dangerousness determination but held that the state court's decision to continue Mr. Poree's civil confinement on the basis of potential dangerousness did not conflict with clearly established Supreme Court precedent.

However, the circuit court pointed out that the state court's dangerousness standard appeared to be inconsistent with Louisiana state code, which states that the court must determine "whether the committed person is no longer mentally ill. . . and can be discharged, or can be released on probation, without danger to others or to himself" (*La. Code Crim. Proc. Ann.* art. 657 (1991)). Louisiana defines "dangerous to others" as "the condition of a person whose behavior or significant threats support a reasonable expectation that there is a substantial risk that he will inflict harm upon another person in the near future" (*La. Rev. Stat. Ann.* § 28:2(3) – (4)(1986)); but as the circuit court's review concerned federal law, it held that the "remedy lies in Louisiana state courts, not federal habeas proceedings" (*Poree*, p 250).

Dissent

In a dissenting opinion, one of the justices asserted that the district court was not simply in conflict with its own state code but was also "contrary to clearly established Supreme Court law" (*Poree*, p 254). The dissenting opinion said that the "state court made no finding of dangerousness" (*Poree*, p 252) and that the difference between "dangerousness" and "potential dangerousness" is not merely "semantic." Rather, the district court's use of a "potential dangerousness" standard rendered "the Supreme Court's dangerousness requirement meaningless" (*Poree*, p 252). The dissent related that because "it is possible for every insanity acquittee to become dangerous, the state court's standard lacks any limit" (*Poree*, p 252) and "strips the dangerousness precondition of meaning" (*Poree*, p 254). In closing, the dissent asserted that:

> Civil confinement is not punitive. It may not be used to accomplish what the criminal system could not—here, a life sentence. The systems are distinct in both justification and operation. They will remain so only if courts are faithful to the requirements of continued civil confinement (*Poree*, p 254).

Discussion

The district court's use of a "potential" dangerousness standard would seem to greatly reduce the import of expert opinion as to the appropriateness of release of insanity acquittees to less restrictive settings. If "dangerousness" is deemed "inherent" in the index offense, then the criminal court might just ignore expert opinion recommending release, and justify indefinite confinement, based solely on the "inherent" seriousness of the index offense.

It is important for forensic evaluators to recognize Louisiana's broad interpretation of dangerousness. Future decisions may help to clarify the bounds of potential dangerousness.

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Psychiatrist–Patient Privilege in Criminal Court

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The Supreme Court of Connecticut Denies Defendant's Request for *In Camera* Review of Privileged Psychiatric Records of Homicide Victim

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In *State v. Fay*, *167 A.3d 897 (Conn. 2017),* the Supreme Court of Connecticut ruled that privileged psychiatric records of a homicide victim are subject to *in camera* review for the trial court to determine whether the defendant's constitutional right of confrontation affords him the records. In the instant case, however, the defendant failed to make sufficient showing of his compelling need for the records based on criteria outlined by the court.

Facts of the Case

On July 8, 2010, William Fay shot his brother (who was also his roommate) twice with the victim's firearm in their shared apartment. The victim later died as a result of his injuries, and Mr. Fay did not deny shooting him. He was convicted of manslaughter, although he claimed self-defense. He presented evidence that the victim had problems with depression and alcoholism that had caused previous violent confrontations between them. Mr. Fay alleged

that the victim's mental state had worsened significantly in the months preceding the homicide. The victim had been under the care of a psychiatrist, and Mr. Fay sought to strengthen his self-defense claim by showcasing the victim's mental state at the time of the crime. Mr. Fay's legal team filed multiple motions seeking medical records as well as testimony from the victim's psychiatrist concerning the victim's behavior and the potential effects of prescribed psychotropics on the victim's behavior and temperament at the time of the shooting.

On February 1, 2013, the trial court held a hearing to address the defense motions. Ultimately, the court granted the defendant's motion to subpoena the victim's psychiatric records with the proviso that an expert would ultimately have to present testimony as to whether any information contained therein was exculpatory. Before the evidentiary portion of the trial, the defense also filed a motion to present testimony by the victim's treating psychiatrist. The defense argued that the defendant's Sixth Amendment right to confrontation trumped the psychiatrist–patient privilege and that the duty to guard the privacy of psychiatric records is vitiated if the patient is deceased. In rebuttal, the state noted that without a waiver of the privilege by the victim's authorized representative, even an *in camera* review of the documents would not be allowed. The state also noted that the deceased would not be able to testify and information regarding bottles of prescription medications found at the apartment would be irrelevant without testimony from his psychiatrist or records. Ultimately, the trial court prohibited the victim's privileged mental health records from being reviewed.

Mr. Fay appealed under the premise that the trial court erred in not following the holding in *State v. Esposito*, 471 A.2d 949 (Conn. 1984). In *Esposito*, the Connecticut Supreme Court held that in some situations the privileged psychiatric records of a witness testifying for the state are subject to an *in camera* review, so that it can be determined whether the defendant's constitutional right of confrontation entitles him to such access. If the witness refuses said review, his or her testimony may be stricken from the record. Mr. Fay asserted that access to the victim's psychiatric records might support his claim of self-defense. The trial court ultimately agreed with the state's contention that the victim's psychiatric records were protected by statute. Furthermore, the trial court noted it lacked the authority to create an extrastatutory exception to the statutory psychiatrist–patient privilege "in the absence of express consent by the patient, courts have no authority to create nonstatutory exceptions to general rule of nondisclosure" (*Fay*, p 903, citing *State v. Kemah,* 957 A.2d 852, (Conn. 2008)863). Finally, the trial court noted that while witnesses' testimony had been stricken from the record under *Esposito*, to protect the defendant's constitutional right of confrontation, the *Esposito* holding does not authorize access to a patient's privileged psychiatric records without the patient's consent.

Ruling and Reasoning

The Connecticut Supreme Court held that, in certain circumstances, a defendant can have an *in camera* review of a homicide victim's privileged psychiatric records, but in *Fay*, the court held that the defense had to show a "compelling need for the privileged records, a showing predicated on the relevance of the records to the claim of self-defense, the potential significance of the records in establishing that defense, and the unavailability of alternative sources of similar information" (*Fay*, p 904). The court weighed the statutory psychiatrist–patient privilege of the patient against the right of the defendant to "a meaningful opportunity to present a complete defense" (*Fay* p 906, citing *State v. Cerreta*, 260 Conn. 251, 260 (Conn. 2002)).

The court noted that very few prior cases had addressed the question of this appeal. Most notably, in *United States v. Hansen*, 955 F.Supp. 1225 (D. Mont. 1997), a federal district court held that a victim's privilege may be superseded by a defendant's right to support a claim of self-defense, but only if the emotional state of the deceased is a vital element of the defense. The *Hansen* court also emphasized the critical nature of safeguarding an accused's constitutional rights in something as pivotal as a murder trial.

The Connecticut Supreme Court found that Mr. Fay did not demonstrate a compelling need for the deceased's privileged psychiatric records, and thus his motion did not qualify as an exception to the general rule of nondisclosure. The court noted that, although Mr. Fay testified that the victim had mental health problems, the "mere existence of a mental condition, without any showing of relevance, will

not suffice to justify intrusion into the victim's privileged medical records" (*Fay*, p 914). Although the court had allowed Mr. Fay to testify that the victim "was taking certain medications, including Risperdal and Librium, and that those medications were being used to treat the victim's depression," they pointed out that Mr. Fay had failed "to move to introduce expert testimony on the potential effects of those medications" (*Fay*, p 915). The court held that Mr. Fay had failed to make the required preliminary showing that he was not entitled to an *in camera* review of the victim's psychiatric records.

Discussion

In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the United States Supreme Court upheld the psychiatrist–patient privilege of a police officer in a wrongful-death civil action. Certainly, the right to have one's most personal information kept private has been zealously guarded by the courts. In *Fay*, the privacy right is preserved in the face of a criminal defendant's attempt to prove his innocence. The denial of *in camera* review in *Fay* appears to rest more on the putative inadequacy of his counsel than on an actual determination of whether the psychiatric records contained evidence that might have supported Mr. Fay's self-defense claim. The court dismissed the claim based on a lack of sufficient showing to justify intrusion into a patient's private psychiatric records. However, there are troubling details in this case. For instance, the victim was prescribed Risperdal and Librium (*Fay*, p 915). Treatment with an antipsychotic (Risperdal) would at least suggest fairly serious target symptoms. In addition, the Connecticut Supreme Court acknowledged that during the appeal process, Mr. Fay submitted a brief that suggested that the victim was using alcohol and marijuana, while prescribed a benzodiazepine (Librium). The potential for significant disinhibition from the admixture of these various substances would warrant concern. Possibly, the outcome in this case could be attributed to defense counsel errors, such as the failure to introduce "expert testimony on the potential effects" of Risperdal and Librium (*Fay*, p 915). However, because the defendant was facing a homicide-related charge, an independent mental health review might have better resolved problems such as those raised in this case.

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Greatly Reduced Sentence Due to Mild Autism Spectrum Disorder Deemed Unreasonable

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Fourth Circuit Rules a Defendant's Reduced Sentence on the Basis of Mild Autism Spectrum Disorder Is Substantively Unreasonable and Remands for Resentencing

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In *United States v. Zuk*, 874 F.3d 398 (4th 2017), the United States Court of Appeals for the Fourth Circuit considered the government's appeal that a federal district court's sentence was "substantively unreasonable" in sentencing Julian Alexander Zuk to 26 months, which was time served, despite the recommendation of 20 years imprisonment in the federal sentencing guidelines. While awaiting trial, Mr. Zuk received a diagnosis of mild autism spectrum disorder (ASD), which became the "primary driver" in the lower court's determination of his sentence. The government argued that this sentence was "substantively unreasonable" as it was too lenient to provide just punishment or adequate deterrence. The Fourth Circuit agreed and vacated and remanded his case for resentencing by the lower court.

Facts of the Case

While a high school sophomore in North Carolina, Mr. Zuk began to collect online nude images of minors, some with sadomasochistic themes. By his freshman year of college, he was exchanging child pornography with multiple individuals through hundreds of fake e-mail addresses. In particular, he developed an online relationship with a 16-year-old boy from Texas who was sexually abusing his 5-year-old cousin. As this relationship developed, Mr. Zuk choreographed the 16-year-old's abuse of his cousin and even planned a visit to Texas, under the facade of looking for a summer internship, so that Mr. Zuk might personally witness and participate in the abuse