

tivated to report the incident to the police out of a sense of professional obligation, although this testimony was questioned in the dissent.

The state has competing interests to respect the privacy and sexual rights of its citizens on the one hand and to protect persons whose intellectual disabilities make them vulnerable to sexual predation on the other. As this case demonstrates, however, states and judges have yet to reach consensus on the point at which protection should override sexual freedom. Forensic clinicians involved in these cases should therefore be mindful of local legal standards, if they exist, and of the relevant literature on this complex subject.

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Procedures Governing the Disclosure of Psychological Reports and Evidence in a Pretrial Competency Hearing

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The Supreme Court of Tennessee Adopts Temporary Procedures Governing the Discovery and Disclosure of Psychological Records in Pretrial Competency Proceedings in Criminal Cases

In *State v. Harrison*, 270 S.W.3d 21 (Tenn. 2008), the state obtained a judicial subpoena directing the defendant's forensic evaluator to produce "[a]ny and all records" related to his examination of the defendant for competency to stand trial, on the basis of a statute governing law enforcement authority to subpoena records. The defendant moved to quash the subpoena. The trial court denied the motion, but granted the defendant an interlocutory appeal to the Court of Criminal Appeals. The court held that the trial court erred by issuing a subpoena under this statute, but went on to characterize the competency hearing as civil in nature and ordered the production

of the records sought in accordance with civil statutes in Tennessee. The defendant then appealed to the Supreme Court of Tennessee, which affirmed in part and reversed in part. In particular, the court concluded that the rules of civil procedures do not apply to pretrial competency hearings in criminal cases and adopted a temporary procedure for the disclosure and use of psychological evidence related to competence to stand trial in criminal cases, based primarily on existing rules of criminal procedures.

Facts of the Case

In June 2005, a grand jury in Chester County indicted Robert Jonathan Harrison on three counts of rape, one count of rape of a child, one count of attempt to commit rape, and one count of incest. His attorney requested a forensic psychological evaluation through the state's court evaluation system, which concluded that Mr. Harrison was competent to stand trial and that "a defense of insanity cannot be supported." Mr. Harrison's attorney then requested and received funding for an independent evaluation to be conducted. The psychologist, Dr. Dennis Wilson, opined that Mr. Harrison was not competent to stand trial because he did not understand the functions of the prosecutor, the judge, or the jury, and he was only marginally able to assist in his defense.

The state then obtained a judicial subpoena in accordance with Tenn. Code Ann. § 40-17-123 (2006) directing Dr. Wilson to produce "[a]ny and all records" related to his examination of the defendant. Soon afterward, Mr. Harrison, later joined by Dr. Wilson, moved to quash the subpoena, but the trial court denied the request. The trial court, however, did grant the defendant permission to seek an interlocutory appeal to the Court of Criminal Appeals and ordered Dr. Wilson's records sealed pending the appeal's resolution. On appeal, Mr. Harrison argued that judicial subpoenas under Tenn. Code Ann. § 40-17-123 were not intended to allow the state to compel the production of confidential records of an expert retained in a criminal case and that reciprocal discovery requirements in the Tennessee Criminal Code did not require the production of Dr. Wilson's records because he did not intend to call Dr. Wilson as a witness or rely on his records as evidence in his case in chief at trial. The Court of Criminal Appeals held that the state was not authorized to issue a subpoena, because the district attorney does not have the authority to do so. The court

then outlined a discovery procedure for proceedings related to the competency to stand trial of a defendant in a criminal case, characterizing the competency hearing as civil and ordering the production of the records sought in accordance with state civil statutes. The Supreme Court of Tennessee granted Mr. Harrison's appeal to address the application of civil procedure to competency to stand trial proceedings in criminal cases.

Ruling and Reasoning

The Supreme Court of Tennessee affirmed in part and reversed in part the judgment of the Court of Criminal Appeals, and the case was remanded to the trial court for further proceedings. First, the Supreme Court agreed that the subpoena had been issued under a statute designed to provide information for criminal investigations and ruled that the District Attorney was not a law enforcement authority as described by the statute. It further stated that a competency hearing was not a criminal investigation, so this particular statute did not apply. Next, the court addressed the Court of Criminal Appeals' choice to use Tennessee's civil statutes as a guide. The Supreme Court ruled these procedures inapplicable, noting that civil procedures contain no provision protecting an individual's Fifth Amendment right against self-incrimination. The court also found there are no existing statutes that explicitly govern the procedure for determining discovery in competency to stand trial procedures in Tennessee. Accordingly, the court then reviewed the Tennessee Rules of Criminal Procedure, which contain both general and specific discovery provisions. It found that the general discovery provisions in Tennessee's code of criminal procedure are applicable only to the discovery of evidence that a defendant intends to introduce "at trial," and thus do not necessarily apply to pretrial hearings. The court felt that the term "at trial" necessarily limits the application of the rules to evidence introduced during legal proceedings during which guilt would be determined, which is not the case in pretrial competency proceedings.

In addition to the general discovery rules reviewed, the court also examined the Tennessee statutes outlining the specific procedures requiring a defendant to provide notice of intent to introduce expert testimony regarding any mental disease, defect, or condition "bearing on the issue of [the defendant's] guilt." The court reasoned that this statute is

also inapplicable to pretrial competency proceedings, since those proceedings similarly do not involve the defendant's guilt. It found that the appellate court erred by applying civil procedures to pretrial competency proceedings because it did not adequately balance the rights and interests of criminal defendants. The court had previously described competency proceedings as *sui generis* in the matters that they address and instead chose to model pretrial competency proceedings on Tennessee criminal procedures. It noted that although the express application of criminal procedures was not appropriate, the principles reflected in these rules could provide guidance in the formulation of competency procedures.

From this, the court formulated a temporary set of procedures governing pretrial competency proceedings in criminal cases, allowing for mutual discovery of materials, but including specific limitations of record sharing. Specifically, the court included provisions requiring sharing of information only if the party intends to introduce part of the report in its case in chief or if the party intends to call the preparer as a witness. It determined that, unlike rules of discovery for insanity defenses, disclosure of a competency report by the defense is not contingent on the defense's initiating discovery for prosecution reports. In drafting this rule, the court observed that open disclosure of expert reports "enhances the integrity, reliability and accuracy of the truth-seeking function of the competency proceeding" (*Harrison*, p 36). Moreover, the court established clear rules regarding the admissibility of statements made by the defendant in the course of competence to stand trial examinations. It ruled that such statements, or testimony based on these statements, could not be admitted into evidence against the defendant at trial. The court then noted that its rules would remain in place until specific rules governing the discovery of evidence in competency hearings are adopted.

Discussion

In this case, the court addressed the legal procedures with respect to notice, discovery, and use of forensic mental health evaluation materials related to competency to stand trial proceedings, specifically in Tennessee. As competency hearings do not fall neatly into civil or criminal categories, there are several implications for forensic practice in other jurisdictions. This case suggests that research into the jurisdictional standards for the discovery of competency evaluation

work products is in order, as they may vary widely. For example, in California, discovery proceedings in competency hearings are governed by civil procedure rules. Pretrial competency evaluations are subject to the rules of the Civil Discovery Act, and as such, the Fifth Amendment right against self-incrimination does not apply, nor does the Sixth Amendment right to counsel. However, a judicially declared rule of immunity provides that a defendant will not be convicted of a crime by the use of any information obtained from a court-ordered evaluation. It also allows for any party to obtain discovery related to a mental examination. This decision arose in the context of *Bagleh v. Superior Court*, 122 Cal. Rptr.2d 673 (Cal. Ct. App. 2002). In Massachusetts, the Supreme Judicial Court briefly addressed self-incrimination, as it may arise in the context of a competency examination. In contrast to California, the court referred to the rules of criminal procedure to protect a defendant's statements provided in the context of a competency evaluation (*Seng v. Commonwealth*, 839 N.E.2d 283 (Mass. 2005)). They provide that no statements made by the defendant during an examination can be disclosed to the prosecutor unless ordered by a judge and only after the judge has determined that the report contains no incriminating information.

It is likely that that many other jurisdictions will face a dilemma similar to the one in Tennessee. As a result, mental health practitioners conducting these evaluations should be aware of the impact that this question has on their evaluation and report-writing procedures, particularly with respect to a defendant's Fifth Amendment right against self-incrimination. In particular, because competency reports can be made available to the prosecution, either for the competency hearing or during the criminal phase of the trial, it is important to exclude any incriminating information about the defendant in the report. This exclusion is specifically acknowledged in the American Academy of Psychiatry and Law (AAPL) practice guideline for competence to stand trial evaluations (Mossman D, Noffsinger SG, Ash P, *et al.*: AAPL practice guideline for the forensic psychiatric evaluation of competence to stand trial. *J Am Acad Psychiatry Law* 35:S1–72, 2007).

Discovery and the subsequent use of forensic evaluation materials also have implications for evaluators asked to simultaneously conduct evaluations of both competency and criminal responsibility. Because

criminal responsibility evaluations necessarily include incriminating information, it is further recommended by AAPL that such information be provided in a separate report (Mossman *et al.*). Overall, forensic evaluators should be as careful as possible when drafting competency reports for the court with respect to the inclusion of incriminating information, as well as researching jurisdictional standards for the discovery of a competency evaluation work product. Finally, it is noteworthy that in this case the court ruled that the defendant had standing to object to the subpoena, even though he was not the direct recipient of it. In jurisdictions in which no clear guidelines for discovery yet exist, forensic evaluators may want to discuss these matters with the retaining attorney and come to an agreement, should their work products be subpoenaed in the context of a pretrial competency hearing.

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Following Edwards, Godinez Revisited

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Defendant Permitted to Defend Himself After Being Found Competent to Stand Trial and Competent to Waive Right to Counsel

In *United States v. deShazar*, 554 F.3d 1281 (10th Cir. 2009), the United States Court of Appeals for the Tenth Circuit examined competence to stand trial, competence to waive the right to counsel, and competence to represent oneself in light of *Godinez v. Moran*, 509 U.S. 389 (1993) and the U.S. Supreme Court's recent holding in *Indiana v. Edwards*, 554 U.S. 164 (2008). In this case, the court of appeals upheld the conviction of a defendant charged with stalking, finding there was no duty to deny him the right to represent himself, especially in light of findings that his comportment was related to a personality disorder and that he had been competent to stand