

DEFENSE ACCESS TO A PROSECUTION WITNESS'S PSYCHOTHERAPY OR COUNSELING RECORDS

presented by
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I. CONSTITUTIONAL PROVISIONS TO BE CONSIDERED

- A. **Sixth Amendment Confrontation Clause:** “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...”
- B. **The Due Process Clauses:** “No person shall be deprived of life, liberty, or property, without due process of law” (**Fifth Amendment**); “[N]or shall any State deprive any person of life, liberty, or property, without due process of law” (**Fourteenth Amendment**).
- C. **Sixth Amendment Compulsory Process Clause:** “In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor; ...”

II. THREE SUPREME COURT DECISIONS

A. *Redmond v Jaffee*, 518 U.S. 1 (1996): Federal courts must recognize the patient-psychotherapist privilege, and the privilege is “absolute.” (Most states hold likewise.)

Respondent Redmond, a police officer, shot and killed a man after receiving a "fight in progress" call at an apartment complex. Thereafter she participated in approximately 50 counseling sessions with Karen Beyer, a social worker licensed by the state of Illinois and employed by the village that employed Redmond. Petitioner, the administrator of the dead man's estate, sued Redmond and the village, alleging violation of the deceased's civil rights, and sought access to the social worker's notes for use in cross-examining Redmond. Redmond and Beyer, asserting a patient-psychotherapist privilege, refused to surrender the notes or answer any questions concerning the sessions. The trial judge, rejecting their claim of privilege, instructed the jury that Redmond and Beyer had no legal justification for refusing to turn over the notes and that it could therefore presume that the contents of the notes would have been unfavorable to Redmond and the village. The jury found for petitioner.

¹ Copyright 2014 by Clifford S. Fishman. All rights reserved. This outline is a brief abstract of the article of the same name published in 86 Oregon Law Review 1-63 (2007), updated by research conducted in 2014. I can be reached at 202-319-5026, or at Fishman@law.edu.

The U.S. Court of Appeals for the Seventh Circuit reversed and remanded, concluding that the law should recognize a qualified patient-psychotherapist privilege that would apply unless the judge concluded that the interests of justice the evidentiary need for disclosure of information relating to a patient's counseling sessions outweighed the patient's privacy interests. Although the Supreme Court affirmed the Seventh Circuit's reversal of the verdict, it rejected the balancing test enunciated by the circuit court, creating instead a near-absolute privilege.

The Supreme Court began by acknowledging the basic understanding that "the public ... has a right to every man's evidence." A testimonial privilege may be justified, however, by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."

The Court likened the psychotherapist-patient privilege to the spousal and attorney-client privileges: each is "rooted in the imperative need for confidence and trust." Specifically,

Effective psychotherapy ... depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

The Court made no attempt to "delineate [the] full contours" of the privilege, leaving that task to the lower courts on a case-by-case basis. It noted, however, that "there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." Nor did the Court discuss whether the privilege would be "absolute" in criminal as well as civil litigation.

The Court also extended the privilege to communications with a licensed social worker made in a course of psychotherapy.

B. *Davis v Alaska*, 415 U.S. 308 (1974): A defendant has a constitutional right to "confront," i.e. to cross-examine, a state witness with information that undermines the witness's credibility; and this is true, even if the state, for good reasons of public policy, prohibits disclosure of that information. (State law held that a witness's record of a juvenile delinquency adjudication could not be used to impeach his testimony. The Court held that where that adjudication was relevant to suggest that the witness had a motive to lie, the importance of allowing a defendant to "confront" his accusers, a right guaranteed by the Sixth Amendment, was more important than the state's right to protect such a witness from the embarrassment of having his adjudication revealed.)

C. Pennsylvania v. Ritchie, 480 U.S. 39 (1987): Under some circumstances, a judge may have to inspect a witness's therapy or counseling records to see if they contain information about the witness which must be given to the defense attorney.

A defendant accused of sexually abusing his teenage daughter sought to discover the records of the state Children and Youth Services (CYS) agency relating to the child, arguing that he was entitled to the information because the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence. The statute creating the agency directed that its records were generally privileged, but provided that the agency must disclose the information when directed to do so by court order. The trial judge refused to order disclosure of the records to the defendant and, further, refused to examine the records *in camera* to determine what, if anything, should be disclosed to defendant. Defendant was convicted, and appealed. The state supreme court held that by denying access to the CYS file, the trial court order had violated both the Confrontation and the Compulsory Process Clauses of the Sixth Amendment, because, without the CYS material, defense counsel could not effectively question the defendant's daughter and best expose potential weaknesses in her testimony. It remanded for a hearing to determine if a new trial was necessary, and directed that, at the hearing, defense counsel was entitled to review the entire file for any useful evidence. The State appealed to the U.S. Supreme Court.

The Supreme Court agreed that further proceedings were necessary to determine if the defendant's rights had been violated, but did not produce a clear majority as to the right in question. A four-Justice plurality concluded that well-established due process principles, requiring the State to disclose any exculpatory material *it possessed*, applied to otherwise privileged information in a witness's mental health records maintained by a state agency – at least where, as here, the privilege was conditional, not absolute.

The appropriate remedy, the Court concluded, was for the **trial judge to privately examine the records “in camera” to determine whether they contained information “material do the defense,”** which the Court defined as follows:

"Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

This is the standard the Court has applied generally in cases involving the government's obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1979), to disclose exculpatory information. See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566-1567 (1995).

The Court did not rule on whether the Confrontation Clause authorized or required a judge to order pretrial discovery, or whether the compulsory process clause applied to records in the possession of a private entity (e.g., a private mental health care provider). And the

Court's "materiality" test in *Ritchie*, governing post-verdict disclosure, doesn't tell us very much about what standard a trial judge should apply *prior to* or *during* the trial.

III. ISSUES AND UNCERTAINTIES

A. Overview

1. Does it matter if the privilege is "absolute," or, as in *Ritchie*, only "qualified"?
2. Does it matter whether the records were created and possessed by a *state agency*, or by a *private* hospital, practitioner or medical group?²
3. What must a defense attorney show, in order to get the judge to inspect the records *in camera*?
4. Assuming the judge does inspect the records, what standard should the judge use in deciding what information, if any, should be disclosed?

B. "Absolute" Privileges: three approaches (state and federal court decisions can be found following each of them):

1. If the witness asserts an "absolute" privilege, i.e., if she refuses to allow at least potential defense access, she cannot testify (in which case, the charges against the defendant may have to be dismissed).
2. No in camera review, no disclosure; witness may testify.³
3. The *Ritchie* approach (in-camera inspection and possible disclosure) prevails even if the privilege is "absolute."

² In re Crisis Connection, Inc., 949 N.E.2d 789, 792 (Ind. 2011). Charged with molesting two children, defendant sought a review of therapy records of the children and their mother from a nongovernmental organization, despite a statutory privilege that was absolute in its terms. Held: "Because neither the Due Process Clause nor the Sixth Amendment [Compulsory Process Clause] requires disclosure of information protected by this privilege in the present case, we enforce the victim advocate privilege as enacted."

³ See U.S. v. Schrader, 716 F.Supp.2d 464 (S.D. W. Va. 2010). Schrader was charged with using an interstate facility to stalk his victim – a crime requiring the government to prove that defendant put the victim in fear or caused her emotional distress. The court nevertheless held that in light of *Jaffe*'s categorization of the psychotherapist privilege as "absolute," defendant had no right to an in camera review of her therapy records. The case is particularly useful because it collects other federal decisions pro and con that position. (Whether or not the court was correct as a general matter, the judge's decision was certainly justified by the facts.)

C. Records Held by Private Entities Unaffiliated with the State

The *Ritchie* plurality mandated in camera inspection by the trial court, at least in part because the records were *possessed by a state agency, and the state has a due process obligation to turn over any exculpatory information to the defense*. If the entity possessing the records is unaffiliated with the state, that aspect of *Ritchie* is inapplicable. Does the Compulsory Process Clause of the Sixth Amendment provide a constitutional basis to require in camera inspection by the trial court, and potential disclosure to the defense? Courts (get ready for a surprise) are divided.

D. What must defense counsel show, to trigger an in-camera inspection, assuming such an inspection is ever required? Here, too, there is a wide variety of approaches (or, at least, verbal formulas) that courts have used, both as to –

“Column A”: what counsel must show the records are likely to contain;

“Column B”: how persuasively he or she must show it.

Keep in mind that counsel must make this showing without any access to the very records he or she hopes to persuade the judge to inspect.

1. What counsel must show: in general. Courts and state legislatures have used a variety of verbal formulas,; perhaps the most frequently cited one is a “*good-faith, reasonable probability*.” A careful review of the decisions reveals that the cases generally fall into discrete factual situations.
 - a. What counsel must show: rape and child abuse cases
 - (1) Recantation or other contradictory conduct; or
 - (2) Evidence of behavioral, mental or emotional difficulties; or
 - (3) Questions about the complainant’s ability to perceive, remember and relate events; or
 - (4) Other situations.
 - b. Criminal cases generally (often, where the witness is not the victim or complainant; sometimes he or she was a participant in the crime)
 - (1) Witness suffered from significant impairment of testimonial capacity (ability to perceive, remember, narrate accurately);⁴ or

⁴ See, e.g., *US v Robinson*, 583 F.3d 1265 (10th Cir 2009). At Robinson’s trial for unlawfully selling a firearm to a CI, the trial judge refused to disclose to the defense information relating to the CI’s significant mental difficulties, medication and abuse of drugs—problems plaguing the CI at the time of the crime and also immediately before the CI testified. Held: this deprived Robinson of his Confrontation Clause rights.

- (2) Substance abuse that might have this effect on the witness;⁵ or
 - (3) Other situations.
- c. “Unavailable from less intrusive sources”: even if defense counsel can make the required showing, courts understandably are reluctant to mandate in camera inspection, let alone disclosure, if evidence of this kind is available from less intrusive sources. Still, evidence of such difficulties that comes from the witness’s own counseling records is likely to be more persuasive to a jury than similar evidence that comes from witnesses who might have a motive to lie.
2. How persuasively counsel must show it: courts have created a hodgepodge of ill-defined standards.

E. Recommendations.

1. *How persuasively*: “Probable cause” that records will contain ...
2. *Factual showing*: ... information raising serious doubts about witness credibility or accuracy of the witness’s testimony.

F. Timing of in Camera Review and Disclosure

As a rule, even if the defense attorney makes a satisfactory showing (see IV.D, IV.E), the judge should not conduct an in camera inspection of records until after the witness has testified on direct examination, i.e. not until it is the defense attorney’s turn to cross-examine the witness. But in some cases earlier inspection, including pre-trial inspection, is appropriate.

RECOMMENDATIONS

1. Just as a defendant has a right pursuant to the Due Process Clause of the Sixth Amendment to seek such in camera review when records are in possession of the State, so too a defendant must be allowed to seek in camera review of records that are possessed by a private entity, pursuant to the Compulsory Process Clause of the Sixth Amendment.
2. In camera review of such records should be available in appropriate cases, whether the

Contrast *Drake v Woods*, 547 F.Supp.2d 253 (SD NY 2008). W, who was in no way connected with the defendant or person he assaulted, witnessed the assault while on her way home from a psychotherapy session – her third session, to discuss “the general issues of her life.” Held: the trial judge’s refusal to conduct an in camera inspection of the records of her therapy was no abuse of discretion, as there was no reasonable likelihood the records would contain information relevant to her capacity to view, remember or testify accurately.

⁵ See, e.g., *US v Robinson*, 583 F.3d 1265 (10th Cir 2009).

privilege on its face is conditional or absolute.

3. A judge must conduct an in camera inspection of such records if, but only if, defense counsel can offer specific evidence that establishes probable cause to believe that the records in question contain information that casts serious doubts on the truthfulness or accuracy of the witness's testimony, of a kind not available from less intrusive sources. As a rule, the judge should not conduct such an inspection until the witness has testified at trial but may conduct the inspection prior to trial where it appears that postponing the review until after the witness testifies may require a lengthy adjournment.

4. The judge must release portions of the records to defense counsel only if they contain information that "raises a significant question about the credibility of a witness or the accuracy of testimony which is important to resolving important issues in the case."

The solution I propose has its costs. The possibility that a judge might review a witness's therapy or counseling records may undermine the witness's ability to cope with whatever experiences or difficulties led the witness to therapy or counseling in the first place. The far more upsetting possibility is that the fear that such information to the defense may diminish the witness's willingness to engage in therapy or counseling at all. Each of these results is lamentable. The alternative, however, is to increase the risk that an innocent person will be convicted of a serious crime and deprived of his or her liberty or, in an extreme case, his or her life. I believe the latter is the greater evil, and a more liberal approach toward judicial in camera review of such records, coupled with the flexible disclosure standard for evidence that may raise a serious question about the truthfulness or accuracy of the witness's testimony regarding important issues of the case, strikes the best balance.