another competence hearing to allow Hawkins to cross-examine witnesses and present his own expert. Before that hearing, Hawkins moved to proceed pro se, which the district court granted. After several months of delays due to Hawkins' actions, the court proceeded to find Hawkins competent and sentence him despite his never presenting evidence regarding competency. Hawkins appealed.

Holdings: The Supreme Court of Idaho affirmed the judgment of the district court, finding no reversible error in the actions of the court below. Specifically, the Supreme Court of Idaho found that the district court’s retroactive determination of Hawkins’ competency to stand trial did not violate his due process rights. Further, the Court held that, although a standard was not yet established for reviewing, in response to an *Indiana v. Edwards* challenge, a lower court’s granting of a pro se motion, the standard of review was in fact controlled by the fact that Hawkins raised the issue for the first time on appeal. Therefore, the lower court’s actions were to be reviewed under the fundamental error standard, and the Court found that Hawkins did not establish a clear violation of a constitutional right. The Court agreed with other courts that “*Edwards* allows, but does not require, states to insist upon representation by counsel for certain “gray-area” defendants. It does not give such a defendant a constitutional right to have his request for self-representation denied.”

Sentencing of Defendants with Intellectual Disability and/or Psychiatric Issues: Trial court did not abuse its discretion when it (1) declined to reduce the sentence of defendant convicted of sexually abusing two children based upon the mitigating developmental and psychiatric circumstances, and (2) relinquished defendant to custody of Board of Correction when a suitable community-based placement could not be found.

***State v. Dabney*, No. 42650-2014, 2016 WL 768121 (Idaho Feb. 29, 2016)**

Background: Darrien Dabney, a developmentally disabled 18-year-old, forcibly sodomized two 6-year-old boys with whose family he had been living for less than a month. He was indicted for two counts of lewd conduct and ultimately pled guilty pursuant to a plea agreement: the State would dismiss the other count and would recommend a suspended sentence of 20 years (5 fixed and the remaining indeterminate), with Dabney to be committed to a secure residential center for mentally delayed adults. When the district court determined that no suitable community placement could be found, it relinquished jurisdiction over Dabney and remanded him to the custody of the Idaho Board of Correction. Dabney filed a motion asking for reconsideration of his sentence, and, finding that Dabney had not presented any new information in support of his motion, the lower court denied reconsideration of his sentence or relinquishment of jurisdiction.

Holdings: The Supreme Court of Idaho affirmed (1) the defendant’s sentence, (2) the lower court’s order relinquishing jurisdiction, and (3) the lower court’s order denying the motion to reduce the sentence.

Notable Points:

The district court did not abuse its discretion in pronouncing its sentence or relinquishing jurisdiction over defendant: The Supreme Court of Idaho held that the trial court’s sentence was not unreasonable despite the mitigating evidence presented. Although mitigating circumstances included the defendant’s abusive upbringing, sexual abuse at age 10, and extensive psychiatric issues, the sentencing decision was not an abuse of discretion because it was based primarily on the need to protect the

community. Because no suitable community placement existed, the court did not err when it eventually relinquished jurisdiction over the defendant. The trial court had retained jurisdiction for a period of time following sentencing, but once it was determined that there was no appropriate community-based facility that could allow for treatment of the defendant, it was not unreasonable for it to relinquish its jurisdiction. This holding was supported by the fact that the defendant had “ample opportunity to provide evidence regarding placements to allay [the] court’s concerns, [but] he did not do so.”

Incarcerating defendant instead of placing him on probation is constitutional: The Supreme Court also held that the district court’s decision not to place Dabney on probation clearly did not violate any of his constitutional rights. Because Dabney had already been sentenced to prison—and the only issue before the court was whether the sentence would be suspended and Dabney would be placed on probation—he had no constitutional or inherent right to be released prior to the expiration of his prison term.

Confidentiality of Medical Records: In litigation over nursing home liability for a resident’s assault on another resident, state confidentiality laws prohibit and prevent discovery by the plaintiff of the medical records of the resident who committed the assault.

Stuckey v. Renaissance at Midway, 2015 IL App (1st) 143111, 45 N.E.3d 1151 (Il. Dec. 18, 2015)

Background: While a resident at a long-term care facility operated by defendants, Robert Holman was physically assaulted by another resident. Plaintiff Johnnie Stuckey—as attorney-in-fact for Holman—filed a personal injury action to recover damages incurred in the assault. Plaintiff moved to compel defendants to produce partially redacted records regarding the resident who assaulted Holman. Defense counsel refused and was held in “friendly contempt.” On appeal, defendants contended that the circuit court erred in ordering production of the records, arguing that both the Illinois’ Mental Health and Developmental Disabilities Confidentiality Act (the “Confidentiality Act”) and physician-patient privilege prohibited disclosure of the records.

Holdings: The appellate court agreed with the defendants, reversing the circuit court’s discovery orders and vacating the order imposing a fine on defendants for refusal to comply with those discovery orders. The appellate court concluded that the records were protected by the Confidentiality Act and that, because the plaintiff had not shown any exception to the provisions of the Act, the defendant could not be compelled to produce the records.

Notable Points:

Plaintiff failed to raise any possible exception to the Confidentiality Act that would authorize disclosure: Because plaintiff sought records including patient information

forms, nurse's notes, care plans, and social service progress notes—all documents that constitute “records” or “communications” under the Mental Health and Developmental Disabilities Confidentiality Act—plaintiff was required to demonstrate a specific exception to the Confidentiality Act that allowed disclosure. Statutory exceptions, however, are “narrowly crafted” and plaintiff never asserted the applicability of any exception.

Civil Commitment of Sexually Dangerous Individuals: Release of an individual from civil commitment under the state's sexually dangerous individual law ordered upon finding that the district court failed to cite on the record facts establishing by clear and convincing evidence that the offender “has a present serious difficulty controlling his behavior.”

In re Johnson, 2016 ND 29, 2016 WL 669398 (ND Feb. 18, 2016)

Background: Jeremy Johnson was committed as a sexually dangerous individual in 2012, and in 2013, Johnson petitioned the court for discharge. Finding that Johnson was still a sexually dangerous individual, the district court continued his commitment; Johnson appealed and the North Dakota Supreme Court remanded the case for further findings of fact on the question of whether Johnson had difficulty controlling his behavior. On remand, the district court made additional findings and again issued an order continuing Johnson's commitment. Johnson appealed the district court's order continuing his commitment as a sexually dangerous individual, arguing that the court's findings were insufficient to demonstrate that he had serious difficulty controlling his behavior.

Holdings: The Supreme Court of North Dakota concluded that the district court's order and findings were insufficient and reversed the order continuing Johnson's commitment, directing that Johnson be released from civil commitment. Specifically, the Supreme Court of North Dakota found that the district court had not put forward specific factual findings to support the legal conclusion that Johnson's mental disorder involved serious difficulty controlling his behavior that sufficed to “distinguish a dangerous sexual offender whose disorder subjects him to civil commitment from the dangerous but typical recidivist in the ordinary criminal case.” When the district court fails to put forward such findings, it errs as a matter of law.

Notable Points:

Lack of progression in treatment is not sufficient: The Supreme Court of North Dakota made it clear that an actual finding of serious difficulty controlling behavior must be made in order to justify denial of a petition for discharge from civil commitment of a sexually dangerous individual. Specifically, this means that a court may not rely solely on evidence of lack of progression in treatment to prove that a committed individual has difficulty controlling his behavior—such lack of progress does not necessarily equate to a serious difficulty controlling behavior. Although the Supreme Court conceded that lack of progress in treatment “may indicate serious difficulty controlling behavior” it “decline[d] to infer one equals the other.” The State

must present specific evidence (and the court must make a specific finding) regarding whether a defendant has serious difficulty controlling his behavior.

IV. Institute Programs

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Special program of interest to mental health providers, juvenile justice agencies, youth services programs, attorneys working with juveniles, policy and administrative professionals, and others:

Understanding, Assessing and Treating Aggressive and Antisocial Youth

May 17 2016: Charlottesville VA: This one-day program - with Paul Frick PhD - will cover a range of issues regarding aggressive and antisocial youth: risk factors across different subgroups, discussion of callous-unemotional traits in these youth, overview of research regarding DSM-5 diagnostic criteria, assessment of behaviors and traits, overview of research regarding effective prevention and treatment, and discussion of some evidence-based approaches in mental health settings.

Professor Frick is the Roy Crumpler Memorial Chair and Professor in the Department of Psychology at Louisiana State University and he is a Professor in the Learning Science Institute of Australia at Australian Catholic University. His work has been funded by the National Institute of Mental Health, Office of Juvenile Justice and Delinquency Prevention, and the John T. and Catherine D. MacArthur Foundation. Dr. Frick was a member of the American Psychiatric Association's DSM-V Workgroup for ADHD and the Disruptive Behavior Disorders (2007-2012).

Accredited Continuing Education of interest to psychiatrists, psychologists and other mental health professionals, criminal justice professionals, attorneys, and others available. More information regarding CE, registration, and venue at:

<http://cacsprd.web.virginia.edu/ILPPP/OREM/JuvenilePrograms/Course/87>

Developments in Mental Health Law is published electronically by the Institute of Law, Psychiatry & Public Policy (ILPPP) with funding from the Virginia Department of Behavioral Health and Developmental Services. The opinions expressed in this publication do not necessarily represent the official position of either the ILPPP or the Department.

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ISSN 1063-9977

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