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Recent Development: State v. Johnson: To Warrant an In Camera Review of a Victim's Mental Health Records, a Defendant Must Offer a Factual Predicate to Show a Reasonable Likelihood That the Records Contain Exculpatory Information

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RECENT DEVELOPMENT

STATE V. JOHNSON: TO WARRANT AN IN CAMERA REVIEW OF A VICTIM'S MENTAL HEALTH RECORDS, A DEFENDANT MUST OFFER A FACTUAL PREDICATE TO SHOW A REASONABLE LIKELIHOOD THAT THE RECORDS CONTAIN EXCULPATORY INFORMATION.

By: April L. Inskeep

The Court of Appeals of Maryland held that a defendant's trial rights may trump a victim's privilege to preclude mental health records, warranting an in camera review when the defendant establishes a reasonable likelihood that the records contain exculpatory information relevant to the defense. *State v. Johnson*, 440 Md. 228, 231-32, 247, 102 A.3d 295, 297, 306 (2014). The court further held that the defendant's proffer of hypotheticals was insufficient to establish such likelihood and outweigh the victim's privilege. *Id.* at 251, 102 A.3d at 309-10.

Respondent, Jonathan Johnson ("Johnson"), was charged in the Circuit Court for Baltimore City with sexual abuse of his girlfriend's son, "J.C." As a result of the alleged abuse, J.C. became a patient at National Pike Health Center, Inc. ("National Pike"). Prior to trial, Johnson filed a *subpoena duces tecum* requiring National Pike to produce J.C.'s mental health records. National Pike resisted and filed a motion for protective order to effectively quash the subpoena and withhold the records. During the subsequent motions hearing, defense counsel stated that he requested J.C.'s records in order to determine why J.C. was in treatment. Counsel asserted that such records had the potential to include exculpatory information. The judge noted that defense counsel's request was nothing more than a fishing expedition. Defense counsel replied that the records may affect J.C.'s credibility, but he had "no idea" without knowing what the records contained. The trial judge granted National Pike's motion, finding that defense counsel's proffer was insufficient to permit disclosure of the victim's records.

Johnson was subsequently convicted of sexual abuse of a minor and second-degree sexual offense. Johnson appealed to the Court of Special Appeals of Maryland, which reversed his conviction. The intermediate appellate court reasoned that Johnson's proffer, stating the need to know J.C.'s "propensity for veracity," was sufficient to establish the likelihood that the records would provide exculpatory information, thus warranting an in camera review. The State filed a petition for writ of certiorari in the Court of Appeals of Maryland, which was granted.

The Court of Appeals of Maryland began its analysis by determining whether a defendant's trial rights may trump a victim's privilege in their mental health records. *Johnson*, 440 Md. at 237, 102 A.3d at 30 (relying on *Goldsmith v. State*, 227 Md. 112, 651 A.2d 866 (1995)). The court recognized

that a patient's privilege to preclude the disclosure of his communications to a licensed psychiatrist is statutorily based. *Johnson*, 440 Md. at 237-38, 102 A.3d at 300 (citing Md. Code Ann., Cts. & Jud. Proc. §§ 9-109, 9-121). Pursuant to sections 9-109 and 9-121 of the Courts and Judicial Proceedings Article, there was no dispute that the records were privileged records and J.C. had not waived his privilege. *Johnson*, 440 Md. at 238, 102 A.3d at 301. As a competing consideration, the court also recognized a defendant's constitutional right to confrontation and compulsory process. *Id.* at 241, 102 A.3d at 302. However, neither a victim's privilege nor a defendant's constitutional right are absolute. *Id. at* 247, 102 A.3d at 306.

Having recognized that a patient's privilege in their mental health records is not absolute, the court looked to *Goldsmith v. State* to determine when a defendant may obtain such privileged mental health records. *Johnson*, 440 Md. at 239-40, 102 A.3d at 301-02 (citing *Goldsmith v. State*, 337 Md. 112, 651 A.2d 866 (1995)). *Goldsmith* presents three distinct scenarios when a defendant might request a victim's records: "(1) [P]retrial discovery of privileged information; (2) disclosure of merely confidential (rather than privileged) information; and (3) disclosure of privileged information at trial." *Johnson*, 440 Md. at 240, 102 A.3d at 302. Relying on *Goldsmith*, the court found that the first category is an absolute bar to disclosure, however, the second and third categories may be available to a criminal defendant if the required showing is made. *Id.* (citing *Goldsmith*, 337 Md. at 121, 127, 651 A.2d at 870, 873). The court noted that records may be available at trial because a trial judge is in a better position to balance and protect the interests of the parties. *Johnson*, 440 Md. at 241, 102 A.3d at 302. Unlike a pre-trial subpoena, a trial *subpoena duces tecum* allows a judge to discuss the records with mental health care providers. *Id.* at 241, 102 A.3d at 302-03 (citing Md. Rule 4-264, 4-265; *Goldsmith*, 337 Md. at 131, 651 A.2d at 875).

Additionally, the court reviewed *Jaffe v. Redmond* to dispel the notion that *Jaffee* was inconsistent with *Goldsmith*. *Johnson*, 440 Md. at 241-42, 102 A.3d at 303 (citing *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996)). The court found that *Jaffee* did not cast doubt on *Goldsmith* because *Jaffee* was a civil case that did not involve a criminal defendant's significant constitutional rights. *Johnson*, 440 Md. at 242-43, 102 A.3d at 303. Further, as the first Supreme Court case to recognize that a psychotherapist privilege may be abrogated, *Jaffe* does not provide an exhaustive list of all the circumstances when such abrogation could occur. *Johnson*, 440 Md. *at* 243-46, 102 A.3d at 304-06 (citing *Jaffee*, 518 U.S. at 17-18, 116 S. Ct. at 1932).

Having determined that a defendant's trial rights may trump the victim's privilege, the court next decided *when* such a defendant will be entitled to an in camera review of the privileged records. *Johnson*, 440 Md. *at* 247, 102 A.3d at 306. To warrant an in camera review of the records, a defendant must proffer sufficient facts to establish a reasonable likelihood that the records contain exculpatory information. *Id.* It is not enough for a defendant to suggest that the records "may contain evidence useful for impeachment on

cross-examination." *Id.* at 248, 103 A.3d at 307 (citing *Goldsmith*, 337 Md. at 133, 651 A.2d at 876; *People v. Stanaway*, 521 N.W.2d 557, 576 (Mich. 1994)). The defendant bears the burden of convincing the trial judge that there is a reasonable likelihood that the "records contain information that might influence the determination of guilt." *Johnson*, 440 Md. *at* 250, 102 A.3d at 308 (citing *Reynolds v. State*, 98 Md. App. 348, 369, 633 A.2d 355, 464 (1993)). If the threshold is not met, a trial judge should not review the privileged records. *Johnson*, 440 Md. *at* 249, 102 A.3d at 307 (citing *Fisher v. State*, 128 Md. App. 79, 736 A.2d 1125 (1999)).

After clarifying that Maryland courts should apply *Goldsmith*, the court found that Johnson did not offer the necessary factual predicate to show a reasonable likelihood that J.C.'s records contained exculpatory information and reversed the judgment of the intermediate appellate court. *Johnson*, 440 Md. at 250, 102 A.3d at 308. Although knowing J.C.'s propensity for veracity may be helpful to Johnson's defense, this fact alone does not meet the necessary threshold. *Id.* at 253, 102 A.3d at 310. If the court found such hypotheticals were sufficient, any assertion could provide access to the victim's records and essentially nullify the psychotherapist-patient privilege. *Id.* at 251, 102 A.3d at 309. The court went on to state that Johnson needed to "point to some fact outside the records that makes it reasonably likely the records contain exculpatory information." *Id.* at 252, 102 A.3d at 309. Other jurisdictions have found such likelihood exists when a defendant produces evidence that the victim made prior inconsistent statements, when a victim exhibits strange behavior surrounding counseling sessions, or when there is evidence of past abuse. *Id.* at 252-253, 102 A.3d at 309-10 (citing *State v. Peseti*, 1010 Haw. 172, 65 P.3d 119 (2003); *Brooks v. State*, 33 So. 3d 1262 (Ala. Crim. App. 2007); *Burns v. State*, 968 A.2d 1012 (Del. 2009); *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994)).

In *State v. Johnson*, the Court of Appeals of Maryland held that a defendant's trial rights may trump a victim's psychotherapist-patient privilege, and warrant an in camera review if the defendant establishes a reasonable likelihood that records contain exculpatory information relevant to the defense. An in camera review is an appropriate safeguard in that it allows only the judge to review the records and determine relevancy before permitting the records in open court. While attempting to balance the two competing interests, a defendant's right to a fair trial and the victim's right to privacy, the court presents an unworkable test. For defense counsel to make a sufficient proffer during trial they must point to something outside of the victim-patient's records that will convince the trial judge that there is a reasonable likelihood the records in question contain exculpatory evidence. This is an extremely arduous task without first having the opportunity to view the records.