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

REPLY BRIEF

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THE TRIAL COURT PROPERLY ORDERED IN CAMERA REVIEW OF A STATE WITNESS'S PSYCHIATRIC RECORDS AS THE DEFENDANT SHOWED THAT THOSE RECORDS "LIKELY" CONTAINED IMPEACHMENT EVIDENCE.

The principal disagreement between Defendant David Famiglietti and the State concerns whether Fla.Stat. 90.503 provides an absolute or a qualified privilege. A plurality of the court below found that the psychotherapist-patient privilege codified in that section is -as the State suggests- absolute. See State v. Famiglietti, 817 So.2d 901 (Fla. 3d DCA 2002) (en banc). Three judges of that court and a panel of the Fifth District, however, have reached the opposite -and more appropriate- conclusion. See id.; Guerrier v. State, 811 So.2d 852 (Fla. 5th DCA 2002).[1]

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[1]. While it did not address §90.503, the Fourth District's decision in Katlein v. State, 731 So.2d 87 (Fla. 4th DCA 1999), also supports Mr. Famiglietti's position. In Katlein, the court recognized that Fla.Stats. 394.4615 and 397.501 authorize the disclosure of otherwise confidential records in certain "limited circumstances," and thus are qualified privileges. Id. at 89. The dissent below

Section 90.503 contains three exceptions to the psychotherapist-patient privilege: 1) for communications relevant in a proceeding for compelled hospitalization; 2) for communications made during a court-ordered examination; and 3) for communications concerning the mental or emotional condition of the patient when the patient relies on that condition as part of a claim or defense. Fla.Stat. 456.059 provides a further exception when the communication contains a threat of physical harm to another. Therefore, as recognized in Guerrier, "[i]t is obvious that the Legislature did not envision the psychotherapist-patient privilege as absolute or immutable given the exceptions provided in sections 90.503 and 456.059." Id. at 855.[2]

This conclusion is consistent with the staff analysis of the Florida Senate committee considering the sexual assault counselor-victim privilege.[3] That analysis distinguished §90.5035 from §90.503 by noting that the former contained no exceptions while the latter allowed for the three exceptions discussed above. See State v. Pinder, 678 So.2d 410,414 (Fla. 4th DCA 1996). Surely, if the Legislature had

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relied on Katlein in finding that "because [§90.503] contains exceptions, it is a qualified privilege." Id. at 910. The State, however, makes no mention of Katlein in its brief.

[2]. See also Fla.Stat. 90.510.

[3]. Fla. Stat. 90.5035.

intended the psychotherapist-patient privilege to be absolute, it would have treated it as it did the sexual assault counselor-victim privilege. Accordingly, the inclusion of the three exceptions in §90.503 reflects a legislative determination that the privilege contained therein is not unqualified.

Further support for the Defendant's position is found in Pennsylvania v. Ritchie, 480 U.S. 39 (1986). As noted in Mr. Famiglietti's initial brief, the Court in Ritchie found that "[g]iven that the Pennsylvania legislature contemplated some use of CYS records in judicial proceedings, we cannot conclude that the statute prevents all disclosure in criminal proceedings." Id. at 58 (emphasis in original). Similarly, §90.503 clearly "contemplate[s] some use" of psychotherapist-patient communications "in judicial proceedings." Therefore, its prohibition against the admissibility of those communications is not absolute and the Due Process analysis utilized by the Court in Ritchie must be applied here.

In its brief, the State suggests that "[w]ithout th[e] promise of absolute confidentiality, the patient may not seek treatment or may not disclose information necessary for successful treatment." Id. at 27. But the statute does not provide absolute confidentiality. Exceptions exist. Yet despite those exceptions, patients continue to consult with mental health experts. No doubt they will continue to do so even if disclosure may additionally be required in criminal proceedings.

Finally, circumstances will surely exist in which the purpose of the statute will not be furthered by the rule proposed by the plurality below. This is such a case. If Ms. Scott, the purported victim here, is now to be believed, she lied to her psychiatrist about the identity of the persons who had previously assaulted her. That lie -if in fact it was a lie- was certainly not "necessary for [her] successful treatment." However, it might be pivotal to Mr. Famiglietti's defense. Absent in camera review of Ms. Scott's psychiatric records, a wrongful conviction may thus occur while no societal interest will be served. Such a result would surely be -as the dissent below noted- "intolerable". Id. at 914. This Court should therefore uphold the order of the trial court compelling production of those records for its review.

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 August _____, 2002.

_____

ERIC M. COHEN

CERTIFICATE OF COMPLIANCE

The Defendant certifies that this brief uses Times New Roman 14 pt base font as required by Fla.R.App.P. 9.210(a)(2).

ERIC M. COHEN