

STATE OF SOUTH CAROLINA  
In the Supreme Court

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\*CAPITAL CASE\*

Appeal from Spartanburg County  
Roger L. Couch, Circuit Court Judge

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RECEIVED

JUL 03 2017

S.C. SUPREME COURT

The State of South Carolina,

Respondent,

v.

Ricky Lee Blackwell,

Petitioner.

Appellate Case No. 2014-000610

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**RETURN TO MOTION TO UNSEAL THE BRIEFS  
AND THE RECORD ON APPEAL**

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Respondent State of South Carolina hereby makes a Return to the motion to unseal the briefs and record. Respondent opposes the motion as the materials referenced remain privileged. In support of its position Respondent would respectfully show the Court:

1. Petitioner Blackwell raised two issues in regard to a witness's mental health records. (Initial and Final Brief of Appellant, Issues I and II). On January 28, 2015, Respondent moved to strike and/or seal in regard to references and designation of the privileged records. On February 9, 2015, Petitioner made his return. By Order dated May 20, 2015, this Court granted the motion to seal the full briefs and record, and ordered redacted copies filed of the briefs and record on appeal for the public record. When hearing oral argument on April 13, 2016, this Court cleared and closed the courtroom to hear argument regarding the privileged records.

2. In Opinion No. 27722 issued on May 31, 2017, this Court affirmed Petitioner's murder and kidnapping convictions, and his sentence of death. In regard to the privilege matter

before the Court, the majority found “the trial court erred in granting defense counsel access to Angela’s mental health records prior to an *in camera* review, declining to review the records at trial, and refusing to accept the proffer of the records.” The Court found, though, that any error was harmless. The Court also acknowledged that it has “accepted the records under seal,” and “reviewed the contents of the records” but resolved Petitioner failed to “establish[] the necessity of these records as they were neither material nor exculpatory, particularly since Blackwell conceded guilt.” The Court also “question[ed] how this information was probative and how it would have helped Blackwell’s case in mitigation.”

3. Petitioner Blackwell did not petition for rehearing, or cite any further challenge to the sealing of the record, or error in the Court’s process protecting the privileged information.

4. The State did not have access to the privileged records at the trial level, and has not reviewed the records on appeal consist with the finding of privilege. *See* Rule 407, Rules of Professional Conduct, Rule 4.4 (Respect for Rights of Third Persons).

5. Petitioner Blackwell now moves for reconsideration of the Court’s order to seal the publically accessible briefs and record in this matter citing the public’s right under the First Amendment, and “infringe[ment] upon Blackwell and his attorneys’ First Amendment rights and their ability to discuss the case in public and with interested persons, including attorneys who may ultimately represent Blackwell in post-conviction proceedings.” (Motion, pp. 2-3). However, the privilege was not pierced in any way. It would be illogical to strip the privilege from the witness in order to allow Petitioner’s counsel to discuss the privileged information in public while discussing this Court’s ruling.<sup>1</sup> Rather, when the privilege holds, the records and information from

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<sup>1</sup> It does not appear the witness was given notice of this motion to unseal. Though not a party to the litigation, it would seem only fair the witness know the records the defense improperly hold are being considered for public release. Again, this Court found “the trial court erred in granting

those records should be protected. *See, for example, Kinder v. White*, 609 Fed.Appx. 126, 131-32 (4th Cir. 2015) (Fourth Circuit found in similar circumstances the privilege could not be pierced and directed the records be returned or copies destroyed).

Moreover, as a rule, counsel should not discuss specifics of a case in public while still in “adjudicative proceeding[s].” *See generally* Rule 407, Rules of Professional Conduct, Rule 3.6 (limitations on “extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication will have a substantial likelihood of materially prejudicing and adjudicative proceeding in the matter.”).

Even so, this Court has found: “Public access to court records may be restricted in certain situations, such as matters involving juveniles, legitimate trade secrets, or information covered by a recognized privilege.” *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 10, 630 S.E.2d 464, 469 (2006). The one case Petitioner offers in support of his position arguing “public access” should be protected, *Ex parte Greenville News*, (see Motion, p. 2), does not aid his position.<sup>2</sup> In *Ex parte Greenville News*, 326 S.C. 1, 6, 482 S.E.2d 556, 558 (1997), this Court resolved only “[t]he sealed record will be open to the public for inspection *after redaction* by this Court.”) (emphasis added). Since that 1997 case, the Court has only heightened its sensitivity to protecting privacy in court filings, noting the advent of ease in obtaining public documents electronically. *See In re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings*, 407 S.C. 607, 609, 757 S.E.2d 421, 422 (2014) (“Parties should also exercise caution in including other sensitive personal data in their filings, such as ... medical records....”).

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defense counsel access to Angela’s mental health records prior to an *in camera* review....”

<sup>2</sup> The public access argument was not made in the return to the motion to strike or seal.

*Cf. In re S.C. Elec. Filing Policies & Guidelines*, 415 S.C. 1, 16–17, 780 S.E.2d 600, 608 (2015) (providing process to file motions to seal sensitive matter).

Petitioner’s further argument that he will be prevented from discussing the records in post-conviction relief is not ripe for consideration. But even so, Respondent would again rely on the fact that the privilege was not pierced.<sup>3</sup>

Lastly as to this portion of Petitioner’s argument, there is no unequal treatment among the parties to the litigation. The witness was not a party. The State has neither reviewed nor relied upon any specific records or entry in the records. Thus, there is no inequity in access by the parties to the litigation.

6. Petitioner Blackwell also asserts that he “needs to be able to reference and quote the sealed briefs and the sealed record in his petition for certiorari” to the Supreme Court of the United States, and argues the “Court will need access to the sealed materials to review appellant’s petition.” (Motion, p. 3). Of note, not one quote from the records appears in the Opinion. Rather, the Court carefully set out that it was addressing the process to be followed in future cases to avoid improper disclosure, and the fact that the records were not “material [ ]or exculpatory” because Petitioner conceded guilt. The dispositive facts are other facts of record, not any particular entry in the privileged mental health records. Respondent would also emphasize that the witness was available and testified. She was cross-examined. Moreover, Petitioner has not contested the presence of facts in the record supporting the Court’s finding of “strong evidence of malice” and

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<sup>3</sup> Further, claims, such as this one, which are raised on direct appeal and actually addressed on the merits cannot be raised again in post-conviction relief. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993) (“...errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings”). Even so, this Court has already ruled the records are not available to Petitioner. To the extent Petitioner would allegedly ineffective assistance and avoid the bar to being heard, he could not show prejudice given this Court’s review and ruling.

the unchallenged testimony of another witness to the event, Petitioner's son-in-law. Again, the dispositive facts are other facts of record, and those facts are not restricted in the record or otherwise unavailable for discussion.

7. Petitioner also asserts that the state court issue was "novel" and may "draw interest from parties wishing to file *amicus curiae* briefs with the United States Supreme Court." (Motion, p. 3). He notes "an *amicus* brief was already filed in the proceedings before this Court." (Motion, p. 3). Petitioner's argument undermines his requested relief in two distinct ways. First, the *amicus* brief filed in this case was filed on the interest and proceed without access to the privileged material. (See Motion for Leave to Appear as Amici Curiae, p. 3, referencing the "significant redactions to the parties' brief"). Second, a proper *amici* brief does not urge a factual resolution but a policy result. "The term 'amicus curiae' means friend of the court, not friend of a party." See *Ryan v. Commodity Futures Trading Comm'n.*, 125 F.3d 1062, 1063 (7th Cir. 1997). And, again, the privilege was not pieced. It is not necessary to discuss individual privileged communications in order to be able to discuss whether the policy and/or structure of review set out in the opinion was fairly evaluated and decided by this Court.

8. In his alternative request for relief, Petitioner Blackwell "urges the Court to unseal these materials for the limited purpose of seeking and obtaining review at the United States Supreme Court." (Motion, p. 3). Respondent submits such appears unnecessary for several reasons. To begin with, the record is not submitted to the Supreme Court unless the Court calls for the record when considering the petition. Moreover, privileged matter may be sealed apart from the record transmitted. See, for example, Docket Sheet, *Jaffee v. Redmond*, 97-2447, referencing

“2 in camera envelopes” as part of record from District Court).<sup>4</sup> Upon information and belief, Petitioner will, however, need to file a motion for leave to file under seal to submit the sealed record (or portions thereof) with his petition. The Federal Courts, like our Court, are concerned about the protection of sensitive or privileged materials while still allowing proper filings in pending cases. *See* Fed.R.App.P. 25(a)(5); Fed.R.Civ.P. 5.2.

WHEREFORE, for all the foregoing reasons, Respondent State of South Carolina opposes the motion to unseal.

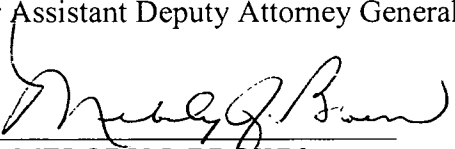
Respectfully submitted,

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

MELODY J. BROWN  
Senior Assistant Deputy Attorney General

BY:

  
MELODY J. BROWN  
SC Bar No. 14244

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

July 3, 2017.  
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

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<sup>4</sup> Undersigned counsel for Respondent reviewed the docket entries from this case as this is a Supreme Court case in which the Court reviewed of disclosure of privileged psychotherapy records under the federal rules in a civil case. *Jaffee v. Redmond*, 518 U.S. 1 (1996). Respondent also notes the docket shows a wealth of amicus briefs underscoring the importance of the privilege.

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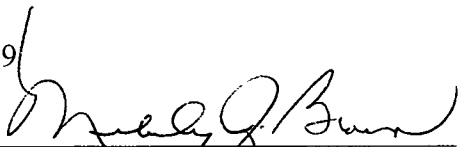
**PROOF OF SERVICE**

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I, Melody J. Brown, certify that I have served Respondent's *Return to Motion to Unseal the Briefs and Record on Appeal* on Petitioner by depositing one copy of same in the United States mail, postage prepaid, to counsel of record, addressed as follows:

Robert M. Dudek, Chief Appellate Defender  
David Alexander, Appellate Defender  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589

This 3rd day of July, 2017.

  
MELODY J. BROWN  
Senior Assistant Deputy Attorney General

Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-6305

ATTORNEY FOR RESPONDENT