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Another Courtroom Assault on the Confidentiality of the Psychotherapist-Patient Relationship

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ABSTRACT: The therapeutic and legal protections afforded by California's psychotherapist-patient privilege have become increasingly eroded in such recent cases as *People v. Wharton* and *Menendez v. Superior Court*. In another capital case, *People v. Webb*, the California Supreme Court further erodes this privilege in regard to the private (confidential) treatment records of a prosecution witness. The *Webb* case and its possible implications are explored.

KEYWORDS: psychiatry, psychotherapy, privilege, confidentiality, privacy

The confidentiality of psychotherapist-patient communications for non-treatment settings, and particularly privilege in legal settings, is to be guarded carefully unless there are persuasive overriding considerations. The preservation of the confidential psychotherapist-patient relationship is needed in order to foster therapeutic treatment goals and benefit society by encouraging potentially dangerous patients to seek treatment. The psychotherapist-patient privilege allows the holder of the privilege, the patient, to keep psychiatric records and testimony out of legal proceedings unless there are countervailing circumstances permitting exceptions to the privilege. Reasons for these exceptions include civil commitment proceedings, court-ordered evaluations, child custody disputes, child abuse hearings, legally required reports, and the patient-litigant exception when the patient places his/her mental state at issue [*1*].

More recently in California, the "dangerous patient" exception found in the California Evidence Code section 1024 ("There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger") has been interpreted by the California Supreme Court to permit private psychotherapist-patient communications to be disclosed during the criminal trials of the patient-defendant in *People v. Wharton* [*2*] and *Menendez v. Superior Court* [*3*]. In *Wharton* and *Menendez*, privilege became non-existent because of a prior dangerous threat by a patient, even if the danger no longer was present.

In summary, the prototypical exceptions to the psychotherapist-patient privilege almost always have involved the principal parties to a legal dispute in which at least one of the parties in some manner took an action to waive privilege: the involuntarily hospitalized patient seeking discharge, the criminal defendant offering an insanity defense, the plaintiff in a civil case seeking damages for psychic injury, the parent seeking custody of his or her child, and disability (including worker's compensation) claimants. A recently added privilege exception has involved the dangerous psychotherapy patient [*2,3*].

A recent ruling by the California Supreme Court in *People v. Webb* enters more questionable territory insofar as it considers the confidentiality of the psychiatric records of an individual who is not a principal party to the legal dispute, namely a prosecution witness [*4*]. The California Supreme Court seems to be approaching yet another new area for ignoring confidentiality and privilege if therapy information is deemed relevant. This time the only offense of the "victim" amounts to agreeing to be a prosecution witness. We discuss the *Webb* case and its potential implications.

Synopsis of *Webb* Relevant to the Psychotherapist-Patient Relationship

Dennis Duane Webb was convicted of two counts of first degree murder, one count of robbery, and one count of burglary. In addition, the jury found three special circumstances to be true, thereby giving the jury a choice of either life imprisonment without the possibility of parole or capital punishment. The jury then chose the latter option—the death penalty.

Part of the prosecution's case during trial involved the testimony of Webb's girlfriend, Ms. B. Shortly after the criminal complaint was filed, Webb subpoenaed a private psychiatrist and a county mental health center for Ms. B's psychiatric records with regard to the time period prior to Ms. B contacting the police and becoming a prosecution witness. The subpoenaed parties transmitted the records to the court under seal and claimed the psychotherapist-patient privilege [*5*]. Webb "argued that assuming the records showed (Ms. B) suffered from "delusions" or other mental disorders affecting her competence or credibility as a witness, defendant's right to "fairly cross-examine" her under the due process and confrontation clauses of the federal Constitution would prevail over any state law privilege or privacy interest (Ms. B) might otherwise claim in the records" [*6*]. The prosecution "seemed to agree that disclosure could be compelled to the extent the records contained the type of information identified by the defense" [*6*].

The magistrate of the Municipal Court (preliminary hearing

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level) and subsequently the judge of the Superior (trial) Court performed in camera reviews of the records. Little "relevant" information was found and the jurists concluded they were privileged in most respects [6]. Both the magistrate and judge stated that there was absolutely no indication that Ms. B suffered from or was diagnosed with any "thought difficulties, . . . delusions, hallucinations," or other "mental illness that would in any way affect her ability to perceive, recollect or relate events that she had witnessed" [6]. However, in a precautionary move, the magistrate furnished both prosecution and defense counsel with a confidential "sanitized" version of the records arising out of Ms. B's therapy sessions since the time of Webb's alleged crimes [6]. At trial, during cross- and redirect examination of Ms. B, she disclosed that she had been undergoing treatment for anxiety and substance abuse for several years, up to and including the time of trial, and that tranquilizing medication had been prescribed throughout that time.

On appeal to the California Supreme Court, Webb argued that the limited pretrial disclosure of Ms. B's records undermined his right to cross-examine her effectively at trial. Webb based his argument on *Pennsylvania v. Ritchie* [7] which discusses a criminal defendant's federal constitutional rights in this context. In that case, the United States Supreme Court found that a defendant accused of child abuse had a right to have the trial judge review, in camera, the confidential files of the state agency regarding their investigation of the child abuse allegations.

Following *Ritchie*, the Court noted that the due process clause required the "government" to give the accused all "material" exculpatory evidence "in its possession," even where the evidence is otherwise subject to a state privacy privilege, at least where no clear state policy of "absolute" confidentiality exists. When the state seeks to protect such privileged items from disclosure, the court must examine them in camera to determine whether they are "material" to guilt or innocence [8]. The Court questioned if Ms. B's records were even "in the possession" of the "government" and that *Ritchie* might not apply; and if so, it seems likely that Webb had no constitutional right to examine the records even if they were "material" to the case [8]. However, in case *Ritchie* did apply, the Court opined that no error occurred as the courts had examined the records in camera a total of three times and found no information significant enough to override Ms. B's psychotherapist-patient privilege [8].

Five of the Court's seven justices signed the majority opinion. Two justices offered concurring and dissenting opinions. Both of these justices concurred with the final judgment upholding the death penalty. However, Justice Mosk disagreed with the majority's interpretation of who comprised the "government" who possessed Ms. B's records. Mosk stated that the "government" included the county mental health agency [9]. Justice Kennard disregarded the issue of who had possessed the records and focused only on the issue of whether the records contained information that was favorable to the defendant [9].

Discussion

The principal psychiatric-legal question in *Webb* was competence to testify. Generally, this competency has been of major concern in cases where children are witnesses. Competency to testify encompasses the following criteria: (1) understanding of the obligation to tell the truth, (2) reliability of memory, (3) ability to perceive reality accurately, (4) vulnerability to suggestion [10]. Clearly, young children can be readily seen to fail competency criteria in many cases. However, the competency of an adult witness is less often challenged.

The legal argument in favor of giving a defendant a right, at least through in camera review by a judge, to otherwise confidential and privileged records to help his defense derives from the U.S. Supreme Court case of *Pennsylvania v. Ritchie* [7]. In *Webb*, though five of the seven California Supreme Court justices questioned whether the defense had a right to the prosecution witness's psychiatric records in that the government did not possess them, they hedged by saying if *Ritchie* did apply, the in camera reviews satisfied the *Ritchie* holding.

Of seemingly greater concern to the mental health professions is that in *Webb* there was no mention that the prosecution made any attempt at trial to protect the witness's psychiatric records, other than to ask for examination by the judge in camera for relevance, and was solely interested in ensuring a fair trial to decrease the possibility of being reversed on appeal if the defendant was convicted. There is no mention that the prosecution tried to protect its witness by arguing that *Ritchie* was inapplicable, and their witness's psychiatric records privileged, even from examination by a judge in camera. Moreover, no objection was made to the release of "sanitized" records at trial and the fact that even "sanitized" records could prove embarrassing to the witness. In fact, no one at trial tried to protect the privacy of the prosecution witness who had no representation. The prosecution further conceded that the prosecution witness's discussion with her therapist about the defendant's arrest in the instant case was discoverable.

In essence, the prosecution was first and foremost concerned with legal procedure and ensuring the appearance of due process and not to any right of privacy of a prosecution witness. Because the prosecution showed such little respect and concern for protecting the privacy rights of its own witness, it would almost seem that the lesson to be learned is that, assuming they have a choice, people should not offer to assist the prosecution, at least in California, if they are not prepared to have their private psychotherapy records opened to the judge, and possibly the public, if there is any way their psychotherapy records could be interpreted as "in the possession" of the "government."

The actions at the trial level and subsequent review by the justices infer that the appearance of fairness and due process supersedes the psychotherapist-patient privilege of a prosecution witness. The *Webb* decision implies that although *Ritchie* involved a defendant wishing potentially exculpating records from a child abuse investigatory agency about the crime for which he was being tried, the California Supreme Court is ready to abrogate privilege for any psychiatric records in the possession of the government. It is unclear what "in the possession" of the "government" means but at least the five justice majority questioned whether voluntary treatment by private and governmental agency employed therapists is applicable. Sacrificing privilege and confidentiality under these circumstances has several potential ominous implications.

The *Webb* case signals the continuing erosion of the psychotherapist-patient privilege with the subsequent loss of confidentiality in order to further the ends of justice in the criminal system [11,12]. Although *Webb* did not specifically eradicate the preservation of the psychotherapist-patient privilege for a prosecution witness, it did introduce the idea, and future case law could easily further weaken the psychotherapist-patient privilege in the context of criminal proceedings. Cases like *Webb* may further discourage psychiatric treatment because embarrassing material could be disclosed if a psychiatric patient later becomes a prosecution witness. Since many psychiatric patients are embarrassed to have anyone find

out they are in treatment, it is likely to discourage many, including potentially dangerous ones, if they find out that even a witness to a crime can have his or her private psychotherapy "secrets" made public if a judge considers the information relevant to the trial.

If Justice Mosk's dissenting opinion later prevails, it might discriminate against the disadvantaged who need to obtain their psychiatric treatment at "government" facilities. The privacy of psychotherapist-patient communications could be sacrificed solely for trying to be a "good" citizen and assist the prosecution. In the *Webb* case, the trial court did permit the release of the prosecution witness's records, albeit a "sanitized" version. Moreover, in the *Webb* case, the magistrate, the judge, and possibly other courtroom personnel and various others had access to the psychiatric records. Such access could breach confidentiality and privacy. In addition, for judges or other non-clinicians to "sanitize" the records without psychiatric consultation would require the judge to have psychiatric expertise in order to decide what is important and relevant in past treatment records regarding the current legal issue and also which information is sufficiently neutral to constitute adequate "sanitization." Also, so-called "sanitized" versions still could be embarrassing to many witnesses, some of whom might find even mentioning the fact that they received psychiatric treatment disturbing.

Extending the concept of questioning the psychiatric history of a prosecution witness has other far-reaching possibilities. For example, what about police officers who are frequent prosecution witnesses? Are their pre-employment psychological (or government agency psychotherapist) tests or treatment sessions with the police psychologist accessible to the defense and potentially admissible in a public courtroom? Will private (non-governmental) psychotherapy be privileged, or also be considered potentially non-privileged? Even the fact that he or she was in treatment could be embarrassing to a police officer and its potential publicity could very well discourage him or her from getting needed help. The lack of such help could lead to worsening problems, suicidality, or even danger to others. Parenthetically, the California Supreme Court in a death penalty case had already, in 1985, ruled that the trial court in camera should have examined the psychiatric records in the personnel folder of the police officers in a case in which it had been claimed that they coerced a defendant's confession [*13*].

Perhaps even more troubling is the concern in the *Webb* case that focused around the witness being "delusional." It may not be the "delusional" witness that is the real problem for the criminal justice system, but those witnesses with personality disorders or personality disorder traits. Moreover, those with personality disorders may be more convincing witnesses than those who are "delusional" and their testimony assigned unfair weight by the trier of fact. Should being a witness open a person up to scrutiny of these issues in the context of their psychiatric treatment? These questions underscore the need for the legal system, whether by statutory change or future case law, to reexamine the imbalance between privacy needs versus the well-intended but possibly overzealous preoccupation with relevance and due process. While it is appreciated that even relevant attorney-client matters, clergyman-penitent, or husband-wife matters remain privileged, in our opinion, due process, similarly should allow relevant psychotherapist-patient privilege to remain privileged. Psychotherapist-patient privilege has been recognized as more necessary than physician-patient privilege since the stigma of psychiatric treatment can more readily prevent needed treatment and a patient is more likely to need to disclose embarrassing material in order to be effectively treated. California, for example, legislated that the psychotherapist-patient privilege be applicable in criminal and civil matters [*14,15*] though the physician-patient privilege is applicable only for civil matters [*16,17*].

The fact that a person has tried to seek confidential help should not make that information discoverable in a courtroom whenever the information is relevant. The purpose of privilege is to protect information even when it is relevant. Relevance is a minimal protection against violating privacy when no privilege exists. If relevance always trumps confidentiality and privilege, then perhaps the police (since they usually first interview a potential prosecution witness) as well as the prosecution should provide *Miranda*-type warnings in order to inform potential prosecution witnesses that their past psychiatric treatment can lose its privacy before they even speak to the potential witness [*18*].

The *Webb* case is yet another example of the California Supreme Court showing diminished interest in protecting the psychotherapist-patient privilege and its value to society as well as the individual. The Court appears ready to sacrifice this privilege whenever evidence is relevant. This trend is especially remarkable since the same Court has refused to permit attorneys to violate confidentiality even when they wish to do so in order to prevent a future homicide [*19*].

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