for an appointed psychiatric expert at the sentencing phase, and (2) that the lower court's application of the law was not egregious. However, the "*Ake* issues" are not resolved and will undoubtedly be revisited in the future.

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Public Access to Competency Reports

The Supreme Court of Vermont Refuses to Shield Media Access to a Report on Competency to Stand Trial, Despite Dissent's Concern Over "Rank Invasion of Privacy"

In *State v. Whitney*, 885 A.2d 1200 (Vt. 2005), the Supreme Court of Vermont affirmed a trial court's decision to refuse to seal a competency-to-stand-trial report stemming from the psychiatric evaluation of Edgar Whitney, a defendant charged with first-degree murder. The primary issue considered by the court was whether Vermont statutes governing public access to court records bar access to a competency report that is never formally admitted into evidence at the competency hearing. The court also considered whether public access to a competency report should be barred in a case in which (1) the report contained potentially prejudicial information, (2) the defendant was not informed by counsel "that his communications with the psychiatrist would become public and available to the news media," and (3) the defendant did not request the evaluation.

Facts of the Case

Edgar Whitney was arraigned on a charge of first-degree murder in Vermont. After Whitney attempted suicide, the trial court ordered an evaluation *sua sponte* for competency to stand trial. A psychiatrist performed the evaluation, and a corresponding report was filed with the court. Both the state and defense stipulated in writing that Mr. Whitney was competent to proceed to trial, and the court stated that it would accept the stipulation because the report supported it and the report was entered into the record. Concerned that the court may have "accepted" the report, defense counsel stated that he wanted the report to be part of the record, but he was not offering it into evidence because "he did not want the press to have access to it."

Defense counsel immediately moved that the record be sealed because the report was never formally introduced into evidence. A recess was granted to allow attorneys for the press, who intended to access the report, to enter a motion opposing the request to seal. The defense argued that § 6(b)(19) of Vermont's Rules for Public Access to Court Records denied the public access to the report because it was never formally introduced into evidence. The defense also argued that the report contained information that could prejudice Mr. Whitney "in a potential civil suit and prejudice his right to a fair trial under the federal and state constitutions." The trial court refused to seal the record because it had indeed relied on the report to make its decision regarding competency and because the defense failed to show where the report was prejudicial.

The defendant appealed to the Supreme Court of Vermont, arguing that there was no presumptive First Amendment right of access to competency reports not admitted into evidence and that the trial court erred by denying defendant's motion to seal. The defense also argued that releasing the report could prejudice Mr. Whitney in a pending civil suit and his criminal trial.

Ruling and Reasoning

The Supreme Court of Vermont affirmed the judgment of the trial court. The majority reasoned that the defense's primary argument was that the competency report should not be open to the public because it was never formally admitted into evidence. The majority conceded that § 6(b)(19) does not allow access to such competency reports if they are not admitted into evidence, but then followed by stating, "We find defendant's technical argument unconvincing" with respect to the report's not being a part of evidence, noting that "for all practical purposes" the report was admitted into evidence based on the fact that the trial court relied on the report in determining that it would accept written stipulations from counsel on both sides. Given this reasoning, the ma-

jority found that the trial court did not err on this matter. Furthermore, given prior Vermont case law on the issue of public access to court records such as competency reports, the majority concluded that the instant case did not warrant a First Amendment analysis.

Regarding the matter of purported prejudicial information in the report, the majority reasoned that the defendant had every opportunity to demonstrate that the report would be prejudicial, but never did. According to the court, Mr. Whitney "only vaguely argued that releasing the report could prejudice him. . . ." The majority conceded that there might be reasonable arguments made about why the defendant wanted the report sealed; however, the court noted that Mr. Whitney never actually presented any of those arguments. The majority found that the lower court balanced the information presented to it by the defense and concluded that Mr. Whitney would not be harmed by public access to the report, particularly given that "the report contained nothing that had not already been in the newspaper."

Dissent

The judge writing for the dissent raised a sharply contrasting opinion, stating that

> Because of the rank invasion into the privacy of the accused for no apparent good reason, I respectfully suggest the issue presented in this case deserves greater scrutiny by the Court and a more careful assessment of the competing interests.

The dissent criticized the trial court for not using "more judicial vigor" in determining if the defendant's trial rights would be violated despite defense counsel's being "restrained or inconclusive" in arguments regarding the potentially prejudicial information contained in the competency report. The dissent wrote that the public did not have an absolute right to court records and that the trial court, pursuant to Vermont statute apart from access rules, was mandated to admit only the "relevant portion of a psychiatrist's report" into evidence, thereby shielding a defendant from unnecessary and potentially damaging public scrutiny. The dissent reasoned:

> Release of the entire evaluation done by a mental health professional on any defendant will certainly not promote the goal of encouraging the kind of objective examination that [Vermont statute] intends."

The dissent opined that the possibility of issues shared with a psychiatrist appearing on the front page of a newspaper could be even more of a deterrent to open self-report than the established protection from information being used against the defendant at trial. The dissent "would reverse and remand for a hearing on the motion to seal," reasoning that there was no useful public purpose to disclose the record that would outweigh the defendant's right to a fair trial.

Discussion

In the instant case the court primarily addressed a legal technicality that hinged on whether a report on competency to stand trial was open to the public based on its being entered into evidence; however, concerns put forth by the dissent, such as "rank invasion into the privacy of the accused for no apparent good reason" appear most relevant to the forensic evaluator. In the instant case, a forensic report with potentially prejudicial information landed in the lap of the media, and the dialogue that ensued indicated that evaluees (or their counsel) may not fully appreciate the potentially public nature of reports generated following court-ordered forensic evaluations. In fact, the defense attorney stated that had he known such, he would have "advised the defendant not to say anything" during the forensic evaluation. The case highlights the importance of adherence to the American Academy of Psychiatry and the Law ethics guidelines that instruct forensic evaluators routinely to provide notice of the nonconfidential nature of evaluations before conducting forensic assessments.

The same concern issued by the dissent calls to attention a debate about whether, in certain instances, a forensic evaluator may consider weighing the prejudicial versus probative value of information included in a competency report. When inclusion of data in a competency report is likely to be damaging in some way to an evaluee and that information is not relevant to the opinion regarding competency, an evaluator may consider withholding such information from the competency report. This can be a difficult determination, but judicious application of such a practice might, in certain cases, prevent the need for the court to address said issue.

An important detail about the nature of the forensic evaluation performed in the instant case which was only briefly mentioned by the court, but discussed in an article entitled "Whitney report: chilling details" (*The Stowe Reporter*, September 29, 2005) was that the evaluation and report in the instant case were addressing both competency to stand trial and

sanity at the time of offense. The latter evaluation, in which it is sometimes necessary to detail a defendant's (often incriminating) account of the events leading to arrest, changes the dynamic, making it difficult for the forensic evaluator to withhold potentially prejudicial information from a report, given that such information may be essential to supporting an expert opinion regarding sanity at the time of the alleged offense.

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Farmer Progeny

Deliberate Indifference Not Found in a Case in Which a Prisoner Was Placed in Conditions That Exacerbated His Psychosis and Caused Him Severe Distress

In *Scarver v. Litschser*, 434 F.3d 972 (7th Cir. 2006), the Seventh Circuit Court of Appeals affirmed a lower district Wisconsin court ruling that Wisconsin prison officials neither subjected the plaintiff to cruel and unusual punishment nor were they deliberately indifferent to his needs when they placed him in conditions that exacerbated his psychotic illness and caused the plaintiff severe distress.

Facts of the Case

Christopher Scarver, the plaintiff, was an extremely dangerous man with diagnosed schizophrenia, who murdered three people; two of his three victims were murdered during his incarceration at Wisconsin's Columbia Correction Institution in 1994. One of his victims was Jeffrey Dahmer, the notorious cannibal murderer of 17 young men. Mr. Scarver was actively psychotic while he was incarcerated and had continuous auditory hallucinations and psychotic delusions. He believed God had ordered him to commit the murders. In addition, Mr. Scarver attempted suicide twice (once by setting himself on fire) while incarcerated at Columbia Correctional Institution. Wisconsin prison officials believed that they could not adequately provide for the safety of other inmates or staff. Arrangements were made to transfer Mr. Scarver to a more secure setting.

After being briefly detained in the U.S. Medical Center for Federal Prisoners for a psychiatric evaluation, he was transferred to the most secure prison in the Federal system at Florence, Colorado. Mr. Scarver was detained at the Federal prison in Florence for five years without incident and was surprisingly well behaved. He was given audiotapes to quell the auditory hallucinations, and he was permitted daily contact with the other inmates.

At the request of Wisconsin prison officials, Mr. Scarver was transferred to the then newly built Wisconsin Secure Program Facility, a "Supermax" prison, at Boscobel, Wisconsin. Such facilities are designed to house particularly violent or disruptive inmates whose behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates. The Wisconsin prison officials were reportedly unaware of the improved behavior of Mr. Scarver at the federal prison in Florence, Colorado, and thus did not take this information into account in determining his management at the Supermax. The Supermax facility had a restrictive classification system that inmates were subjected to on entering the facility. All inmates are given Level 1 (the most restrictive) status for at least the initial 30 days. Inmates could then progress to higher (less restrictive) levels after behavioral criteria were met and could transfer out of the Supermax facility to a less restrictive prison if they moved beyond Level 5.

Level 1 status entailed being confined all but four hours per week in a small, windowless, constantly illuminated cell with little or no contact with other human beings. The cells had no air conditioning and were extremely hot during the summer months. Mr. Scarver decompensated in this environment. The heat of his cell reportedly interacted with his antipsychotic medications. The constant illumination and inability to use his audiotapes exacerbated his psychosis. While at the facility, Mr. Scarver engaged in self-injurious behavior such as banging his head against the wall and cutting his wrists and head with a razor in attempts to remove the voices that were inside his head. In addition, he attempted to commit suicide on two separate occasions by overdosing on