expert testimony regarding determination of future dangerousness.

Justification for the Ninth Circuit's broader interpretation of the psychiatric expert requirement can be discerned, however, from the Supreme Court's dicta in *Ake*, stating that the state must provide a psychiatrist "to assist in evaluation, preparation, and presentation of the defense." Further, the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), referenced by the *Ake* Court appears to support a broader right to a psychiatric expert, as the defendant's stake in a capital trial is "almost uniquely compelling," and both the value of assistance and risk of error when assistance is denied may indeed be great.

Sixth Amendment Confrontation Clause and Nonappearing Experts' Opinions

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Michigan Supreme Court Affirms Defendant's Right to Confront Witness Against Him and Bars the Out-of-Court Opinion Testimony of an Expert

Charles Fackelman was found guilty but mentally ill in relation to several charges to which he had pleaded not guilty by reason of insanity. The prosecution's argument against the insanity defense relied heavily on a diagnosis made by a psychiatrist who was not called as a witness to testify. Mr. Fackelman challenged the use of the psychiatrist's report and petitioned for a retrial. His request was denied by the trial court, and the court of appeals affirmed. Upon review by the Supreme Court of Michigan, Mr. Fackelman was granted his application for leave to appeal. In its subsequent decision in the case, the Michigan Supreme Court reversed Mr. Fackelman's conviction and remanded the case for further proceedings consistent with the reversal (*People v. Fackelman*, 802 N.W.2d 552 (Mich. 2011)). The reversal of the conviction was based on the holding that the state's introduction of the opinions of the nonappearing psychiatrist violated Mr. Fackelman's right to confront the witnesses against him.

Facts of the Case

On March 28, 2007, Charles Fackelman drove to the home of Randy Krell with a gun, pointed the gun at Mr. Krell's chest, and said they needed to talk. Mr. Krell had been convicted a few months earlier of involvement in the death of Mr. Fackelman's son in a road rage incident. Mr. Krell ran to a neighbor's house, and Mr. Fackelman broke into the house and stated that he was looking for Mr. Krell. Mr. Krell escaped, and Mr. Fackelman drove away to his mother's house, where he hid the gun and then left.

A family friend found Mr. Fackelman at a gas station and drove him to Flower Hospital in Toledo, Ohio. Mr. Fackelman was arrested en route, and his lawyer arranged for an admission to the hospital. He was evaluated by Dr. Agha Shahid, who prepared a report on Mr. Fackelman's psychiatric condition on March 30, 2007. Mr. Fackelman was prescribed antipsychotic medication and remained in the hospital for approximately two weeks.

He was charged with first-degree home invasion, two counts of felonious assault with a dangerous weapon, and felony firearms possession. To support a claim of insanity, the defense presented the expert testimony of Dr. Zubin Mistry, a psychologist who examined Mr. Fackelman in September 2007. Dr. Mistry testified that Mr. Fackelman was legally insane at the time of the alleged offenses, based on the expert's opinion that he had experienced a "major depressive episode with psychotic features" or a "brief reactive psychosis." The prosecution presented the expert testimony of Dr. Jennifer Balay, a psychologist who examined Mr. Fackelman at the Michigan Center for Forensic Psychiatry in May 2007. Dr. Balay said that he was mentally ill but not legally insane at the time of the alleged offenses.

Both experts had reviewed the report prepared by Dr. Shahid. On cross-examination, the prosecutor's questioning of Dr. Mistry was largely focused on Dr. Shahid's report and his diagnosis of major depression, single episode, severe, without psychosis. In his questioning of Dr. Balay, his own expert, the prosecutor again referred to Dr. Shahid's diagnosis and repeatedly mentioned it in closing arguments. The prosecutor told the jury that "it's real important to look at what Dr. Shahid had to say, even though he

did not testify here before you" (*Fackelman*, p 556). The defense did not object to the questioning of the experts and on their reliance on Dr. Shahid's report or to the prosecutor's closing arguments.

The jury found Mr. Fackelman guilty but mentally ill, and he was sentenced to several years in prison on the various charges. He appealed on the basis of ineffective assistance of counsel. The Michigan Court of Appeals granted his motion and allowed him a hearing before the trial court. Following that evidentiary hearing, the trial court denied the defendant's motion for a new trial. The court of appeals affirmed and rejected his challenges to the use of Dr. Shahid's report at trial. The Michigan Supreme Court granted his application for leave to appeal.

Ruling and Reasoning

The question before the court was whether the admission of Dr. Shahid's opinion regarding Mr. Fackelman's mental state violated his Sixth Amendment right of confrontation. The majority opinion that his confrontation right was violated was focused on the following arguments.

The right of confrontation has an inherent truth-seeking function, such that confronting and cross-examining witnesses promotes reliability in a criminal trial. Dr. Shahid was a true "witness against" the defendant, because his assertion in his report that the defendant had not been experiencing psychosis rendered him a witness against the defense. The defendant, therefore, had a right to cross-examine this witness against him.

The majority also held that Dr. Shahid's diagnosis falls within the "core class of 'testimonial' statements" that are subject to the Confrontation Clause. The report was considered to be "testimonial" because it was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (*Fackelman*, p 561). The opinion cited the following five circumstances that would have led Dr. Shahid to this belief: Mr. Fackelman's hospitalization was arranged by lawyers, he was arrested en route to the hospital, the report noted that the Monroe County Sheriff requested notification before his discharge, Mr. Fackelman referred to his legal situation in answering Dr. Shahid's questions, and the report focused on his alleged crime and the pending charges.

The majority opinion stated, "As discussed previously, the ultimate issue at trial was whether the defendant was legally insane at the time of the incident, or, in the parlance used at trial, whether he was experiencing psychosis" (*Fackelman*, p 564). Because the two testifying experts disagreed on whether the defendant was experiencing psychosis, Dr. Shahid's diagnosis served as a "tiebreaking expert opinion." Furthermore, because Dr. Shahid had examined the defendant within days of the incident, as opposed to months later when the two experts had examined him, "a reasonable juror . . . could not have overlooked the significance of Dr. Shahid's diagnosis, which constituted the tiebreaking, neutral expert opinion of the only doctor who had personal knowledge regarding whether defendant was experiencing symptoms of psychosis near the time of the offense" (*Fackelman*, p 565). Thus, it was imperative that Mr. Fackelman have the opportunity to confront the most powerful witness against him before his guilt or innocence was decided.

Dissent

The dissent addressed Mr. Fackelman's claim that he received ineffective assistance of counsel after counsel failed to object to the use of Dr. Shahid's psychiatric evaluation. They argued that Mr. Fackelman made a strategic choice not to call Dr. Shahid to the witness stand and thus waived his right to confront him. Therefore, the dissent said, he cannot now claim that the prosecutor's failure to call Dr. Shahid as a witness violated the defendant's confrontation rights. The dissent expressed concern that the majority's decision would promote trial and appellate gamesmanship. The dissent also objected to the majority's failure to give appropriate credence to Dr. Shahid's efforts to diagnose Mr. Fackelman's medical problem and to create a treatment plan and criticized the majority's assertion that Dr. Shahid "was aware of and acknowledged the pendency of charges against defendant" (*Fackelman*, p 587). It referenced the *Melendez-Diaz* Supreme Court decision (*Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009)), which affirmed the nontestimonial nature of medical reports created for treatment purposes and that reviewing courts must examine the primary purpose of the statement's creation when determining whether it runs afoul of the Confrontation Clause.

Discussion

The Sixth Amendment's Confrontation Clause became an issue in this case, because at trial, the prosecutor introduced into evidence psychiatric expert opinions that a nontestifying psychiatrist had previously written in a clinical report. Those out-of-court opinions were offered by the prosecutor to prove a matter of fact in court, but the author of the opinions was not called to testify. Thus, the defendant had no opportunity to confront the witness against him, even though that expert's opinions were offered to undercut the defendant's insanity defense. The Michigan Supreme Court held that *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny bar such out-of-court opinions when they are offered for their truthfulness. Introducing such testimony clearly violates a defendant's right to confront the witnesses against him. Further, the court held that the prosecutor's error was not harmless, and so Mr. Fackelman's conviction was overturned.

What are the implications of the *Fackelman* holding for the practicing clinician? If the case were retried, the prosecutor could call Dr. Shahid to testify at trial where he would be subject to cross-examination. Perhaps his in-court testimony would be less persuasive than the unchallenged opinions contained in his report. He might even demur if asked if he had an opinion concerning Mr. Fackelman's sanity at the time of the crime, perhaps modestly noting that he had not conducted a forensic evaluation and thus had no opinions on forensic matters. Indeed, the prosecutor, anticipating such cross-examination might choose not to call Dr. Shahid or use his out-of-court opinions concerning only clinical matters.

This segues to a central question that *Fackelman* raises for psychiatric practice: whether, or how, the *Fackelman* holding might affect the everyday practice of clinical and forensic psychiatry. Will realizing that under certain circumstances one's written reports will not be admissible as in-court testimony increase the likelihood that the reporter will be called to court to opine and be cross-examined? Would such a concern lead a clinician to alter the everyday contours of an evaluation or otherwise invite attenuating one's usual clinical opinions, thereby lowering the likelihood of being summoned as a witness?

Also, there is potential ambiguity in determining which statements are testimonial. As noted, the *Melendez-Diaz* Court affirmed that medical records for the purpose of treatment are not testimonial. Doubtless, Dr. Shahid did not anticipate that he would be called as a witness, as it has not been customary to call treating psychiatrists to testify at criminal proceedings. The five circumstances identified by the Michigan Supreme Court as making his report testimonial have occurred many times before, and they did not result in the clinician's being called for in-court testimony. However, the Supreme Court is starting to develop guidelines as to what medical/psychiatric records and scientific reports will be regarded as testimonial and therefore will require opportunity for cross-examination as a condition for in court admissibility. (See, for example, *Williams v. Illinois*, 132 S. Ct. 2221 (2012).) One could anticipate, for example, that a psychologist who performs testing that forms the basis of a psychiatric opinion will be required to testify. It is possible that mental health professionals who work in jails will be required to appear and undergo cross-examination far more often than they do now. Certainly, treating psychiatrists will be called upon more frequently than they have been. The judicial determination of what is and is not testimonial will be an ongoing process, but will result in increased court testimony for psychiatrists and other mental health professionals.

Ultimately, the purpose of the Confrontation Clause is to promote truth-finding by allowing defendants the right to face those who testify against them and scrutinize their statements through cross-examination. The *Fackelman* ruling supports that constitutional right. It does place a greater burden on the prosecution, which has the obligation to produce in-court witnesses, rather than merely their out-of-court statements, so that they can be confronted by the defense. It will also place a greater burden on mental health professionals, who will doubtless be required to testify more frequently, provide the basis of their opinions, and have those opinions subjected to cross-examination. The degree to which it will affect psychiatric practice is yet to be determined, but it is an important ruling that clarifies and strengthens defendants' Sixth Amendment rights.

Provision of *Miranda* Warning Is Age Related

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