

ments that echo *Kansas v. Hendricks*. However, the dissent noted several features in the statute that supported a finding that its proceedings are criminal. One was that committed persons under Ohio Rev. Code Ann. § 2945.39 remain under pending indictment for the duration of their commitment, suggesting that proceedings under the statute occur as part of the criminal case. Another is that the statute ties the maximum length of commitment to the maximum prison sentence the defendant would have received if convicted, suggesting punitive intent. The majority opinion discounted this fact, noting that earlier release is allowed if the defendant is deemed no longer “mentally ill and subject to hospitalization.” However, unlike release from civil commitment under Ohio’s probate code, which requires only the authorization of the chief medical officer, release from commitment under Ohio Rev. Code Ann. § 2945.39 is considerably more onerous, requiring submission of an application by the chief clinical officer to the court, an independent review by a local forensic center, and ultimately, a court order. Given political disincentives to early release of individuals who could be perceived as potentially dangerous, it remains an open question whether the early-release option would ever be exercised. If not, Ohio Rev. Code Ann. § 2945.39 would fail the effects prong of the intent-effects test, lending support to the view that the statute is criminal. One could then further argue that future re-indictment in the event of competency restoration would amount to a violation of the constitution’s Double Jeopardy Clause.

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## **A Victim’s Right to Privacy Versus the Defendant’s Right to a Fair Trial**

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## **Iowa Supreme Court Determines Victim’s Mental Health Records Are Admissible to Support a Defendant’s Plea of Self-defense**

In *State v. Cashen* (789 N.W.2d 400 (Iowa 2010)), the Iowa Supreme Court devised a protocol to permit appellee Ross Cashen to access the victim’s mental health records for his self-defense claim. The court vacated the appellate decision, affirming in part the district court’s judgment, stating that the defendant presented compelling evidence that the victim’s mental health records provided exculpatory evidence that would aid in his defense. The court also reversed the district court in part, stating that obtaining the mental health records by way of a patient’s waiver is not permissible. Accordingly, the court developed and outlined a protocol for the party seeking access. Under this new protocol, there is limited disclosure of information, which can be used for discovery. This part of the decision was remanded to the district court with instructions.

### *Facts of the Case*

On April 18, 2007, the state charged Ross Cashen with his third offense of domestic assault and willful injury, Class D felonies, against his former girlfriend, Chastity Schulmeister. Mr. Cashen filed a notice of self-defense, asking the court to allow an expert to review, interpret, and testify to the victim’s “propensity of violence” based on her mental health records. This motion was denied pending a decision on admissibility.

Mr. Cashen deposed the victim, during which she admitted to past abusive relationships and being diagnosed with posttraumatic stress disorder, anxiety, and depression, for which she had been in therapy since age 15. She reported a history of impulsivity and reactive behaviors and difficulty with frustration tolerance with regard to Mr. Cashen. During the deposition, Ms. Schulmeister admitted to taking antidepressants currently and during her relationship with Mr. Cashen because of her anxiety about his “safety and welfare” in the armed forces and her belief that he was violent.

Mr. Cashen filed a motion to obtain the victim’s mental health records, which was denied. He then hired a private investigator to obtain them. Having learned of this, the state filed a motion to suppress the records and exclude any previous mental health records. The district court denied the state’s motion, stating that the victim’s “propensities for violence

and explosive behavior [were] relevant to Cashen's defense of self-defense" (*Cashen*, p 404). The records would also speak to the victim's credibility to recall events with accuracy, possibly impeaching her at trial. The court also allowed Mr. Cashen to obtain an expert to review the records and testify to the victim's violent tendencies and her credibility as a witness.

Based on the court's ruling, Mr. Cashen filed two separate motions: one to resume the victim's deposition, and the other to obtain her mental health records. The court granted the motion requiring Ms. Schulmeister to sign a patient waiver form, allowing the defense to obtain her mental health records. Upon review of the records, the deposition was reconvened to discuss the content of the mental health records. As a response to Mr. Cashen's motions, the state filed an application for discretionary review of the records. The Iowa Supreme Court granted the review and transferred the case to the court of appeals. On appeal, Mr. Cashen was found to have presented compelling evidence that the victim's records would help in his defense, affirming the district court's decision to disclose the records. The appellate court also determined that the district court did not have the authority to obtain the records by way of a patient waiver form, but did not "address the procedure for the production of the records" (*Cashen*, p 405). The Iowa Supreme Court addressed how to procure the mental health records.

#### *Ruling and Reasoning*

The Iowa Supreme Court set forth a protocol for requesting privileged mental health records of the victim. It implements rules that are careful and cautious, allowing for "limited disclosure of privileged information," satisfying the defendant's due process rights to present potentially exculpatory evidence.

The court first referred to its ruling in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006) where the defendant, charged with first-degree murder, was permitted to obtain the victim's medical records to assist in his defense. The court noted, "Regardless of the charge or penalty, all defendants have a right to a fair trial" (*Cashen*, p 405), but reserved that this sensitive information should be released on "a limited basis." The court stipulated that a certain protocol must be followed to obtain such information, limiting the amount of information disclosed.

The court developed a "proper protocol" to follow when defense counsel requests the victim's mental

health records by examining prior case law. The protocol was based on the previous "balancing test" determined in *Chidester v. Needles*, 353 N.W.2d 849 (Iowa 1984). In *Chidester*, the Iowa Supreme Court allowed the county attorney to "review the confidential medical records of a nonparty" in an investigation of medical fraud. It was determined that only medical testimony is protected from being subpoenaed, not the medical record. The court "recognized the patient's right to privacy of their medical records but acknowledged that this privilege was not absolute" (*Cashen*, p 406). Based on this ruling, a balancing test was implemented that weighed the privacy interests of privilege against public interest in "a fair and effective administration of criminal justice." Should the balancing test favor public interest, "it may override the privacy interest."

Previous case law provided a basis for the "proper protocol" used in *Cashen*, which "strikes the proper balance between the victim's right to privacy in his or her mental health records and a defendant's right to produce evidence that is relevant to his or her innocence" (*Cashen*, p 408). The protocol provides five procedural instructions for obtaining mental health records while minimizing the invasion of privacy of the victim.

First, the defendant is not allowed to go on a "fishing expedition when seeking the victim's mental health records" (*Cashen*, p 408). The defense must reasonably demonstrate that the victim's records contain exculpatory evidence. Second, the victim is to be notified of the request for records and is asked to sign an affidavit of consent to disclose them. Should the victim oppose disclosure, the court will hold a hearing to determine if there is a "reasonable probability" that the records contain exculpatory evidence. Third, once the records are obtained, the defense attorney can review the records at the courthouse. An *in camera* review is not sufficient because the judge does not have the "complete information" necessary to make a decision about which records are of importance to the defendant. Fourth, once this information is identified, the defense attorney notifies the court of the specific information in the records that will be used. The county attorney is then permitted to review the records at the courthouse. Fifth, a closed hearing is held to determine if the records contain exculpatory evidence. If the court rules in favor of the defense, copies of the records with the nonexculpatory information redacted are

provided to the defense and county attorneys. The court emphasized that this protocol does not automatically mean that the victim's mental health records are admissible at trial; that is a separate determination.

The court allowed Mr. Cashen to use specific parts of the record in his defense and agreed with the district court's ruling that Ms. Schulmeister's testimony at the deposition fulfilled the requirement of "reasonable probability." It was determined that the victim's records contained evidence in favor of the defense. The case was remanded to the district court, and all parties were directed to adhere to the newly established protocol.

#### *Dissent*

Justice Cady reasoned that the protocol gives too much power to the defendant to protect the right to a fair trial while compromising the victim's treatment. This balancing test, he said, may prevent victims of domestic violence from reporting abuse or seeking help, as their records may be used against them in court.

#### *Discussion*

This decision considers both the defendant's and the victim's needs and rights in determining the admissibility of the victim's mental health records. While providing this additional "privilege" for the defendant, the victim's confidential information is exposed, and this exposure can have a negative impact on both victims and mental health professionals. As explained in the dissent, victims may be less likely to come forward and seek help, because their confidential information can, in effect, be used against them. The procedure outlined may deter victims of domestic abuse from seeking necessary help or disclosing their problems fully, making it difficult for them to feel secure within the safe haven of mental health care. This loss of confidence may ultimately lead to a backlash from mental health professionals attempting to regain the trust of their clients. One solution to this dilemma is for mental health professionals to refrain from taking notes or to be selective in what they write. Although this is not the standard, those who choose to work with victims of domestic violence may find that this is one way to help their clients and still maintain confidentiality. Perhaps with time a better balanced compromise will be enacted.

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## Do Verbal Statements Constitute Dangerousness?

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### **The Supreme Court of Texas Reversed the Court of Appeals and Remanded for Determination of Factual Sufficiency of Specific Verbal Threats for a Civil Commitment Adjudication**

In the case *State v. K.E.W.*, 315 S.W.3d 16 (Tex. 2010), the statutory sufficiency of a verbal threat as the basis for the imminent-threat arm of a civil commitment code was deliberated to different ends by a trial court and a court of appeals. On review, the Supreme Court of Texas held that the appellate court's interpretation of "overt act" in a Texas code authorizing civil commitment was impermissibly narrow. The Supreme Court of Texas held that a verbal threat could satisfy the statutory requirement of a "recent overt act" sufficient to authorize involuntary hospitalization of a mentally ill client.

#### *Facts of the Case*

On April 17, 2008, K.E.W., a patient known to the Gulf Coast Mental Health and Mental Retardation Center (hereafter, Center), presented for a scheduled appointment with Dr. Pugh (a Center psychiatrist). K.E.W., who had been diagnosed with schizophrenia, related that he had been "assigned to impregnate multiple women" (*K.E.W.*, p 18). He then alarmed the Center staff by making multiple requests to see a particular female Center employee. Fearing for the safety of others, Dr. Pugh called the police. K.E.W. refused to cooperate with the police, and was taken to the emergency room at the University of Texas Medical Branch at Galveston.

K.E.W. was cared for at a psychiatric hospital by Drs. Ortiz and Stone. He informed the staff of his plan to impregnate a group of women to create a "better race of humans" (*K.E.W.*, p 18). This "group" included his adult stepdaughter. He intermittently became angry because he believed that certain of the women he had been assigned to impregnate were being kept from him and that hospital staff