

Andrews could have remained in his building if the residents of the 40-unit building were notified about his threats. While a broad interpretation of “readily identifiable” victims might at first glance appear to protect victims, discharging a warning to a large group may ultimately increase patients’ risk of violence.

## Limitations of Right against Self-Incrimination in Statements Made to Psychiatrists

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### Voluntary Statement to a Psychiatrist May Be Used to Impeach Criminal Defendant at Trial after Psychiatric Defense Is Withdrawn

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**Key words:** self-incrimination; confidentiality; expert testimony; testimony impeachment; diminished capacity

In *Rosen v. Superintendent Mahanoy SCI*, 972 F.3d 245 (3d Cir. 2020), the Third Circuit Court of Appeals affirmed that the trial court did not err in permitting statements made to the Commonwealth's expert for impeachment purposes because it does not violate clearly established Fifth Amendment law.

#### Facts of the Case

On June 30, 2001, Adam Rosen stabbed and killed his wife, Hollie Rosen, in their home in Pennsylvania. He called the police initially claiming that his wife had been stabbed by two masked intruders. Shortly thereafter he confessed that he had “blacked out” in the middle of a heated argument with her and, after regaining consciousness, found her wounded on the floor. Mr. Rosen was arrested and charged with first-degree murder.

Mr. Rosen underwent two trials. During his first trial, in 2002, he presented a diminished capacity defense and retained an expert witness psychiatrist, Dr. Paul Fink. Mr. Rosen also underwent evaluation by the Commonwealth's expert, Dr. Timothy Michals. At trial, the jury heard testimony from Dr. Fink, who opined that Mr. Rosen could not have formed the specific intent to kill due to his bipolar disorder with psychotic features and stress from his failing marriage. Dr. Michals, however, testified that Mr. Rosen did not have a mental disorder affecting his ability to form intent, pointing to discrepancies in statements Mr. Rosen made to his psychiatric examiners and to the police. The jury convicted Mr. Rosen of first-degree murder.

After claiming ineffective assistance of counsel, Mr. Rosen was granted a new trial. At his second trial, in 2008, he abandoned his diminished capacity defense and planned to testify that he did not premeditate or have the deliberate, willful intent to kill his wife. Although Mr. Rosen had planned to proceed without the use of a mental health expert, the Commonwealth sought to admit evidence from Mr. Rosen's first trial, including his statements to Dr. Michals about killing his wife and previously attempting to rape her. Mr. Rosen claimed Dr. Michals failed to adequately administer *Miranda* warnings prior to examining him. The trial court ruled that, although these statements could not be used as substantive evidence in Mr. Rosen's case-in-chief, they could be used to impeach him should he choose to testify. Mr. Rosen then elected not to testify during the bench trial, where he was convicted of first-degree murder and sentenced to life in prison without the possibility of parole.

Mr. Rosen appealed, asserting among other things that the trial court erred in allowing for admission of psychiatric evidence from his first trial in a subsequent trial where no mental health defense was presented. The appellate court affirmed; the Pennsylvania Supreme Court likewise affirmed. In 2015, Mr. Rosen filed a *habeas* petition, arguing that the trial court violated his Fifth Amendment right against self-incrimination by ruling that his statements to Dr. Michals could be used to impeach him during his second trial. A federal district court denied his petition, and the Third Circuit affirmed the denial.

#### Ruling and Reasoning

In denying Mr. Rosen's *habeas* petition, the district court explained that Mr. Rosen failed to show

that the Pennsylvania Supreme Court ruled contrary to, or through unreasonable application of, federal law in concluding that there was no Fifth Amendment violation. The Third Circuit, in reviewing this denial, agreed, citing that Mr. Rosen had failed to meet his burden under the Antiterrorism and Effective Death Penalty Act of 1996, which requires deference to established state law as a threshold for federal scrutiny. Their reasoning was that Mr. Rosen misapplied key Supreme Court decisions, including *Estelle v. Smith*, 451 U.S. 454 (1981), *Buchanan v. Kentucky*, 483 U.S. 402 (1987), and *Kansas v. Cheever*, 571 U.S. 87 (2013), as well as the Third Circuit decision in *Gibbs v. Frank*, 387 F.3d 268 (3d Cir. 2004), in asserting that his self-incrimination rights had been violated.

In *Estelle*, the U.S. Supreme Court held that, without a valid waiver, the statements of a defendant made during a compelled psychiatric evaluation cannot be used as evidence against him during the penalty phase if the defendant had not initiated a mental health defense. In *Estelle*, the examining psychiatrist, without informing the examinee, derived information about the defendant's antisocial tendencies during a competency evaluation; this information was later used against the defendant during death penalty proceedings in violation of his Fifth Amendment rights. Subsequently, in *Buchanan*, the U.S. Supreme Court held that a defendant who voluntarily requests psychiatric evaluation or presents a mental health defense waives his Fifth Amendment privilege against introduction of the psychiatric evidence in court. Even when a defendant undergoes compelled psychiatric examination, the Court ruled in *Cheever*, the results from the examination can be used to rebut the defendant's mental health defense, ostensibly preserving the adversarial process of fair trial by presenting the court with more than one psychiatric opinion. In *Gibbs*, the Third Circuit granted *habeas* relief to Mr. Gibbs, who argued that his Fifth Amendment privilege was violated when incriminating statements he made to a psychiatrist after giving a general Fifth Amendment waiver were then used in the case-in-chief during his second trial, in which he did not raise a mental health defense.

The Third Circuit reasoned that, in contrast to *Estelle* and in line with *Buchanan*, Mr. Rosen voluntarily raised a mental health defense, triggering a waiver of his Fifth Amendment privilege against self-

incrimination. Moreover, in contrast to *Cheever* and to *Gibbs*, Mr. Rosen's psychiatric testimony would have been introduced to impeach him and not to rebut a mental health defense or to prove the truth of the matter at hand, respectively.

#### Discussion

This case is instructive in its clarification of waivers of the Fifth Amendment privilege against self-incrimination. In *Rosen*, the federal appellate court considered the context and use of the defendant's statements, as well as whether the defendant was adequately apprised of his Fifth Amendment rights, to determine whether a defendant's admissions to a psychiatrist in one instance can be used against the defendant in another. Although the U.S. Supreme Court has never addressed the use of compelled statements to a psychiatrist as impeachment evidence, it has previously held impeachment evidence to a different admissibility standard than substantive evidence, noting that the right of the defendant to testify "cannot be construed to include the right to commit perjury" (*Harris v. New York*, 401 U.S. 222 (1971), p 225).

Although Mr. Rosen's statements to the Commonwealth's expert were compelled under court order, and possibly without the benefit of *Miranda* warnings, they were given in the setting of Mr. Rosen's raising a mental health defense, which triggered a waiver of his Fifth Amendment privilege. This waiver extended into his second trial, even though Mr. Rosen had abandoned his original mental health defense, and this waiver applied to impeachment evidence, which is held to a different admissibility standard than substantive evidence. In light of this reasoning, the trial court's admissibility ruling was found to not be contrary to or an unreasonable application of an ambiguous area of Fifth Amendment law.

The Third Circuit, assuming *arguendo* that Dr. Michals failed to apprise Mr. Rosen of confidentiality limits, still found that Mr. Rosen failed to establish that he was entitled to *habeas* relief. Although the *Rosen* decision does not appear to have direct implications for the conduct of expert witnesses, close reading suggests that the prudent psychiatric examiner administer *Miranda*-type warnings and seek a waiver from the examinee to reduce ambiguity as to whether disclosures are compelled or willingly and knowingly given. Beyond that, examiners have a

duty not to harm a defendant and to disclose the limits of confidentiality.

## Protections against Indefinite Solitary Confinement for Death Row Inmates Awaiting Resentencing

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### Indefinite Solitary Confinement on Death Row without Regular Justification for Need Violates the Eighth Amendment

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**Key words:** solitary confinement; cruel and unusual punishment; deliberate indifference; procedural due process; expert testimony

In *Porter v. Pennsylvania Department of Corrections*, 974 F.3d 431 (3d Cir. 2020), an inmate argued that continued placement on indefinite solitary confinement violated Eighth and Fourteenth Amendment protections following the *vacatur* of his death sentence. Following summary judgment in favor of the defendants, the inmate appealed to the U. S. Court of Appeals for the Third Circuit. In reversing and remanding aspects of the lower court's ruling, the circuit court recognized the substantial risks of serious psychological and physical harm associated with prolonged solitary confinement as the foundation for Eighth and Fourteenth Amendment violations.

#### Facts of the Case

In 1986, Ernest Porter was convicted of first-degree murder and was sentenced to death. Mr. Porter was placed on death row at a maximum-security state prison, where he remained for more than 33 years in solitary confinement. Following his initial sentencing, Mr. Porter filed a petition under the Pennsylvania Post Conviction Relief Act (P.C.R.A., 42 Pa. Cons. Stat. Ann. § 5941 (1978)), which was

denied. Later, in 2003, a federal district court in the Eastern District of Pennsylvania granted Mr. Porter partial relief on the ground that the penalty phase verdict from his trial was unconstitutional. Accordingly, his death sentence was vacated, and the case was remanded for resentencing. The district court also ruled that the resentencing order would be stayed if either side appealed the decision.

Mr. Porter and the Commonwealth appealed the decision, and the district court's order was stayed. In 2007, the Third Circuit granted Mr. Porter's motion to temporarily postpone the pending federal appeals while Pennsylvania courts considered an additional P.C.R.A. petition filed by Mr. Porter. While his additional P.R.C.A. petition awaited resolution, Mr. Porter remained in solitary confinement on death row with his federal appeals in abeyance. In 2017, Mr. Porter filed suit claiming that his Eighth and Fourteenth Amendment rights had been violated due to his continued confinement on death row.

Mr. Porter's complaint cited the Third Circuit Court's decision in *Williams v. Secretary of Pennsylvania Department of Corrections*, 848 F.3d 549 (3d Cir. 2017), which held that inmates granted resentencing hearings have a due process liberty interest in avoiding indefinite solitary confinement. Mr. Porter argued that, because his death sentence had been vacated and he was awaiting resentencing, he was improperly held in indefinite solitary confinement without the opportunity to earn privileges or to be released from solitary confinement akin to other inmates who were not on death row. Mr. Porter also alleged that prolonged solitary confinement had irreversibly damaged his mental health and caused him to experience "severe anxiety, depression, panic, paranoia, bipolar mood swings, and at sometimes [sic] suicidal impulses" (*Porter*, p 443).

The defendants denied Mr. Porter's claims and filed a motion for summary judgment. In granting the defendants' motion, the magistrate judge reasoned that *Williams* did not give Mr. Porter procedural due process rights regarding solitary confinement because his death sentence remained active, Mr. Porter did not offer evidence of actual injury or deliberate indifference by individuals at Department of Corrections to support an Eighth Amendment claim, and Mr. Porter could not make a substantive due process claim using the same allegations supporting his Eighth Amendment claim. Mr. Porter appealed the decision to the Third Circuit Court of Appeals.