

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

\*CAPITAL CASE\*

APPEAL FROM SPARTANBURG COUNTY  
Roger L. Couch, Circuit Court Judge

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SC SUPREME COURT

The State of South Carolina,.....Respondent

v.

Ricky Lee Blackwell,.....Appellant

Appellate Case No.: 2014-000610

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**BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLANT**

SUBMITTED BY

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## STATEMENT OF INTEREST

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School, in Portland, Oregon. NCVLI actively promotes balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys; researching and analyzing developments in crime victim law; and assisting crime victims by providing information on crime victim law and litigating issues of national importance regarding crime victims' rights in cases nationwide. NCVLI also participates as *amicus curiae* when a case presents an issue of importance regarding crime victims' rights.

The South Carolina Victim Assistance Network (SCVAN), established in 1984, provides coordination for representatives of all agencies involved in victim services through its collaboration, public awareness, advocacy and victim assistance functions. SCVAN serves as the voice for all victims of crime in South Carolina and the people who serve them. Through its programs and services, SCVAN seeks to fulfill three main objectives: 1) ensure all crime victims receive access to and assistance from the criminal justice system; 2) improve the quality of services provided to crime victims by victim advocates; and 3) ensure the criminal justice system adequately serves crime victims. The outcome of the present case will

directly affect South Carolina crime victims' right to be heard, among others, in the criminal process.

This case presents an issue of statewide importance affecting the rights of crime victims, as well as the rights of witnesses to crime and other privilege holders who participate in the criminal justice system. Victims, witnesses, and other privilege holders are entitled to the full enforcement of their rights even in the midst of criminal justice proceedings; key among these rights requiring enforcement are the due process rights of notice and a meaningful opportunity to be heard in connection with proceedings that implicate the confidentiality of their privileged records. Amici urge this court to affirm these rights and clarify the appropriate procedures by which these rights may be protected when access to privileged records is sought during criminal proceedings.

#### **STATEMENT OF ISSUES ON APPEAL**

In light of the significant redactions to the parties' briefs, amici are unable to adequately reference and adopt either party's Statement of Issues on Appeal.

#### **STATEMENT OF THE CASE**

To the extent practicable in light of the redacted materials filed in this case, amici adopt Respondent's Statement of the Case. Amici further highlight the following facts, which are particularly relevant to amici's involvement.

The underlying criminal proceedings involve a privilege holder who testified as an eyewitness to the aggravated murder of a child-victim (hereinafter "privilege holder"). Prior to trial, defense counsel filed a motion for disclosure of records relating to the mental health treatment the privilege holder received after the murder.

(State's Mot. to Seal, 2). In that motion, defense counsel asserted generally that the defense was entitled to any information that would bear on the credibility of the state's witnesses or would constitute impeachment material. (State's Mot. to Seal, Att. 4 [Def. Mot. for Disclosure of Psychiatric History of State's Witnesses]). At the hearing on the motion, the solicitor informed the trial court that the state did not have the records. Because the state did not have the records, the trial court denied the motion.

Following the hearing on the motion for disclosure of the records, and unbeknownst to the state or the privilege holder, defense counsel filed an *ex parte* motion seeking disclosure from the Department of Mental Health of the privileged documents, under seal, and obtained an *ex parte* order, also under seal, from the trial court for the production of the privilege holder's mental health records. In accordance with the trial court's order, the Department of Mental Health released the records to defense counsel. (Def. Return to Mot. to Seal, 2, 4). Neither the state nor the privilege holder received notice or had an opportunity to be heard by the court in connection with defendant's *ex parte* motion or the trial court's *ex parte* order directing the production of the privileged mental health records to the defense.

Thereafter, the privilege holder testified at trial and, on cross-examination, defense counsel questioned her about certain statements she purportedly made to a mental health provider after the murder. In response to the state's objection, defense counsel argued that he intended to show bias and only then revealed to the state and to the privilege holder that the defense was in possession of the privilege holder's mental health records. (State's Mot. to Seal, 2-3). Defense counsel argued

generally that defendant's constitutional right to confrontation trumped the privilege holder's assertion of privilege in the mental health records. (State's Mot. to Seal, 4).

The trial court ruled that the privilege holder had not waived her statutory privilege and that the defense could not use the information in the records on cross-examination because it was privileged. (State's Mot. to Seal, 3). Reference to material in the privileged mental health records was included in Appellant's initial brief on appeal, which was later placed under seal, and Appellant subsequently filed a redacted version of the brief. (State's Mot. to Seal, 1; Court's May 20, 2015 Order, 1).

### **ARGUMENT**

Victims and witnesses are guaranteed a number of constitutional and statutory rights under South Carolina law, and South Carolina courts have recognized the importance of ensuring the "full and complete enforceability of these rights" in connection with criminal justice system proceedings. *Reed v. Becka*, 333 S.C. 676, 683, 511 S.E.2d 396, 400 (Ct. App. 1999). These rights include the right to privacy; the right to be treated with fairness, dignity, and respect, the right to be free from intimidation, harassment, or abuse, throughout the criminal justice process; the right to protection; the right to due process; and the right to maintain the confidential and privileged nature of often highly sensitive mental health information.

This case involves a privilege holder whose privileged mental health records were disclosed to the defense without her knowledge or consent. When victims, witnesses, and other privilege holders are guaranteed rights in connection with criminal proceedings, judges are required to "weigh competing interests to ensure the

truth of a matter is brought to light and justice to all parties before the court is served.” *In re Michael H.*, 360 S.C. 540, 549, 602 S.E.2d 729, 733 (2002). This requirement cannot be satisfied if victims, witnesses, and other privilege holders are denied notice and an opportunity to be heard by the court in connection with the potential disclosure of privileged information and in advance of any *in camera* review or disclosure of the material.

**I. Victims and Witnesses Are Guaranteed Rights Under South Carolina Law.**

South Carolina law guarantees victims, witnesses, and other privilege holders who are involved with criminal justice proceedings important constitutional and statutory rights.

Through the ratification of the Victims’ Bill of Rights to its state constitution, South Carolina articulated its commitment to ensuring that victims of crime are guaranteed a myriad of constitutional rights, including the rights to “justice and due process regardless of race sex, age, religion, or economic status”; to “be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process”; to “be reasonably protected from the accused or persons acting on his behalf throughout the criminal justice process”; and to “have all rules governing criminal procedure and the admission of evidence in all criminal proceedings protect victims’ rights.” S.C. Const. art. I, § 24(A); *see also Ex parte Littlefield*, 343 S.C. 212, 218, 540 S.E.2d 81, 84 (2000) (observing that “South Carolina citizens overwhelmingly ratified the Victims’ Bill of Rights”).

South Carolina's legislature re-emphasized this commitment in its statutory provisions, which are intended to "ensure that all victims of and witnesses to a crime are treated with dignity, respect, courtesy, and sensitivity," and declared that victims' and witnesses' rights must be "honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants." S.C. Code Ann. § 16-3-1505 (2015); *see also Patterson v. I.H. Services, Inc.*, 295 S.C. 300, 309, 368 S.E.2d 215 (Ct. App. 1988) (reiterating that the purpose of victims' and witnesses' rights "is for the protection of the public, namely those members thereof caught up as victims or witnesses in this state's criminal justice system").

In addition to these specific constitutional and statutory rights, victims and witnesses are also guaranteed constitutional and statutory rights that they share in common with all individuals. These include the constitutional right to privacy, S.C. Const. art. I, § 10,<sup>1</sup> and constitutional due process rights, *see, e.g., Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965) (observing that fundamental aspects of due process include the opportunity to be heard in a "meaningful manner" and to be treated fairly); *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2006) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."). Further, statutory rights in South Carolina exist specifically to safeguard

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<sup>1</sup> All individuals, including crime victims, also have a federal constitutional right to privacy. *See, e.g., Roe v. Wade*, 410 U.S. 113, 152 (1973) ("[A] right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution"); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (observing that privacy includes an "individual interest in avoiding disclosure of personal matters").

privileged mental health information. *See, e.g.*, S.C. Code Ann. §§ 19-11-95, 44-22-90 (2015).

## **II. Criminal Defendants Do Not Have An Unqualified Right To Access Privileged Mental Health Information.**

In contrast to the clear rights afforded to victims, witnesses, and privilege holders, criminal defendants have no general constitutional right to pretrial discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 846 (1977) (“There is no general federal constitutional right to discovery in a criminal case, and Brady [*v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963)] did not create one”); *State v. Childs*, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989) (“No right to discovery exists in a criminal case absent statute or court rule.”). Nor do defendants have an established constitutional right to pretrial discovery of privileged information under the Confrontation Clause, the Compulsory Process Clause, or the Due Process Clause. Indeed, the United States Supreme Court has emphasized that the right to confront witnesses is a *trial* right and has never held that a defendant has a right to pretrial discovery under the Confrontation Clause. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 107 S. Ct. 989, 999 (1987) (“The ability to question adverse witnesses . . . does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.”) (plurality opinion).<sup>2</sup>

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<sup>2</sup> Although lower courts around the country are split on the issue of whether the Confrontation Clause provides a basis for pretrial discovery, “the predominate view” that has emerged post-*Ritchie* is that the denial of pretrial discovery does not violate defendants’ constitutional rights. *See, e.g., In re Crisis Connection, Inc.*, 949 N.E.2d 789, 797 (Ind. 2011) (discussing cases that address this issue); *see also United States v. Hargrove*, 382 F. App’x 765, 774-75 (10th Cir. 2010) (unpublished) (citing *Ritchie*

Put simply, parties, including criminal defendants, are not entitled to conduct an unrestricted “fishing expedition” into privileged information in the hope that material that could be potentially useful on cross-examination might be discovered. *See, e.g., United States v. Nixon*, 418 U.S. 683, 699, 94 S. Ct. 3090, 3103 (1974) (disapproving of criminal subpoenas that constitute a general “fishing expedition”); *State v. Terry*, 339 S.C. 352, 359, 529 S.E.2d 274, 278 (2000) (upholding the disclosure of defendant’s mental health records in a capital case, where other means

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and concluding that the trial court’s refusal to order production of the witness’s mental health records prior to trial did not violate defendant’s confrontation right); *United States v. LaVallee*, 439 F.3d 670, 692 (10th Cir. 2006) (affirming the trial court’s denial of defendant’s pretrial discovery motion on the ground that no “relevant authority” establishes that the Confrontation Clause permits defendants to obtain pretrial discovery of a witness’s privileged mental health records); *Kinder v. White*, 609 F. App’x 126 (4th Cir. 2015) (unpublished) (holding that the trial court erred in ordering the pretrial production of a witness’s privileged mental health records, based on defendant’s argument that, as the central witness for the government, the case may turn on the witness’s credibility; disapproving of the trial court’s “balancing” approach between defendant’s desire to access privileged mental health records for potential impeachment purposes and the privilege holder’s guarantee of confidentiality; and finding no basis in the record to justify the disclosure of privileged records); *Isaac v. Grider*, 211 F.3d 1269, at \*6-8 (6th Cir. 2000) (unpublished) (citing *Ritchie* and rejecting state prisoner’s argument that trial court violated his confrontation right “by refusing to permit defense counsel to examine [a sexual assault victim’s] medical and psychiatric records” before trial and finding the state court’s “rejection of [defendant’s] Confrontation Clause argument was entirely consistent with *Ritchie*”); *People v. Hammon*, 938 P.2d 986, 989-93 (Cal. 1997) (Cal. 1997) (observing that “in light of the divided views of the justices of the Supreme Court as reflected in the several opinions in *Ritchie*, . . . it is not at all clear ‘whether or to what extent the confrontation or compulsory process clauses of the Sixth Amendment grant pretrial discovery rights to the accused’” and finding inadequate justification for concluding that defendant has a Sixth Amendment right to pretrial discovery of the victim’s privileged records when “the United States Supreme Court has not gone” in that direction); *State v. Cermak*, 442 N.W.2d 822, 825 (Minn. Ct. App. 1989) (adopting *Ritchie*’s plurality opinion and concluding that the trial court did not violate defendant’s confrontation right by denying his request for pretrial discovery of records relating to the victims); *cf. State v. Nicholson*, 366 S.C. 568, 580, 623 S.E.2d 100, 106 (Ct. App. 2005) (finding, *inter alia*, no error in the trial court’s decision not to disclose psychological examination records to defendant, after an *in camera* review of the materials).

of obtaining the information were unavailable, where the trial court made a specific finding of necessity, where “good cause” had been shown, and where the trial court found that the “public need outweighed the need for privacy”); *see also* S.C. Code Ann. §§ 19-11-95(D), 44-22-100(A)(2) (2015) (addressing the showing necessary for disclosure of privileged communications); Rule 5(d)(1), SCRCrimP (requiring a “sufficient showing”).<sup>3</sup>

### **III. It Violates A Privilege Holder’s Rights For A Court To Permit The Disclosure Of Privileged Information Without First Providing The Privilege Holder With Both Notice And An Opportunity To Be Heard.**

The importance of privileged communications to mental health treatment is widely recognized, as the “psychotherapist-patient privilege is ‘rooted in the

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<sup>3</sup> Other jurisdictions to have addressed this issue affirm that, even assuming privilege rights may need to be weighed in some circumstances against defendants’ constitutional rights, defendants bear the burden of making a sufficient showing before privileged information is subject to *in camera* review and potential disclosure. *See, e.g., N.G. v. Superior Court*, 291 P.3d 328, 337 (Alaska Ct. App. 2012) (summarizing case law nationally); *State v. Whitaker*, 520 A.2d 1018, 1025 (Conn. 1987) (holding that a claim of privilege may be “countered” by a showing that there are reasonable grounds to believe that the failure to provide the information is likely to “impair the defendant’s right of confrontation such that the witness’ direct testimony should be stricken” prior to any *in camera* inspection of the information); *State v. Johnson*, 102 A.3d 295 (Md. Ct. App. 2014) (concluding that defendants bear the burden of establishing “a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense” —a showing which requires more than a “speculative assertion that the records might be relevant for impeachment” and which requires defendant to “be able to point to *some fact* outside those records that makes it *reasonably likely* that the records contain exculpatory information”) (emphases in original) (quoting *Goldsmith v. State*, 651 A.2d 866, 877 (Md. 2013) (internal quotation marks omitted); *State v. Bassine*, 71 P.3d 72, 75-76 (Or. Ct. App. 2003) (clarifying that defendants seeking access to privileged material at trial must demonstrate that the information sought is favorable and material to the issues in the case); *cf. In re Michael H.*, 360 S.C. at 548, 602 S.E.2d at 733 (requiring a burden of “compelling need” in the context of compelled psychological examinations of child-victims, to protect victims from “unnecessary or traumatizing invasions of their privacy”).

imperative need for confidence and trust.” *Jaffee v. Redmond*, 518 U.S. 1, 10, 116 S. Ct. 1923, 1928 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 913 (1980)). Mental health treatment “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.” *Id.* Because mental health treatment often necessitates the disclosure of a wide range of sensitive and private information, “the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.” *Id.* Privilege holders must be assured that their confidential communications will not be disclosed without their knowledge and unless constitutional requirements permit no other alternative. *See id.* at 18 (“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.”). Indeed, if victims and witnesses are to be treated with fairness, dignity, and respect, as South Carolina’s constitution and statutes mandate, S.C. Const. art. I, § 24(A)(1); S.C. Code Ann. § 16-3-1505 (2015), their privacy must be honored and protected. *Cf. Schmerber v. California*, 384 U.S. 757, 769-70, 86 S. Ct. 1826, 1835 (1966) (observing in the context of searches and seizures that the Fourth Amendment protects the twin “interests in human dignity and privacy”).

Due process further requires that victims, witnesses, and privilege holders be provided with notice and the opportunity to be heard with respect to proceedings that implicate their rights. *See, e.g., Armstrong*, 380 U.S. at 552 (observing that fundamental aspects of due process include the opportunity to be heard in a “meaningful manner” and to be treated fairly); *Torrence v. South Carolina Dep’t of*

*Corrections*, 373 S.C. 586, 594, 646 S.E.2d 866, 869 (2007) (clarifying that “a state-created right cannot be denied ‘without affording due process of law’”) (quoting *Wicker v. S.C. Dep’t of Corrections*, 360 S.C. 413, 424, 602 S.E.2d 56, 57 (2004)); *South Carolina Dep’t of Social Services v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”).

Any court process that circumvents victims’ or witnesses’ rights, including their rights as privilege holders, in considering or ordering the disclosure of confidential mental health records fails to comport with the requirements of due process. Moreover, such a process eviscerates the rights themselves by depriving victims and witnesses of the opportunity to act to safeguard their rights and subjects them to harm as a result their participation in the criminal justice system.

**IV. To Protect The Rights Of Victims And Witnesses, As Well As All Privilege Holders, Trial Courts Must Use The Correct Procedure When Analyzing Requests For Disclosure Of Confidential and Privileged Mental Health Records.**

**A. The harm to privilege holders that results from an improper procedure in disclosing mental health records is substantial.**

The harm to privilege holders that results from the improper disclosure of mental health records is substantial. Without notice, a privilege holder has no opportunity to obtain counsel, to timely assert the privilege, to otherwise assert and act to safeguard his or her rights, or to object to the disclosure of confidential records prior to disclosure. In addition, disclosure without following the appropriate procedure violates the privilege holder’s rights to privacy; to be treated with dignity and respect; to protection; and to due process.

Indeed, once privileged records have been disclosed and reviewed, it is too late to “unring the bell.” See *State-Record Co. v. State*, 332 S.C. 346, 356 n.19, 504 S.E.2d 592, 597 n.19 (1998) (noting that, once a privileged communication has been disclosed, “it can never be recalled”) (citing *United States v. Davis*, 904 F. Supp. 564, 569 (E.D. La. 1995) (it is difficult, if not impossible, to “unring a bell”)). The very fact that privileged information is disclosed without consent may itself result in harm. See, e.g., Ann Bartow, *A Feeling of Unease About Privacy Law*, 155 U. Pa. L. Rev. PENnumbra 52, 61 (2007) (stating that individuals may be “harmed in a significant, cognizable way when their personal information is distributed against their will”); Dean J. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 25 (1987) (describing victims’ further victimization by the criminal justice system); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Social Justice Research 313, 314 (2002) (noting that “secondary victimization” by the criminal justice system can negatively influence “self-esteem, faith in the future, trust in the legal system, and faith in a just world”); cf. Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 Suffolk U. L. Rev. 467, 473 (2005) (observing that, for many victims, “privacy is like oxygen; it is a pervasive, consistent need at every stop of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot”).

**B. The trial court erred when it disclosed privileged records without following the correct procedure.**

The trial court made several critical errors when it allowed disclosure of the privilege holder's mental health records in the manner that it did. First, the court failed to provide any notice to the privilege holder, or to the state, before it ordered the wholesale disclosure of the records to the defense. See *McMakin v. Bruce Hosp. Sys.*, 318 S.C. 15, 20, 455 S.E.2d 693, 696 (1995) (concluding that the trial court's pretrial discovery order allowing disclosure of the identities of mental health patients substantially complied with federal notice requirements because it provided "notice to the patients and the opportunity to object *before* disclosure" occurred) (emphasis in original); *State v. Gonzales*, 125 P.3d 878, 885-86 (Utah 2005) (applying civil notice requirements to a criminal case and observing that, "[w]hen a victim's confidential records are reviewed before she even knows they are subpoenaed, she cannot choose to protect them").

Second, the trial court allowed disclosure of the records without a sufficient showing by the defense that it was entitled to the records, without an *in camera* review process (assuming defendant met the burden), and before it made a ruling on privilege.

As an initial matter, defendants must make a sufficient showing before obtaining confidential records. Rule 5 of the South Carolina Rules of Criminal Procedure requires defendants to make a "sufficient showing" before a trial court may order discovery. Rule 5(d)(1), SCRCrimP. In addition, a provider may disclose confidential mental health records only as required by law or court order "for good cause shown." S.C. Code Ann. § 19-11-95 (2015).<sup>4</sup> This Court applied a "good

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<sup>4</sup> See also S.C. Code Ann. § 44-22-100(A)(2) (2015) ("Certificates, applications,

cause” standard in *State v. Terry*, concluding that the trial court correctly determined that the state had made a sufficient showing of factual necessity to warrant the disclosure of mental health records, where the trial court found that the records were necessary and that “good cause had been shown.” *Terry*, 339 S.C. at 359, 529 S.E.2d at 278; *see also Johnson*, 102 A.3d at 307-09 (holding that “in order to abrogate a privilege such as to require disclosure at trial of privileged records, a defendant must establish a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense”; a “mere assertion” that privileged records may contain information relevant to credibility is insufficient to pierce the privilege). Thus, even in cases where a third party against whom discovery is sought has no constitutional rights at issue, defendants must—at a minimum—support any pretrial request for confidential or privileged documents with specific facts of which the defendant has personal knowledge, narrowly identify the records sought, and support the discovery request with an explanation of how the records are material and exculpatory.<sup>5</sup>

Here, defendant failed to make a sufficient showing that the privilege holder’s mental health records were material, exculpatory, and necessary to the defense. Indeed, his motion for disclosure of the records contained no showing of substance. He contended only that “[t]he defense is entitled to be made aware of any information that would bear upon the credibility of the State’s witnesses and/or be of an

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records, and reports . . . directly or indirectly identifying a mentally ill or alcohol and drug abuse patient or former patient . . . must be kept confidential and must not be disclosed unless . . . a court directs that disclosure is necessary for the conduct of proceedings before it and that failure to make the disclosure is contrary to the public interest[.]”)

<sup>5</sup> *See* case law identified, *supra*, note 3.

impeaching nature[.]” (State’s Mot. to Seal, Att. 4 [Def. Mot. for Disclosure of Psychiatric History of State’s Witnesses, 2]). As noted *supra*, defendants may not engage in a “fishing expedition” through third-party records, hoping to find evidence useful to their case. See *Nixon*, 418 U.S. at 699-700, 94 S. Ct. at 3103 (under federal law, in order to require production prior to trial, the moving party must show, *inter alia*, that the documents are evidentiary and relevant, that the party cannot properly prepare for trial without such production and inspection in advance of trial, and that the request is made in good faith and is not intended as a general “fishing expedition”); *Johnson*, 102 A.3d at 308-09 (agreeing with the trial court that a “fishing expedition” is insufficient justification to pierce the victim’s privilege).

Only if the defendant makes a sufficient showing, may a trial court conduct an *in camera* review of confidential records, which, based on information available to amici, the trial court here seems to have failed to do.<sup>6</sup> See *State v. Nicholson*, 366 S.C. at 580, 623 S.E.2d at 106 (concluding that the trial court followed the correct

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<sup>6</sup> Indeed, any disclosure of privileged materials—including to a court *in camera*—is itself a violation of privacy and must be weighed against a defendant’s showing of need. See, e.g., *State v. Pinder*, 678 So. 2d 410, 415 (Fla. Dist. Ct. App. 1996) (recognizing that “[e]ven in camera disclosure to the trial judge (and to court reporters, appellate courts and their staff) intrudes on the rights of the victim and dilutes the statutory privilege”) (internal citation omitted); *State v. Kalakosky*, 852 P.2d 1064, 1076 (Wash. 1993) (en banc) (observing that a victim’s “privacy interests are infringed” by *in camera* reviews of a victim’s records; affirming that before a victim’s privacy is violated in this way, Washington law requires defendants to make a showing of need); *People v. Foggy*, 521 N.E.2d 86, 92 (Ill. 1988) (noting that even *in camera* review “would seriously undermine the valuable, beneficial services of [rape crisis support services]”); *People v. District Court*, 719 P.2d 722, 726-27 (Colo. 1986) (en banc) (observing that “it is of paramount importance to assure a victim of a sexual assault that all records of any treatment will remain confidential unless otherwise directed by the victim” and finding no error in the trial court’s refusal to conduct an *in camera* review of these records—or to allow defendant to access these records—based on speculation regarding the contents).

procedure when it reviewed the records under seal for admissibility, and then declined to admit them based on their confidential nature); *Gonzales*, 125 P.3d at 887 (defense counsel had no authority to review mental health records—privileged or not—without approval from the trial court following an *in camera* review). Even where defendant can show “with reasonable certainty that exculpatory evidence exists which would be favorable to the defense,” he or she may not search through those records unsupervised; rather, he or she has the right to have the records reviewed by the trial court. *Id.* (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989 (1987)); accord, *State v. Bryant*, 307 S.C. 458, 461-62, 415 S.E.2d 806, 808-09 (1992).

The third error by the trial court was in neglecting to determine the question of privilege before requiring disclosure of the substance of the confidential communications. *See, e.g., Wilson v. Preston*, 378 S.C. 348, 358, 662 S.E.2d 580, 585 (2008) (citing, *inter alia*, *State v. Doster*, 276 S.C. 647, 284 S.E.2d 218, *cert. denied*, 454 U.S. 1030 (1981)).

Finally, the trial court allowed disclosure of privileged records in an *ex parte* order, without giving the privilege holder an opportunity to exercise and safeguard her rights. It goes without saying that a privilege holder cannot choose to protect his or her mental health records if those records are disclosed to the defense without the privilege holder’s knowledge.

- C. This Court should clarify the correct procedure to prevent future harm to privilege holders by the disclosure of mental health records, and to ensure that, in the event of remand, the trial court takes steps to prevent further harm to the privilege holder in this case.**

The rights of privilege holders and the correct procedure governing disclosure of confidential material are important issues, both in this case and in future cases.

Accordingly, this court should clearly articulate the proper procedures, to prevent the problems that arose in this case from arising in future cases and to ensure that rights are safeguarded should this case be remanded to the trial court. Minimally this procedure must include notice to privilege holders of any motions seeking the disclosure of confidential material, including mental health records, so that he or she has the opportunity to obtain counsel, protect his or her rights, and be heard by the court prior to disclosure of those records.

With respect to the privilege holder in this case, this Court should require the trial court to issue a protective order to prevent any further use or publication of information contained in the privileged mental health records, in addition to any other remedy the court deems just and proper.

### **CONCLUSION**

This case involves a privilege holder with a reasonable expectation of privacy and explicit rights with respect to the confidentiality of her mental health counseling records. Mental health records, by their very nature, may contain a vast array of personal information, and victims, witnesses, and other privilege holders are entitled to the full enforcement of their rights, including the due process rights to notice and a

meaningful right to be heard in connection with court proceedings that implicate their rights and the confidentiality of those records.

RESPECTFULLY SUBMITTED THIS 7<sup>th</sup> day of March, 2016.

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THE STATE OF SOUTH CAROLINA

In the Supreme Court

\*CAPITAL CASE\*

APPEAL FROM SPARTANBURG COUNTY

Roger L. Couch, Circuit Court Judge

The State of South Carolina,.....Respondent

v.

Ricky Lee Blackwell,.....Appellant

Appellate Case No.: 2014-000610

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**CERTIFICATE OF SERVICE**


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I, Lindsey D. Jacobs, certify that I have served all counsel in this action with copies of the **MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE** and the **BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLANT** (Conditionally Filed) by depositing copies of the same in the United States Mail, postage prepaid, to the following addresses:

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This 7th Day of March, 2016.

  
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