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# Recent Developments: Cruzan v. Missouri Department of Health: Missouri May Require Clear and Convincing Evidence of a Patient's Wishes to Discontinue Food and Water

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In November 1984, Richard Stephenson was murdered in East St. Louis, Illinois. There were no suspects in the homicide until March 1986, when Donald Charlton, an inmate of the Graham Correctional Facility, informed the police that he had pertinent information regarding the crime. A fellow inmate of Charlton's, Lloyd Perkins, had told him the details of a murder he committed in East St. Louis.

Acting on Charlton's detailed account, which the police found to be credible, police traced Perkins to a jail in Montgomery County, Illinois, where he was awaiting trial on an unrelated charge. In order to further investigate Perkins' relation to the murder, police placed undercover agent, John Parisi, and Charlton in a cellblock with Perkins. The two men were instructed to engage Perkins in casual conversation and report any reference made to the Stephenson murder. Parisi and Charlton gained Perkins' confidence by promising a fabricated escape plot. In that murder could have been necessary to effectuate such a plot, Parisi inquired whether Perkins had ever murdered anyone before. Perkins responded by relaying the details of how he murdered Stephenson. At no time was Perkins given *Miranda* warnings, and Perkins was subsequently charged with the Stephenson murder.

At trial, Perkins moved to suppress his statements made to Parisi while in jail. The trial court granted the motion; the State appealed. In affirming, the appellate court held that *Miranda v. Arizona*, 384 U.S. 436 (1966), "prohibits all undercover contacts with incarcerated suspects which are reasonably likely to elicit an incriminating response." *Perkins*, 110 S. Ct. at 2396. The Supreme Court granted certiorari to determine whether *Miranda* warnings must be given under such circumstances, and reversed.

In an opinion delivered by Justice Kennedy, the Supreme Court first cited the fifth amendment privilege against self-incrimination, which prohibits the admission into evidence of statements made during custodial interrogation, absent *Miranda* warnings. Custodial interrogation involves the questioning of a suspect in a coercive, police-dominated atmosphere. *Id.* at 2397. The Court found that the doctrine was in-

tended to safeguard suspects from the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* (quoting *Miranda*, 384 U.S. at 467).

The Court, however, distinguished *Perkins* from the concerns underlying *Miranda*. The problem of compulsion inherent in a police-dominated atmosphere, the Court reasoned, is not present when an incarcerated suspect speaks voluntarily to an undercover agent. "Coercion is determined from the perspective of the suspect." *Id.* (citations omitted). Thus, the coercive atmosphere is absent where a suspect speaks voluntarily to a fellow inmate, unaware that the inmate is a police officer. *Id.*

Moreover, the Court rejected the state court's assumption that whenever a suspect is in technical custody, *Miranda* warnings must precede any conversation with an undercover agent. *Id.* The Court reasoned that a suspect, unaware that he is speaking with an undercover agent, is neither motivated by pressure nor the reaction he expects from his listener. *Id.* at 2398. *Miranda*, the Court stated, was not intended to protect statements motivated entirely by a suspect's desire to impress other inmates. When inmates boast to fellow inmates of their crimes, they do so at their own risk. Only when a suspect is under coercive pressure to do so, must *Miranda* warnings be given. *Id.*

In addressing the ploy used to elicit Perkins' statements, the Court found that "strategic deception" did not rise to the level of coercion and, was therefore not violative of the Self-Incrimination Clause. *Id.* (citations omitted). Relying primarily on *Hoffa v. United States*, 385 U.S. 293 (1966), the Court reiterated its approval of the use of deceptive tactics. *Perkins*, 110 S. Ct. at 2398. In *Hoffa*, incriminating statements made by the petitioner to a police informant who fooled him into believing that he was a colleague, were held admissible, in that they did not result from coercion. The only factual distinction between the cases, the Court noted, was that Perkins was incarcerated, a fact the Court considered irrelevant. *Id.*

In addition, the Court distinguished

ated suspect made incriminating statements to an Internal Revenue Service agent absent *Miranda* warnings. *Id.* In *Mathis*, the suspect's statements were found to be inadmissible. However, in *Mathis*, the Court noted, the suspect was fully aware that the agent was a government official and was therefore susceptible to coercive pressure to answer questions. *Perkins*, on the other hand, was unaware of the undercover agent's official status. *Id.*

Finally, the Court rejected the respondent's argument that a bright-line rule for applying *Miranda* was desirable. *Id.* at 2389. The Court reasoned that law enforcement officials would have no problem implementing the holding that undercover agents need not *Mirandize* incarcerated suspects. *Id.* The holding clearly stated that *Miranda* concerns were not present in such cases, and therefore, *Miranda* warnings were not required under such circumstances.

Finding no *Miranda* concerns implicated when an undercover agent speaks with an incarcerated suspect, the Court held that *Miranda* warnings need not be given. The Court found arguments against the use of such deceptive techniques and in favor of *Miranda* warnings in all custodial situations to be unpersuasive. Thus, the use of undercover agents to elicit incriminating information from suspects was ruled to be a valid law-enforcement technique.

— Tena Touzos

#### ***Cruzan v. Missouri Department of Health*: MISSOURI MAY REQUIRE CLEAR AND CONVINCING EVIDENCE OF A PATIENT'S WISHES TO DISCONTINUE FOOD AND WATER**

In *Cruzan v. Missouri Dep't of Health*, 110 S. Ct. 2841 (1990), the Supreme Court held that a state may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person in a persistent vegetative state. Thus, unless the patient expressed his wishes sufficiently to meet this standard before incompetency, he would remain in a vegetative state indefinitely, regardless of the objections and wishes of family members.

Nancy Cruzan was rendered incompetent by injuries sustained in an automobile accident. After the accident she remained in a Missouri state hospital in a persistent vegetative state, where the State of Missouri bore the cost of her care. Nancy's parents sought a court order for the withdrawal of their daughter's artificial feeding and hydration equipment, as it was apparent that she had virtually no chance of recovering. The trial court found that an incompetent person had the right to refuse "death-prolonging procedures," but the Court did not adopt the clear and convincing evidence standard. *Id.* at 2846. Thus, the Court issued the order based on a conversation between Nancy and her housemate in which Nancy stated that if sick or injured she would not wish to continue her life unless she could live at least halfway normally. *Id.*

The Supreme Court of Missouri reversed and held that because no clear and convincing evidence existed as to Nancy's intentions specifically regarding refusal of food and fluids, her parents could not refuse the treatment for her. *Id.* It also decided that the Missouri Living Will statute, Mo. Rev. Stat. § 459.010 et. seq. (1986), embodied a state policy strongly favoring the preservation of life. *Id.* The U.S. Supreme Court granted certiorari to decide whether Nancy had a constitutional right to require the hospital to withdraw her treatment under these circumstances.

The Court began by recognizing a person's right to refuse treatment based on the common law doctrine of informed consent. It stated that the dispensing of medical treatment first required a patient's informed consent embodied in the notion of bodily integrity. *Id.* at 2846-47. The right to privacy, which was the foundation of a similar case, *In re Quinlan*, 70 N.J. 10, 38-42 355 A.2d 647 (1976), was also examined as a basis for terminating treatment. *Cruzan*, 110 S. Ct. at 2847.

In *Quinlan*, the Supreme Court of New Jersey granted the parents' request to disconnect their incompetent daughter's respirator based on the daughter's constitutional right to privacy. The court concluded that the only practical way to preserve the incompetent patient's privacy right was to allow her family to decide whether she would exercise it in these circumstances. The U.S. Supreme

Court, however, pointed out that after *Quinlan*, most courts based a patient's right to refuse treatment either solely on the common law right to informed consent or on both the common law right and the right to privacy. *Id.*

The *Cruzan* Court also inferred from its prior decisions that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment. It previously held in *Washington v. Harper*, that "[t]he forcible injection of medication into a non-consenting person's body represent[ed] a substantial interference with that person's liberty," *Cruzan* 110 S. Ct. at 2851 (quoting *Washington* 110 S. Ct. 1028, 1033 (1990)). The Court stated that determining that a person has a Due Process "liberty interest" did not end the inquiry, but that the liberty interest must be balanced against the relevant state interests. *Id.* (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)).

The Court assumed for the purposes of this case that the Constitution grants a competent person the right to refuse lifesaving hydration and nutrition. Based upon this assumption, the Court addressed the Cruzan's claim that an incompetent person possesses the same right. The Court noted, however, that an incompetent person cannot make an informed and voluntary choice without the help of some sort of "surrogate." *Id.* at 2852.

The Court acknowledged Missouri's recognition of a surrogate to act for the patient in electing to have life-sustaining treatment withdrawn. It focused, however, on Missouri's establishment of the procedural safeguard requiring proof by clear and convincing evidence to assure that the action of the surrogate conformed to the wishes expressed by the patient while competent. *Id.* Thus, the Court determined that the issue was whether the United States Constitution forbade the establishment of such a requirement. Based upon the interest the state sought to protect, the Court found that the required heightened procedural standard was valid. *Id.*

Missouri's interest was the protection and preservation of human life. The Court supported this interest by recognizing that states treat homicide as a serious crime, and most impose criminal penalties for assisting with suicide.

*Id.* Missouri also properly sought to secure the deeply personal nature of choosing between life and death. *Id.* at 2842-53. The Court cautioned, however, that not all incompetents will have available surrogates, and where family members are present, some will not act to protect the patient. *Id.* at 2853. The Court thus allowed Missouri to advance these interests through the adoption of the heightened evidentiary requirement. *Id.* In addition, the Court asserted that a state may decline to make judgments about the quality of an individual's life and simply assert an unqualified interest in the preservation of life to be weighed against the constitutionally protected interests of the individual. *Id.*

The Court determined that Missouri correctly sought to advance these interests through the adoption of a clear and convincing standard of proof in this situation. It noted that the greater the consequences of an erroneous decision, the more stringent the burden of proof should be. *Id.* at 2854. The Court thus held that Missouri properly placed that increased burden on those seeking to terminate an incompetent's life-sustaining treatment in that the decision to withdraw treatment is irreversible.

After finding that the Missouri Supreme Court had properly concluded that the evidence at trial did not meet the required standard of proof, the Court ruled that the Due Process Clause did not require a state to accept the "substituted judgment" of close family members in its absence. *Id.* at 2855-56. Based upon the same reasons that it may require a heightened procedural standard, a state may choose to defer to a patient's wishes rather than confide the decision to close family members. *Id.* at 2856.

Justice O'Connor concurred that a person has a liberty interest in refusing artificially delivered food and water. She was concerned, however, in that the majority's decision does not preclude a future determination that the Constitution requires the states to accept the decisions of a patient's duly-appointed surrogate. She stated that such acceptance may be required because of its practicality and the desire to honor a patient's intent. *Id.* at 2857 (O'Connor, J., concurring). She concluded that the procedures for safeguarding incompetents' liberty interests are entrusted to

the “laboratory” of the states. *Id.* at 2859 (O’Connor, J., concurring).

Justice Scalia also concurred with the Court’s analysis but preferred that the decision pronounce that the federal courts have no business in this field. *Id.* (Scalia, J., concurring). He noted that American Law has always accorded the state power to prevent suicide. He added that the cause of death in suicide and starvation is the suicidal person’s conscious decision to “pu[t] an end to his own existence.” *Id.* at 2860 (Scalia, J., concurring) (quoting 4 W. Blackstone, Commentaries 189).

In a vigorous and lengthy dissent, Justice Brennan, joined by Justice Marshall and Justice Blackmun, opined that the majority’s opinion failed to respect the best interests of the patients. He stated that “the right to be free from unwanted medical treatment [was] categorically limited to those patients who had the foresight to make an unambiguous statement of their wishes while competent.” *Id.* at 2879 (Brennan, J., dissenting).

Justice Stevens, dissenting, questioned the majority’s definition of “life” by suggesting that, for patients like Nancy, there is a serious question as to whether the mere persistence of their bodies is “life.” *Id.* at 2892 (Stevens, J., dissenting). He emphasized that “[t]he meaning and completion of her life should be controlled by persons who have her best interests at heart — not by a state legislature concerned only with the ‘preservation of life.’” *Id.* (Stevens, J., dissenting).

The Supreme Court recognized that a “right to die” exists by virtue of the Due Process Clause and mandated that it be respected in states that have such legislation. Missouri properly chose to limit this right by requiring clear and convincing evidence of the patient’s wishes. Other limits on the right to die are left to the states to define in their own “laboratories.” It would appear that the confusion over the right to die has just begun.

— Lesley A. Davis

### **Peel v. Illinois: THE FIRST AMENDMENT’S COMMERCIAL SPEECH STANDARDS ALLOW AN ATTORNEY TO ADVERTISE HIS CERTIFICATION**

In *Peel v. Illinois*, 110 S. Ct. 2281 (1990), the United States Supreme Court held that an attorney had a constitutionally protected right, under the first amendment’s commercial speech standards, to advertise his certification as a trial specialist. States are, thereby, prohibited from completely banning these advertisements but may use less restrictive measures to regulate them.

In 1987, the Attorney Registration and Disciplinary Commission of Illinois (“Commission”) filed a complaint alleging that Gary Peel held himself out as a certified legal specialist in violation of the Illinois Code of Professional Responsibility. *Peel*, 110 S. Ct. at 2285.

Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility provides that “a lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice... no lawyer may hold himself out as ‘certified’ or a ‘specialist.’” *Id.* at 2286. Peel’s professional letterhead included the notation “Certified Civil Trial Specialist by the National Board of Trial Advocacy” (“NBTA”), followed by the words “Licensed: Illinois, Missouri, Arizona.” *Id.* at 2285.

The Illinois Supreme Court held that the letterhead was misleading in three ways. First, on the letterhead, the certification was listed prior to the licensure, and the court found that the public could mistakenly construe that Peel’s authority to practice trial advocacy came from the NBTA, thereby “impinging on the exclusive authority” of the courts to license attorneys. *Id.* at 2286. Second, the NBTA certification implied that Peel’s legal services as a trial advocate were superior to other attorneys’ services, and thirdly, that NBTA certification was a product of state licensure. *Id.* at 2287. Therefore, the Illinois Supreme Court followed the Commission’s recommendation and censured Peel. *Id.* at 2286.

The Supreme Court found that NBTA was a well recognized organization requiring exacting standards for certification. These standards included jury and non-jury trial experience as lead counsel, successful completion of a day-long

examination, continuing legal education requirements, and demonstrated writing ability. *Id.* at 2284-85. The Court also found that certification must be renewed every five years and that several states, including Minnesota and Alabama, recognized NBTA certification. *Id.*

The Court next examined which standards should be used in determining whether the State could regulate this type of advertisement. The Supreme Court agreed with the state court that the standards for commercial speech under the first amendment applied because Peel’s letterhead was a “form of commercial speech governed by the ‘constitutional limitations on the regulation of lawyer advertising.’” *Id.* at 2287 (quoting *In re Peel*, 126 Ill.2d 397, 402, 534 N.E.2d 980, 982).

In the case of *In re R.M.J.*, 455 U.S. 191 (1982), the Court summarized these standards as:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions.

*Peel*, 110 S. Ct. at 2287. However, the Court in *In re R.M.J.* also held that the states may not place an absolute prohibition on certain types of potentially misleading information. *Id.* (citing *In re R.M.J.*, 455 U.S. at 203.)

The Court then evaluated whether the letterhead was misleading and whether state censorship was justified. The Court assumed that some consumers might infer from the sequential listing of the certification that it exceeded the qualifications for admission to a state bar. *Id.* at 2288. However, since the NBTA’s requirements were verifiable factually, and not statements of quality or opinion, they were not misleading. *Id.* In addition, the Court emphasized that NBTA’s certification was like a trademark, in that, the quality of the certification was recognized because of the organization granting it. *Id.*

The state court had argued that the statements were misleading because consumers might identify the certification as being issued by the state. The Supreme