IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-1305

LOWER CASE NO.: 3D01-1158

DAVID FAMIGLIETTI,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, **DAVID FAMIGLIETTI,** petitions for discretionary review of a decision of the Third District Court of Appeal certifying direct conflict with a decision from the Fourth District Court of Appeal. *State v. Famiglietti,* 817 So. 2d 901 (Fla. 3d DCA 2002) (Appendix). **THE STATE OF FLORIDA** was the Petitioner in the district court. **DAVID FAMIGLIETTI** was the Respondent. In this brief, the parties will be referred to by their proper names. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State has filed an eight (8) count information charging Famiglietti, with, *inter alia,* various acts of domestic violence, including attempted murder, against his then girlfriend. *State v. Famiglietti,* 817 So. 2d 901, 902 (Fla. 3d DCA 2002). During a deposition by the defense, the victim testified that Famiglietti had beaten her in the past which resulted in her hospitalization. She testified that she had lied to her psychiatrist about that incident by telling the psychiatrist that she had been beaten by two unidentified males. *Id.* She testified that she lied about that incident because she did not want to disclose that Famiglietti had beaten her. *Id.*

Famiglietti filed in the trial court a motion for issuance of a subpoena duces tecum seeking disclosure of the victim's psychiatric records from her psychiatrist. In support of his motion, Famiglietti asserted that the information contained in the files "is potentially either exculpatory evidence, goes to the credibility of the victim's testimony, or is necessary information toward the preparation of the Defendant's defense." Id. The court ruled that Famiglietti's allegation that the records contain relevant information was sufficient to warrant an in-camera inspection. Id. The State petitioned the Third District Court of Appeal for certiorari review. *Id.* At 903.

On June 27, 2001 a panel of the Third District issued an

opinion granting the State's petition. Relying on *State v. Pinder,* the panel found that Famiglietti's allegations were insufficient to warrant even an in camera disclosure of the victim's psychiatric records. *Id.* Subsequently, however, the district court issued an order *sua sponte* granting rehearing *en banc* and directing the parties to address the following questions:

I

WHETHER THE DECISION IN STATE V. PINDER, 678 SO. 2D 410 (FLA. 4TH DCA 1996), CORRECTLY STATES THE LAW, OR WHETHER THIS COURT SHOULD DECLINE TO FOLLOW PINDER AND HOLD THAT NO APPLICABLE FEDERAL CONSTITUTIONAL PRINCIPLE MANDATES INVASION OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

II

WHETHER THE DECISION IN JAFFEE V. REDMOND, 518 U.S. 1 (1996), HAS A BEARING ON THE ISSUE PRESENTED.

III

WHETHER THE STATE HAS STANDING TO ASSERT THE PSYCHOTHERAPIST-PATIENT PRIVILEGE ON BEHALF OF THE PATIENT. SEE § 90.503, FLORIDA STATUTES.

III

IF THE PATIENT ASSERTS THE PRIVILEGE AND DESIRES ASSISTANCE IN PROTECTING IT, MAY THE STATE REPRESENT THE VICTIM WITH RESPECT TO THE PRIVILEGE?

The court also invited the Florida Association of Criminal Defense Lawyers, the Florida Psychiatric Society, the Florida Psychological

Association, and the American Psychiatric Association to file amicus briefs on the issues.

On May 8, 2002 the Third District issued it's opinion in which six of the judges concurred in certifying conflict with *State v. Pinder*. *State v. Famiglietti,* 817 So. 2d at 902-908. Three judges, including the chief judge, concurred in the result but dissented on the certification issue. *Id.* at 908-909. Three judges dissented. Id. at 909-914.

The question answered by the plurality opinion was:

> WHETHER THE DEFENDANT IN A CRIMINAL CASE CAN INVADE THE VICTIM'S PRIVILEGED COMMUNICATIONS WITH HER PSYCHOTHERAPIST IF THE DEFENDANT CAN ESTABLISH A REASONABLE PROBABILITY THAT THE PRIVILEGED MATTERS CONTAIN MATERIAL INFORMATION NECESSARY TO HIS DEFENSE.

Id. at 902. The plurality answered the question "no." *Id.* The opinion centered on the fact that the privilege was created by statute, the Evidence Code, which contained no provision for the invasion of the privilege. *Id.* at 903-904. The opinion noted the circumstances where the Code provides no privilege, but concluded that the exception did not render the privilege a qualified privilege as with the journalist privilege. *Id.* at 903-904. The plurality also rejected any claim that the privilege may be invaded under Federal constitutional principles. *Id.* at 906. Consequently, the court disagreed with the Fourth District Court of Appeal's analysis in *State v. Pinder,* 678 So. 2d 410 (Fla. 4th DCA

1996).

In that case, the Fourth District held that the Due Process clause of the Federal constitution required a balancing of the defendant's need for the privileged material against the patient's interest protected by the privilege. The plurality below concluded that the Fourth District erroneously relied on *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed. 2d 40 (1987), because the privilege at issue in that case was a qualified privilege. *State v. Famiglietti,* 817 So. 2d at 907. Consequently, the court certified conflict with the decision in *State v. Pinder. Id*. at 908.

ISSUE PRESENTED

I

WHETHER A DEFENDANT IN A CRIMINAL CASE CAN INVADE THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IF THE DEFENDANT CAN ESTABLISH A REASONABLE PROBABILITY THAT THE PRIVILEGED MATERIAL CONTAIN EVIDENCE NECESSARY TO HIS OR HER DEFENSE.

SUMMARY OF ARGUMENT

The plurality opinion below was correct in holding that a defendant in a criminal case cannot invade the psychotherapist-patient privilege even if the defendant established a reasonable probability that the privileged material contain evidence necessary to his or her defense. The psychotherapist-patient privilege is an unqualified privilege. The statute contains no qualified privilege statute. Further, the Legislature did not intend for the psychotherapist-patient privilege to be a qualified statute.

No Federal constitutional principle mandates the invasion of the psychotherapist-patient privilege. The court in *State v. Pinder* erred in concluding that due process requires a balancing of the interest protected by the privilege against the defendant's need for the privileged material. The Legislature, in providing for the unqualified privilege balanced society's need for the privilege against the possible loss of potentially probative evidence. The Legislature determined that the interests protected by the privilege outweighed any possible need for the privileged material. Consequently, the Fourth District erred in holding that courts should engage the balancing test.

The plurality opinion below was therefore correct in holding that communication shielded by the psychotherapist-patient privilege is not subject to compelled disclosure. This Court should therefore affirm the decision below.

ARGUMENT

A DEFENDANT IN A CRIMINAL CASE CANNOT INVADE THE PSYCHOTHERAPIST-PATIENT PRIVILEGE EVEN IF THE DEFENDANT ESTABLISHES A REASONABLE PROBABILITY THAT THE PRIVILEGED MATERIAL CONTAIN EVIDENCE NECESSARY TO HIS OR HER DEFENSE.

Section 90.503, Florida Statutes (2001), the Florida Evidence Code, provides in part:

> 90.503 **Psychotherapist-patient privilege.-**
>
> (2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, ..., between the patient and the psychotherapist, ...

"Evidentiary privileges are generally looked on with disfavor, and privileges ... which were unknown at common law, are particularly disfavored, and strictly construed to limit their application." *Guerrier v. State,* 811 So. 2d 852, 854 (Fla. 5th DCA 2002), *citing National Union Fire Ins. Co. of Pittsburg, Pa. v. KPMG Peat Marwick,* 742 So. 2d 328, 331 (Fla. 3d DCA 1999) *approved,* 765 So. 2d 36 (Fla. 2000). "One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning....." *Green v. State*, 604 So.2d 471, 473 (Fla.1992).

A.

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE STATUTE CONTAINS NO "QUALIFIED PRIVILEGE" LANGUAGE.

The psychotherapist-patient privilege is an absolute privilege since the statute does not say that it is a qualified or limited privilege. Had the legislature intended for the psychotherapist-patient privilege to be a qualified privilege, it simply would have said so. The legislature knows how to create a qualified privilege, it did so when it created the journalist's privilege, section 90.5015(2), Fla. Stat. That statute provides, in part,

> A professional journalist has a **qualified** privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news.

§ 90.5015(2), Fla. Stat. (2001) (emphasis supplied). Clearly, then, by comparing the plain language of the psychotherapist-patient privilege with the plain language of the journalist privilege, the psychotherapist-patient privilege is an absolute privilege since it does not say that it is a qualified or limited privilege.

Famiglietti, however, argues, and the dissenting opinion below found, that the psychotherapist-patient privilege is a qualified or limited privilege because the statute provides exceptions to the privilege. That argument relies on section 90.505(4), which

provides:

> (4) There is no privilege under this section:
>
> (a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.
>
> (b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient.
>
> (c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

§ 90.503(4), Fla. Stat. (2001). Here again, the statute does not say that the privilege is qualified or limited; it simply lists three situations where there is **no** privilege. Clearly, that there is **no** privilege under the listed situations does not render the privilege qualified in situations where the privilege applies.

Nor does the exception to the privilege provided in section 456.059, Florida Statutes, render the privilege a qualified privilege.

> When the Legislature enacted section 456.059, it provided for an exception to the privilege when a patient makes a threat to physically harm an identified person and the treating psychiatrist makes a clinical judgment that the patient has the capability to commit that act and will likely do so in the near future. In that situation, the psychiatrist "may disclose patient communications to the extent

> necessary to warn any potential victim or to communicate the threat to a law enforcement agency."

Guerrier v. State, 811 So. 2d at 855. By providing for this limited exception to the privilege, the Legislature clearly did not say that any other communication between the psychotherapist and patient is likewise subject to disclosure.

Consequently, then, there in nothing in the language of the psychotherapist-patient privilege, or in the exception to the privilege, which states that the privilege is a qualified privilege. The opinion below was therefore correct in concluding that the statute itself contains no "qualified privilege" language. *State v. Famiglietti,* 817 So. 2d at 904.

B

THE FLORIDA LEGISLATURE DID NOT INTEND FOR THE PSYCHOTHERAPIST-PATIENT PRIVILEGE TO BE A QUALIFIED PRIVILEGE.

Testimonial privileges are generally not favoured in law because they are in derogation of the fundamental maxim that the public has the right to every man's evidence; "there is a general duty to give what testimony one is capable of giving." *Jaffee v. Redmond,* 518 U.S. 1, 9, 116 S.Ct. 1923, 1928 (1996). Testimonial privileges, however, may be justified where necessary to promote a sufficiently important public interest. *Trammel v. Unites States,*

445 U.S. 40, 51, 100 S.Ct. 906, 912, 63 L.Ed. 2d 186 (1980).

In *Jaffee v. Redmond, supra*, the United States Supreme Court recognized for the first time the psychotherapist-patient privilege in federal law. In that case, the survivors of a man shot and killed by a police officer filed a wrongful death suit in Federal District Court against the police officer and her employer. The officer's version of the shooting conflicted with other eye witnesses' account. *Jaffee v. Redmond,* 518 U.S. at 5, 116 S.Ct. at 1926. The plaintiff discovered that after the shooting the officer had several counseling sessions with a clinical social worker. The plaintiff sought access to the clinical social worker's note. *Id.* The social worker and the officer asserted the psychotherapist-patient privilege in resisting disclosure of the notes. *Id.* At trial, the court instructed the jury that it could infer that the contents of the notes would have unfavorable to the defendants. *Id*. at 6, 116 S.Ct. at 1926.

On appeal, the circuit court found reversible error in the trial court's instruction that the jury could presume that the notes contained unfavorable information. *Id.* That court recognized for the first time the psychotherapist-patient privilege. That court, however, engaged a balancing test between the evidentiary need for the privileged information against the patient's privacy rights. *Id* at 7; 116 S.Ct. at 1926. On certiorari review, the United States Supreme Court stated the issue

as "whether a privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence...'" *Id* at 9-10, 116 S.Ct. at 1928.

The court agreed with the circuit court to the extent that it recognized the psychotherapist-patient privilege in federal law. Acknowledging the need for the privilege in the successful treatment of the patient, the Court observed:

> 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.

Id. at 10, 116 S.Ct. at 1928.

The Court noted that although the psychotherapy-patient privilege serves important private interests, the privilege is justified only if it also serves public ends. *Jaffee v. Redmond,* 518 U.S. at 11, 116 S.Ct. at 1929. The Court found that the psychotherapist privilege

> serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical

> health, is a public good of transcendent importance.

Id., 116 S.Ct. at 1929. The Court provided the following example of the benefit the psychotherapist-patient privilege affords society:

> Police officers engaged in the dangerous and difficult tasks associated with protecting the safety of our communities not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger. The entire community may suffer if police officers are not able to receive effective counseling and treatment after traumatic incidents, either because trained officers leave the profession prematurely or because those in need of treatment remain on the job.

Id. at 11, fn. 10).

Contrasting the societal need for the privilege to the evidentiary need for the information, the Court concluded that the need for the privilege transcended the evidentiary need for the information. In reaching this conclusion the Court observed that the type of evidentiary information disclosed to the psychotherapist because of the privilege would likely not come into being had it not been for the privilege. *Id* at 12, 116 S.Ct. at 1929. Thus the Court observed "[t]his unspoken 'evidence' will therefore serve no greater truth seeking function than if it had been spoken and privileged." *Id.*

Although the Court agreed with the lower court on the need for

the privilege, it disagreed with the court as to any limitation of the privilege. The Court rejected the balancing test adopted by the lower court. The lower court attempted to "determine the appropriate scope of the privilege by 'balancing the interests protected by shielding the evidence sought with those advanced by disclosure." *Jaffee v. Redmond,* 51 F.3d 1346, 1357 (7th Cir. 1995), *citing In re Zuniga,* 714 F.2d 632, 640 (6th Cir.), *cert. denied,* 464 U.S. 983 (1983). The Court, however, found that any limitation on the privilege would in effect completely nullify the privilege. The Court observed:

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege....if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'

Jaffee v. Redmond, 518 U.S. at 17-18, 116 S.Ct. at 1932. *citing Upjohn Co. v. U.S.,* 449 U.S. 383, 393 (1981). *See also, Cantor v. Toyota Motor Sales*, 546 So.2d 766, 767 (Fla. 5th DCA 1989)("psychotherapist-patient privilege is based on the recognition that a patient of a psychologist is expected to 'bare his or her soul' and reveal matters of a private nature in order to

receive help, but will not do so if the psychologist can be compelled to reveal these innermost thoughts and confidences on the witness stand.").

Although *Jaffee v. Redmond* is a civil case, it's holding applies with equal force to criminal cases. This is so because, as explained in *Jaffee*, the defining moment in the psychotherapist-patient relationship is the moment the patient consults the psychotherapist. At that point, the psychotherapist must be able to assure the patient that the communication is completely privileged. *See also, Swidler &. Berlin v. U.S.,* 524 U.S. 399, 409 (1998)("In any event, a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege.").

Florida's Legislature did not intend for the psychotherapist-patient privilege to be a qualified privilege. As argued above, the statute does not state that it is a qualified privilege. Further, as explained in *Jaffee*, the defining moment in the psychotherapist-patient relationship is the moment the patient consults the psychotherapist. At that point, the patient must know

whether the information he or she is about to disclose to the therapist is in fact confidential. By providing for the situations where there is no privilege, § 90.503(4), and for the types of communications that are not privileged, § 456.059, the Legislature has defined the contours of the privilege such that the patient knows what is not privileged.

In *Jaffee,* the Court opined that because it had only recognized the psychotherapist-patient privilege in that case, it was "neither necessary nor feasible to delineate its full contours in a way the would 'govern all conceivable future questions in this area.'" *Jaffee v. Redmond,* 518 U.S. at 18, 116 S.Ct. at 1932, *citing Upjohn Co. v. United States,* 449 U.S. at 393, 101 S.Ct. at 681. The Court's statement is understandable because it created the privilege. *Jaffee v. Redmond,* 518 U.S. at 8, 116 S.Ct. at 1927. Since the Court created the privilege it stands to reason that it can also define the scope of the privilege.

In Florida, by contrast, the psychotherapist-patient privilege was created by the Legislature. As argued above, the Legislature has defined the scope of the privilege. Since the Legislature has defined the scope of the privilege, courts cannot redefine that scope by allowing for the invasion of the privilege where the Legislature did not intend such invasion. *Cf. Jackson v. State,* 603 So. 2d 670, 671 (Fla. 4th DCA 1992)(court declines to add additional exceptions to marital privilege where statute

specifically delineates exceptions).

Since the Legislature did not, by words or intent, create a qualified psychotherapist-patient privilege, the plurality opinion below was correct in concluding that the statute does not allow disclosure of the privileged communications.

C

NO FEDERAL CONSTITUTIONAL PRINCIPLE MANDATES THE INVASION OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

In *State v. Pinder*, 678 So. 2d 410 (Fla. 4th DCA 1996), the Fourth District Court of Appeal held that the accused in a criminal case has a due process right to have access to privileged matter where necessary to defendant against the State's accusation. *Id.* at 415. That court's finding of a "due process right" to privileged material resulted from the court's erroneous reliance on *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed. 2d 40 (1987).

The material at issue in *Pennsylvania v. Ritchie* was a file compiled by the state created agency Children and Youth Services (CYS). That agency was charged with investigating suspected child abuse and neglect. *Id.* at 43, 107 S.Ct. at 994. A statute provided a qualified privilege for CYS reports; it provided for eleven specified exceptions. *Id.* One of those exceptions permitted the reports to be provided to a court pursuant to a court

order. *Id.* at 44-45, 107 S.Ct. at 994.

Ritchie was charged with numerous sex acts against his minor daughter. *Id.* at 43, 107 S.Ct. at 994. He sought production of CYS report of its investigation concerning the his daughter. CYS asserted the statutory privilege and refused to produce the report. The trial court denied Ritchie's motion to compel the production of the report. *Id.* at 44, 107 S.Ct. at 994. The trial court placed no limitation on the Ritchie's cross-examination of the victim. *Id.* at 45, 107 S.Ct. at 995.

On appeal Ritchie complained that the failure to provide him access to CYS's report violated his right of confrontation. *Id.* The appellate court agreed with Ritchie but found that he was only entitled to the verbatim statements his daughter made to CYS. *Id.* The appellate court reversed Ritchie's conviction. It remanded the case for the trial judge to conduct an *in camera* review of CYS's file and to release to Ritchie the verbatim statements, and also to make the entire file available to defense counsel for the limited purpose of allowing him to argue the relevance of the statements. *Id.* The court held that Ritchie was entitled to a new trial if the trial court determined that the failure to disclose information in the record was prejudicial to Ritchie. *Id.* at 45-46, 107 S.Ct. at 995.

The state supreme court found that the trial court violated Ritchie's rights of confrontation and compulsory process where it

denied him access to CYS's record. The court concluded that Ritchie was entitled to review the entire file to search for any useful evidence. *Id.* at 46, 107 S.Ct. at 995.

A plurality of the United States Supreme Court rejected outright the state supreme court's finding that denial of access to the record violated the Confrontation Clause. *Id.* at 51, 107 S.Ct at 998. On that issue, the Court held that the Confrontation Clause guarantees only the defendant's right to physically face those who testify against him and the right to conduct full cross-examination, i.e. "to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Id.* at 51-52, 107 S.Ct. at 998. The Court found that the Confrontation Clause was not implicated in that case because the victim testified at trial and because Ritchie's cross-examination of her was not restricted. *Id.* at 54, 107 S.Ct. at 1000.

The Court took the opportunity to distinguish its holding in *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974). In that case, the state court restricted the defendant's cross-examination of the state's main witness. The court precluded the defendant from inquiring into the witness' juvenile record because those records were privileged by statute. *Pennsylvania v. Ritchie,* 480 U.S. at 52, 107 S.Ct. at 998-999. The Court explained that the problem it had with *Davis* was not the fact that the defendant was denied access to the privileged material, but the

fact that at trial, the trial court precluded the defendant from cross-examining the witness about the records where that evidence might have affected the witness' credibility. *Id.* at 54, 107 S.Ct. at 1000. Thus, the Court concluded, its holding in *Davis* was not relevant to that case because Ritchie was not in fact denied full cross-examination of his daughter. *Id.*

The Court also disagreed with the state supreme court on the application of the Compulsory Process Clause. The Court found that Ritchie's claim, that the failure to disclose the CYS file prevented him discovering the names of favourable witnesses and possibly useful evidence, was more properly analyzed under the Due Process Clause rather than under the Compulsory Process Clause. *Id* at 55-56, 107 S.Ct. at 1001.

The Court concluded that Ritchie may have been denied due process if CYS file contained evidence that may be relevant to his defense. The Court's holding was based on the state's duty to disclose favorable evidence in its possession. *Id.* at 57, 107 S.Ct. 1001. The Court rejected the state's argument that disclosure of the file would violate the state's compelling interest in the confidentiality of CYS records. The Court noted that although the public interest in protecting the information contained in CYS file is strong, the state legislature itself did not think that that interest transcended the defendant's rights in all criminal prosecutions since it provided only a qualified

privilege. *Id.* at 58, 107 S.Ct. at 1001-1002. The Court noted that it was not dealing with an absolute privilege. *Id.,* 107 S.Ct. at 1001 The Court specifically noted that it was expressing no opinion on whether the result of the case would have been the same if the statute provided an unqualified privilege. *Id* at fn. 14.

In *State v. Pinder,* the Fourth District had before it the unqualified privilege issue that the Court did not address in *Ritchie.* The materials at issue in *State v. Pinder,* were the testimony and file of sexual assault victim counselors. Section 90.5035, Florida Statutes, the sexual assault counselor-victim privilege, provide an absolute privilege for such material.

Pinder was charged with numerous violent crimes, including sexual battery, against the victim. *State v. Pinder,* 678 So. 2d at 411. During deposition the victim refused to answer any questions regarding her communications with her sexual assault counselors. At their depositions the sexual assault counselors asserted the sexual assault counselor-victim privilege in refusing to answer questions concerning the victim's consultation with them. *Id.* at 412. Pinder moved to compel the counselors to answer the questions or alternatively, for the court to conduct an *in camera* hearing to question the counselors or inspect their files. *Id.* The Court granted Pinder's motion. The court, however, noted that the *in camera* inspection was to "determine the existence of 'exculpatory information as to the defendant herein which may outweigh any

interest of Victim Services or [the victim] in preserving the secrecy of such information.'" *Id.*

Relying on *Pennsylvania v. Ritchie,* the court concluded that the issue raised in that case was properly analyzed under the Due Process Clause. *Id.* at 415. While recognizing that neither the Sixth Amendment nor the Due Process Clause compel disclosure of such privileged material, and that there is no general constitutional right to discovery in a criminal case, the Fourth District determined that because the Court conducted the due process analysis in *Ritchie,* that such analysis was required in its case. However, the Fourth District observed that the precise due process analysis used in *Ritchie*, disclosure of *Brady*[1] material, was not appropriate in its case because the material at issue was not in the state's possession. Consequently, the court determined that the issue is more properly analyzed "under the more general concept of due process--that the accused has a right to a fair opportunity to defend against the state's accusation." *State v. Pinder,* 678 So. 2d at 415.

The court went on to conduct a balancing test weighing the importance of preserving the privilege against the defendant's right to a fair trial. *Id.* The court found further support for this balancing test in *Mill v. State,* 476 So. 2d 172 (Fla. 1985), *cert. denied,* 475 U.S. 1031 (1986). *State v. Pinder,* 678 So. 2d at

[1]*Brady v. Maryland,* 373 U.S. 83 (1963).

416. The court concluded that Pinder's allegations were insufficient to overcome the privilege because he did not make a sufficient factual showing of the need for the privileged material. *Id.*

The Fourth District Court of Appeal erred in its reliance on *Pennsylvania v. Ritchie*. The privilege at issue in *Ritchie* was a qualified privilege. The Court in that case reasoned that because the state legislature provided for disclosure of the privileged information under certain circumstances, including by court order, the privilege could not outweigh the defendant's right of access to favorable and material evidence in the state's possession. However, as discussed above, Court specifically rejected any balancing of the unqualified privilege in *Jaffee v. Redmond*. The Court there observed that if the purpose of the privilege is to be served, the participants in the privileged communication must have some assurance that the communication will be protected. *Jaffee v. Redmond,* 518 U.S. at 18, 116 S.Ct. at 1932. The Court opined that if disclosure of the unqualified privileged information was subject to balancing by the courts, the privilege would be "little more than no privilege at all." *Id.*

By contrast, the privilege at issue in *Pinder* was an unqualified privilege. The statute did not provide for disclosure of the privileged information under any circumstances. Further, while the Court in *Ritchie* identified a specific right that the

defendant had to have access to the privileged material, i.e. that the defendant had a right to favorable and material evidence in the state's possession, the court in *Pinder* identified no specific right that the defendant had to access the privileged material. Instead, the court simple concluded that the defendant had a "right to a fair opportunity to defend against the state's accusation." *Pinder v. State,* 678 So. 2d at 415. However, the Due Process Clause does not confer on the defendant the right to unlimited discovery. *See e.g., Wardius v. Oregon,* 412 U.S. 70, 474, 93 S.Ct. 2008, 2212, 37 L.Ed. 2d 82 (1973), ("Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, ... it does speak of the balance of forces between the accused and the accuser."); *Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed. 2d 30 (1977) ("There is no general constitutional right to discovery in a criminal case..."). Thus, the *Pinder* balancing was not warranted since the defendant had no right to access the privileged material.

Additionally, the balancing on interests warranted with the qualified privilege is not necessary with the unqualified privilege because the legislature, by making the privilege unqualified, has already balanced the interest protected by the privilege against the evidentiary need for the information. In *Pennsylvania v. Ritchie,* the Commonwealth argued that disclosure of the privileged material would override its compelling interest in the

confidentiality of the material. *Pennsylvania v. Ritchie,* 480 U.S. at 57, 107 S.Ct. at 1001. The Court rejected that argument pointing out that the legislature must have contemplated some evidentiary use for the privileged material since it chose to qualify the privilege. *Id.* By contrast, with the unqualified privilege, the legislature must not have contemplated any evidentiary use for the privileged material. Hence, the legislature has already made the determination that the benefit to society in providing the privilege outweighs the cost of the loss of potentially relevant probative evidence protected by the privilege. *Guerrier v. State,* 811 So. 2d at 856.

The primary argument in opposition to the unqualified privilege in the criminal case is the contention that the defendant has the right to potentially exculpatory evidence. Thus, according to the argument, the privilege should give way when necessary to prove the defendant's innocence. The Court addressed that argument in *Jaffee.* There the Court observed that but for the privilege, much of the desirable evidence would not come into being. *Jaffee v. Redmond,* 518 U.S. at 12, 116 S.Ct. at 1929. "This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged." *Id.* According to the Court then, the information sought by the defendant would not have come into existence had it not been for the promise of confidentiality. *See also, Swidler & Berlin v. U.S.,* 524 U.S. at

408, 118 S.Ct. at 2087 ("Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real.").

In providing for the unqualified psychotherapist-patient privilege, the Legislature made the determination that the promise of absolute confidentiality is essential to the successful psychotherapist-patient relationship. Without this promise of absolute confidentiality, the patient may not seek treatment or may not disclose information necessary for successful treatment. Without this disclosure, the "evidence" does not come into existence. The Legislature has therefore determined that the benefit to society in providing an atmosphere where those suffering from mental or emotional problems can obtain the help they need outweighs any need for this "evidence" since without the privilege there would be no "evidence". Thus, as to the evidential value, it makes no difference to the defendant whether the "evidence" is unspoken or is spoken and privileged; but it makes a difference to society as a whole since without the privilege, those in need of treatment won't seek the treatment. Hence, the Legislature has already weighed the need for the privilege against the possible loss of potentially probative evidence.

For the foregoing reasons, then, the State submits that *Pinder* was wrongly decided. The case relied on a case dealing with a

qualified privilege where the privilege in that case, and in the instant case, is an unqualified privilege. The Legislature, in providing the situations where the privilege does not apply and the type of communication that is not protected by the privilege, has weighed the need for the privilege against the loss of possibly probative evidence protected by the privilege. By providing these exceptions to the privilege the Legislature has already determined the circumstances where the need for the privilege is outweighed by the need for the disclosure of the information. Consequently, the balancing of interest by the Court propounded in *Ritchie* is not warranted where the Legislature has already balanced those interests.

In summary, the court in *Pinder* erred in balancing the interests protected by the unqualified privilege against the defendant's general due process right. *Jaffee v. Redmond* holds that where the privilege is unqualified, no balancing is required because such balancing would effectively render the privilege little better than no privilege at all. There is no difference in the application of a privilege between a civil and a criminal case. *Swidler & Berlin v. U.S., supra.* No applicable federal constitutional principle mandates invasion of the psychotherapist-patient privilege. The plurality opinion below was correct in holding that communications shielded by the psychotherapist-patient privilege is not subject to compelled disclosure.

CONCLUSION

Based upon the foregoing argument and cited authorities, this Court should affirm the plurality decision below and hold that communications shielded by the psychotherapist-patient privilege is not subject to compelled disclosure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing SUPPLEMENTAL BRIEF OF APPELLEE was furnished by mail to Eric M. Cohen, Esq., Two Datran Center, Suite 1200, 9130 South Dadeland Boulevard, Miami, Florida 33156; H. Scott Fingerhut, Esq., The 2400 Building, 2400 S. Dixie Highway, 2nd Floor, Miami, Florida 33133-3100, Benedict P. Kuehne, Esq., Bank of America Tower, Suite 3550, 100 S.E. 2nd Street, Miami, Florida 33131-2154 on this 31st day of July 2002.

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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-1305

DAVID FAMIGLIETTI,
Petitioner,

vs

THE STATE OF FLORIDA,
Respondent.

_____/

APPENDIX

Exh. A *State v. Famiglietti*, 817 So. 2d 901 (Fla. 3d DCA 2002).