

## Protecting the Victim's Privacy: *United States v. Morris*

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### Overview of *United States v. Morris*, No. 2:08-CR-90, 2009 WL 290601 (E.D. Tenn. Feb. 5, 2009)

While on duty as a deputy sheriff in Tennessee in 2005, Dexter L. Morris, Jr. stopped a vehicle driven by a woman and sexually assaulted her in his patrol car. In the ensuing criminal proceedings, Morris sought to exclude testimony (introduced by the prosecution) provided by the psychologist who examined the victim and obtain a court order requiring the victim to submit to a psychological examination by the defendant's own expert. The U.S. District Court for the Eastern District of Tennessee held that the psychologist who examined the victim may be allowed to testify as an expert concerning: (1) her clinical interview and testing of the victim, (2) her diagnosis of post-traumatic stress disorder (PTSD), (3) the characteristics and behavior of sexual abuse victims generally, and (4) her expert opinion that the victim's PTSD is consistent with what would be expected of a victim following the trauma of sexual assault. The psychologist also would be permitted to testify to limited statements made by the victim that were relevant to the psychologist's opinions and diagnosis. The Court concluded that this type of expert testimony is relevant to the victim's lack of consent and that its probative value is not substantially outweighed by the danger of unfair prejudice to the defendant. Furthermore, the Court denied Morris' request to conduct his own independent psychological evaluation of the victim because there was no compelling need for such a drastic measure. This decision followed a line of cases that underscore the importance of considering the victim's privacy, limiting the potential of harassment by defense, and understanding the possibility that subjecting the victim to additional examination by a defense-recommended psychologist would deter victims from coming forward and thus impede law enforcement investigations as well as the aim of the criminal justice system to protect victims and society.

### Introducing Expert Testimony to Explain Victim Behavior

While victims of sexual violence respond to their victimization in unique ways, it is sometimes helpful to have an expert testify to explain common victim behaviors and counter persistent myths and stereotypes that jurors may have about victims. Therefore, prosecutors may need to consult with and introduce the testimony of experts who are experienced in working with and observing the behaviors of victims of sexual violence. These experts can discuss the dynamics of sexual violence and common victim behaviors as well as dispel any surrounding myths. Some examples of such experts include victim advocates, directors of shelters or crisis centers, social workers, physicians, sexual assault nurse examiners (SANEs), counselors, therapists, psychiatrists, or psychologists.

In *United States v. Morris*, the prosecution gave notice that it intended to offer the expert testimony of Dr. Catherine Zook-Bell, a psychologist who examined and tested the victim, as to her opinions about the victim and her observations and experiences with sexual assault victims generally. She planned to testify that – based on her clinical evaluation and objective psychological testing of the victim in this case – the victim suffered from PTSD and her behaviors were consistent with what would be expected following a trauma such as sexual assault. The prosecution agreed that Dr. Zook-Bell should not be permitted to offer an opinion as to the credibility of the victim and would limit testimony about the victim's subjective complaints, because the victim herself would be testifying at trial.<sup>1</sup>

According to the Federal Rules of Evidence and case law, in order to admit expert testimony, the prosecution must establish that (1) the expert is qualified, (2) the subject of the expert's testimony is relevant, and (3) the probative value of the evidence substantially outweighs any unfair prejudice to the defendant. In *United States v. Morris*, the defense did not challenge the qualifications of Dr. Zook-Bell but rather sought to exclude her testimony on the grounds that it was not relevant and was more prejudicial than probative. The Court did not find a compelling reason to justify excluding the expert's testimony, denied Morris' motion, and held that Dr. Zook-Bell's testimony was admissible.

Based on prior legal precedent, the Court reasoned that Dr. Zook-Bell's testimony was relevant on the issue of the victim's consent (or lack of consent) and its probative value was not substantially outweighed by the danger of unfair prejudice to the defendant, confusion of the issues, or misleading the jury. The Court reviewed previous cases in which

the testimony of similar experts was found to be reliable, relevant, and admissible. For example, an expert in one case introduced social scientific research to explain common victim responses such as delayed reporting and an inability to recall details of a rape. In another case, the expert's testimony was based on general research and personal interaction with hundreds of abuse victims; the expert concluded that the victim's behavioral response was consistent with the behavior of abuse victims generally. A third case involved the testimony of a psychologist regarding the results of clinical tests administered to the victim and her conclusion that the victim suffered from PTSD with a sexual abuse trigger.

## Protecting the Privacy Interests of Victims

When introducing expert testimony, prosecutors must remain mindful of the victim's privileges and privacy interests. It is especially important to limit the victim's exposure to further examination than what may be necessary. If a victim is ordered to submit to additional unnecessary psychological examinations, the victim may feel harassed or re-victimized.

In *United States v. Morris*, the defendant requested an order to conduct his own independent psychological evaluation of the victim. While Morris argued that his Constitutional rights – including the “confrontation and fair trial” provisions of the Sixth Amendment and the due process clause of the Fifth Amendment – entitled him to an order requiring the victim to submit to a psychological examination by the defense expert, he did not cite any legal authority to support this assertion. Furthermore, the Court could not find any prior cases in which a court held that the refusal to order a witness to undergo a psychiatric examination is a violation of a defendant's constitutional rights. However, several courts had previously recognized that ordering a witness to undergo a psychological examination is a “drastic measure” and a matter “particularly within the discretion of the trial court.”<sup>2</sup> The *Morris* Court went further to clarify that, while the defendant's alleged need for the examination is an important factor to consider in exercising this discretion, the Court must also consider the infringement on a witness's privacy, the opportunity for harassment of the witness, and the possibility that an examination will hamper law enforcement by deterring witnesses from coming forward.

In attempting to articulate a “compelling need” sufficient to warrant the drastic measure of ordering the victim to undergo an examination by a defense expert, Morris' attorney merely complained about the “unfairness” of the situation and claimed that they needed the examination to test the prosecution's proof and properly confront and cross-examine the witnesses.<sup>3</sup> The Court found Morris' need “quite unconvincing.”<sup>4</sup> The Court acknowledged that there were sufficient safeguards to protect Morris' rights because he already had hired his own expert who could advise him in the cross-examination of Dr. Zook-Bell and provide rebuttal testimony. Morris' expert would have access to all of the testing data and documents upon which Dr. Zook-Bell relied, would be able to testify on the same matters, and would be able to criticize her methodologies, diagnosis, and other conclusions. Morris' expert was permitted to remain in the courtroom while the victim and Dr. Zook-Bell testified. Furthermore, the prosecution would be prohibited from impeaching Morris' expert on the basis that she had not personally examined the victim. Finally, the Court would be instructing the jury that it should weigh the expert's testimony just as it would any other testimony. For all of these reasons, the Court denied Morris' request for an independent examination.

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## ENDNOTES

<sup>1</sup> Although [the victim's] statements concerning her subjective complaints are likely admissible under the hearsay exception of Fed. R. of Evid. 803(4) as statements made for the purpose of medical diagnosis, see *United States v. Kappell*, 418 F.3d 550, 556-57 (6th Cir.2005), the government has agreed to limit its questioning of Dr. Zook-Bell concerning [the victim's] subjective complaints.” *United States v. Morris*, 2009 WL 290601 \*3.

<sup>2</sup> *Lee Wan Nam v. United States*, 363 U.S. 803 (1960).

<sup>3</sup> 2009 WL 290601, \*6.

<sup>4</sup> *Id.*

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