Loyola University Chicago Law Journal

Volume 32
Issue 2 *Winter 2001*

Article 4

2001

Post-Conviction Challenges to the Death Penalty: Mental Health Records and the Fifth Amendment

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I. INTRODUCTION

The State has elected to proceed with the death penalty. The jury returns guilty verdicts on four counts of first degree murder based on the predicate offenses of robbery and burglary. After the verdict, the twenty-one-year-old defendant waives his right to a jury as to eligibility for the death penalty and final sentencing. Now the judge has the onerous task of considering a sentence of death by lethal injection.

In the present case, the defendant was born to a cocaine-addicted mother, lived in a crack house, and suffered brutal physical and sexual abuse at the hands of many. This defendant's background includes disobedience of the law in terms of early truancy and curfew violations. It is apparent that the defendant's framework for coping with life's challenges was severely limited from the beginning.[1] Because the

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Thanks to James Commerford, summer intern from The John Marshall School of Law.

1. Criminal court judges often encounter defendants with a history of drugs, gangs, lack of parental involvement, and criminal activity. Probation sentencing reports commonly report that a defendant had no primary caretaker, inadequate living conditions, or no appropriate male role

defendant waived his right to a jury, the trial court judge is required to determine the defendant's eligibility for capital sentencing and make a final sentencing determination. During the eligibility phase, the judge asks the defendant if he suffers from any psychological or psychiatric conditions. In response, the defendant refers to an earlier incident at the department of corrections but does not expound on the circumstances. The defendant was in custody for juvenile offenses or probation. Additionally, while in custody or probation, the defendant talked with mental health professionals about crimes that were unrelated to the homicide crime.

The prosecutor interrupts the judge and relates that there were mental health records written by a department of corrections psychiatrist. The defendant then volunteers that an unrelated commitment in the department of corrections resulted in the defendant's transfer to a psychiatric ward, psychological examination and resulting psychological report. The prosecutor reports that the mental health records indicate no evidence of a psychosis or psychiatric diagnosis. At the end of this phase of the capital sentencing hearing, the trial court judge finds the defendant eligible for the death penalty because the statutory aggravating factors were met—the murder occurred during the course of a felony and the defendant was over eighteen years of age at the time of the murder.[2]

The prosecutor then insists that the court consider the psychiatric report and other mental health records to sentence the defendant to death even though the defendant had not put his mental status at issue. In the hearing for aggravation and mitigation, the prosecutor argues that the defendant was diagnosed with an antisocial personality disorder and that he exhibited a pervasive pattern of a total disregard for the rights of others. Surprisingly, the State does not even call the psychiatrist and psychologists who had previously worked with the defendant, but rather chooses to present their affidavits.[3] Defense counsel objects to the court considering these certified affidavits because the documents are hearsay and not subject to cross-examination. The trial court judge admits the documents.

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model. BENJAMIN B. WOLMAN, ANTISOCIAL BEHAVIOR 105-29 (1999) (discussing that today's rise in sociopathy is related to factors such as the decline of the modern family, which fails to give the children adequate guidance; parental rejection; maternal deprivation; violent parental behavior; spousal abuse; child abuse; and lack of guidance and parental overpermissiveness).

2. *See infra* Part II.A (discussing post-trial death penalty proceedings and capital punishment reform).

3. No *Miranda* warnings were given by the psychiatrists or psychologists during psychological evaluation, interview and treatment.

The trial court judge makes extensive findings: that the defendant leads a completely antisocial life, that his conduct has always been antisocial, and that the prognosis of the future would be such that the defendant's antisocial conduct would continue.[4] In his findings, the trial court judge specifically refers to the psychiatrist's and psychologists' reports. Subsequently, the trial court judge finds that there are no mitigating factors sufficient to preclude imposition of the death penalty, and the defendant is sentenced to death.

Upon direct appeal to the Illinois Supreme Court,[5] the court affirms the trial court's judgment, holding that the defendant's Eighth Amendment right was not violated by admission of psychiatric evidence in affidavit form and by the judge's consideration of the defendant's antisocial personality disorder and antisocial behavior as aggravating evidence. The court does not examine the issue of confidentiality of the defendant's mental health records as granted by the Fifth Amendment. In fact, the court states that the defendant relied upon the diagnosis of antisocial personality disorder evidence as mitigating evidence and focuses its analysis on the Eighth Amendment. Moreover, the court finds that the trial court did not abuse its discretion in finding the psychiatrist's and psychologists' affidavit evidence relevant and reliable.[6] The United States Supreme Court denies certiorari.

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4. Charles M. Sevilla, *Anti-Social Personality Disorder: Justification for the Death Penalty?*, 10 J. CONTEMP. LEGAL ISSUES 247 (1999) (discussing that the use of any mental disorder, including antisocial personality disorder, to justify imposition of the death penalty should be impermissible under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution). Sevilla states that for legal purposes, mental conditions may significantly limit the defendant's ability to perceive reality and to make rational and appropriate choices. *Id.* Moreover, Sevilla states that while it may not be as appealing, antisocial personality disorder should have the same mitigating effect. *Id.* The prosecution's use of antisocial personality disorder either as aggravating evidence or as rebuttal evidence is premised on the notion that the disorder is permanent, and the jury may thus infer that the defendant's behavior will not be altered by exposure to the prison environment. However, studies have shown that age and other factors can cause improvement. *Id.* at 255. Furthermore, "given the changing scientific understanding of the antisocial personality disorder diagnosis and the immense legal consequences for those so diagnosed, the diagnosis alone should not suffice for an expert's opinion that the defendant is dangerous and that the death penalty is warranted." *Id.* at 256.

This hypothetical case took place before the United States Supreme Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt).

5. The Illinois Constitution provides in part, "appeals from judgments of Circuit Courts imposing a sentence of death shall be directly to the Supreme Court as a matter of right." ILL. CONST. art. VI, § 4.

6. The court found that the affidavit evidence was relevant to the defendant's character and background. Additionally, the court found that the affidavits were reliable opinion evidence from trained experts who diagnosed the defendant based on their professional experience; therefore, the

The defendant files a petition for post-conviction relief at the trial court level claiming, in part, that his Fifth Amendment rights were violated when his privileged mental health records were introduced by the prosecution during the aggravation phase of the capital sentencing hearing. The trial court judge finds that the defendant's Fifth Amendment and Fourteenth Amendment rights were violated under the United States Constitution and the defendant's right against self-incrimination was violated under the Illinois Constitution. The defendant's death penalty is overturned and a sentence of sixty years is imposed.

The defendant's murder trial, death penalty sentence and subsequent post-conviction proceedings present an unique interplay between a defendant's right to keep mental health records confidential when he has not placed his mental status in issue, the privilege against self-incrimination as granted by the Fifth Amendment and violation of the privilege where the State uses the defendant's mental health records in sentencing.[7] This hypothetical case illustrates how post-conviction proceedings can remedy violation of a defendant's constitutional rights. This constitutional issue was addressed by the trial court in post-conviction proceedings and the death penalty was overturned.[8]

Post-conviction proceedings provide an important remedy to defendants seeking redress for the violation of their constitutional rights because great injustice results when these improperly convicted defendants are sentenced to the death penalty. Statistics show that

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court found no abuse of discretion in the trial court's admission of the affidavit evidence at the defendant's sentencing hearing. 720 ILL. COMP. STAT. 5/9-1 (1998 & West Supp. 2000). The Criminal Code of 1961 provides:

> Any information relevant to any additional aggravating factors or any mitigating factors indicated in subsection (c) [Consideration of factors in Aggravation and Mitigation] may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

720 ILL. COMP. STAT. 5/9-1(e) (1998); *see also* People v. Hall, 499 N.E.2d 1335 (Ill. 1986) (discussing that the death penalty statute allows the introduction of evidence during the sentencing hearing that ordinarily is inadmissible during the guilt phase of a trial; factors controlling the admissibility of evidence at a capital sentencing hearing are relevance and reliability; determination of admissibility is discretionary by the trial court; and hearsay testimony will not per se be deemed to be inadmissible at a sentencing hearing as denying a defendant's right to confront witnesses).

7. It is important to note that at no time did the defendant want to put his mental status at issue.

8. The Illinois Supreme Court did not address the issue of confidentiality of mental health records as protected by the Fifth Amendment.

Illinois has as many death sentences overturned as upheld on appeal.[9] Additionally, a recent news investigative series stated that 381 homicide convictions nationwide have been thrown out since 1963 because prosecutors failed to disclose evidence suggesting innocence or knowingly used false evidence.[10] Moreover, another investigative series has found that in Illinois, at least thirty-three times, a defendant who was sentenced to die was represented by an attorney who had been disbarred or suspended.[11] A recent emerging trend shows that the number of post-conviction petitions is increasing.[12]

This article discusses post-conviction relief when a defendant's Fifth Amendment privilege against self-incrimination is violated because his privileged mental health records were disclosed during a sentencing proceeding. The article first discusses the death penalty, including a brief historical background.[13] Next the Illinois post-conviction procedure is presented.[14] The article then explains the Illinois mental health statutes and privilege,[15] followed by a discussion of the Fifth Amendment privilege against self-incrimination.[16] The article then examines Illinois law and the privilege against self-incrimination.[17] Finally this article analyzes post-conviction relief when the defendant's right against self-incrimination was violated by use of privileged mental health records.[18]

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9. Kenneth Armstrong & Steve Mills, *Justices Reject 6 Death Sentences*, CHI. TRIB., Aug. 11, 2000, § 1, at 1, *available at* 2000 WL 3695948.

10. Kenneth Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, § 1, at 1, *available at* 1999 WL 2833492.

11. Kenneth Armstrong & Steve Mills, *Failure of the Death Penalty in Illinois, Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, § 3, at 1, *available at* 1999 WL 2932178.

12. Statistics show that the number of mandatory jurisdiction appeals on the general docket for the Illinois Supreme Court was six in 1994, fifteen in 1995, nineteen in 1996, twenty-six in 1997 and twenty-six in 1998. ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY FOR 1998.

13. *See infra* Part II.A (discussing post-trial death penalty proceedings and capital punishment reform).

14. *See infra* Part II.B (discussing writ of habeas corpus and post-conviction procedural requirements).

15. *See infra* Part II.C (discussing the scope of the mental health communication privilege).

16. *See infra* Part II.D (discussing the development and limitations of Fifth Amendment jurisprudence).

17. *See infra* Part II.E (discussing Illinois court decisions applying the Fifth Amendment).

18. *See infra* Part III (analyzing the hypothetical from Part I under both federal and Illinois law).

II. HISTORICAL BACKGROUND AND APPLICABLE LAW

A. Death Penalty

The Illinois death penalty statute was reinstated on June 21, 1977[19] and may be imposed when the defendant has been found guilty of first degree murder.[20] Illinois law dictates that a separate post-trial proceeding must be held to determine first whether the defendant is eligible for the death penalty,[21] and second whether the death penalty should be imposed.[22] During the first phase, the prosecutor must prove beyond a reasonable doubt that the defendant was at least eighteen-years-old at the time of the offense and that one or more aggravating factors exist.[23] If the defendant meets the statutory eligibility for the death penalty, the court moves to the second phase, where statutory and

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19. After the Supreme Court decision in Furman v. Georgia, 408 U.S. 238 (1972), the General Assembly enacted new procedures for imposition of the death penalty. *See* 1973 Ill. Laws 2959, P.A. 78-921, §§ 1-2. These procedures required three judges to be impaneled to consider imposing a sentence of death. *See id.* § 2. This process was held to violate the Illinois Constitution. People v. Cunningham, 336 N.E.2d 1, 7 (Ill. 1975). In 1977, the General Assembly established a new sentencing process for imposing the death penalty. *See* 1977 Ill. Laws 70, P.A. 80-26, §§ 1-4. The Act established the current death penalty sentencing procedures requiring consideration of aggravating and mitigating factors by the sentencing judge or jury prior to imposition of the death penalty and repealed the provisions of Section 5-8-1A. *Id.* §§ 1, 3.

20. 730 ILL. COMP. STAT. 5/5-5-3(c)(1) (1998) (providing in part that "[w]hen a defendant is found guilty of first degree murder the State may . . . where appropriate seek a sentence of death"). First degree murder is statutorily defined as:

> A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) he is attempting or committing a forcible felony other than second degree murder.

720 ILL. COMP. STAT. 5/9-1(a) (1998).

21. 720 ILL. COMP. STAT. 5/9-1(d) (1998). Under Illinois procedures, the prosecutor must request a separate sentencing hearing where statutory aggravating and mitigating factors are considered prior to imposition of the death penalty.

22. *Id.* § 5/9-1(a) (eligibility); § 5/9-1(d) (sentencing hearing); § 5/9-1(g) (jury sentencing procedures); § 5/9-1(h) (non-jury sentencing procedures).

23. *Id.* § 5/9-1(b). Some aggravating factors include: the murdered individual was killed in the course of another felony if the murdered individual was actually killed by the defendant and the defendant acted with the intent to kill the murdered individual; or the murder was committed in a cold, calculated and premeditated manner pursuant to a preconceived plan, scheme or design to take a human life by unlawful means, and the conduct of the defendant created a reasonable expectation that the death of a human being would result therefrom. *Id.* Other aggravating felonies enumerated in the statute include robbery, armed robbery, armed violence, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnapping, aggravated vehicular hijacking, forcible detention, arson, aggravated arson, aggravated stalking, burglary, residential burglary, and home invasion. *Id.*

non-statutory factors are examined in mitigation and aggravation.[24] The statute provides that any mitigating factors which are relevant to the imposition of the death penalty may be considered.[25]

Psychiatric evidence may be used in mitigation and aggravation and is admissible when the defendant raises the issue of his mental condition in sentencing. For example, in *People v. Whitehead*,[26] the defendant made his psychological condition an issue at the sentencing hearing, and the Illinois Supreme Court therefore found that the defendant waived any objection to the introduction of relevant information on the question of his psychological condition.[27] In *People v. Lyles*,[28] the Illinois Supreme Court held that where the defendant initially introduces psychiatric testimony to establish a mental or emotional disorder as a mitigating factor at the sentencing hearing, the defendant's Fifth Amendment privilege against self-incrimination is not violated when the

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24. *Id.* § 5/9-1(c); *see also, e.g.*, Payne v. Tennessee, 501 U.S. 808 (1991) (holding that victim characteristics and emotional consequences from the killings may be considered by a sentencing jury).

25. 720 ILL. COMP. STAT. 5/9-1(c). Mitigating factors that may be considered include:

(1) the defendant has no significant history of prior criminal activity;

(2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

(3) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

(4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

(5) the defendant was not personally present during commission of the act or acts causing death.

Id. In addition to the stated mitigating factors, the statute expressly allows other factors to be considered. *Id.* However, there is some limitation on how a court may consider relevant information. People v. Childress, 730 N.E.2d 32, 38 (Ill. 2000) (stating that in presenting evidence in a capital murder hearing, the defendant's troubled childhood, including evidence that a defendant was physically or sexually abused as a child, has no inherently mitigating value and may actually be aggravating); People v. Szabo, 447 N.E.2d 193 (Ill. 1983) (stating that polygraph evidence is not admissible in a death penalty hearing).

26. People v. Whitehead, 508 N.E.2d 687 (Ill. 1987).

27. *Id.* at 700; *see also* People v. Simms, 736 N.E.2d 1092 (Ill. 2000) (discussing the argument of defendant's counsel that the jury should consider the defendant's background, including his difficult childhood and the defendant's mental condition in mitigation); People v. Morgan, 719 N.E. 681 (Ill. 1999) (finding that there was no ineffective assistance of counsel where the defense counsel made no investigation into the defendant's mental condition even though the defense counsel had notice of brain damage incurred by the defendant as a child); People v. Foster, 660 N.E.2d 951 (Ill. 1995) (stating that under the Illinois statute, evidence that a defendant was acting under the influence of an extreme emotional disturbance at the time of the murder is one of the factors to be considered in mitigation and may be the basis for imposing a sentence other than death).

28. People v. Lyles, 478 N.E.2d 291 (Ill. 1985).

State introduces evidence of a psychiatrist who examined the defendant pursuant to a court order.[29] In another case, *People v. Silagy*,[30] the Illinois Supreme Court stated that the defendant's Fifth Amendment privilege against self-incrimination was not violated because the defendant waived any objection to the admission of psychiatric testimony during the sentencing phase when he requested the appointment of a medical expert to conduct a psychiatric examination and was the first to specifically mention the psychiatric testimony during the hearing.[31]

Recently, Illinois has attempted to reform its capital punishment system.[32] In 1999, the Illinois Supreme Court established a committee comprised of seventeen judges to examine the death penalty process in Illinois.[33] Furthermore, on January 31, 2000, Governor George H. Ryan placed a moratorium on death penalty executions in Illinois.[34] New Supreme Court rules adopted January 22, 2001 now set minimum standards of training and experience for defense lawyers and prosecutors in capital cases.[35]

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29. *Id.* at 310.

30. People v. Silagy, 461 N.E.2d 415 (Ill. 1984).

31. *Id.* at 429. *Contra* People v. Williams, 454 N.E.2d 220, 244 (Ill. 1983) (stating that psychiatric testimony that the defendant's conduct may be of scientific interest is not a proper subject of mitigation since such fact does not concern the circumstances of the offense or character and record of the defendant and does not serve to restore the defendant to useful citizenship; furthermore, it was not an abuse of discretion for the trial court at the sentencing hearing to exclude the testimony of a psychiatry professor who stated that he wished to study the defendant further for insight into motivations behind the defendant's criminal conduct); People v. Kimpel, 397 N.E.2d 926, 928 (Ill. App. Ct. 1979) (affirming the conviction of murder because, in part, there was no indication that the trial court took into account eighteen-year-old psychological evaluations in determining the sentence because the court did not mention them in announcing the sentence).

32. David E. Rovella, *Execution Ban Deemed Moot: Illinois Prosecutors Contend Reforms are Already in the Works*, NAT'L L.J., Feb. 21, 2000, at A1; *see also* LESLIE A. HARRIS, ABA DEATH PENALTY REPORT, *available at* http://www.uncp.edu/home/vanderhoof/dp-news/aba-rept.html (recommending that each jurisdiction that imposes capital punishment not carry out the death penalty until the jurisdiction implements policies and procedures that ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and minimize the risk that innocent persons may be executed).

33. Kate Marquess & Zack Martin, *Judges to Look at Death Penalty*, CHI. LAW., May 1999, at 10; *see also* Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 U. PITT. L. REV. 321, 323-24 (1999) (stating that capital punishment does not have a deterrent effect; instead, the decreasing proportion of teenagers and young adults in the population has been responsible for much of the decrease in homicide rates during the past ten years).

34. Rovella, *supra* note 32, at A1.

35. Ryan Keith, *Illinois Supreme Court Sets New Rules for Death Penalty Cases* (Feb. 4, 2001), *at* http://www1.law.com/il/capitalpunishment.shtml. The lead lawyer must have at least five years of criminal litigation experience. *Id.* Judges who might preside over capital cases must

B. Post-Conviction Procedures

The writ of habeas corpus dates back to English common law.[36] Historically, the primary function of the writ was to release a person from unlawful imprisonment.[37] Generally, a determination of the prisoner's guilt or innocence was not the issue; the issue presented was whether the prisoner was restrained of his liberty by due process.[38] Under federal law, the United States Constitution provides for a writ of habeas corpus.[39] Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.[40] However, an application for writ of habeas corpus shall not be granted unless the applicant has exhausted available state court remedies, there is no available state corrective process, or circumstances exist that render such process ineffective to protect the rights of the applicant.[41] Under Illinois law, the Post-Conviction Hearing Act provides a state collateral remedy.[42]

Following a conviction, a defendant may, pursuant to the Post-Conviction Hearing Act, collaterally attack a judgment by means of a post-conviction petition in the trial court.[43] The Post-Conviction Hearing Act procedures provide a remedy to criminal defendants claiming substantial violations of their federal or state constitutional

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go to a seminar every two years. *Id.* Also, if prosecutors intend to seek the death penalty, they must let defendants know more quickly. *Id.*; *see also* ILL. S. CT. R. 432 (Opening Statements); ILL. S. CT. R. 431 (Voir Dire Examination).

36. BLACK'S LAW DICTIONARY 716 (7th ed. 1999).

37. *Id.*

38. *Id.*

39. U.S. CONST. art. I, § 9.

40. 28 U.S.C. § 2241 (1994).

41. 28 U.S.C. § 2254 (1994 & West Supp. 2000).

42. 725 ILL. COMP. STAT. ANN. 5/122-1 to 5/122-7 (West 1992 & Supp. 2000). The Illinois Post-Conviction Act provides that:

> Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article.

Id. § 5/122-1(a). The Act further provides that:

> No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

Id. § 5/122-1(c).

43. *Id.* § 5/122-1(a).

rights in the original trial or sentencing hearing.[44] The purpose of the post-conviction proceeding is to allow inquiry into constitutional issues involved in the original conviction and sentence that have not been, and could not have been, adjudicated previously on direct appeal.[45] Because this is a collateral attack, it is not an appeal from an underlying judgment.[46] Furthermore, issues that were raised and decided on direct appeal are barred by the doctrine of res judicata.[47]

To merit a post-conviction hearing, the petition must make a substantial showing that the petitioner's constitutional rights have been violated.[48] The trial court's determinations in a post-conviction proceeding will not be disturbed unless manifestly erroneous.[49] In death

44. The Post-Conviction Hearing Act is distinguished from a direct appeal, usually dealing with guilt or innocence, in that it provides a remedy for constitutional issues. People v. Towns, 696 N.E.2d 1128 (Ill. 1998) (stating that the defense counsel's failure to investigate and present mitigation evidence at sentencing materially prejudiced defendant). In *Towns*, a jury found no mitigating factors sufficient to preclude the death penalty, and the trial judge sentenced the defendant to death. *Id.* at 1134.

45. People v. Griffin, 687 N.E.2d 820 (Ill. 1997) (holding that the purpose of the Post-Conviction Hearing Act is to resolve allegations that constitutional violations occurred at trial when those allegations could not have been adjudicated previously). In *Griffin*, the trial court sentenced the defendant to death after he was convicted of murder, solicitation to commit murder, and conspiracy to commit murder. *Id.* at 827; *see also* People v. Owens, 544 N.E.2d 276, 277 (Ill. 1989) (noting that a post-conviction hearing is not an appeal, but rather a collateral attack where the scope of review is limited to issues that have not been previously adjudicated).

46. People v. Pecoraro, 677 N.E.2d 875 (Ill. 1997) (holding that the scope of post-conviction review is on matters that have not previously been adjudicated and stating that determinations of the reviewing court are res judicata as to issues actually decided). In *Pecoraro*, the trial court found the defendant eligible for the death penalty because he had a prior murder conviction. *Id.* at 880.

47. *Griffin*, 687 N.E.2d at 827; *see also* Michael B. Levy, *Practice Under the Illinois Post-Conviction Hearing Act*, DCBA Brief 42 (1999). In his article, Mr. Levy explains that while a direct appeal is an extension of the original proceedings, a post-conviction proceeding is a new and independent action where the court determines whether a person convicted of a crime and imprisoned has suffered a substantial denial of his constitutional rights. *Id.* Furthermore, in a direct appeal, the error must be apparent from the trial record; whereas, in post-conviction proceedings, claims outside the trial record may be developed. *Id.*

48. People v. Del Vecchio, 544 N.E.2d 312, 316 (Ill. 1989) (holding that the defendant is not entitled to an evidentiary hearing as a matter of right, but only if the defendant shows a violation of a constitutional right); People v. Rose, 253 N.E.2d 456, 461 (Ill. 1969) (suggesting that it is clear that the Post-Conviction Hearing Act is not invoked where the issue is essentially that of the defendant's guilt or innocence); People v. Mitchell, 517 N.E.2d 20, 21 (Ill. App. Ct. 1987) (holding that the defendant's post-conviction petition alleged ineffective assistance of counsel where trial counsel failed to object to the State's prejudicial use of peremptory challenges).

49. People v. Childress, 730 N.E.2d 32, 35 (Ill. 2000) (stating that an appellate court will not reverse a trial court's decision to dismiss a petition for post-conviction relief after conducting an evidentiary hearing unless it is manifestly erroneous); *Griffin*, 687 N.E.2d at 827.

penalty cases, an appeal of the post-conviction proceeding is taken directly to the Illinois Supreme Court.[50]

C. Mental Health Statutes and Privilege

1. Mental Health Statutes and Basis for Privilege

Historically, Illinois has been a pioneer in developing the law of privilege as applicable to mental health communications.[51] The public policy justifying privilege is to encourage the free flow of information in certain relationships and to protect the privacy of those relationships.[52] Privileges are necessary to ensure that patients are able to freely communicate with medical professionals.[53] Additionally, privileges are justified as needed safeguards protecting privacy, freedom, trust and honor in professional relationships.[54] Some courts have concluded that the mental health privilege has a constitutional basis in the right to privacy because matters disclosed in psychotherapy

50. ILL. SUP. CT. R. 651. The Illinois Supreme Court Rules provide in part:

> (a) An appeal from a final judgment of the circuit court in any post-conviction proceeding involving a judgment imposing a sentence of death shall lie directly to the Supreme Court as a matter of right. All other appeals from such proceedings shall lie to the Appellate Court in the district in which the circuit court is located.

Id.

51. Illinois was the first state to recognize the common law privilege to protect psychotherapeutic communications. Leila M. Foster, *Illinois: A Pioneer in the Law of Mental Health Privileged Communications*, 62 ILL. B.J. 668 (1974); *see also* Note, *Confidential Communications to a Psychotherapist: A New Treatment Privilege*, 47 NW. U. L. REV. 384 (1952) [hereinafter *Confidential Communications*]. Before the Mental Health and Development Disabilities Confidentiality Act was passed, Illinois common law applied to privileges. *Confidential Communications*, *supra*, at 385. The psychotherapist-patient privilege was recognized as being important so that the patient would reveal personal data that is essential for the purpose of constructing a reliable case history. *Id.* Also, this note provides an historical perspective where the author stated that in enacting a psychotherapist-patient privilege, that the Illinois legislature must consider what information is to be considered confidential and who would be a psychotherapist within the meaning of the statute. *Id.* The mental health communications privilege protects the disclosure of communications between mental health providers and patients. Foster, *supra* (calling for the state to consider new legislation to satisfy the needs developed by new treatment modalities in the mental health field). Ms. Foster further states: "The greatest danger in the lack of privilege is the deterrent effect on persons who should seek mental health treatment. . . . In these days when we are trying to make our communities safer and our lives healthier, we should be encouraging persons to seek mental health treatment as soon as they feel a need for it." *Id.* at 669.

52. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE § 5.1 (1st ed. 1995).

53. *Id.*

54. *See id.* § 5.37.

are often personal and, if not protected, likely to cause embarrassment or lead to civil or criminal liability.[55]

The statutory vanguard providing the mental health communications privilege is the Mental Health and Developmental Disabilities Confidentiality Act ("MHDDCA").[56] Under the MHDDCA, a recipient[57] and a therapist[58] on behalf of and in the interests of a recipient, have the privilege to refuse to disclose and to prevent the disclosure of the recipient's record or communications.[59] However, disclosure of therapist-client communications is permitted in judicial or administrative proceedings in which the recipient introduces his mental condition or any aspect of his services received for such a condition as an element of his claim or defense.[60]

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55. *See In re* Zuniga, 714 F.2d 632, 639 (6th Cir. 1983) (alluding that a certain level of mental health privilege is necessary if individuals are to enjoy other fundamental freedoms, particularly those protected by the First Amendment).

56. 740 ILL. COMP. STAT. 110/1 to 110/10 (1998 & West Supp. 2000), *amended by* An Act in Relation to Mental Health, P.A. 91-726, § 15, 2000 Ill. Legis. Serv. 3 (West). The statute provides in part: "All records and communications shall be confidential and shall not be disclosed except as provided in this Act." *Id.* § 110/3(a). Under the Act, the term "confidential communication" or "communication" means "any communication made by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health or developmental disability services to a recipient . . . includ[ing] information which indicates that a person is a recipient." *Id.* § 110/2. Under the Act, the term record "means any record kept by a therapist or by an agency in the course of providing mental health or developmental disabilities service to a recipient concerning the recipient and the services provided." *Id.*

57. *Id.* § 110/10(a). The statute provides that a recipient means a person who has received or is receiving treatment or habilitation. *Id.* § 110/2.

58. The statute defines a therapist as "a psychiatrist, physician, psychologist, social worker, or nurse providing mental health or developmental disabilities services or any other person not prohibited by law from providing such services or from holding himself out as a therapist if the recipient reasonably believes that such person is permitted to do so." *Id.* Also, a therapist includes any therapist who is a successor. *Id.*; Johnson v. Lincoln Christian Coll., 501 N.E.2d 1380, 1386 (Ill. App. Ct. 1986) (stating that even though a student may have incorrectly referred to a person to whom he was referred by a school as a psychologist rather than as a therapist, that this did not defeat his claim against the counselor for breach of the MHDDCA).

59. One Illinois court has held that threatening messages left by the defendant on the answering machine of his court-appointed therapist were communications that were exempt from disclosure under the MHDDCA. People v. Gemeny, 731 N.E.2d 844, 852 (Ill. App. Ct. 2000) (stating that in defining communication the legislature showed its willingness to protect statements made outside the formal treatment process, and that a client's phone messages to his therapist are communications under the statute).

60. The *Gemeny* court stated that this exception did not apply even though the defendant introduced his mental state as an element of his defense. The court reasoned that the State had failed to prove that the defendant had the requisite mental state to commit the charged offense.

In another case, a psychiatric therapist claimed that any answer in the grand jury identifying a criminal suspect as her patient was privileged from disclosure by the terms of the MHDDCA. People v. Doe, 430 N.E.2d 696, 698 (Ill. App. Ct. 1981) (finding that where a psychiatric

There are additional statutes providing certain professionals with a basis for withholding information. For example, confidentiality in substance abuse treatment is governed by the Illinois Alcoholism and Other Drug Abuse and Dependency Act.[61] Furthermore, statutes exist governing confidentiality and privileged communications for clinical psychologists,[62] social workers,[63] licensed professional counselors,[64] marriage and family therapists[65] and clergy.[66]

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therapist knew the identity of a person resembling a composite sketch as a suspect in an ax murder case, this information was not privileged by the express terms of the MHDDCA). The psychiatric therapist appealed a judgment from the circuit court where the circuit court found the therapist in contempt of court for refusing to answer a question before a grand jury. *Id.* at 696. The court reasoned that in answering the question, the therapist would not be disclosing a "recipient's record" or that which constitutes a communication within the meaning of the Act. *Id.* at 698. The court further reasoned that none of the information that the therapist had given to the grand jury in response to questioning by the prosecutor indicated that the person was a recipient. *Id.* Additionally, the court stated that the therapist made no claim that she learned the name of the person resembling the one in the drawing through conversation with him nor did she claim that the information was obtained by a conversation or other communication with somebody else. *Id.* at 699; *see also* People v. Davison, 686 N.E.2d 1231 (Ill. App. Ct. 1997). In *Davison*, the defendant filed a petition for post-conviction relief. *Id.* at 1232. The court held that counsel did not provide ineffective assistance of counsel by failing to object to the introduction of the defendant's mental health records at sentencing. *Id.* at 1238. The court reasoned that the defendant waived his privilege of confidentiality when he consented to reveal his mental health records, which he did by requesting, through his counsel, that the trial court consider those records. *Id.*; *see also* People v. Phillips, 470 N.E.2d 1137, 1139 (Ill. App. Ct. 1984) (stating that a psychologist's testimony in a previous trial could be used against the defendant because the defendant waived the psychiatrist-patient privilege by having the psychologist testify in the first trial).

61. 20 ILL. COMP. STAT. 301/30-5(bb) (1998). This privilege is distinct from the MHDDCA because of the nature of treatment. *See* People v. Leggans, 625 N.E.2d 1133 (Ill. App. Ct. 1993) (finding that intake information provided by the defendant to an employee of a substance abuse rehabilitation center concerning the defendant's consumption of alcohol was not privileged under the MHDDCA because the court stated that alcoholism treatment is not included under mental health services).

62. 225 ILL. COMP. STAT. 15/5 (1998). The statute provides in part:

> No clinical psychologist shall disclose any information he or she may have acquired from persons consulting him or her in his or her professional capacity, to any persons except only:
>
> (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide,
>
> (2) in all proceedings the purpose of which is to determine mental competency, or in which a defense of mental incapacity is raised . . .

Id. Even in instances where statutory disclosure is not required, the privilege may not be absolute. People v. Smith, 416 N.E.2d 814 (Ill. App. Ct. 1981) (stating that the defendant did not have the expectation of confidentiality when he was told before the psychiatric examination that it could be used against him and that the patient-therapist privilege must be asserted by either the therapist or defendant or it is considered waived).

63. 225 ILL. COMP. STAT. 20/16 (1998). One exception provided in the statute is when a communication reveals the intended commission of a harmful act or crime and the disclosure is judged necessary to protect any person from a clear, imminent risk of serious mental or physical

2. Exceptions to the Privilege

While statutes provide a basis for non-disclosure of mental health information, disclosure may nonetheless occur in certain situations. In one category, disclosure may be required to facilitate some aspect of a trial or other proceeding.[67] Additionally, public policy concerns may compel disclosure when there is a concern of serious injury or the need arises in the course of investigating criminal activities.[68]

In a civil, criminal, or administrative proceeding, disclosure may occur where the recipient introduces his mental condition as an element of his claim or defense.[69] However, this occurs only after the court, to

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harm or injury, or to forestall a serious threat to the public safety. *Id.* § 20/16(d).

64. 225 ILL. COMP. STAT. 107/75 (1998) (stating that no professional counselor shall disclose information acquired from persons consulting the counselor in a professional capacity except under limited circumstances).

65. 225 ILL. COMP. STAT. 55/70 (1998) (stating that no marriage or family therapist shall disclose any information acquired from persons consulting the therapist in a professional capacity, except under limited circumstances).

66. 735 ILL. COMP. STAT. 5/8-803 (1998). The statute provides that "[a] clergyman . . . shall not be compelled to disclose in any court . . . a confession or admission made to him or her in his or her professional character . . . nor be compelled to divulge any information which has been obtained by him or her." *Id.*

67. *See infra* notes 69-75 (discussing required disclosure when the defendant puts his or her mental condition at issue); *infra* notes 76-77 (discussing disclosure after court-ordered examinations).

68. *See infra* notes 78-83 (discussing disclosure when there is a concern of serious injury to the patient or another); *infra* note 84 (discussing disclosure relevant to homicide investigations).

69. D.C. v. S.A., 687 N.E.2d 1032 (Ill. 1997). In *D.C.*, a pedestrian sued the driver and owner of an automobile for injuries received after being struck by the automobile. *Id.* at 1034. The defendants sought discovery of the pedestrian's psychiatric records compiled during the pedestrian's stay in the hospital and mental health facility immediately after the accident. *Id.* at 1034-35. The court found that the plaintiff did not introduce his mental condition as an element of his claim. *Id.* at 1040. The court reasoned that the mental condition must be "specifically made" a part of the claim for damages as opposed to a general allegation of pain and suffering. *Id.* The court stated that fundamental fairness commands that the privilege yield such that the pedestrian's records referring only to his purported conduct at the times of the accident and various assessment by his treater of those purported events were discoverable. *Id.* at 1041. In *Kelly v. Rush-Presbyterian St. Luke's Med. Cen.*, 736 N.E.2d 129 (Ill. App. Ct. 2000), the Illinois Third District Appellate Court found that the trial court erred by granting judgment on the pleadings to a hospital accused of breaching the physician-patient relationship by releasing to an insurance company a patient's medical records, which contained information about his treatment for alcohol use. *Id.* at 132. The court found that the patient's authorization for release of his medical records did not meet the general designation requirements of the applicable federal regulations dealing with the release of alcohol treatment records. *Id.* In *People v. Sutton*, 2000 Ill. App. LEXIS 803 (Ill. App. Ct. Sept. 29, 2000), the Illinois First District Appellate Court found that the trial court abused its discretion in allowing the State to cross-examine a defendant with statements made by a defendant to a nontestifying psychiatrist during a fitness and sanity examination where no insanity defense was raised. *Id.* at *2. The court found that the exception to the use of such statement as provided by the fitness statute did not apply because the defense of insanity or drugged or intoxicated condition was not raised. *Id.* at *22.

which an appeal or other action for review is made, examines, in camera, the testimony or other evidence and finds that it is both relevant and probative, not unduly prejudicial or inflammatory, and otherwise clearly admissible.[70] Further, the court must find that other evidence is demonstrably unsatisfactory as evidence of the facts sought to be established by such evidence[71] and that disclosure is more important to the interests of substantial justice than protection from injury to the therapist-recipient relations or to the person whom disclosure is likely to harm.[72] Records and communications may also be disclosed where they

70. *Compare* Sassali v. Rockford Mem'l. Hosp., 693 N.E.2d 1287 (Ill. App. Ct. 1998) (holding that a woman who was the subject of an involuntary commitment proceeding and sued the hospital and its facility director for allegedly making improper release of her mental health record in violation of the MHDDCA had not placed her mental condition at issue so as to waive the privilege under the act; that the commitment proceeding was not brought pursuant to the act as would warrant disclosure; and that disclosure of the records directly to the physician appointed for purposes of the commitment proceeding violated the act), *and* House v. Swedish Am. Hosp., 564 N.E.2d 922, 926 (Ill. App. Ct. 1990) (holding that where a person was allegedly attacked by a patient in a hospital lounge and brought a negligence action against the hospital, the patient's medical records were protected from disclosure by the MHDDCA and physician-patient privilege), *with* Novak v. Rathnam, 478 N.E.2d 1334 (Ill. 1985) (holding that disclosure by the psychiatrist of privileged information at the patient's homicide trial was a waiver of the psychiatrist's testimonial privilege under the MHDDCA and thus the psychiatrist could not refuse to testify in a wrongful death action against the treating psychiatrist and psychologist), *and* Roberts v. Norfolk and W. Ry. Co., 593 N.E.2d 1144, 1152 (Ill. App. Ct. 1992) (finding that in a personal injury action, the employee's treatment for drug or alcohol abuse or psychiatric problems prior to the injury was irrelevant and privileged under the MHDDCA and Alcoholism and Other Drug Dependency Act where there was no evidence indicating that the employee was under the influence of drugs or alcohol at the time of the accident, or that any mental problems contributed to the accident, or that the employee missed work prior to the accident because of these problems), *and* Maxwell v. Hobart Corp., 576 N.E.2d 268, 270 (Ill. App. Ct. 1991) (where the court held that alcoholism treatment was not a mental health service within the meaning of the MHDDCA and the worker impliedly placed his condition at the time of the accident at issue when he filed suit and his blood alcohol level was .136 after the accident; and the Alcoholism and Other Drug Dependency Act did not protect the worker's alcoholism treatment records from disclosure).

71. Norskog v. Pfiel, 733 N.E.2d 386 (Ill. App. Ct. 2000), *petition for leave to appeal*, 738 N.E.2d 928 (Ill. App. Ct. 2000) (reversing the trial court order holding the defendant in civil contempt for refusing to comply with a prior order directing him to identify any mental health providers who provided him treatment). In a wrongful death and survival action the plaintiff brought an action against the defendant who allegedly stabbed and killed the plaintiff's thirteen-year-old daughter and the defendant's parents. *Id.* at 388. During discovery the plaintiff sought to obtain the records of a court-appointed psychiatrist who examined the defendant for fitness to stand trial in the criminal case for the plaintiff's daughter. *Id.* at 389. The plaintiff argued that the records were relevant to the issue of what the defendant's parents knew about the son's mental condition and violent propensities prior to the murder. *Id.*

72. 740 ILL. COMP. STAT. 110/10(a)(1) (1998). However, the statute further provides that:

> [I]n any action brought or defended under the Illinois Marriage and Dissolution of Marriage Act, or in any action in which pain and suffering is an element of the claim, mental condition shall not be deemed to be introduced merely by making such claim and shall be deemed to be introduced only if the recipient or a witness on his behalf

are made in the course of a court-ordered examination when good cause is shown and the information is relevant and otherwise admissible.[73] Such records or communications may be disclosed provided the court has found that the recipient has been adequately and effectively informed that the records and communications would not be considered confidential or privileged before submitting to examination. In this case, such records and communications are admissible only as to issues involving the recipient's physical or mental condition and only to the extent that they are germane to such proceedings.[74]

In a criminal setting, where there is an issue of fitness for trial, to plead, or to be sentenced, the MHDDCA and the Code of Criminal Procedure intersect.[75] In a court-ordered fitness examination involving the defendant's mental condition, statements made by the defendant and information gathered in the course of the examination shall not be admissible during trial proceedings against the defendant unless he places his mental condition at issue.[76] If this is the case, statements or information gathered are admissible only when the defendant raises the defense that he was insane, drugged, or intoxicated.[77]

If none of the above circumstances exist, privileged mental health information may be, nonetheless, disclosed by a therapist.[78] A therapist, in her sole discretion, may disclose information when the disclosure is necessary to protect the recipient[79] or another person against a clear,

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first testifies concerning the record or communication.

Id.

73. *Id.* § 110/10(a)(4).

74. 740 ILL. COMP. STAT. 110/10(a)(4) (1998).

75. 725 ILL. COMP. STAT. 5/104-14 (1998).

76. *Id.* § 5/104-14(a). *Contra* People v. Knuckles, 589 N.E.2d 1080, 1087 (Ill. App. Ct. 1992) (holding that the attorney-client privilege barred the state from compelling production of a psychiatrist's reports, notes, and memoranda reasoning that the attorney-client privilege protected from disclosure communications made by the defendant to a psychiatrist who was retained by defense counsel to assist with the insanity defense).

77. 725 ILL. COMP. STAT. 5/104-14(a) (1998). The statute further provides that:

> Except as provided in paragraph (a) of this Section, no statement made by the defendant in the course of any examination or treatment ordered . . . which relates to the crime charged or to other criminal acts shall be disclosed by persons conducting the examination or the treatment, except to members of the examining or treating team without the informed written consent of the defendant, who is competent at the time of giving such consent.

Id. § 5/104-14(b). *Contra* People v. Morton, 543 N.E.2d 1366, 1372 (Ill. App. Ct. 1999) (holding that the Abused and Neglected Child Reporting Act trumps the MHDDCA in prosecution for aggravated criminal sexual assault of a child because the Abused Neglected Child Reporting Act mandates that social workers report suspected cases of child neglect or abuse).

78. 740 ILL. COMP. STAT. 110/11(ii) (1998 & West Supp. 2000).

79. The statute defines recipient as "a person who is receiving or has received mental health or

imminent risk of serious physical or mental injury, or to protect disease or death from being inflicted upon the recipient or by the recipient on himself or another.[80] The therapist may also disclose records and communications where, in her sole discretion, disclosure is necessary to warn or protect a specific individual against whom a recipient has made a specific threat of violence.[81] However, in both situations, the therapist's personal notes regarding a recipient are not subject to disclosure.[82] These personal notes are considered the work product and personal property of the therapist and are not subject to discovery in any judicial, administrative or legislative proceeding or any preliminary proceeding.[83]

Finally, records and communications of the recipient may also be disclosed in investigations of trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide.[84]

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developmental disabilities services." *Id.* § 110/2.

80. People v. Ranstrom, 710 N.E.2d 61 (Ill. App. Ct. 1999) (stating that the trial court properly determined that a therapist's testimony was admissible under the dangerous person exception to the psychotherapist-patient privilege). Records and communications may be disclosed when, and to what extent, a therapist in his or her sole discretion determines that disclosure is necessary to initiate or continue civil commitment proceedings or to otherwise protect the recipient or other person against a clear, imminent risk of serious physical or mental injury. 740 ILL. COMP. STAT. 110/11(ii) (1998 & West Supp. 2000).

81. 740 ILL. COMP. STAT. 110/11(viii) (1998 & West Supp. 2000).

82. *Id.* § 110/3(b).

83. *In re* Estate Bagus, 691 N.E.2d 401, 403 (Ill. App. Ct. 1998) (holding that although a psychiatrist's personal notes were protected from discovery under MHDDCA, the trial court retained inherent authority to review the psychiatrist's records in camera to determine which documents were in fact personal notes).

84. 740 ILL. COMP. STAT. 110/10(a)(9) (1998). The statute itself uses "recipient," not just defendant. *Id.* However, if the defendant has received mental health services, then the defendant becomes a recipient. *Id.*; *see also* People v. Wilson, 647 N.E.2d 910 (Ill. 1994) (holding that the defendant's mental health records and journal were admissible under the homicide exception, and the defendant did not have the right to be read *Miranda* warnings before a therapist spoke to him where the defendant had not been charged with the murders and armed robbery before the therapist went to visit him, the therapist's visit was not court-ordered, and the purpose of the visit was to assess if the defendant was suicidal); People v. Doe, 570 N.E.2d 733 (Ill. App. Ct. 1991) (holding that information identifying male residents of a facility providing alternate housing and treatment for chronically mentally ill persons was privileged under the MDDCA defining confidential communication as that which includes information which indicates that a person is a recipient of mental health or developmental disability services; and that records and communication of recipients of mental health or developmental disability services may be disclosed in investigations of and trials for homicide when the disclosure relates directly to the facts or immediate circumstances of the homicide, but that a showing that the disclosure merely relates to circumstances of the homicide is not sufficient to invoke the exception).

D. The Fifth Amendment Privilege Against Self-Incrimination

The MHDDCA also intersects with the privilege against self-incrimination under the Fifth Amendment to the United States Constitution.[85] The Fifth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself. . . ."[86] The development of the constitutional protection against compulsory self-incrimination was partly due to certain historical practices such as ecclesiastical inquisitions where admission of guilt was compelled from a person's own lips.[87] The basic purposes that lie behind the privilege against self-incrimination are related not to protecting the innocent from conviction but to preserving the integrity of the judicial system.[88] When the privilege is claimed, a judge must decide whether the answer would tend to incriminate the witness-claimant based on the interrogator's question and all the surrounding circumstances.[89]

In court-ordered psychiatric examinations, the initial question is whether the privilege applies at all. If the examiner observes only the characteristics of the defendant, then there is no testimonial activity and the privilege does not apply.[90] However, in *Estelle v. Smith*,[91] the

85. U.S. CONST. amend. V.

86. *Id. Contra In re* Zuniga, 714 F.2d 632, 639 (6th Cir. 1983) (where the court found that psychotherapists could not raise the Fifth Amendment as a bar to the production of certain information because the psychotherapists' practices were maintained as professional corporations and the billing records were corporate rather than private records).

87. Andresen v. Maryland, 427 U.S. 463 (1976). Professor Graham C. Lilly presents an interesting discussion concerning policy justifications. *See* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 9.11 (2d ed. 1987). He states that first the privilege protects individuals from being treated such that it would be offensive to societal notions of privacy and individual autonomy. *Id.* The privilege restrains the government from forcing an individual to cooperate in a process that could lead to his conviction. Even a guilty person has dignity. Second, without the privilege the criminal defendant would be forced to choose between incriminating himself, perjuring himself or suffering criminal contempt of court. *Id.*

88. Tehan v. U.S. *ex rel.* Shott, 382 U.S. 406 (1966); 8 WIGMORE, EVIDENCE § 2252 (McNaughton rev. 1961) (stating that the policy underpinning the privilege is anything but clear; however, the significant purposes of the privilege are to protect against abusive tactics by a zealous questioner, and that an individual not be bothered by less than good reason and not be conscripted by his opponent to defeat himself). In *Tehan*, the United States Supreme Court further stated that the guilty are not to be convicted unless the prosecution shoulders the entire load. *Tehan*, 382 U.S. at 415. Historically, the privilege against self-incrimination was not greatly litigated until the end of the nineteenth century because in most jurisdictions, criminal defendants were disqualified as witnesses because of interest. WIGMORE, *supra*. Before 1868, the privilege was discussed in fifteen reported federal cases. *Id.*

89. Hoffman v. U.S., 341 U.S. 479 (1951) (stating that to sustain the privilege, it need only be shown that injurious disclosure could result based on the setting in which the question was asked and implications of the question).

90. 13 JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE § 124 (1992).

United States Supreme Court held that there are situations where the Fifth Amendment privilege may apply.[92] The Court held that where a psychiatrist had relied upon the defendant's communicated remarks the State's later use of the psychiatrist's testimony implicated the Fifth Amendment.[93] The Court focused on the use of the information to determine whether the protections of the Fifth Amendment applied.[94] Additionally, the Court stated that the Fifth Amendment privilege is as broad as the mischief against which it seeks to guard, and the privilege is fulfilled only when a criminal defendant is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty for silence. Significantly, the Court also found that the defendant had not introduced any psychiatric evidence nor had he indicated that he might do so.[95]

In response to *Estelle*, limitations were subsequently placed on Fifth Amendment jurisprudence applicable to mental health examination privilege in *United States v. Byers*.[96] In *Byers*, the District of Columbia Circuit Court held that when a defendant raises the defense of insanity, he may constitutionally be subject to compulsory examination by court-appointed or government psychiatrists.[97] When the defendant introduces psychiatric testimony into evidence to support his insanity

91. Estelle v. Smith, 451 U.S. 454 (1981).

92. *Id.* at 464-65. In *Estelle*, the Supreme Court specifically held that where, prior to in-custody court-ordered psychiatric examination to determine competency to stand trial, the defendant had not been warned that he had the right to remain silent and that any statement made could be used against him at a capital sentencing proceeding, admission at the penalty phase of the capital felony trial of the psychiatrist's damaging testimony on the crucial issue of future dangerousness violated the Fifth Amendment privilege against compelled self-incrimination. *Id.* at 468.

93. *Id.* The Court further stated that there was no basis to distinguish between the guilt and penalty phases of the defendant's capital murder trial so far as the protection of the Fifth Amendment privilege was concerned and given the gravity of the decision to be made at the penalty phase, the State was not relieved of the obligation to observe fundamental constitutional guarantees. *Id.* at 462-63. Moreover, the Court found that the communications to the psychiatrist were a communicative act unlike a voice exemplar, handwriting exemplar, lineup or blood sample. *Id.*

94. *Id.* at 465. The Court found that the trial judge *sua sponte* ordered the evaluation for a limited, neutral purpose of determining competency to stand trial. *Id.* However, the results of the inquiry were used for a broader objective that was plainly adverse to the defendant which then implicated the defendant's Fifth Amendment rights. *Id.* If the application of the psychiatrist's findings had been confined to insuring that the defendant had understood the charges and was capable of assisting counsel, then no Fifth Amendment issue would have arisen. *Id.*

95. *Id.* at 466.

96. United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984).

97. *Id.* at 1115.

defense, the examining psychiatrist's testimony may be received as well.[98]

E. Illinois Law and the Privilege Against Self-Incrimination

The Fifth Amendment privilege against self-incrimination has been incorporated into the Fourteenth Amendment and, therefore, applies to Illinois state court actions.[99] Additionally, the Illinois Constitution provides in part: "[n]o person shall be compelled in a criminal case to give evidence against himself . . . ."[100] In Illinois courts, when the privilege exists, it applies to self-incriminating testimonial evidence and personal records of an incriminating nature.[101] In contrast, the United States Supreme Court has held that the Fifth Amendment's protections do not extend beyond testimonial communications that are incriminating.[102]

Illinois courts have had several opportunities to interpret *Estelle*.[103] Generally, Illinois courts have found differing bases to distinguish the cases at bar from *Estelle*. For example, in *People v. Hampton*,[104] the Illinois Supreme Court stated that under *Estelle* it has not been decided yet whether *Miranda* warnings are required where a probation officer interviews a defendant pursuant to a court-ordered pre-sentence investigation and that the *Hampton* case was not a proper vehicle for addressing the issue.[105] In *People v. Davis*,[106] the defendant argued that use of a Treatment Alternative to Street Crime ("TASC") report as evidence in aggravation at his sentencing hearing was error.[107] The

98. *Id.*

99. Malloy v. Hogan, 378 U.S. 1 (1964) (holding that the Fourteenth Amendment prohibits state infringement of the privilege against self-incrimination just as the Fifth Amendment prevents the federal government from denying the privilege).

100. ILL. CONST. art. I, § 10.

101. Lamson v. Boyden, 43 N.E. 781 (Ill. 1896) (holding that where a witness is excused from testifying on the ground that his answers will tend to incriminate him, he cannot be compelled to produce books and papers which will have the same effect).

102. Baltimore City Dept. of Soc. Serv. v. Bouknight, 493 U.S. 549 (1990) (holding that a mother who is the custodian of her child pursuant to a court order may not invoke the Fifth Amendment privilege against self-incrimination to resist a subsequent court order to produce the child).

103. Estelle v. Smith, 451 U.S. 454 (1981).

104. People v. Hampton, 594 N.E.2d 291 (Ill. 1992).

105. *Id.* at 304.

106. People v. Davis, 530 N.E.2d 601 (Ill. App. Ct. 1988).

107. *Id.* at 604; *see also* People v. Nicklaus, 498 N.E.2d 753 (Ill. 1986) (ruling that it was error to permit the State to use the defendant's statements from a voluntary fitness examination as evidence at defendant's sentencing hearing where defendant's sanity was not in issue).

Davis court distinguished *Estelle* and *People v. Nicklaus*[108] stating that the defendant requested treatment as a drug addict, and the court accommodated that request by ordering a TASC evaluation. The court stated that *Estelle* was different based on the facts because the psychiatric examination to determine the defendant's competence to stand trial in *Estelle* was court-ordered and was not requested by defense counsel.[109] The *Davis* court also stated that while the *Nicklaus* court held that use of statements made in a fitness examination requested by the defendant would be improper as well, the statute in that case expressly prohibited use of those statements for any purpose other than determining whether the defendant was insane, drugged, or intoxicated.[110] Additionally, the *Davis* court stated that unlike the statute in *Nicklaus*, the statute governing the election to be treated as a substance abuser contains no similar limitation on the use of statements made during an evaluation.[111] Furthermore, the *Davis* court stated that unlike *Estelle* and *Nicklaus*, the evaluation in the instant action was not to determine defendant's fitness to stand trial, but rather to determine defendant's disposition following conviction.[112] Thus, the court stated that the evaluation was more akin to a pre-sentence report.[113]

In *People v. Bachman*[114] the court considered the defendant's contention that his privilege against self-incrimination was violated at the sentencing hearing by statements he made during a pre-sentence interview.[115] The court stated that *Miranda* warnings were not required in connection with the submission by a defendant to a routine pre-sentence interview.[116]

In *People v. Whitehead*,[117] the defendant argued that statements he made in two court-ordered interviews were inadmissible because in neither case was there any showing that he had been advised of his constitutional right against self-incrimination.[118] The court stated that

108. People v. Nicklaus, 498 N.E.2d 753 (Ill. App. Ct. 1986). In *Nicklaus*, the court held that where a defendant's sanity is not at issue, it is error to admit the defendant's voluntary statements during a fitness examination at the sentencing hearing. *Id.* at 756.

109. *Davis*, 530 N.E.2d at 604.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. People v. Bachman, 468 N.E.2d 817 (Ill. App. Ct. 1984).

115. *Id.* at 822.

116. *Id.*

117. People v. Whitehead, 508 N.E.2d 687 (Ill. App. Ct. 1984).

118. *Id.* at 700.

the statements made by the defendant in court-ordered psychological interviews were admissible in a sentencing hearing to determine whether to impose the death penalty where the defendant had made his psychological condition an issue at the sentencing hearing, and the statements did not concern the murder for which the defendant had been convicted.[119]

In *People v. Lyles*,[120] the court stated that the *Estelle* decision was not analogous to the *Lyles* case, because the psychiatric testimony in *Estelle* was initially introduced by the State at the sentencing hearing to carry its burden of proof of showing that the defendant would be dangerous in the future.[121] The court stated that admission in the second phase of the sentencing hearing of the testimony of a psychiatrist who examined the defendant pursuant to a court order to rebut the defendant's psychiatric testimony establishing a mental or emotional disorder as a mitigating factor did not deprive the defendant of his Fifth Amendment privilege against self-incrimination.[122]

Finally, in *People v. Allen*,[123] the court stated that since there is no privilege against self-incrimination in sexually dangerous person proceedings there is no need for *Miranda* warnings to be given.[124]

III. POST-CONVICTION RELIEF: PRIVILEGED MENTAL HEALTH RECORDS, THE ILLINOIS MENTAL HEALTH STATUTE AND THE FIFTH AMENDMENT

The hypothetical presented in the Introduction demonstrates a tension between two competing legal principles: what information should be used in a sentencing hearing versus the defendant's privilege against self-incrimination. On the one hand, it can be argued that in a capital sentencing hearing any information that can be used in mitigation should be presented because the stakes are so high. On the other hand, if privileged information such as mental health records is disclosed when the defendant has not put his mental status at issue, defendants would be discouraged from revealing their innermost secrets, thus preventing or influencing treatment.

119. *Id.*
120. People v. Lyles, 478 N.E.2d 291 (Ill. 1985).
121. *Id.* at 310.
122. *Id.*
123. People v. Allen, 481 N.E.2d 690 (Ill. 1985).
124. *Id.* at 696.

Illinois Appellate Courts have confronted some of these issues.[125] The Second District Appellate Court, in *People v. Sagstetter*,[126] found that if a defendant did not make his mental condition a defense to charges against him by agreeing to receive counseling for his mental problems, this precluded admission at the sentencing hearing of the statements that the defendant made to his therapist.[127] In another Second District appellate opinion, *People v. Nicklaus*,[128] the court found that the psychologist who had been appointed to examine the defendant to determine fitness to stand trial should not have been permitted to testify at the sentencing hearing where the defendant had never raised the insanity defense.[129] However, in *People v. Kashney*,[130] the First District allowed the State to question the defendant regarding statements he made to psychiatrists who performed a court-ordered fitness examination, because the defendant did present some evidence indicating that he falsely confessed due to delusions caused by mental

125. The Capital Litigation Division of the Office of the State Appellate Defender in Chicago, Illinois has stated in a telephone interview that since 1995 post-conviction relief has been granted in twenty-seven cases. On direct appeal to the Illinois Supreme Court twenty-five cases have been granted relief. Telephone Interview with Marshall Hartman, Deputy Defender, Capital Litigation Division of the Office of the State Appellate Defender (September 15, 2000).

126. People v. Sagstetter, 532 N.E.2d 1029 (Ill. App. Ct. 1988).

127. *Id.* at 1033 (finding that the defendant's letters were drafted as part of a treatment program and should not have been considered at the sentencing hearing without the defendant's express approval). Additionally, the court found that the defendant did not make his mental condition an element of his claim or defense because he pleaded guilty to the charge of aggravated criminal sexual abuse and thus had no defense. *Id.* at 1034. Furthermore, the court stated that it found no evidence that the therapist allowed the defendant any opportunity to refuse the disclosure of the documents. *Id.*

128. People v. Nicklaus, 498 N.E.2d 753 (Ill. App. Ct. 1986).

129. *Id.* at 756. The psychologist's opinion indicated that the defendant had little regard for human life and would probably commit future criminal acts. *Id.* The court stated a public policy argument that the blanket protection of mental health records is important to encourage the free interchange of conversation, information and ideas between the examining therapist and the defendant to determine his mental status. *Id.*; *see also* People v. Lee, 471 N.E.2d 567 (Ill. App. Ct. 1984) (reversing the conviction of the defendant and remanding the case for another trial, and ordering that testimony concerning the defendant's psychiatric examination be barred unless the statutory requirements were met). The State presented testimony of a clinical psychologist who had been ordered by the court to interview the defendant after the defendant indicated in his answer to discovery that he might raise the insanity defense. *Id.* at 570. Subsequently, the defendant did not raise the insanity defense, but the defendant offered testimony of a psychiatrist who had examined the defendant after his arrest and the psychiatrist determined that the defendant was suffering from post-traumatic stress syndrome. *Id.* The court found that the psychiatric testimony presented by the defendant's expert was intended to establish that the defendant did not have the mental state necessary for the crime of rape, a general intent crime that does not require an allegation of a specific mental state, and that the defendant's expert testimony was intended to establish that the defendant did not exhibit any of the culpable mental states. *Id.* at 571.

130. People v. Kashney, 472 N.E.2d 164 (Ill. App. Ct. 1984).

illness.[131] Similarly, in *People v. Davis*,[132] the Second District upheld the trial court's use of treatment records in a sentencing hearing because the defendant had requested treatment as a drug addict.[133] Each of these cases is distinguishable from the hypothetical in that they were reviewed on direct appeal; the hypothetical presents the unique situation of presenting the issue for review on post-conviction appeal.

The issue presented for post-conviction analysis in the hypothetical is whether the defendant's Fifth Amendment rights were violated when his privileged mental health records were introduced by the prosecution during the aggravation phase of the capital sentencing hearing.[134] First, under the MHDDCA, the mental health records were privileged because in any criminal proceeding a recipient and a therapist, on behalf and in the interest of the recipient, have the privilege to refuse to disclose and to prevent the disclosure of the recipient's record or communications.[135] In the hypothetical case, the defendant did not waive his right to the confidentiality of his mental health records and, therefore, they were privileged under the MHDDCA. Also, since the defendant did not raise any mental health defense claims, the use of these privileged records by the State in the aggravation phase of the sentencing violated the defendant's rights under the MHDDCA.

The defendant's Fifth Amendment privilege against self-incrimination, as based on the *Estelle v. Smith* doctrine, was also violated. First, the defendant did not put his mental status at issue at

131. *Id.* at 169.

132. People v. Davis, 530 N.E.2d 601 (Ill. App. Ct. 1988).

133. *Id.* at 602 (granting, under the Alcoholism and Substance Abuse Act, defendant's petition to be treated as an addict and ordering the defendant to be evaluated by the TASC; the defendant was not accepted into the treatment program; and at the sentencing hearing, the court used the report). The court found that at no time did the defendant object to the court using the report's conclusions in rendering sentence and that the defendant's mere difference of opinion with the report's conclusions did not constitute an objection to the court's use of the report's conclusion. *Id.* at 603. Furthermore, the court found that the evaluation was not to determine the defendant's fitness to stand trial, but was used to determine the defendant's disposition following conviction; thus it was more like a pre-sentence report. *Id.* at 604-05. The court held that the statements made in the evaluation to determine whether the defendant qualified for treatment as a substance abuser were similar to statements made in a pre-sentence report; thus the trial court's use of those statements as aggravating or mitigating factors in a sentencing determination was no error. *Id.* at 605.

134. Developments in the mental health field may further complicate the issue. Sevilla, *supra* note 4, at 262 (stating that in the future as scientific research further establishes an organic, non-volitional or hereditary basis, courts may have to limit antisocial personality evidence to mitigation only).

135. 725 ILL. COMP. STAT. 110/10(a) (1998); *see also supra* Part II.C (discussing mental health statutes, counselor-patient communication privileges, and exceptions to counselor-patient communication privileges).

anytime—no insanity defense was contemplated and there was no issue of fitness for trial. Additionally, when the defendant was interviewed and seen by the psychiatrist and psychologists he was not given *Miranda* warnings. During all discussions with the mental health professionals, the defendant was in custody for juvenile offenses or probation. The defendant talked with the psychiatrist and psychologists about crimes that were unrelated to the homicide crime. Furthermore, the defendant did not waive his right to the confidentiality of his mental health records.

Finally, the defendant's privilege against self-incrimination under the Illinois Constitution was also violated for the same reasons as discussed above in the context of the Fifth Amendment of the United States Constitution. As a corollary, the defendant's Fourteenth Amendment rights under the United States Constitution were violated because the improper use and admission of the defendant's mental health records in aggravation resulted in the denial of his rights to a fair and reasonable determination of the proper sentences.

IV. CONCLUSION

Dealing with a defendant's mental health status presents a complex interplay of legal and social issues. Practitioners on the bench and bar should carefully analyze whether a defendant's rights may be violated when the defendant's mental health records are used in a proceeding. This is especially true if the records are used and the defendant has not put his or her mental status at issue. The decision to put a defendant's mental health status at issue can be likened to a tripartite conundrum: the defendant's records can be used in aggravation, mitigation, or both. While one judge and jury may use the defendant's mental health history in aggravation, another judge and jury may use these records in mitigation, and a third judge and jury may use this history both as mitigation and aggravation.

For example, in the case of a defendant who has been diagnosed as having an antisocial personality disorder, one judge and jury may say that the defendant has no remorse for his crime, that the crime was heinous, and therefore an enhanced sentence may be imposed as long as the statutory factors are proven to a jury beyond a reasonable doubt. On the other hand, a judge may find that the defendant's mental status is due in part to poor family upbringing and may impose a lesser sentence. A different judge may weigh these same factors and impose no lesser or greater sentence.

In a mental health situation, it must be remembered that the privilege against self-incrimination helps provide a forum for treatment to enable the defendant to become a productive member of society. We should allow even the convicted this fundamental opportunity. In light of the seriousness of the deprivation of one's liberty, if it appears that a defendant's constitutional rights have been violated, a post-conviction petition can provide an important safeguard beyond the initial trial court and direct appeal process.