MSC Opinion: Confrontation Clause prohibits use of non-testifying psychiatrist's diagnosis at trial

2. August 2011 By Michael Azzi

In *People v. Fackelman*, No. 139856 (July 28, 2011), the Supreme Court held that the use of a psychiatrist's diagnosis against a criminal defendant violates the Confrontation Clause of the United States and Michigan's Constitution, when the psychiatrist did not testify at trial and the psychiatrist's report was not admitted into evidence.

In *Fackelman*, the defendant was found guilty but mentally ill of home invasion, felonious assault, and felony firearm possession. The only issue at trial was whether the defendant was legally insane at the time of the crime. The prosecutor's expert concluded the defendant was not legally insane, while the defense's expert concluded that he was. The defense's expert based his opinion on the medical report prepared by the defendant's treating psychiatrist that met with the defendant near the time of the incident. During his testimony, the defense's expert noted he relied on the psychiatrist's report, but never testified as to the conclusion in the report, which was that the defendant was not insane at the time of the crime. The prosecutor subsequently cross-examined the defense's expert extensively regarding the psychiatrist's report, including the ultimate opinion of the psychiatrist on the insanity issue. In addition, the prosecution's expert testified at great length as to the psychiatrist's diagnosis, and the prosecutor placed great emphasis on the non-testifying psychiatrist's diagnosis during closing arguments. The defense never objected to the prosecution's use of the report at trial.

After being found guilty but mentally ill of the charged offenses, the defendant appealed to the Court of Appeals and moved for an evidentiary hearing regarding his claim of ineffective assistance of counsel. The motion for a hearing was granted, but following the hearing, the trial court ultimately denied the defendant's motion for a new trial, and the Court of Appeals affirmed. The Supreme Court granted the defendant's application for leave to appeal. The Court concluded that the prosecution's use of the psychiatrist's conclusions at trial was unconstitutional, and the judgment below was reversed, the convictions were vacated, and the matter was remanded for further proceedings.

The Court relied on the Confrontation Clause, which guarantees the accused the right "to be confronted with the witnesses against him." The Court concluded that the record conclusively indicated that the psychiatrist was a true "witness against" the defendant, the diagnosis was testimonial, and the prosecution improperly introduced and repeatedly used the psychiatrist's diagnosis without the psychiatrist's own testimony. The Court also noted that use of the report was improper under MRE 703 because it was never introduced into evidence, and even if admitted, only the "facts and data" would be allowed—the ultimately diagnosis would have been precluded, as the diagnosis was hearsay that went to the central issue at trial.

In dissent, Chief Justice Young, joined by Justice Zahra, would have held that the defendant affirmatively waived his right to confront the psychiatrist by not calling him as a witness. Additionally, the dissent would have held that the diagnosis and accompanying report were not "testimonial" as required to implicate the Confrontation Clause under *Crawford* and its progeny. Moreover, the dissent argued

that even if the diagnosis was testimonial under *Crawford*, the prosecution used the statement for impeachment purposes against the defense's expert, who relied on the report—a permissible use under *Crawford*.