366 (1956), for its argument. That decision allowed federal civil commitment of those found incompetent to stand trial on federal charges for which state custody was not available. The court identified the persons who would meet federal civil commitment under this ruling as those in federal custody facing federal charges who were not accepted by a state for care, unlike those facing commitment under 18 U.S.C. § 4248 who have stood trial, been convicted, and served their sentences.

The court of appeals ruled that the district court correctly held that 18 U.S.C. § 4248 was unconstitutional. It then stated that, if the federal government truly has concerns about the dangerousness of a person up for release, it should contact the state authorities to proceed with civil commitment under state law.

Discussion

The matter of civil commitment for sex offenders has been a much-debated topic throughout its history. Most of the debate has surrounded the constitutionality of state sexually violent predator acts and the civil commitment of sex offenders under these acts, which this case does not address. This decision solely affects the ability of the federal government to carry out the civil commitment of a person whom it certifies as "sexually dangerous." It remains important because it addresses a matter that has divided trial courts at the federal level. The court of appeals decision states that the power for civil commitment of sex offenders is held by the state and that Congress does not have the power to grant this authority to the federal government.

The constitutionality of state statutes permitting the civil commitment of sex offenders has been upheld. The U.S. Supreme Court ruled in *Kansas v. Hendricks*, 521 U.S. 346 (1997), that the Kansas Sexually Violent Predator Act was constitutional. In that decision, the court stated that the basis for the commitment must be dangerousness to others that is linked to a "mental abnormality" or "personality disorder." The person must have a mental condition that causes a likelihood of sexually violent behavior in the future. The persons determined by the state to meet those requirements are then afforded appropriate due process before their commitment. The ruling by the Supreme Court established the constitutionality of these civil commitments for the purpose of treatment. The court of appeals' decision was in line with the Supreme Court's ruling that the state has the power to commit sex offenders and provide them with treatment. The Supreme Court ruling establishes the due process elements that make the Sexually Violent Predator Acts constitutional.

In ruling that the federal government does not have the power of indefinite civil commitment of sex offenders, the court of appeals has strengthened the position of the state programs that allow such civil commitment. The court ruled that the power of civil commitment has always been held by the states and that the commitment of sex offenders should also remain under the states' control. It appears that civil commitment of federal prisoners as sexually violent predators may still be possible as long as the commitment proceedings are pursuant to state statutes.

The Therapist-Patient Privilege Challenged

Joel Watts, MD
Fellow in Forensic Psychiatry

Joy Stankowski, MD
Assistant Professor of Psychiatry
Division of Forensic Psychiatry

Case Western Reserve University
Cleveland, OH

Psychotherapy-Patient Privilege Upheld in a Civil Action in Which Physical, Not Emotional, Injury Was Alleged

In *Sims v. Blot*, 534 F.3d 117 (2nd Cir. 2008), the Second Circuit Court of Appeals considered whether a litigant had waived his psychotherapist-patient privilege in responding to questions at deposition. The court considered whether the inmate's claim of "garden-variety," or nonpathologic, emotional injuries sustained during an alleged assault by correctional officers would be enough to cause a waiver of his privilege. The inmate was found not to have waived his privilege. Basing its decision largely on the U.S. Supreme Court case of *Jaffee v. Redmond*, 518 U.S. 1 (1996), and the D.C. Circuit Court of Appeals case of *Koch v. Cox*, 489 F.3d 384 (D.C. Cir. 2007), the court found that garden-variety emotional damage claims are not enough to sustain a waiver of the psychiatrist-patient privilege.

Facts of the Case

On December 20, 1999, Nathaniel Sims, an inmate at New York's Correctional Facility at Ossining (Sing Sing Prison), underwent a routine strip search by correctional officers. He contended that respondent officers Mike Blot and Francisco Caraballo physically assaulted him without provocation or justification. The respondents contended that Mr. Sims started the altercation. Mr. Sims filed a § 1983 complaint as a *pro se* litigant in February 2000. He asked the court to appoint him counsel, and the district court told Mr. Sims that he would be permitted to request assignment of counsel again, after he submitted a copy of the transcript of his deposition.

During his deposition, Mr. Sims said that upon entering a frisk area at the prison on December 20, 1999, he and Officer Blot "had a few words" based on a previous confrontation. He alleged that Officer Blot threw him on the floor and other officers began punching him. Officer Caraballo yelled out, "You hit an officer! I'll kill your effen' behind," and while holding a knife, swung down toward Mr. Sims' head, cutting him. Mr. Sims was shackled and taken to the emergency room where he received stitches. He said his confrontation with Officers Blot and Caraballo a week earlier occurred when he "spoke up" while Officers Blot and Caraballo were "beat[ing] up" a fellow "crazy inmate." The officers placed Mr. Sims behind a glass partition because they alleged that he threatened to throw liquid detergent on them. He broke the glass, cutting himself, and was then sent to the psychiatric satellite unit (PSU) for one week. Later in his deposition, Mr. Sims said that previously he had been housed on the PSU. He added that before his assault on December 20, 1999, he had complained at least five times to a mental health nurse about being under stress due to officers' threats to harm him. When asked initially about his injuries, however, he listed only physical ones. When asked if he suffered any mental injuries, he said, "I wouldn't say that I suffered mental injuries as a result of this, but I do think about it continuously . . . I dream about it" (*Sims*, p 124). He said that the fear of being assaulted again by officers had exacted an "emotional toll."

Shortly after Mr. Sims was granted the appointment of counsel, defendants requested production of his psychiatric records. His attorneys' objection that the records were protected by privilege was denied on the grounds that his alleged fear of all knives as the result of the defendants' conduct was not a garden-variety emotional distress claim. The attorneys then informed the court that they did not intend to place his mental or emotional state at issue and were therefore withdrawing all non-garden-variety emotional distress claims against the defendants. The district court ruled that Mr. Sims' deposition constituted a waiver of his privilege, and he could not later "unring the bell." They granted a disclosure order on February 1, 2006. Mr. Sims then petitioned the Second Circuit Court of Appeals for review under a writ of *mandamus*.

Ruling and Reasoning

The Second Circuit reversed the disclosure order, stating that the district court had abused its discretion by ordering Mr. Sims to disclose mental health records. The court cited a decision in *Koch v. Cox*, 489 F.3d 384 (D.C. Cir. 2007), by the D.C. Circuit Court of Appeals that distinguished garden-variety emotional distress from "any specific psychiatric injury or disorder, or unusually severe distress." The court agreed with the *Koch* court on several grounds. A plaintiff does not forfeit therapist-patient privilege by claiming depression or anxiety for which he does not seek damages. Furthermore, he may withdraw all claims of emotional distress to avoid forfeiting privilege. In addition, the privilege is not overcome simply because the defendant puts the plaintiff's mental state at issue. The court further noted that the district court had failed to consider fairness factors, such as Mr. Sims' statements about his emotional distress, which were made while he was a reluctant *pro se* litigant. In addition, Mr. Sims did not claim damages for those emotional disturbances, even after respondents introduced the subject during deposition. The court also noted that he had renounced and withdrawn any claim of mental injury or non-garden-variety emotional injury, and no part of his deposition would be introduced into evidence unless respondents requested it.

The court also cited the landmark U.S. Supreme Court case *Jaffee v. Redmond*, 518 U.S. 1 (1996), in which the Court ruled that federal courts are required to recognize that confidential communications between licensed psychotherapists (including a licensed social worker engaged in psychotherapy) and their patients are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. The *Jaffee* Court cited "wide agreement that confidentiality is the sine qua non for successful psy-

chiatric treatment." The *Jaffee* Court ruled that, if not waived, the psychotherapist-patient privilege was to be upheld without being subjected to a case-by-case balancing analysis of evidentiary needs versus the litigant's privacy interests. They stated, "An uncertain privilege, or one which purports to be certain but results in a widely varying application by the courts, is little better than no privilege at all" (*Jaffee*, p 18).

The court also rejected the respondents' alternative arguments for upholding the disclosure order. The respondents contended that Mr. Sims' allegation of improper use of force raised the question as to whether he started the fight "due to uncontrolled aggression, a persecution complex, or some other psychological problem." The court pointed out, however, that if he had started the fight, the respondents would not have been liable, regardless of whether he was motivated by any mental condition. The court said that if a party forfeits his psychotherapist-patient privilege simply because he alleges or implies that an attack on him was unprovoked, the respondent could lose the privilege, too. The court also rejected the respondents' notion that "anyone" seeking damages for "pain and suffering has waived the psychiatric privilege because the records might conceivably disprove the experience of pain and suffering" (*Sims*, p 130). The court pointed out that disclosure, rather than protection of confidentiality, would become the norm.

Discussion

This case further defines the boundaries and scope of privilege. In *Jaffee*, the U.S. Supreme Court said that the "principles of common law. . .in the light of reason and experience" permitted testimonial privileges to be extended to include the psychotherapist-patient privilege, under Rule 501 of the Federal Rules of Evidence. The court added that the psychotherapist-patient privilege "promotes sufficiently important interest to outweigh the need for probative evidence." The court reasoned that successful psychotherapy depends on an atmosphere of trust, and the possibility that confidential communications could be disclosed would impede the development of the therapeutic relationship. The court also recognized that a privilege serves the public interest, because the mental health of citizens is "a public good of transcendent importance." In support of this notion, they noted that all 50 states have already enacted some form of psychotherapist-patient privilege.

In 1970, the California Supreme Court ruled on the question of psychotherapist-patient privilege in the famous case *In re Lifshutz*, 467 P.2d 557 (Cal. 1970). Although the question before the state supreme court was whether the psychiatrist or the patient "owned" the privilege (they ruled the patient does), the state supreme court said that when a patient raises the issue of mental health in litigation, "trial courts should properly and carefully control compelled disclosures in this area in light of accepted principles" (*Lifschutz*, p 561). The California Supreme Court recognized that when a patient discloses a history of mental health problems in the context of litigation, not all aspects of the patient's mental health treatment would necessarily be relevant to the claims that are sought. Patients or psychotherapists may apply to the trial court to limit the scope of the disclosure and therefore protect non-litigation-relevant private information from being disclosed.

In *State v. Andring*, 342 N.W.2d 128 (Minn. 1984), the Supreme Court of Minnesota extended a patient's privilege to group psychotherapy sessions. The court stated that mandatory child abuse reporting statutes could abrogate the privilege to the extent that only information required in a maltreatment report is admitted into evidence. This further supports the legal precedent of maintaining as much of a patient's confidentiality as is possible, without unduly hampering the courts from obtaining probative information. The court echoed other courts' views of the importance of maintaining confidentiality rights of patients by recognizing the essential nature of confidentiality as a tool in the therapeutic process and extended this protection beyond traditional individual therapy to group settings.

It is evident that courts have long recognized the importance of confidentiality in the doctor-patient relationship, but it presents them with a challenge when confronted with their fact-finding responsibilities. Courts have been inconsistent in their rulings on the extent of psychotherapist-patient privilege. This ruling in *Sims* indicated that the patient's privilege to retain confidentiality is of such importance that it is not to be overcome by probative evidentiary needs when an unrepresented witness raises the question of mental distress during deposition. Furthermore, a plaintiff withdrawing claims of emotional

injury can maintain the privilege. This, along with the U.S. Supreme Court's ruling in *Jaffee v. Redmond*, suggests that courts should err on the side of favoring the protection of patients' privacy interests involving communications with their mental health clinicians.

IQ in *Miranda* Waivers and Death Penalty

Praveen Kambam, MD
Fellow in Forensic Psychiatry
University Hospitals, Case Medical Center

Sherif Soliman, MD
Associate Director, Forensic Services
Northcoast Behavioral Healthcare, Cleveland Campus

Division of Forensic Psychiatry
Case Western Reserve University
Cleveland, OH

Low IQ *per se* Does Not Render a Waiver of *Miranda* Rights Invalid or Preclude the Imposition of the Death Penalty

In *Bevel v. State of Florida*, 983 So.2d 505 (Fla. 2008), the Florida Supreme Court held that low IQ alone is not sufficient to preclude knowing and intelligent wavier of *Miranda* rights. The court also held that mental age under the age of 18, as determined by IQ, does not preclude the imposition of the death penalty.

Facts of the Case

At the age of 22, Thomas Bevel used an AK-47 rifle to kill his roommate, Garrick Stringfield, and to shoot his roommate's girlfriend, Feletta Smith. As Mr. Bevel was leaving Mr. Stringfield's house, he shot and killed Mr. Stringfield's 13-year-old son, Philip Sims. Mr. Bevel remained in hiding for almost a month before his arrest.

Detective Coarsey, an investigating officer, testified that he inquired about Mr. Bevel's educational level and about whether he was under the influence of drugs or alcohol. He asked Mr. Bevel to read the top line of the constitutional rights form aloud and then he read each right to Mr. Bevel and asked him to initial each right indicating his understanding. After giving four different versions of the events at the time of the crime, he confessed to the murders. In his confession, he admitted killing Philip Sims because the child was a witness. He was charged with the first-degree murders of Mr. Stringfield and Philip Sims as well as the attempted first-degree murder of Ms. Smith. About one year before these events, Mr. Bevel had committed a violent felony.

Mr. Bevel was evaluated by two psychologists, Dr. Harry Krop, the defense's psychological expert, and Dr. William Riebsame, a court-appointed psychologist for the state. Based on Dr. Krop's opinion that Mr. Bevel's IQ was 65, Mr. Bevel filed a motion to suppress. An evidentiary hearing was held.

Dr. Krop testified that Mr. Bevel had a full-scale IQ of 65. He opined that Mr. Bevel had the mental age of a 14- or 15-year-old and that, although his low full-scale IQ placed him in the range of mild mental retardation, his diagnosis could not be mental retardation because of his higher level of adaptive functioning. Dr. Riebsame testified that Mr. Bevel had a verbal IQ of 75 and that it was potentially underestimated due to his limited attention span, lack of effort during the examination, and potential need for eyeglasses. Dr. Riebsame opined that Mr. Bevel understood language fairly well and had an adequate vocabulary, and he concluded that no deficiencies in adaptive behavior suggestive of mental retardation could be identified.

The trial court denied the motion to suppress the confession. Mr. Bevel was found guilty on all counts and sentenced to death for the first-degree murders and life imprisonment for the attempted first-degree murder. He appealed, raising nine issues for review, including, in part, whether the trial court erred in denying his motion to suppress his confession because his IQ of 65 was so low that he lacked the mental ability to waive his *Miranda* rights knowingly and voluntarily; in rejecting his mental age of 14 or 15 as a mitigator; in assigning too little weight to the mitigating circumstance of his IQ of 65; and in applying the death penalty, considering that his mental age was less than 18 years.

Ruling

The Supreme Court of Florida affirmed the convictions and death sentences.

Reasoning

Mr. Bevel contended that his IQ of 65 was so low that he lacked the mental ability to waive his *Miranda* rights knowingly and voluntarily. The court found that although IQ is a relevant factor in