

mation from expert testimony. The interpretation of the actuarial data by the different courts is of interest to forensic clinicians. Ultimately, the question of how much risk is enough to meet the criteria for commitment as an SVP is a legal one. In this case, the appeals court rejected actuarial data that were consistent with moderate to high levels of reoffending as insufficient to support dangerousness beyond a reasonable doubt. The supreme court had a similar though less strict interpretation. The state's expert used testing data, in part, to support his opinion of dangerousness. Experts would do well to prepare for challenges to actuarial findings based on the calculated risk, recognizing the limitations of the particular test.

The court's view of the alleged sexual behavior that resulted in the 2003 parole revocation raised another important evidentiary question. The dissenting justice argued that the data on this behavior were not subject to proper evidentiary analysis, but the SCK relied heavily on Dr. Reid's testimony regarding Mr. Williams' "uncharged and unproven conduct." Thus, another important matter for forensic clinicians to be aware of is that the court may or may not consider the data underlying a forensic opinion to be admissible or relevant in legal proceedings.

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

Use of State Facilities for Postconviction Mental Retardation Evaluations Did Not Violate a Defendant's Constitutional Rights; Potential Violation of Those Rights Are Redressable by Appeal

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Supreme Court of Kentucky Denies Writ of Prohibition to Prevent Judge From Forcing Death Row Inmate to Submit to a Mental Retardation Evaluation Conducted by the Kentucky Correctional Psychiatric Center

Karu Gene White was convicted of three counts of capital murder and three counts of first-degree robbery and sentenced to death. In *White v. Payne*, 332 S.W.3d 45 (Ky. 2010), Mr. White sought a writ of prohibition seeking relief from Judge Payne's order requiring him to submit to a mental retardation evaluation by the Kentucky Correctional Psychiatric Center (KCPC) examiner, rather than by an expert of his choosing. Mr. White contended that the judge acted erroneously and that he would suffer irreparable injury by losing state and federal constitutional rights that could not be readdressed on appeal.

Facts of the Case

In 1980, the Powell County Circuit Court convicted Mr. White of three counts of capital murder and three counts of first-degree robbery and sentenced him to death for each of the murders. The Supreme Court of Kentucky affirmed his convictions and sentences. Mr. White's subsequent motion to vacate his death sentence was denied, and that denial was affirmed on appeal. He petitioned for a writ of *habeas corpus* in the United States District Court for the Western District of Kentucky, which was held pending the outcome of his claim that his execution was precluded by his mental retardation, per *Atkins v. Virginia*, 536 U.S. 304 (2002).

Despite no determination of his intelligence quotient (IQ) by testing, Mr. White's petition described deficits in adaptive behavior that convinced Special Judge Paisley that there was sufficient doubt to warrant an evidentiary hearing. The judge subsequently ordered the Finance and Administration Cabinet to pay up to \$5,000 for mental health testing by an expert of Mr. White's choosing. The commonwealth sought a writ of prohibition, and the Supreme Court of Kentucky found that Judge Paisley had abused his discretion by ordering the Finance and Administration Cabinet to pay for a private psychologist without first showing that the use of state facilities was impractical, as set forth in *Commonwealth v. Paisley*, 201 S.W.3d 34 (Ky. 2006).

On remand, Special Judge Payne opined that KCPC was capable of providing a competent examiner for the mental retardation evaluation of Mr.

White and ordered him to its custody for that evaluation. Seeking relief from Judge Payne's order that a KCPC examiner conduct his mental retardation evaluation, Mr. White sought a writ of prohibition. In the writ, he asserted that Judge Payne failed to comply with the court's mandate in *Paisley* by ordering a KCPC evaluation without first making a finding that the use of a state facility was not impractical. In addition, he contended that Kentucky law mandates and both the United States and Kentucky Constitutions mandate an independent confidential defense evaluation, and that KCPC is not statutorily authorized to conduct postconviction mental retardation evaluations. He claimed that if the KCPC evaluation proceeded, he would "lose his state and federal constitutional rights to confidential defense communications, his right to remain silent, and his right to a full and fair hearing on his claim that he is mentally retarded, constitutional rights which can never be returned to him on appeal" (*White*, 332 S.W.3d. at 50).

Ruling and Reasoning

In a unanimous decision, the Kentucky Supreme Court denied the writ of prohibition. Noting that the trial court was clearly acting within its jurisdiction, the court held that Mr. White's only avenue for relief was his claim that the court ordering the KCPC evaluation acted erroneously "in a way that would cause him to suffer great and irreparable injury for which an appeal would not be an adequate remedy" (*White*, Id. at 48). The court opined that, although Judge Payne's order did not specifically address the court's mandate for a finding on whether the use of a state facility was impractical before authorizing the use of a private examiner to be paid for by the Finance and Administration Cabinet, his finding that KCPC was capable of completing a competent mental retardation evaluation of Mr. White was the "functional equivalent." Thus, Judge Payne complied with the court's mandate in *Paisley* and did not act erroneously on this basis. In an aside, the court referenced *Mills v. Messer*, 268 S.W.3d 366 (Ky. 2008), and instructed the circuit court to determine whether the defendant is entitled to state funding to procure expert testimony that is "reasonably necessary for a full presentation of the petitioner's case." If so, such an expert should be appointed.

The supreme court, even assuming that the trial court had acted erroneously under one of the bases

claimed by Mr. White, was not persuaded that Mr. White demonstrated an irreparable injury that could not be redressed by appeal. The court found no realistic threat to Mr. White's "state and federal constitutional rights to confidential defense communications" that would result from a KCPC evaluation. Moreover, if Mr. White could demonstrate that the disclosure of "confidential defense communications" affected the proceedings, the trial court's determination could be appealed. The court found Mr. White's Fifth Amendment right to remain silent would be minimally affected, if at all. Finally, the court found that if "unforeseen detriments" resulted from the KCPC evaluation, this problem would be redressable on appeal; otherwise, the court found Mr. White's claim that he would be permanently deprived of his right to a full and fair hearing to be "vague, speculative, and unpersuasive."

Discussion

Previous Kentucky cases established that the use of a state examiner for evaluations must not be impractical (*Paisley* standard) and that a defendant may be entitled to a private expert if necessary for a "full presentation" of the petitioner's case. This case examined the potential for irreparable injury that could not be redressed on appeal, which was incurred by Mr. White when he was subjected, in violation of state and federal constitutional rights, to a postconviction mental retardation evaluation performed by a state expert at a KCPC facility. No discernible threats to confidential defense communications were identified. The court noted that mental retardation evaluations are objectively neutral examinations, entailing IQ testing, an interview, and review of the history, with little risk of disclosing confidential defense communications. In addition, in postconviction mental retardation evaluations, one's Fifth Amendment right to remain silent would not be applicable to the crimes for which one is facing the death penalty, since those crimes have been adjudicated. If additional crimes were to be discussed in the course of the evaluations, the court could provide proper safeguards to prevent the state facility from divulging that information. The court found that the claim that one would be permanently deprived of a "full and fair hearing" by submitting to a mental retardation evaluation performed by examiners at a state facility as speculative and vague. In this ruling, the court established that the act of submitting to a

postconviction mental retardation evaluation does not intrinsically create unfairness in defense communications, a violation of Fifth Amendment rights, or an unfair hearing.

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

Disclosure of Mental Health Records in Court-Mandated Outpatient Treatment Proceedings and the Health Insurance Portability and Accountability Act (HIPAA)

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Disclosure of Psychiatric Records to Determine the Need for Court-Ordered Outpatient Treatment Without Notice to the Patient or the Patient's Permission Violates the Privacy Rule Adopted by the Federal Government Pursuant to HIPAA

In the Matter of Miguel M. v. Barron, 950 N.E.2d 107 (N.Y. 2011), the New York Court of Appeals considered whether the release of a patient's mental health records to establish the need for mandated court-ordered outpatient treatment without giving notice or seeking the patient's consent violates provisions of HIPAA. In particular, the court considered whether the disclosure is permitted under HIPAA's "public health" exception or "treatment" exception, despite state laws that permit the disclosure.

Facts of the Case

N.Y. Mental Hyg. Law § 9.60 (1999), commonly known as Kendra's Law, stemmed from the death of Kendra Webdale after a man with paranoid schizophrenia, who was noncompliant with psychiatric treatment, pushed her in front of an oncoming subway train. After this incident, the New York legislature enacted a system of assisted outpatient treat-

ment (AOT). The goal of AOT was to help those with chronic mental illness avoid hospitalization by providing them community supervision, which includes court-ordered outpatient treatment. To qualify under this law, evidence must be established that a mentally ill person's lack of compliance with treatment has resulted in at least two psychiatric hospitalizations in the past 36 months. Public officials were given the task of enforcing Kendra's Law.

It was in light of these provisions that Dr. Barron, the Director of Psychiatry at Elmhurst Hospital Center, initiated proceedings for Miguel M. to be evaluated for qualification under the provisions of AOT. Dr. Garza, the director of AOT at Elmhurst Hospital Center, testified that he received Mr. M.'s mental health records by directly requesting them from centers where Mr. M. obtained treatment. Mr. M. was not given notice that his records would be requested. He did not authorize the release of his records, and no court order was obtained, nor was a subpoena served, for their release. Mr. M.'s counsel objected to the inclusion of the records, as evidence in the AOT proceeding, but they were included despite his objection. The Supreme Court, Queens County, *Matter of M.M.*, 852 N.Y.S.2d. 696 (N.Y. Sup. Ct. 2007), ordered Mr. M to six months of AOT. Mr. M appealed the decision.

On appeal, *In the Matter of Miguel M.*, 66 A.D.3d 51 (N.Y. App. Div. 2009), the Supreme Court of New York, Appellate Division, Second Department, affirmed the ruling of the lower court. The court found that disclosures of Mr. M.'s mental health records were permissible under the Privacy Rule of HIPAA, 45 C.F.R. 164.512 (b)(1)(i) (2003), because the circumstances of the case qualified under the exception provisions, such that patient authorization was not required. The court regarded the requesting doctor as a "public health authority" and the AOT program and the AOT director's investigative duties as a "public health intervention" and "public health investigation," respectively, under the above statute. They also held that HIPAA did not preempt the state statute related to the confidentiality of clinical records. Mr. M appealed the decision to New York's highest court, the Court of Appeals.

Ruling and Reasoning

The court held that the Privacy Rule adopted by the federal government pursuant to HIPAA did not allow the disclosure of mental health information to