The Fifth Circuit opined that the United States Supreme Court had viewed the privilege as "limited in scope" and in similar situations involving dangerous patients where no confidentiality existed, the privilege would not apply.

Discussion

Confidentiality and testimonial privilege are distinct concepts, with confidentiality being a broad, ethical protection of the psychotherapeutic relationship's privacy, and privilege being patients' specific, legal right to prevent treaters from disclosing therapeutic communications in court.

The implications of confidentiality and privilege are complex as reflected in the divergence of opinions. If there are exceptions as to what constitutes confidential patient information, how does this affect clinical practice? How do we ascertain whether patients are well informed as to the limits of confidentiality? Should a threat expressed in therapy be used for prosecutorial purposes?

The Fifth Circuit rejected the notion that removing privilege would deter patients from disclosing their innermost feelings. However, a strict interpretation of the *Jaffee* footnote or a definitive dangerous-patient exception to the Rules of Evidence could discourage the very patients who struggle with such problems as anger, manipulation, paranoia, impulsivity or overall affective dysregulation, from seeking or remaining in treatment because their communications might not be privileged and could be used against them. The Sixth and Ninth Circuits in *U.S. v. Hayes*, 227 F.3d 578 (6th Cir. 2000), and *U.S. v. Chase*, 340 F.3d 978 (9th Cir. 2003), opined that the risk was great enough to justify arguing against a dangerous-patient exception and that statements made, even without the reasonable expectation of confidentiality, should be privileged.

We do not know for certain if Mr. Auster was dangerous and would have carried out his plan had he not been arrested. The district court acknowledged that both of Mr. Auster's doctors agreed that he was not violent but that "Dr. Davis felt it was his duty to inform CCMSI about the latest threats" (*U.S. v. Auster*, 2007 U.S. Dist. LEXIS 2693, 11 (E.D. La. 2007)). The question, put forth in *Chase* (p 990) to "balance the patient's need for candor, in service of therapy, against the potential victim's need for protection" remains difficult to answer.

When faced with patients who threaten, our primary duty is to protect them from harming themselves or others. Ascertaining whether actual dangerousness exists before acting is imperative in protecting when needed and in preventing misinterpretation and overuse of the duty to warn. If it is true that Mr. Auster was not thought to be dangerous, why was a warning issued? The level of assessment that determined the likelihood of Mr. Auster's carrying out his threat, as well as his history of violence, is unclear. His doctors may have attempted to increase his level of care, in addition to relaying a warning, as a way of mitigating the danger and avoiding legal consequences for their patient.

Disclosure used to protect patients from harming themselves or others is at times necessary. However, ethics-related dilemmas and questions arise when that disclosure might be used as a prosecutorial tool. What effect does the possibility of legal testimony have on a clinician's decision to conduct a therapeutic exploration of a patient's impulses? A warning may indeed compromise the psychotherapeutic "atmosphere of confidence and trust" referred to in *Jaffee*, especially since the details of a threat could leak past its target, causing lasting damage, even if the patient did not intend to carry out the threat.

The Fifth Circuit reasoned that allowing patient-therapist communications at trial would have only a minimal impact on an already compromised therapeutic relationship, but is this true? Does a duty-to-warn imply that the cat must be let out of the bag? Ultimately, does this use of therapists' testimony serve patients, society, or our field?

Addendum: On October 6, 2008, a writ of *certiorari* petition to address whether violent threats disclosed by a patient to a psychotherapist are privileged, even if the patient has reason to believe that the threat would be reported, was denied by the Supreme Court of the United States.

Presence of Counsel in Competency Evaluation

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Counsel Presence Not Required in Evaluations of Competency to Be Executed

In *Commonwealth v. Banks*, 943 A.2d 230 (Pa. 2007), the Supreme Court of Pennsylvania reviewed the ruling of the trial court that granted a defense motion to bar the testimony of the state's psychiatric witness in a hearing to determine the defendant's competence to be executed, on the grounds that the defense attorney was not present during the evaluation.

Facts of the Case

In June 1983, George E. Banks was convicted by jury trial of 12 counts of first-degree murder, one count of third-degree murder, and other offenses related to events in September 1982, when he killed 13 people, most of whom were his own children and their various mothers. He had offered an insanity defense in the capital case. On sentencing, the jury upheld the death penalty requested by the state.

On October 5, 2004, the Governor of Pennsylvania signed a warrant for Mr. Banks' execution, scheduled for December 2, 2004. On November 19, Mr. Banks' mother, Mary Yelland, filed a "next friend" petition, alleging that her son was incompetent to be executed under the *Ford v. Wainwright* (477 U.S. 399 (1986)) decision, which held that the Eighth Amendment prohibits the execution of defendants who are found by the court to be insane. The trial court denied the petition because the time for filing such a motion had lapsed. Ms. Yelland appealed to the Supreme Court of Pennsylvania, which stayed the execution and ordered the trial court to have a competency hearing, specifying that the evaluation be completed in a specific time. What followed were a series of delays in scheduling and completing the evaluation.

In April 2005, the defense counsel asserted a right to be present during the commonwealth's psychiatric examination by forensic psychiatrist Timothy Michals, MD. Neither the state's attorney nor the court commented on that defense assertion. The trial court directed the parties to schedule the psychiatric examination within 10 days. The examination was not completed within the specified time frame, and on July 25, 2005, the Pennsylvania Supreme Court ordered the trial court to hold the hearing by October 3, 2005. Although scheduled for October 3, the hearing was not held because Mr. Banks had a contagious skin condition that precluded his presence at the hearing. The competency hearing was rescheduled for October 24, 2005, and was held at the correctional institution because of an exacerbation of Mr. Banks' skin disorder. At that hearing, the defense moved that, because Mr. Banks had been examined by the state's psychiatrist without notice to the defense, the testimony of the expert should be barred. The trial court rescheduled the competency hearing for January 2006, and scheduled a hearing in December to rule on the defense motion. At that hearing the trial court ruled in favor of the motion and barred the testimony of the state's expert, ruling that the commonwealth could hire a new expert under the condition that defense counsel be present during the examination. The state filed a motion for reconsideration on the basis that the trial court had never included in the original order for a competency evaluation an assertion that the defense had a right to be present at the examination. The trial court denied the state's motion. Another psychiatrist hired by the state refused to conduct the evaluation under the condition imposed by the trial court that defense counsel be present.

The competency hearing was held on January 30, 2006, and the defense called three experts who testified that Mr. Banks "lacked a rational and factual understanding of his death sentences and the reasons for and implications of the same" (*Banks*, p 236). The Commonwealth provided no expert testimony, and on February 27, 2006, the trial court ruled that Mr. Banks was incompetent to be executed. The state appealed the propriety of the trial court's competency ruling to the Supreme Court of Pennsylvania.

Ruling and Reasoning

The Supreme Court of Pennsylvania overturned the ruling of the trial court that excluded the testimony of the state's expert and remanded the case to the trial court to hold another competency hearing that would include testimony of the state's expert. The court further directed the trial court to proceed with the competency hearing in a timely fashion,

stating that it "is not to be diverted by tangential motions and assertions by counsel" (*Banks*, p 239).

In its ruling, the supreme court cited *Ford v. Wainwright*, in which the U.S. Supreme Court held that the Eighth Amendment prohibits states from executing a person the court has determined to be insane. It held, "We leave to the State the task of developing appropriate ways to enforce the constitutional restriction" (*Ford*, p 416). The court rejected the defense argument, based on *Estelle v. Smith*, 451 U.S. 454 (1981), that Mr. Banks' Fifth and Sixth Amendment rights were violated when he was examined by the state's expert without the presence of counsel. The court held that the *Smith* ruling does not establish a constitutional right to have counsel present during evaluation and further that having an attorney present during the psychiatric interview could be disruptive.

The Supreme Court of Pennsylvania elaborated that although the U.S. Supreme Court had not addressed whether there is a constitutional right to counsel during court-ordered psychiatric examinations, six federal circuit courts had determined that the constitutional rights of defendants had not been violated when they were examined without defense counsel present. The court held that the trial court had erred in barring the state expert from testimony at the competency hearing because the trial court had never included an order for the defense counsel to be present in the original competency order, the supreme court had not included such an order when it directed the trial court to hold a competency hearing, and no appellate court had ruled the presence of defense counsel at an evaluation conducted by the state to be constitutionally required. Moreover, the court held that by barring the state's expert just weeks before the competency hearing, the trial court had deprived the state of adequate time for preparation for that hearing.

Dissent

Two justices dissented. Their dissent was based on two factors: first that the state had not followed the trial court's directive to secure another expert and evaluation in presence of counsel and, second, that there was compelling and consistent evidence of Mr. Banks' psychosis over time that corresponded to the defense expert's opinions of his mental state. The previous evidence was sufficient to preclude the need for another evaluation.

Discussion

In this case, the Supreme Court of Pennsylvania followed the precedent set by circuit courts that have rejected the constitutional right of defendants to have an attorney present during evaluations for competency to be executed. The defense's effort to extend legal representation through the evaluation process was fueled by the finality and severity of the consequence of the finding of competency—the carrying out of the execution. Courts' (and society's) interest in all aspects of capital cases demonstrates an appreciation for the serious and immutable punishment of death. When the person on death row is mentally ill, the challenges are far greater. Unlike the decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and in *Roper v. Simmons*, 543 U.S. 551 (2005), in which the U.S. Supreme Court categorically barred the execution of persons who are mentally retarded and those who committed capital offenses before the age of 18, respectively, the decision in *Ford v. Wainwright* has barred the execution of persons deemed insane. But insanity is a legal status considered neither permanent nor incontestable. It is the complex and fluid nature of mental illness that contributes to the many cases that seek to clarify the nuances of insanity and the potential for restoration. Indeed, incompetency for any legal proceeding, including execution, is considered in most cases to be a state that can fluctuate with treatment and other conditions. In most cases a person found incompetent to stand trial is restored to competency; in some cases, a person found competent can experience decompensation that renders him or her incompetent at a later evaluation. The restoration procedure is linked to the ultimate goal of accomplishing the legal process.

When the question of competency involves the capacity to be executed, the goal of restoration is to remove the state of insanity so that the execution can proceed. The standard for competency to be executed is defined under *Ford v. Wainwright*. The *Ford* ruling allowed states to determine both insanity and what follows the determination that someone is incompetent to be executed. Amnesty International, among others, has identified the difficulty left by the *Ford* ruling:

> Although the Ford Court identified some of the components necessary to demonstrate a constitutionally minimum definition of insanity, application of Ford presents challenges because the Court did not define insanity or mandate procedures that courts must follow in determining whether a defendant is insane. U.S. Court of Appeals for

the Fourth Circuit, 28 April 2005 [Amnesty International, 2006, p 120. Available at http://www.amnesty.org/en/library/info/AMR51/003/2006. Accessed September 22, 2008].

In some jurisdictions, an inmate found incompetent to be executed can remain indefinitely on death row with no prescribed treatment or alteration in sentence.

Providing expert testimony related to competency in general is a mainstay of forensic work. However, the death penalty complicates the question of competence at any stage of the case. The guidelines of the American Medical Association Council on Judicial and Ethical Affairs (CEJA) deems physician participation in the evaluation of competency to be ethical as long as a judge makes the final determination; however, it is unethical for psychiatry to participate in the restoration to competence of death row inmates. In 1989, the Board of Ethical and Social Responsibility in Psychology of the American Psychological Association opposed psychologists' participating in evaluations of competency to be executed unless it be for the purpose of "bringing new information which might change the legal verdict and subsequent death sentence" (Agenda, Meeting of May 5–7, 1989, p 117). Other psychologists view participation in evaluations as ethical but still controversial. Enduring are the ethics-related and professional challenges around death penalty cases, especially those that involve persons with mental illness. The legal decisions from the courts have served both to clarify and obfuscate the situation. It is unlikely that the ambivalence and collective emotion around the death penalty will be resolved by court rulings.

Incompetent Defendant Committed Under Massachusetts Sexually Dangerous Persons Laws

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Lack of Competence Does Not Preclude a Nonjury Trial for Sexual Offenses

In *Commonwealth v. Burgess*, 878 N.E.2d 921 (Mass. 2008), the Supreme Judicial Court of Massachusetts reviewed the decision of the Franklin superior court. The superior court had held that Larry Burgess, the defendant, could be civilly committed under the Mass. Gen. Laws ch. 123A, § 15 (2008). This statute allows for a nonjury trial of incompetent defendants charged with sexual offenses, to determine if they did commit the act or acts charged. The Massachusetts Supreme Court considered the defendant's contention that his due process and equal protection rights were violated by engaging in the adversarial hearing as outlined in the state law.

Facts of the Case

In 1993, Larry Burgess was indicted in the superior court on two counts of rape of a child by force and five counts of indecent assault and battery on a child under 14. These charges stemmed from allegations that, over a three-year period, he had repeatedly sexually molested the three sons of his girlfriend at the time. His competence to stand trial was questioned by the court, and he was subsequently found not competent to stand trial following competency hearings in 1994 and 1998.

In 2000, seven years after the defendant's incarceration, the commonwealth filed a petition for the defendant's civil commitment as a sexually dangerous person pursuant to state statute, at which time Mr. Burgess was temporarily committed to a treatment center pending the outcome of that petition. Subsequent to his temporary commitment, he underwent multiple evaluations, most recently in 2003, all of which found him not competent to stand trial for his pending charges.

In 2004, a new judge convened a probable-cause hearing pursuant to Mass. Gen. Laws ch. 123A, § 12 (2008), which determined that there was probable cause to believe that Mr. Burgess was a sexually dangerous person. Given his lack of competence to stand trial, the judge ordered a second hearing pursuant to Mass. Gen. Laws ch. 123A, § 15 (2008), to determine whether Mr. Burgess had committed the acts with which he was charged.

The commonwealth's case rested primarily on the uncontested testimony of two of the alleged victims and their mother. The defense presented no witnesses, and Mr. Burgess did not testify on his own