IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 02-1305

DAVID FAMIGLIETTI,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.
_____/

ON REVIEW FROM THE THIRD DISTRICT
COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

ERIC M. COHEN
TWO DATRAN CENTER - SUITE 1200
9130 SOUTH DADELAND BOULEVARD
MIAMI, FL 33156
TEL. (305) 670-0230
FAX. (305) 670-7003
FLA. BAR NO.: 328-065

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

On February 16th, 2000, an Information was filed in the Circuit Court for Miami-Dade County charging Defendant David Famiglietti with attempted first degree murder, armed kidnapping, tampering with a witness, victim or informant, two counts of battery on a law enforcement officer, aggravated fleeing, reckless driving and resisting an officer with violence. Mary Scott was the alleged victim in the first three of the charged offenses.

In March of 2001, Mr. Famiglietti requested that the trial court issue a subpoena duces tecum seeking production of Ms.Scott's medical records from psychiatrist Greg Friedman. In pertinent part, the Defendant alleged in that motion that Ms. Scott had admitted that she previously lied to Dr. Friedman about the source of certain injuries that she had incurred. While she initially told Dr. Friedman that those injuries had been inflicted by "several black males," she later alleged that Mr. Famiglietti was responsible.

The Honorable Pedro Echarte conducted two hearings concerning this issue. At the first of those hearings, the State, invoking Fla.Stat. 90.503, argued that the requested records were privileged and that the Defendant had not sufficiently established his need for them. The court responded that Mr. Famiglietti had adequately shown the relevancy of the records and ordered they be produced for in

camera inspection.

At the subsequent hearing, the State renewed its objection to the production of Dr. Friedman's records. Again, it argued that the Defendant's basis for seeking the records was not sufficiently specific. Again, the court rejected that argument and ordered that the records be produced for its review.

On May 24th, 2001, the State filed a Petition For Writ of Certiorari in the Third District Court of Appeal asking that the trial court's order be quashed. A panel of that court granted the relief requested by the State on June 27th, 2001. The court then sua sponte granted rehearing en banc. The en banc court's decision granting certiorari was filed on May 8th, 2002. The court there certified conflict with the Fourth District's decision in State v. Pinder, 678 So.2d 410 (Fla. 4th DCA 1996).

On June 5th, 2002, Mr. Famiglietti filed notice seeking discretionary review in this Court.

SUMMARY OF ARGUMENT

The United States Supreme Court has recognized that an accused's Due Process rights can compel the piercing of a statutory privilege, especially when the privilege itself contains exceptions to its confidentiality provisions. Fla.Stat. 90.503, which codifies the psychotherapist-patient privilege, contains such exceptions. It is therefore a qualified privilege. Accordingly, an accused is entitled to an in camera review of records otherwise protected by the privilege if he or she can show that the records might contain favorable evidence. As Defendant David Famiglietti satisfied that burden in the trial court, that court's order requiring in camera review should be approved.

ARGUMENT

DUE PROCESS MANDATES THAT THE TRIAL COURT'S ORDER REQUIRING PRODUCTION OF PSYCHIATRIC RECORDS FOR IN CAMERA REVIEW BE AFFIRMED.

In the instant case, a plurality of the Third District Court of Appeal found that Due Process "does not authorize the invasion of" the psychotherapist-patient privilege codified at Fla.Stat. 90.503. State v. Famiglietti, No. 3D01-1158 (Fla. 3d DCA May 8th, 2002). The court there further noted that its conclusion directly conflicted with that of the Fourth District in State v. Pinder, 678 So.2d 410 (Fla. 4th DCA 1996).[1] Pinder had held that Due Process could compel an in camera review of records otherwise privileged pursuant to the sexual assault counselor -victim privilege.[2] As the Due Process analysis in Pinder adopted that of the United States Supreme Court in Pennsylvania v. Ritchie, 480 U.S. 39 (1987), this Court should approve the reasoning there and reverse the decision below.

Defendant David Famiglietti is charged in part with several offenses resulting from

---

[1]. Judge Ramirez joined the five members of the plurality to constitute a majority certifying conflict.

[2]. Fla.Stat. 90.5035.

a purported attack upon his then -paramour, Mary Scott. Prior to trial, he asked that a subpoena duces tecum be issued for Ms. Scott's psychiatric records. As support for that request, Mr. Famiglietti alleged that Ms. Scott had admitted lieing to her psychiatrist, Dr. Greg Friedman, about the identity of the person or persons who had beaten her during an earlier incident. Although Ms. Scott initially told Dr. Friedman that she had been assaulted by several black males, she later accused the Defendant of inflicting her injuries. When the trial court ordered that the requested records be produced for in camera inspection, the State sought certiorari. That relief was ultimately granted.

Initially, a panel of the Third District granted certiorari because Mr. Famiglietti had not established a "reasonable probability" that the requested records would contain "material information necessary to his defense." The court adopted this standard from Pinder. While the court en banc agreed that relief was warranted, it held instead that the psychotherapist-patient privilege created an absolute bar to the production of the records. This conclusion is precluded by Ritchie.

Ritchie was charged with having sexually assaulted his daughter. Prior to trial, he subpoenaed records concerning his daughter from an agency that investigated incidents of child abuse and neglect (CYS). A Pennsylvania statute provided that those records were confidential subject to eleven exceptions, one of which authorized production pursuant to court order. The trial court, however, refused to order CYS

to disclose the requested items.

The Supreme Court eventually remanded Ritchie's case to the trial court for an in camera review of the CYS file. The Court there found that "[a]lthough we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances." Id. at 57. Accordingly, as the statute there "contemplated some use of CYS records in judicial proceedings," Id. at 58 (emphasis in original), Due Process required an in camera review of those records to determine whether they contained material information favorable to the defendant.[3] The Court noted, however, that it was "express[ing] no opinion on whether the result [] would have been different if the statute had" established an absolute bar to disclosure. Id. at 57 (n. 14).

Despite this caveat, the court in Pinder applied Ritchie's reasoning in holding that Due Process could compel disclosure of privileged information even though the privilege at issue was unqualified. Unlike the statute in Ritchie -and unlike the statute at issue here[4]- Fla.Stat. 90.5035 provides no exceptions to the sexual assault

---

[3]. The Court held that to justify review, a defendant "must make same plausible showing" of how the requested information would be "both material and favorable to his defense." Id. at 58 (n.15), quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

[4]. See Pinder, supra at 414 (distinguishing §90.5035 from §90.503).

counselor-victim privilege. The Fourth District noted, however, that "the objective of most evidentiary rules is to enhance the truth seeking process. Legislatively created rules of privilege shield potential sources of evidence to foster relationships deemed socially valuable. Due process requires that these competing interests be examined and weighed." Id. at 415 (citations omitted).[5] It further found that because the privilege in question was absolute, a more demanding standard was warranted than in Ritchie. Accordingly, the court held that an accused must "establish a reasonable probability that the privileged matters contain material information necessary to his defense," Id. at 417 (citation omitted), to warrant in camera review of information protected by §90.5035.[6]

The Fourth District addressed a similar issue in Katlein v. State, 731 So.2d 87 (Fla. 4th DCA 1999). Katlein was a prosecution witness in a criminal case. The defendant there subpoenaed records of Katlein's mental health treatment at the Broward County Jail. The confidentiality of those files was protected by Fla. Stats. 394.4615 (mental health records) and 397.501 (substance abuse records). Each statute, however, provided an exception for "good cause."

Analogizing those statutes to the one in Ritchie, the court held that when a

---

[5]. The court stated that its analysis would apply even if the requested information was not in the possession of the prosecutor. Id. at 415.

[6]. The defendant there failed to satisfy this burden.

privilege is limited, a defendant need only show that the requested records "are likely to contain certain relevant evidence," Id. at 90,to justify in-camera review. The court applied this less demanding standard because "it should be easier to get in-camera hearing where the privilege is a qualified privilege, rather than an absolute one." Id. at 89.

Katlein, even more than Pinder, compels a finding that the trial court here correctly ordered an in-camera review of the requested records. Although §90.503 does not contain an exception for "good cause," it does authorize production in three specified situations.[7] Therefore, as noted by the Fifth District in Guerrier v. State, 811 So.2d 852,855 (Fla. 5th DCA 2002), "the Legislature did not envision the psychotherapist-patient privilege as absolute or immutable given the exceptions in sections 90.503 and 456.059."[8]

As §90.503 provides only a limited privilege, the analysis in Ritchie and Katlein must be applied here. The court below, however, distinguished Ritchie on two grounds. First, it suggested that §90.503 is a "generally-accepted testimonial privilege," while the statute in Ritchie simply protected a "public agency's case files."

---

[7]. Pursuant to §90.503, the privilege does not apply for communications: a) relevant to compelled hospitalization proceedings; b) made during a court-ordered examination; and c) concerning the patient's mental or emotional condition if that condition becomes an element of his or her claim or defense.

[8]. See also Judge Sorondo's dissent below.

In Ritchie, though, the Court noted that every state and the District of Columbia "have statutes that protect the confidentiality of their official records concerning child abuse." Id. at 61 (n.17). Accordingly, the privilege there was as "generally accepted" as the privilege provided in §90.503. And, of course, victims of child abuse -the class protected by the statute in Ritchie- are entitled to as much protection as those persons being treated for mental health afflictions. The privileges are thus undistinguishable.[9]

The second point of distinction was the absence in §90.503 of a specific statutory provision authorizing the disclosure sought here. But that statute clearly envisions the disclosure of otherwise protected information in certain judicial proceedings.[10] Therefore, the Florida Legislature, like the Pennsylvania Legislature, "contemplated some use of [the subpoenaed] records in judicial proceedings." Ritchie at 58

---

[9]. Notably, the court below does not explain why a "testimonial" privilege is deserving of more protection than a statute like that in Ritchie, which protects not the agency's files but the victims and witnesses who file the complaints that generate those files.

[10]. See also Fla.Stat. 90.510, which authorizes a trial court to make an in camera inquiry in any "civil case or proceeding in which a party claims a privilege as to a communication necessary to an adverse party [.]" While this provision may not be applicable here, it provides another example in which the Legislature has authorized production of privileged information.

(emphasis in original). Accordingly, this Court "cannot conclude that [§90.503] prevents all disclosure in criminal prosecutions." Id.

The court below relied substantially on the Supreme Court's decision in Jaffee v. Redmond, 518 U.S. 1 (1996), which recognized a psychotherapist-patient privilege pursuant to Fed.R.Evid. 501. But Jaffee itself recognized that situations might exist "in which the privilege must give way." Id. at 18 (n.19).[11] Additionally, as recognized in Guerrier, statutorily created privileges unknown at common law -like the one here- are to be "strictly construed to limit their application." Id. at 854 (citation and ftnt. omitted). Such limitations are, of course, particularly appropriate when an accused's right to a fair trial is being threatened.

Interestingly, the court below did not cite Guerrier although it was decided more than a month before the decision here. In Guerrier, the court considered whether a threat communicated by the defendant to a jail psychiatrist was properly admitted at trial. In holding that it was, the court balanced the public policy favoring confidentiality of psychotherapist-patient communications with the potential danger if a legitimate threat is not related to a prospective victim. In language applicable here, the Fifth District concluded that "[b]ecause such communications do not create

---

[11]. The Court's refusal to "speculate about [ ] future developments" that might justify exceptions to the privilege, of course, created the type of uncertainty that it proposed to eliminate.

a net benefit to the public that warrants application of the privilege, the rationale that underpins the privilege vanishes or, at least, significantly diminishes in force." Id. at 856. This, of course, is the type of balancing test rejected by the court below.

Florida courts are not alone in finding that Due Process could compel the disclosure of privileged information. For example, a Wisconsin statute, like §90.503, provided that psychotherapist-patient communications were privileged. Unlike §90.503, that statute contained no exceptions. Despite this absolute privilege, the defendant in State v. Shiffra, 499 N.W. 2d 719 (Wis.Ct.App. 1993), sought disclosure of psychiatric records concerning the purported victim in his case. The trial court ordered that the requested items be produced for in camera review. When the victim refused, her testimony was excluded.

In approving the trial court's rulings, the Wisconsin Court of Appeals first noted that "[u]nder the due process clause, criminal defendants must be given a meaningful opportunity to present a complete defense." Id. at 721 (citation omitted). Then, analogizing the case before it to ones in which an accused seeks the identity of a confidential informant, the court found that "[b]oth situations require us to balance the defendant's constitutional right to a fair trial against the state's interest in protecting citizens by upholding a statutorily created privilege." Id. at 723. The court further held that to justify in camera review, a defendant need only show that the evidence being sought "is relevant and may be helpful to the defense or is necessary to a fair

determination of guilt or innocence." Id. at 723 (emphasis supplied).[12]

In Interest of J.E., 726 So.2d 547 (Miss. 1998), Michael Harrison was charged with sexual battery of a minor (J.E.). Prior to trial, he requested family court records from a proceeding in which J.E. was found to be an abused child. Specifically, Harrison alleged that J.E. had made inconsistent statements concerning the incident for which he was charged. Id. at 549. The confidentiality of the requested records was protected by statute subject to several exceptions, one of which allowed disclosure to a "judge of any court" if necessary for "the best interests of the child, the public safety or the functioning of the youth court." Id. at 550, citing Miss. Code Ann. §43-21-261. The family court judge denied Harrison's request. The Mississippi Supreme Court reversed.

The court there noted the "tension between the statutory rights respecting confidentiality of youth and family court records and the need, however rare, for disclosure of such records in the course of trial." Id. at 551. It then recognized that the statute in question, as in Ritchie, provided for disclosure of the protected records in some situations. Therefore, although Harrison's request did not fall precisely within any of the exceptions provided by the statute, the court remanded to the trial judge for an in camera review of the family court file. In doing so, it found that:

---

[12]. The court in Shiffra, like the Fourth District in Pinder, did not require that the requested records be in the prosecutor's possession.

> By following the procedure of submitting the confidential family court records to the circuit court judge for an in camera inspection and the disclosure of any information that is relevant to [Harrison's] defense to [Harrison], the State's interest in the confidentiality of such records is protected, our statutory scheme is satisfied, our youth courts function within constitutional parameters and our rules of discovery are honored, while allowing [Harrison] limited access to information which might prove vital to his defense. Id. at 553.

The defendant in State v. Roy, 460 S.E. 2d 277 (W.Va. 1995), argued on appeal that the trial court had erroneously failed to order disclosure to him of a victim's psychiatric records. Although the West Virginia Supreme Court of Appeals affirmed Roy's conviction, its analysis of this issue is instructive here.

Of particular interest in Roy were the notes of a counselor who had interviewed the victim. The court there recognized that those notes were "protected from routine disclosure and discovery under three separate West Virginia statutes." Id. at 285 (ftnt. omitted). Like §90.503, those statutes all protected communications. Like §90.503, they did not provide "absolute protection." Id. at 286 (n.10). The court was thus obligated to "strike a balance between the rights of the accused and the rights of the accuser." Id. at 286 (n.12). It did so by holding that "if the defendant can establish by credible evidence that the protected communications are likely to be useful to his defense, the judge should review the communications in

camera." Id. at 286 (ftnt. omitted).[13]

Similarly, in Hospital Corp. of America v. Superior Court of Pima County, 755 P.2d 1198 (Ariz.Ct.App. 1988), a juvenile defendant subpoenaed hospital records concerning several supposed witnesses to the offense for which he was charged. Arizona law, however, established a physician-patient privilege. That privilege was absolute. Accordingly, the hospital sought to quash the subpoena. The trial court denied that request in part. The appellate court affirmed, finding that the defendant's right to a fair trial, as guaranteed by the Fourteenth Amendment, "outweigh[ed] the policy against disclosure." Id. at 1202 (internal quotation marks omitted).[14],[15]

---

[13]. Roy's conviction was affirmed because he failed to satisfy that burden.

[14]. The court there required production of the records although they were in the possession of the hospital, not the prosecution.

[15]. See also State v. Slimskey, 779 A.2d 723 (Conn. 2001) ("The need to balance a witness' statutory privilege to keep psychiatric records confidential against a defendant's rights under the confrontation clause is well recognized." Id. at 731 (citation omitted)) ; State v. Paradee, 403 N.W. 2d 640 (Minn. 1987) ("The in camera approach strikes a fairer balance between the interest of the privilege holder in having his confidences kept and the interest of the criminal defendant in obtaining all relevant information that might help his defense." Id. at 642); State v.

These cases all suggest that the balancing test utilized by the Fourth District in Pinder and Katlein, the Fifth District in Guerrier and the dissent below is the appropriate means for determining whether a defendant's Due Process rights compel piercing of a privilege. As §90.503 is a qualified privilege, the standard applied in Ritchie and Katlein should be used to determine whether production of privileged items for an in camera review is warranted. As Mr. Famiglietti satisfied that burden in the trial court, that court's order should be approved.

As the court in Shiffra recognized, "[i]f we ignore [] the mandate of Ritchie and deny Shiffra's request for in camera inspection, we would be disregarding the best tool for resolving conflicts between the sometimes competing goals of confidential

---

Duffy, 6 P.3d 453 (Mont. 2000) ("[T]he district court must balance the defendant's need for exculpatory evidence against the privacy interest of the victim." Id. at 458); State ex rel. Suttle v. District Court of Jackson County, 795 P.2d 523 (Okla. Crim.App. 1990) (statute in question did not provide absolute confidentiality and therefore public policy favoring confidentiality could be overcome); Dixon v. State, 923 S.W. 2d 161 (Tex. App. Fort Worth 1996), reversed on other grounds, 2 S.W. 3d 263 (Tex. Crim. App. 1998) ("[A] confidentiality statute must not operate to totally bar a defendant access to information, whether in the possession of the State or of any other person, that might be Brady [v. Maryland, 373 U.S. 83 (1963)] material." Id. at 167 (citation omitted)).

privilege and the right to put on a defense." Id. at 724. This Court, like the court there, should therefore "embrace Ritchie."

CONCLUSION

Based on the preceding argument, the Defendant submits that the trial court's order that the requested records be produced for in camera review be approved and that certiorari therefore be denied.

ERIC M. COHEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Paulette Taylor, Office of the Attorney General, Suite 950, 444 Brickell Avenue, Miami, FL 33131, on July_____, 2002.

_____

ERIC M. COHEN

CERTIFICATE OF COMPLIANCE

Undersigned counsel for the Appellant certifies that the instant brief utilizes Times New Roman 14 point as required by Fla.R.App.P. 9.210(a)(2).

ERIC M. COHEN

INDEX TO APPENDIX