The appeals court noted that:

> The Confidentiality Act contains no disclosure exception for police departments performing mental health examinations to determine fitness for duty. It does allow for disclosure on consent, but the consent form used here does not meet the standards set forth by Illinois law. *See 740 ILCS 110/5*(*b*) (listing what is required for valid consent).

Further the appeals court noted:

> . . .that a recipient may consent to disclosure of information for a limited purpose and that any agency or person who obtains confidential and privileged information may not redisclose the information without the recipient's specific consent.

Discussion

With every forensic psychiatric evaluation, we begin with a statement documenting our disclosure to the evaluee that the information will be used in a report to the referring party and is, therefore, not confidential. We also explain that although we are psychiatrists, we have no patient-doctor relationship with those whom we evaluate in a forensic context. Yet, the Seventh Circuit Court of Appeals interpreted the application of the Illinois statute such that by virtue of the fact that the evaluator was a psychologist and in this role assessed Mr. McGreal, the forensic evaluation was construed as a mental health service. The report produced was therefore protected. The appellate court recognized that the statute does provide for a waiver in limited circumstances, but those exceptions must be narrowly read. The key facts on which this case turned are: (1) the waiver used did not meet the statutory exception to nondisclosure; (2) the Alsip Police Department redisclosed the report to another party, not required within the purpose of evaluating Mr. McGreal for his fitness for duty; and (3) the standard for review was that of a summary judgment motion interpreting an Illinois state statute. Thus, the *McGreal* decision instructs that forensic psychiatrists must follow the confidentiality statute(s) applicable in their jurisdiction. This means obtaining the legal consent specified by any relevant mental health confidentiality statute and limiting the dissemination to those permitted under the statute.

McGreal also raises questions about the "no doctor-patient" relationship that we define at the outset of our evaluations. This self-serving descriptor allows us to negate assumptions presumed in our medical role that cannot be reconciled with our forensic role. As forensic evaluators, we cannot promise to "first, do no harm" and that everything disclosed will remain strictly confidential. Yet, it is not only our psychiatric skill that allows us to elicit information from those we evaluate, but also the benevolent authority that is subsumed in the role of psychiatrist. It is precisely because of this combination of skill and authority that we are capable of eliciting information that an evaluee might not otherwise disclose. *McGreal* serves to remind us that with privilege comes responsibility. Under the wording of the Illinois Confidentiality Statue, by virtue of our identity as psychiatrists, we are providing mental health services to those we evaluate. Redefining ourselves at the start of the interview does not dismiss the evaluees' perceptions of us or reduce their vulnerability to our authority.

In sum, *McGreal* cautions that confidentiality remains paramount in all psychiatric services, and proper consent to disclosure should be obtained. Sensitive personal data that are irrelevant to the purpose of an evaluation should be withheld in the interest of privacy. And finally, we are reminded that disclosure is limited in scope and is permitted only for the purpose for which consent was provided.

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Psychiatric Treatment in Prison

The Guilty Defendant Does Not Have the Right to Sentence Departure for Treatment by a Private Psychiatrist Unless Extraordinary Circumstances Exist Under the Federal Sentencing Guidelines

In *United States v. Derbes*, 369 F.3d 579 (1st Cir. 2004), the First Circuit Court of Appeals considered whether a defendant who had pled guilty to tax evasion should have a downward sentence departure based on his alleged need for continued treatment by his private psychiatrist. In this case, there were no

extraordinary circumstances and there was no evidence that the defendant was unable to receive appropriate psychiatric care in prison; therefore, psychiatric treatment should not have caused a departure from sentencing guidelines.

Facts of the Case

Frank and Robert Derbes, the officers of Derbes Brothers, a construction company, defrauded the government through federal tax evasion. Frank Derbes caused a governmental revenue loss of $500,000. Both brothers pled guilty, and sentencing guidelines ranged from 15 to 21 months of imprisonment. Frank Derbes (defendant) was granted a four-level departure and sentenced to 9 months of home confinement with electronic monitoring and 15 months of probation.

The government appealed the downward departure in sentencing Frank Derbes. One of the sentencing departures for the defendant was for mental health concerns, and the other was the impact on employees of his small business. The defendant was under the care of a private psychiatrist, Dr. Chartock, for therapy and medication management. Dr. Chartock had treated the defendant's major depression and generalized anxiety disorder since 1997, and "it had taken several years to find the right combination of medications." Prior to treatment, the defendant had suicidal thoughts, occasional hallucinations, and some difficulty functioning. Dr. Chartock reported that it was critical to maintain the defendant's medication regimen of paroxetine, venlafaxine, and oxazepam and warned that changing medications could "[cause] him to revert to a deep depression and significant panic and anxiety." The defendant claimed that the specific medications might not be available in prison and that maintaining his relationship with Dr. Chartock was critical. The trial court judge stated, "The one thing I do not think the Bureau of Prisons could provide is the connection with Mr. Derbes' treating psychiatrist that has developed over time."

Ruling and Reasoning

The First Circuit Court of Appeals vacated the defendant's sentence and remanded the case for resentencing. The court found that the defendant's asserted need for treatment by his private psychiatrist was not a reason for sentence departure in this case.

Though the Protect Act (April 30, 2003) became law a day after the defendant was sentenced, it applied to his case on appeal. The Protect Act gave a new standard of review for sentencing guideline departures. The government presented evidence that two of the three drugs (paroxetine and venlafaxine) were in the formulary of the Bureau of Prisons. Further, oxazepam had "appropriate substitutes listed in the formulary." There was "little to show that it was the personal relationship that was essential to Derbes' mental health and nothing to show that some adequate substitute would be unavailable in prison." They cited guidelines that "mental condition is a discouraged basis for departure under the guidelines. . .warranted only if circumstances are extraordinary." There was no evidence that the defendant would not be able to receive adequate psychiatric medications and therapy in prison. However, sentence departures based on defendants' mental illnesses were not precluded in future cases.

Discussion

In this case, the First Circuit Court of Appeals did not allow a guilty defendant a downward sentence departure solely based on his asserted need for a continued personal relationship with his private psychiatrist. The defendant's medications or close substitute medications would be available in prison, and he had shown no evidence regarding the importance of his relationship with the single specific psychiatrist. However, the court did discuss the possibility that in other cases, with "extraordinary" circumstances, mental illness could be used for a departure from sentencing guidelines.

A lineage of landmark cases has established a right to treatment in prison. In *Estelle v. Gamble*, 429 U.S. 97 (1976), the U.S. Supreme Court found that "deliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment." Prisoners were not entitled to the best medical care, but had a right to adequate medical care. In *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977), prison inmates' rights to mental health treatment for serious psychiatric and psychological conditions were made explicit, through the Eighth Amendment. Mr. Derbes' diagnoses of depression, panic, and anxiety would therefore qualify him to receive mental health treatment in prison.

The Federal Sentencing Guidelines were a congressional effort to achieve uniformity in sentencing. Sentencing tables were devised to give a guideline range of incarceration length. Factors involved in-

clude the seriousness and characteristics of the offense, criminal history, and specific listed adjustments. The Supreme Court is hearing cases currently regarding enhanced sentencing departures under the sentencing guidelines—specifically, whether the sentencing judge's finding of a fact that was not found by a jury can allow such a sentencing departure.

The ruling in *Derbes* was quite logical. If the court had ruled otherwise and did allow a downward sentence departure in Mr. Derbes' hardly extraordinary case, then any wealthy white-collar convicted criminal could expect a similar departure. It brings to mind Tony Soprano's crimes and the fact that he sees a psychiatrist (*The Sopranos*, HBO). If the court had allowed a sentence departure in this case, then theoretically when Tony Soprano would have charges under the Racketeer Influenced and Corrupt Organizations (RICO) Act brought against him, he could plead guilty. Then he could claim that his relationship with Dr. Melfi and treatment for depression and anxiety should allow him to stay out of prison, so that he could get his combination medication treatment and maintain his relationship with Dr. Melfi.

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Sex Offender Laws

A Sex Offender May Be Banned From Parks Because of His Thoughts

In *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004), the United States Court of Appeals for the Seventh Circuit reheard *en banc* a case that had been decided previously by a three-judge panel (*Doe v. City of Lafayette, Indiana*, 334 F.3d 606 (7th Cir. 2003). The City of Lafayette, Indiana, banned a known sex offender from entering city parks after learning that he had gone to a park and thought about having sexual contact with children. The court held that the ban did not violate the First or the Fourteenth Amendments.

Facts of the Case

John Doe was a convicted sex offender whose past offenses included child molestation, attempted child molestation, voyeurism, exhibitionism, and peeping. He was most recently convicted in 1991, after he invited three adolescent boys into an alley, unzipped his pants, and offered to perform oral sex. For that offense, Mr. Doe was sentenced to four years of house arrest, followed by four years of probation. His probation ended in January 2000, just before the incident at issue in this case. Mr. Doe had been in treatment for his disorder since 1986, and he attended Sexual Addicts Anonymous, a 12-step group.

In January 2000, Mr. Doe entered a city park and watched five teenagers for 15 to 30 minutes. He then said to himself, "I've got to get out of here before I do something," and left the park. When asked about his thoughts as he entered the park and watched the children, Mr. Doe stated:

> [M]y thoughts were thoughts I had before when I see children, possibly expose myself to them, I thought about the possibility of. . .having some kind of sexual contact with the kids, but I know with four kids there, that's pretty difficult to do. . . . Those thoughts were there, but they. . .weren't realistic at the time. They were just thoughts.

After leaving the park, Mr. Doe emergently contacted his psychologist, discussed the incident in his 12-step group on his psychologist's advice, and voluntarily began receiving weekly Depo-Provera injections to suppress his sexual urges. Mr. Doe acknowledged that he had ongoing sexual thoughts about children, and his psychologist testified that, "like any other addict, [he] does not have control over his thoughts. . . . [He] will always have inappropriate thoughts."

An anonymous source reported the park incident to Mr. Doe's former probation officer. After the police department, the superintendent of parks and recreation, and the city attorney became involved, the city issued a ban that permanently prohibited Mr. Doe from entering any city park property, at any time, for any reason, under penalty of prosecution for trespass. In addition to traditional parks, affected park property included a golf course, a sports complex, a baseball stadium, and a zoo. Mr. Doe chal-