ROUGH SEX

Offensive defense

Alden Baker may not be the kind of guy everyone would like to invite to dinner. In the early 1990s, the Medford businessman twice raped his chauffeur after unsuccessful nights of cruising for male lovers, a crime for which he received a six-to-10-year prison sentence in 1991. When he was arrested, authorities seized thousands of pornographic images and videos — some of it kiddie porn — from a computer bulletin board Baker maintained.

In the spring of 2001, Baker finished serving his time, but the government wants to keep him locked up as a sexually dangerous person. Chapter 123A of the Massachusetts General Laws provides for the indefinite detention (up to a life term) of ex-cons with mental abnormalities that predispose them to commit additional sex crimes. Baker is currently being held at the Nemansket Correctional Center, a state-run treatment facility for sexually dangerous persons, pending a civil-commitment trial in Middlesex County.

If a preliminary hearing held this spring is any indication, the government plans to contend at the trial that what makes Baker dangerous is his taste for *sadomasochistic sex*, including altogether voluntary and consensual S&M encounters. Middlesex County prosecutors are arguing that Baker's S&M predilections indicate a mental abnormality that makes him likely to engage in sexual offenses if he is not committed. Baker plans to contest these charges vigorously, and the case will likely emerge as a test of the prosecutors' claim that any sex that inflicts pain is dangerous. The trouble is that preparing this defense requires Baker to think about — and, worse, talk with his attorneys about — sex. And thinking about sex is what the authorities at Nemansket want to stop him from doing.

Baker plans to retain an expert witness on sadomasochistic sex to counter the government's accusation that this practice, even when entirely consensual, is a form of sexual deviancy — which supports the state's case for committing him. But when Baker's attorney, Boston's John G. Swomley, recently sent his client two books by potential witness Guy Baldwin, prison authorities refused to deliver them, citing a regulation prohibiting sexually explicit materials in the prison. Attorney-client privilege protects communications between inmates and their lawyers from the prying eyes of prison authorities, so Swomley filed a court motion asking that the prison authorities be ordered to turn over the books to Baker. In a breathtaking July 22 ruling, Superior Court justice Charles Grabau denied the motion on the grounds that books about sex "might interfere with the institutional goals of rehabilitation." He added that the fact that Swomley knew, from his frequent work at Nemansket, that the packages he marked as confidential would be inspected "precluded [him] from asserting attorney-client privilege." (Disclosure: the authors occasionally collaborate with Swomley, though not on the Baker case.)

The prison authorities are indeed allowed to open mail from attorneys in order to prevent smuggling of contraband (such as drugs) into the prison, but they must do so in front of the inmate to provide assurance that they do not read attorney-client privileged material. This does not, however, give them the right to decide which written materials to pass along to the inmate client. Furthermore, Grabau's ruling ignores the obvious fact that to participate in their own defense, accused murderers need to read about murder, robbers about robbery, and sex offenders about sex. (The books, by the way, were not terribly racy and contained no illustrations.) In order to assess whether he wants to call Baldwin as a witness, Baker needs to read the expert's writings — and determine for himself whether he thinks it contains scholarly analysis or perverse drivel. The expert, after all, could be examined on the witness stand about all his published works, so the client must be able to read what the expert has written. Keeping Baker, in the name of "rehabilitation," from reading books by potential expert witnesses clearly denies him his Sixth Amendment right to work with his lawyer and participate in his defense.

Many prisons allow inmates to receive steamy writing, but not sexy pictures — a distinction that is somewhat arbitrary, but not irrational if one accepts the proposition that sexually explicit material for prisoners should be censored at all. The corrections code, however, allows the Nemansket superintendent to exclude any material that interferes with the "rehabilitation" process there, and he appears to have decided to ban erotic prose. It would be unlawful for a lawyer to smuggle erotic material to his client for its entertainment or prurient value, under cover of an "attorney-client privilege" seal.

Swomley, however, did no such thing. He is plotting a major attack on a key prong of the government's case for Baker's commitment — the notion that indulgence in consensual sadomasochistic sex in and of itself indicates dangerousness — and is duty-bound to consult with his client in doing so. His word that the materials marked as attorney-client privileged were necessary to Baker's defense should have been enough. Once Judge Grabau examined the record, he immediately should have seen the importance and relevance of the materials to Baker's defense and should have supported Swomley's judgment. Ironically, the same day he denied the motion to allow Baker to receive the books, he granted a motion allowing Swomley and Baker to screen some of Baker's homemade blue movies at Nemansket, also as part of the preparation for trial. Defending sex crimes, as Grabau obviously should know, requires talk of sex. The Sixth Amendment trumps prison regulations any day, notwithstanding prison authorities' notions of what constitutes "good" versus "bad" sex.

— Harvey A. Silverglate & Joshua E. Gewolb