

meet the burden of proof regarding impaired adaptive functioning, as standardized testing was not required to establish such deficits.

Ruling and Reasoning

The Pennsylvania Supreme Court vacated the PCRA court's ruling that Mr. Cox had failed to establish intellectual disability. The state supreme court reviewed the finding of the PCRA court based on the common elements of intellectual disability defined in *Commonwealth v. Miller*, 888 A.2d 624 (2005): impaired intellectual functioning, substantive adaptive deficits, and onset before age eighteen. The focus of the appeal was noted to be the role of standardized testing in assessment of adaptive functioning.

In *Miller*, the recommendation from the American Association on Intellectual and Developmental Disabilities (AAIDD) that standardized testing be used to measure adaptive functioning impairments was highlighted. The PCRA court appeared to equate the recommendation with medical community consensus and thus did not consider evidence outside of results from standardized testing, which were not found credible. The state supreme court cited *Hall v. Florida*, 572 U.S. 701 (2014) that per the Eighth Amendment, in matters related to intellectual disability, modern medical practices should guide decision-making. While medical standards recommend the use of standardized testing to assess adaptive behavior, it is not required, and additional evidence may be utilized to inform decisions.

The court did not dispute the credibility finding of the PCRA court regarding the psychological testimony about adaptive functioning, but it was noted the PCRA court did not consider additional evidence presented regarding Mr. Cox's adaptive functioning. Specifically, testimony from Mr. Cox's family members, friends, acquaintances, former counsel, and expert witnesses was disregarded or deemed unreliable or not credible. The court indicated that the PCRA court erred when it discontinued analyzing the available evidence following the decision to disregard one expert's testing results. While the state supreme court did not assert a position regarding the additional evidence to be reviewed, the court stated that the totality of the evidence may have implications regarding impairments in Mr. Cox's adaptive abilities. The case was remanded for further consideration of the evidence regarding Mr. Cox's adaptive functioning.

Discussion

This case provides guidance for determination of adaptive functioning in establishing intellectual disability in death penalty cases. The court concluded that while use of standardized measures is recommended to establish deficits in adaptive functioning, it is not required. Further, additional evidence, such as collateral records, testimony from family members or friends, or expert witnesses regarding adaptive skills, should be considered when results of standardized testing are unavailable or determined not to be credible. From a psychological assessment standpoint, this case highlights the importance of proper administration of standardized measures, along with gathering multiple sources of data to support diagnostic considerations, which may be instrumental in informing the court's decision regarding intellectual disability in capital punishment cases.

Psychotherapist-Patient Privilege Violation in Act 21 Proceedings

Amanda Hecker, MD
Fellow in Forensic Psychiatry

Christopher Fields, MD
Assistant Professor of Psychiatry, Associate Director,
Forensic Psychiatry Fellowship

Department of Psychiatry and Behavioral Sciences
Medical University of South Carolina
Charleston, South Carolina

Harmless Error Doctrine Not Applicable to Violation of Psychotherapist-Patient Privilege in Act 21 Case

DOI:10.29158/JAAPL.210128LI-21

Key words: psychotherapist-patient privilege; harmless error doctrine; sexual violence; redact; Act 21

In *In the Interest of J.M.G.*, 229 A.3d 571 (Pa. 2020), the Supreme Court of Pennsylvania examined the superior court's ruling in an Act 21 case, which involves potential civil commitment for 20-year-old individuals residing in institutional placements who have been adjudicated delinquent for sexually violent

behaviors. J.M.G.'s records submitted to the Sexual Offender Assessment Board (SOAB) were not properly redacted and included incriminating statements made for treatment purposes. The trial court determined that J.M.G. was in need of involuntary inpatient treatment under Pennsylvania's Act 21. The superior court held that the SOAB expert witness's conclusion was not dependent on improperly disclosed communications based on harmless error analysis. On appeal, the state supreme court ruled that harmless error analysis is not appropriate when psychotherapist-patient privilege is violated in Act 21 proceedings. The superior court's ruling was reversed and remanded.

Facts of the Case

J.M.G. was born in 1996 and had a history of chronic mental health difficulties beginning in early childhood. After he attempted to choke his adoptive mother in 2013, he was admitted to Philhaven, an inpatient mental health facility, and later placed at Bradley Center, a residential care facility. While at Bradley Center, he informed his adoptive mother that he was sexually inappropriate with his adopted sister in the past. She reported the incident, and an investigation subsequently followed. On July 6, 2015, he was adjudicated delinquent on a misdemeanor count of indecent assault. Following his adjudication, J.M.G. continued to be placed in various residential treatment facilities.

On May 19, 2016, J.M.G. was ordered by the trial court to undergo an evaluation by the SOAB based on Section 6358 of the Juvenile Act (42 Pa. Cons. Stat. § 6358 (2014)). The Juvenile Probation Department was instructed to provide J.M.G.'s records to the SOAB with redaction of any confidential communications made between J.M.G. and a clinician. On July 13, 2016, J.M.G. requested further redactions to the records, but his motion was denied. The records submitted included a psychiatric evaluation report authored by Dr. Rocco Manfredi for the purpose of consideration of treatment facilities. The report contained incriminating statements made by J.M.G. (e.g., sexually deviant behaviors).

At a dispositional hearing on January 27, 2017, the trial court ruled that a *prima facie* case was established to initiate Act 21 proceedings. Act 21 provides for involuntary treatment if clear and convincing evidence establishes that the juvenile has a mental abnormality or personality disorder that results in

serious difficulty in controlling sexually violent behavior that makes the juvenile likely to engage in an act of sexual violence. At a civil commitment hearing on March 13, 2017, J.M.G.'s independent expert, Dr. Foley, testified inpatient treatment was not necessary. On the contrary, the SOAB expert witness, Dr. Stein, provided testimony about Dr. Manfredi's report and the necessity of inpatient treatment. The trial court ordered the civil commitment of J.M.G.

J.M.G. filed an appeal, citing that the trial court failed to redact privileged communications. The superior court held that the trial court did not properly redact Dr. Manfredi's report, relying on the court's decision in *In the Interest of T.B.*, 75 A.3d 485 (Pa. Super. Ct. 2013), that there is no exception to the psychotherapist-patient privilege in Act 21 proceedings. The superior court additionally held that harmless error analysis is applicable to the psychotherapist-patient privilege, citing *Commonwealth v. Flynn*, 460 A.2d 816 (Pa. Super. Ct. 1983). It was determined that Dr. Stein's opinion would not have changed if he solely relied upon properly disclosed information. In addition, although both expert witnesses believed J.M.G. met criteria for a mental abnormality that causes difficulty with controlling sexually violent behavior, they differed in their conclusions regarding the need for inpatient treatment, which was not considered relevant to the improperly disclosed records.

Following J.M.G.'s appeal with a request to be dismissed from Act 21 commitment, the Juvenile Law Center and the Pennsylvania Psychiatric Society issued a brief as Amici Curiae on behalf of J.M.G., citing that a patient must be able to openly disclose information in order for effective mental health treatment to be rendered; applying harmless error analysis to psychotherapist-patient privilege "upends" the system. Conversely, the Commonwealth submitted a brief that contended the prejudicial impact associated with harmless error analysis is restricted to how improperly redacted records affected the verdict of the Act 21 proceedings. It disregarded J.M.G.'s reliance on the *T.B.* case that only considered whether a violation of the privilege existed and did not examine appropriateness of harmless error analysis.

Ruling and Reasoning

The Supreme Court of Pennsylvania reversed and remanded the superior court's ruling, determining

that harmless error analysis is not applicable to a violation of psychotherapist-patient privilege in Act 21 proceedings.

Based upon 42 Pa. Cons. Stat. § 5944 (1989), the state supreme court noted psychotherapist-patient privilege is interpreted similarly to the attorney-client privilege, which is predicated on open dialogue between the client and attorney, not safeguarding of the fact-finding process. There is erosion of justice when the “sanctity” of confidentiality is breached.

The state supreme court reviewed previous cases related to harmless error doctrine. In *Harman ex rel. Harman v. Borah*, 756 A.2d 1116 (Pa. 2000), the court held that when an appellate court reviews a trial court’s decision, the appellate court must initially decide if an error occurred and then determine whether an error justifies a new trial. According to *Commonwealth v. Story*, 383 A.2d 155 (Pa. 1978), application of harmless error doctrine to errors involving state rules should follow the same application as federal errors in criminal cases. An error is not harmless if there is a reasonable likelihood that it contributed to a verdict. Improper evidence is considered harmless if the impact is *de minimis*, it is “merely cumulative” of properly admitted evidence, or the properly submitted evidence of guilt is considerably overwhelming that the improper evidence would not have contributed to the verdict. If an appellate court opines an error as harmless, it must do so beyond a reasonable doubt.

The state supreme court agreed with the superior court that J.M.G.’s records supplied to the SOAB contained improperly redacted privileged communications, which Dr. Stein relied upon for his opinion and expert testimony. But, it was determined that the superior court did not appropriately apply harmless error analysis based upon the three methods noted above in assessing what Dr. Stein’s opinion would have been without consideration of the improper evidence. The state supreme court held that harmless error doctrine was not applicable to a violation of the psychotherapist-patient privilege in Act 21 proceedings for the following reasons. First, the fundamental purpose of Act 21 is to provide continued mental health treatment for a juvenile sexual offender who is likely to sexually reoffend. Second, effective mental health treatment depends upon protected confidentiality, which includes the juvenile’s willingness to cooperate with

treatment, and ability to candidly disclose information to the clinician and to trust treatment recommendations. Violation of confidentiality negatively affects the rehabilitative treatment goals under Act 21. Finally, “scrupulous adherence” to the psychotherapist-patient privilege is “basic” to fair Act 21 proceedings.

The court held that J.M.G.’s case shall be reconsidered with a new commitment hearing based upon proper redactions of privileged communications. Two justices filed concurring opinions. Although they agreed with the majority mandate, they contrarily asserted that harmless error analysis can be applied to a psychotherapist-patient privilege violation in Act 21 proceedings. Harmless error doctrine cannot be applied to errors that involve constitutional rights that are “basic” to a fair trial (e.g., right to counsel) per *Chapman v. California*, 386 U.S. 18 (1967), but the concurring justices asserted that protecting privileged communications is not “on par” with securing constitutional rights. It was further noted that the improper evidence did not change the framework of the proceedings, have an impact on the fact-finding process of the judge, or preclude the court from measuring its impact relevant to proper evidence.

Discussion

The Supreme Court of Pennsylvania found that the superior court erroneously applied harmless error analysis to a psychotherapist-patient privilege violation in Act 21 proceedings. The case is instructive because it discussed appropriateness of application of harmless error doctrine in various circumstances. Although harmless error doctrine was previously applied to psychotherapist-patient privilege violations, it was not deemed appropriate when this violation occurred in an Act 21 case. In this case, protection of confidentiality between a patient and clinician was emphasized in order for mental health treatment to be effective. But it is important to note that breach of this privilege may unintentionally occur and can have legal implications. It is imperative that mental health clinicians proceed with caution when documenting potentially prejudicial information, as treatment records may not be properly redacted in legal proceedings and can unduly influence the opinions of other clinicians who review those records.