

an entity for use in a proceeding to mandate mental health treatment where the patient did not authorize disclosure and was not given notice of the request for records. The core question was whether the disclosure of Mr. M.'s medical records was allowed by virtue of either exception to the Privacy Rule. The court interpreted the language of the Privacy Rule differently from the lower court, in that the "public health" exception was viewed as a reference to facilitate government activities that protect the public masses from large-scale health concerns, such as epidemics and environmental hazards. Thus, the disclosure of Mr. M.'s mental health records did not fit within the definition of the public health exception.

The Privacy Rule also provides an exception for the disclosure of protected health information "for treatment activities of a health care provider." However, the court viewed this exception as applicable to providers working together, such as a primary care doctor and a specialist. Thus, it was outside of the scope of the instant case in which treatment was to be rendered by a volunteer provider against the patient's wishes.

Although neither exception was applicable, the court asserted that Dr. Barron could have pursued a court order or issued a subpoena to obtain Mr. M.'s records, but he would have had to give Mr. M. notice that his records were subject to such a request. Outside of extenuating circumstances, Dr. Barron could not have obtained a court order for the records without giving Mr. M. notice. Dr. Barron would simply have had to put forth a "reasonable effort" to notify Mr. M.

Discussion

In short, the court stated, "we hold only that unauthorized disclosure without notice is . . . inconsistent with the Privacy Rule" (*Miguel M.*, p 112). The court did not feel that it was imposing a difficult burden by requiring that patients be given a chance to object before their records are disclosed. They emphasized that their intent was not to encumber the enforcement of Kendra's Law. The court did not expect that there would be great difficulty in obtaining a patient's mental health records, because even if the individual objected, they expected that this would often be overruled. It seems logical that a court would order the release of medical records over the objection of someone who is mentally ill, since the purpose of Kendra's Law is to order treatment for

individuals with mental illness who are considered at risk of decompensation.

Certain sections of New York's Civil Procedure Law and Rules (N.Y. CPLR) that legislate HIPAA-authorized consents were amended and subsequently enacted on August 3, 2011. These revisions affect the above decision and state that subpoenas issued for the purpose of obtaining medical records (including mental health records) must be issued with "HIPAA compliant authorizations" (i.e., the patient's consent). Therefore, a court order is the only way to obtain medical records when a patient does not give consent; a subpoena is insufficient (Clark J: HIPAA as an evidentiary rule. *J Law Health* 26:1–28, 2013).

If a jurisdiction adopted a strict interpretation of N.Y. CPLR 2011 revisions (or similar statutes), it could necessitate a cumbersome and time-consuming process to obtain mental health records when the patient does not consent and no exceptions apply. Such a process could thwart the original intent of mandated outpatient treatment programs such as AOT. A jurisdiction that is less stringent may enact a simple process of notice to the patient followed by a subpoena if the patient does not respond. Interpretative provisions will vary with jurisdiction, depending on multiple factors including resources, legal precedent, and the balance between social justice attitudes toward the rights of the mentally ill versus societal rights to public safety.

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Appropriate Use of a Defense of Extreme Emotional Distress

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Utah's Supreme Court Rules That an Extreme-Emotional-Distress Jury Instruction Does Not Require a Contemporaneous Triggering Event, but Does Require Analysis Under a Reasonable-Person Standard

In April 2006, Brenda White was accused of criminal mischief and the attempted murder of her husband, Jon White. During her trial, Ms. White requested that the jury members be instructed about the extreme-emotional-distress defense. The district court denied her motion. The court of appeals concluded that there was no contemporaneous triggering event in her case to warrant the instruction to the jury. The Supreme Court of Utah in *State v. White*, 251 P.3d 820 (Utah 2011), ruled that there is no need for a contemporaneous triggering event and that this defense should be evaluated from the perspective of a reasonable person under the existing circumstances.

Facts of the Case

Brenda and Jon White were married for 11 years. According to Ms. White, Mr. White was addicted to pornography and suggested that Ms. White participate in sexual threesomes with him and his coworker. Ms. White alleged that, during their marriage, Mr. White was having an affair with another woman. His behavior caused Ms. White to experience feelings of great anxiety, anger, and agitation, and eventually led to the couple's divorce.

Following the divorce, Ms. White struggled financially to support her two daughters; she had to work more hours and, as a result, saw less of her children. Throughout this period, Ms. White claims that Mr. White began to withdraw from the children and failed to pay child support. Mr. White canceled Ms. White's medical insurance. As part of the divorce settlement, she was awarded the couple's house. She attempted to refinance the home, but learned that she would not be able to complete the refinancing process without his assistance and signatures.

On April 26, 2006, Ms. White went to Mr. White's office to speak to him about refinancing the house. He told her that the matter would have to be resolved at a later time when the attorneys and accountants could agree on the terms. The conversation escalated in intensity and she became extremely upset. She climbed into her vehicle and turned on music with the lyrics, "I want to kill you; I want to blow you away." During the song, she joined her hands together to mimic a gun and pointed her fin-

gers at him. She then told him that he was a "parasite" and that she was going to "wipe him off the earth."

Later that afternoon, Ms. White returned to Mr. White's workplace, again to discuss refinancing the home. When she arrived, he was leaving the office building. She observed him talking on a cell phone; a cell phone that she claims he had repeatedly denied owning.

As she watched Mr. White talk on his cell phone, Ms. White drove her vehicle toward him. He heard the vehicle approaching and headed back into his office building. She continued to follow him, driving her car through the building's double glass doors. After entering the lobby, she struck him twice with her vehicle. He flew over the hood of the car and landed on the floor, injuring his left leg.

Ms. White was arrested and charged with attempted murder and criminal mischief. In preparation for trial, she filed a motion *in limine* requesting the court to instruct the jury on the defense of extreme emotional distress found in Utah Code Ann. § 76-5-203 (2008). In her motion, she argued that, under this section, she was entitled to a jury instruction that would give members of the jury the option of considering that she was acting "under the influence of extreme emotional distress" for which there was a "reasonable explanation or excuse."

The state opposed her motion. After the trial court heard argument, it denied Ms. White's pretrial motion and declined to give the affirmative defense jury instruction. She filed a petition for an interlocutory appeal to challenge the trial court's decision. The Utah Court of Appeals affirmed the trial court's decision. She filed a petition for *certiorari* with the Utah Supreme Court, which was granted.

Ruling and Reasoning

The Utah Supreme Court remanded to the district court with instructions to reevaluate evidence in support of the extreme-emotional-distress defense, to determine whether Ms. White was entitled to such a jury instruction. The Utah Supreme Court analyzed the definition of extreme emotional distress used by the appellate court. The supreme court held that the appellate court was incorrect in requiring a more exacting standard to the definition of extreme emotional distress than was required by statute at the time of the offense. In *State v. Bishop* 753 P.2d 439 (Utah 1988), the court developed the requirements of the

extreme emotional distress defense. In *State v. Bishop*, the state supreme court expressed its intent to distance itself from the heat-of-passion analysis previously used in extreme-emotional-distress defenses and to expand the class of cases where the defense could be available. The court concluded that the appellate court erred by narrowing the scope and use of the defense in Ms. White's case. In the appeals court decision, that court introduced the qualifiers "contemporaneous" and a "highly provocative triggering event" as necessary aspects of extreme emotional distress, resulting in Ms. White's loss of self-control. While acknowledging that some sort of triggering event may be necessary, in an earlier case, *State v. Shumway*, 63 P.3d 94 (Utah 2002), the state supreme court determined that the "triggering event" does not have to be close in time to the behavior at issue or be "highly provocative" as it was in a heat-of-passion defense. In Ms. White's case, the Utah Supreme Court was clear that a "contemporaneous" and "highly provocative triggering event" represented "an improper retreat into the realm of 'heat of passion' manslaughter."

Finally, the court disagreed with Ms. White's petition on the question of the point of view by which the circumstances of the crime must be considered for this defense. Ms. White argued that her subjective point of view was most important in answering the question of whether she was under extreme emotional distress. The court disagreed and made clear that a "reasonable person under the existing circumstances" is the proper standard. For this portion of the opinion, the state supreme court agreed with the appeals court.

Discussion

The extreme emotional distress defense is in use in various states, often serving as an affirmative defense in the case of murder and attempted murder, allowing for possible mitigation and reduction in the severity of the crime charged. If used successfully, this defense may diminish charges of murder or attempted murder to manslaughter or attempted manslaughter. This defense must be proved by preponderance of the evidence. The Utah Supreme Court in this decision makes clear that consideration for the behavior and its relationship to extreme emotional distress should be analyzed from the standpoint of an ordinary person in an analogous situation, under circumstances in which the actor reasonably believes

herself to be. The law necessitates that the person be exposed to extremely unusual and overwhelming stress that caused the person to lose self-control, but made clear that the triggering event need not be "contemporaneous." The court noted, "A close temporal tie between provocation and the criminal act was necessary under the 'heat of passion' formulation because manslaughter was not available if there was time for the defendant to 'cool off.' No such requirement exists to assert the extreme emotional distress defense" (*White*, p 828).

This decision by the court illustrates the need to evaluate the subjective and idiosyncratic emotional reactions of a defendant, but it also calls for objective analysis regarding the severity of triggering stressors and how a reasonable person might respond. Cogent medicolegal formulations and education for triers of fact necessitate attention to both elements. A genuine subjective emotional reaction involving extreme distress must pass some objective analysis regarding the degree of precipitating adversity for a viable affirmative defense to exist. Novel or unusual stressors causing extreme behavior will necessitate nuanced analysis, to facilitate legitimate defense opportunities and protect against abuses of this affirmative defense option.

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Protecting the Rights of Defendants in Cases Where the Question of Competency Has Been Raised

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