

behavior. Mr. Maedche argued that while treatment may be the stated purpose of § 25-03.3, the procedures used and consequences imposed in his case make the statute punitive. In its opinion, the court stated that he did not offer “the clearest proof” that § 25-03.3 is “so punitive,” either in purpose or effect as to negate the state’s intention that the statute is civil as opposed to criminal. The court identified elements of sex offender civil commitment in North Dakota that further indicate that § 25-03.3 is not criminal. For instance, sexually dangerous individuals are committed to the care, custody, and control of the executive director of the North Dakota Department of Human Services. The director then places the committed individual in the least restrictive treatment facility or program available. Each year, the committed individual may request discharge, and the state must show by clear and convincing evidence that the individual remains sexually dangerous.

*Dissent*

One justice provided a dissenting opinion and argued that Mr. Maedche was committed in violation of his Fifth Amendment right against self-incrimination. The dissent went beyond the civil nature of the statute and focused primarily on the “context” in which he made his incriminating statements. The dissenting justice argued that Mr. Maedche was compelled, as a condition of his probation, which was part of his criminal sentence, to take a prepolygraph interview and examination. The polygraph was not administered by a therapist, but rather by a Bureau of Criminal Investigations (BCI) agent. If Mr. Maedche had failed to respond to the polygraph questions, he would have violated conditions of probation. Such a violation could have led him to lose his liberty for the time to which he could have originally been sentenced. Instead, by complying with the conditions of his probation, he lost his liberty for an indefinite period. In addition, by submitting to the polygraph, he disclosed the only act he engaged in as an adult that qualified as “sexually predatory conduct” for purposes of civil commitment. This act was previously unknown to law enforcement, and the sexual history that was known was insufficient to commit him. Furthermore, he had submitted to the polygraph without the presence of counsel.

*Discussion*

Each of the court’s main findings surrounding *In the Interest of Maedche* has implications for forensic

practice. The court held that North Dakota’s sex offender civil commitment statute was not unduly vague, in part because it gives a “clear” definition of a sexually dangerous individual and defines the terms used. Section 25-03.3 defines a qualifying diagnosis as “a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct” (*Maedche*, p 335). By classifying this definition as “clear,” without addressing the inherent vagueness of the word “other,” the court did not address the difficulty that forensic evaluators have faced in determining what constitutes a qualifying diagnosis for purposes of sex offender civil commitment (see *Sex Abuse* 19:425–48, 2007).

Regarding treatment-related disclosures, the admissibility of Mr. Maedche’s statements during the prepolygraph interview and polygraph examination turned on the question of whether the statements were made in a civil or criminal context. If statements are made in a civil context, the privilege against self-incrimination does not apply; if statements are made in a criminal context, it does. In its decision, the North Dakota Supreme Court broadly construed what constitutes “treatment” for purposes of sex offender civil commitment. While this ruling applies only in North Dakota, clinicians in other jurisdictions should take note of how such a broad interpretation may affect clients whom they treat, and they should adjust their warnings as to the limits of confidentiality accordingly.

Disclosures of financial or other potential conflicts of interest: None.

## Limitations on the Use of Evidence From Evaluations of Competence to Stand Trial in the Penalty Phase

**Natalie M. Anumba, PhD**  
*Fellow in Forensic Psychology*  
*Law and Psychiatry Program*  
*Department of Psychiatry*

**Kenneth L. Appelbaum, MD**  
*Clinical Professor of Psychiatry*  
*Director, Correctional Mental Health Policy*  
*and Research*

Center for Health Policy and Research,  
Commonwealth Medicine

University of Massachusetts Medical School  
Worcester, MA

### The Admission During the Penalty Phase of Mental Health Expert Testimony Concerning Competence to Stand Trial Constituted a Harmful Error

The Florida Supreme Court overturned a defendant's death sentence and remanded the case for a new penalty phase in *Caraballo v. State*, 39 So. 3d 1234 (Fla. 2010). At issue was the penalty phase, during which the state used the testimony of a mental health expert who had evaluated the defendant's competence to stand trial. The defendant appealed, asserting that the trial court erred in admitting this testimony.

#### Facts of the Case

Victor Caraballo, along with four other men, was indicted for charges related to the April 2002 kidnapping of two Miami, Florida, high school students that left one severely injured and the other dead. Mr. Caraballo was scheduled to stand trial in April 2007. In the months before the trial, the defense hired two mental health experts to evaluate Mr. Caraballo's intellectual functioning. The defense then filed a motion requesting that he be found mentally retarded. During a status hearing in October 2006, the state raised questions about his competence to proceed with his case. The court, agreeing that there were concerns, appointed Dr. Lazaro Garcia, a mental health expert, to evaluate his competence. Dr. Garcia, who was hired only for the competence evaluation, eventually concluded that Mr. Caraballo was competent to proceed.

The state indicated its intention to use Dr. Garcia's testimony in a mental retardation hearing to demonstrate that Mr. Caraballo did not have mental retardation and was in fact malingering. Mr. Caraballo filed a motion to preclude Dr. Garcia's testimony from being used for any other purpose than to determine his competence to stand trial; he argued that because Dr. Garcia was hired to evaluate only his competence to proceed, testifying in other proceedings violated confidentiality protections offered by Florida Rule of Criminal Procedure 3.211(e) (2010). Dr. Garcia was then precluded from testifying during the hearing.

Following a jury trial, Mr. Caraballo was convicted of first-degree murder, attempted first-degree murder, sexual battery, two counts of kidnapping, and two counts of robbery. His trial then continued to the penalty phase. His presentation of mitigating factors during this phase included the testimony of two mental health experts. The state of Florida presented two mental health experts for rebuttal testimony; one was Dr. Garcia. The defense objected, again citing Rule 3.211(e). However, the court allowed Dr. Garcia to testify during the penalty phase. He did so, although he acknowledged that he had evaluated Mr. Caraballo only once, for competence to stand trial. At the conclusion of the penalty phase, the jury recommended that Mr. Caraballo be sentenced to death, and the court followed their recommendation.

Mr. Caraballo appealed, raising nine issues in total. One involved the admission of Dr. Garcia's testimony in the penalty phase, given that he had only evaluated Mr. Caraballo's competence to proceed. The Florida Supreme Court granted Mr. Caraballo's appeal to examine all questions raised.

#### Ruling and Reasoning

The Florida Supreme Court held that the trial court's decision to permit Dr. Garcia to testify during the penalty phase was an abuse of discretion. Mr. Caraballo's death sentence was vacated, and the case was remanded to the trial court for a new penalty phase.

The Florida Supreme Court noted that due process required that a defendant be competent to stand trial. The Florida Rules of Criminal Procedure, Rule 3.210 (1992), requires that proceedings halt and a competency hearing take place if doubts arise as to the defendant's competence to proceed. This rule also allows experts to be appointed to evaluate the defendant. Rule 3.211 specifies how expert evaluations are to be conducted.

Given the import of defendants' competence to stand trial in criminal proceedings, courts may order mandatory competence evaluations. However, defendants are at risk of disclosing detrimental or incriminating information during evaluations. Consequently, Rule 3.211(e) provides some confidentiality protection, specifying that, with limited exceptions, information obtained during a competence evaluation may be used only to determine the defendant's competence or need for treatment. A defendant also has the option of waiving his right to confidentiality

and using the report for other purposes. If the defendant chooses this course of action, however, the state is allowed to use all or part of the report as well.

Although trial courts are typically allowed wide discretion with regard to evidence admissibility, the trial court in this case violated Rule 3.211(e) by permitting Dr. Garcia to testify and thus abused its discretion. His testimony in the penalty phase concerned his opinion that Mr. Caraballo malingered psychotic symptoms and cognitive deficits during the competence evaluation. If the jury believed this testimony, they most likely discounted other mental health information presented by the defense. Therefore, the admission of Dr. Garcia's testimony was detrimental to the jury's ability to weigh the relative mitigating and aggravating factors during the penalty phase. It is likely, therefore, that his testimony influenced the jury's recommendation. Because there is a reasonable possibility that the erroneous admission of his testimony affected the outcome of the penalty phase, the error was harmful. The violation of Rule 3.211(e) merited a new penalty phase trial, and the case was remanded to the trial court for proceedings consistent with the opinion.

#### Dissent

In a dissent, Justice Polston stated that the Florida Supreme Court precedent does not prohibit a trial court from permitting an expert to testify about a competency evaluation during the penalty phase to rebut a mental mitigation argument by the defense. He cited *Phillips v. State*, 894 So.2d 28, 40–41 (Fla. 2004), in which the Florida Supreme Court ruled that defense counsel was not ineffective for failing to make what would have been a meritless objection to the admission of expert testimony during a penalty phase. Justice Polston noted that the instant case differed from *Phillips*, only in that Dr. Garcia had disclosed the purpose of his evaluation to the jury, but the expert in *Phillips* testified that he had done a “mental status examination” without using the word competency. Dr. Garcia mentioned the purpose of the evaluation only after defense counsel's questions opened the door, thus inviting an error. Nevertheless, Justice Polston opined that the use of the word competency, as opposed to mental status examination, was a distinction with no practical difference in its potential to create harm.

#### Discussion

The court reversed the penalty phase because the expert originally hired to do a competence-to-stand-

trial evaluation testified about that evaluation during the penalty phase; the admission of this testimony violated Florida's administrative rules governing competence evaluations. The Florida Supreme Court noted a public interest in trying a defendant who is competent; this interest allows a trial court to require that the defendant undergo a mental health evaluation whenever doubts about the defendant's competence to proceed emerge. The court acknowledged that requiring a defendant to participate in an evaluation, then using information learned during the evaluation against the defendant, places the defendant in a difficult position.

In reaching a holding in the instant case, the Florida Supreme Court relied primarily upon the Florida Rules of Criminal Procedure and therefore interpreted Florida statute. Thus, this ruling on its face has limited reach and establishes little precedent in other states. However, the ruling by the court is likely to be consistent with that of other jurisdictions, should those jurisdictions consider similar issues. Specifically, the court acknowledged that given the mandatory nature of a competence-to-stand-trial evaluation, information disclosed during the evaluation should not later be used to incriminate the defendant. It is likely that other states provide comparable protections to similarly situated defendants, whether by statute or case law. The dissent in this case, however, also demonstrates that courts may make unexpected decisions about admissible use of mental health information in legal proceedings.

Although other jurisdictions may endorse similar principles regarding the use of information derived from competence-to-stand-trial evaluations, they may not provide explicit direction to mental health professionals about what they should disclose to defendants undergoing evaluations. When there is limited legal guidance, professional ethics-based obligations would extend beyond legal obligations.

Evaluators assessing competence to stand trial should notify defendants of the purpose of the evaluation, identify the legal professional who requested the evaluation, and describe the limits of confidentiality. That is, the evaluator should acknowledge the obligation to provide information about the evaluation to the referring party, with the understanding that it may not be possible to predict how referring parties or courts will use the evaluation. The evalua-

tor can direct the defendant to contact his attorney to address any concerns or questions.

Disclosures of financial or other potential conflicts of interest: None.

## Instructions to Jury With Regard to Intoxication and Insanity Defense

**Zoe Selhi, MD**  
Fellow in Forensic Psychiatry

**Debra A. Pinals, MD**  
Associate Professor of Psychiatry  
Director, Forensic Education

Law and Psychiatry Program  
Department of Psychiatry  
University of Massachusetts Medical School  
Worcester, MA

### First-Degree Murder Conviction Reversed for Retrial Because of Misleading Instructions Given to Jurors With Regard to Criminal Responsibility

In *Commonwealth v. Berry*, 931 N.E.2d 972 (Mass. 2010), the Massachusetts Supreme Judicial Court (SJC) held that the jury instructions about criminal responsibility given at trial were misleading. The court reinforced the notion of lack of criminal responsibility, whereby consumption of alcohol does not negate the evidence of an active mental illness at the time of an offense, so long as the mental illness can be shown to be directly linked to the requirements for this finding. The court further found the need for additional jury instruction regarding the relationship of criminal responsibility to the defendant's knowledge about her negative reaction to alcohol.

#### Facts of the Case

In August 2002, Sheila Berry consumed three glasses of rum with a friend at dinner. She walked to a nearby market and became involved in a discussion with three women, one of whom was arguing with her boyfriend on the phone. During the conversation, Ms. Berry said that she wanted to blow up the Brockton police station and the train that passed underneath it. She also laid claim to the Oklahoma City Federal Building explosion and the destruction of the World Trade Center in New York.

When the boyfriend of one of the women arrived, Ms. Berry became furious after he starting to yell and spit at her. She attempted to throw beer bottles at him but was unsuccessful. An acquaintance of Ms. Berry's, Admilson Goncalves, arrived and attempted to calm her by putting his arm around her. She pushed him away and rode his bike back to her friend's apartment.

Her friend, Deanna Marshall, found Mr. Goncalves attempting to restrain Ms. Berry outside her apartment. Ms. Berry appeared excessively agitated. Having never seen her in this state before, Ms. Marshall told her to go to the back of the house. Although she initially went, she later returned with a cinder block and violently hit Mr. Goncalves with it until the cinder block broke into pieces, killing him. Despite the use of pepper spray at the scene, three police officers had to hold her down to take the handcuffs off at the station.

Ms. Berry was sent to Taunton State Hospital in Massachusetts for an evaluation of her mental state. She was found incompetent to stand trial in September 2002 and again in March 2003, for behavior that was described as delusional, paranoid, and erratic at times. She continued to show agitation and paranoia, even after the implementation of court-ordered medications in March 2003. In April 2003, she had a longstanding cerebellar tumor removed, and her behavior improved markedly. She was later found competent to stand trial.

At her trial, Ms. Berry pleaded insanity, given her history of several psychiatric hospitalizations, her substance abuse history, and the effects of the cerebellar tumor that was discovered in 1994. In what would later become the critical issue during trial, the judge gave specific instructions to the jury with regard to criminal responsibility, based on the Model Jury Instructions on Homicide 52-53 (1999):

Lack of criminal responsibility is not present when a defendant with a mental disease or defect knows, or, in the circumstances has reason to know, that consumption of a substance will cause [her] to be substantially incapable of either appreciating the wrongfulness of [her] conduct or conforming [her] conduct to the requirement of the law (or both). In deciding what the defendant had reason to know about consequences of [her] consumption of a substance, you should consider the question solely from the defendant's point of view, including her mental capacity [*Berry*, p 980].

During her trial, Ms. Berry testified that she could "feel the effects of alcohol" and that alcohol "made [her] laugh." Five expert witnesses evaluated her, all