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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN THE INTEREST OF: J.M.G., A MINOR

APPEAL OF: J.M.G

Appeal from the Order Entered March 15, 2017 in the Court of Common Pleas of Cumberland County Civil Division at Nos: 2017-3322-CV, CP-21-JV-0000206-2014

BRIEF OF *AMICI CURIAE* PENNSYLVANIA PSYCHIATRIC SOCIETY IN SUPPORT OF J.M.G. AS APPELLANT

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INTEREST OF THE AMICI CURIAE

The Pennsylvania Psychiatric Society (PaPS), a district branch of the American Psychiatric Association (APA) is comprised of more than 1,700 physicians practicing the specialty of psychiatry in the Commonwealth of Pennsylvania. PaPS's mission is to fully represent Pennsylvania psychiatrists in advocating for their profession and their patients, and to assure access to psychiatric services of high quality, through activities in education, shaping of legislation and upholding ethical standards. PaPS submits this brief because our members know that the doctor-patient relationship and the privileged communication shared within treatment is paramount to effective evidenced-based treatment.

No person or entity other than the *amici curiae*, its members, or counsel have paid in whole or in part for the preparation of the amicus curiae brief or authored in whole or in part the amicus curiae brief.

SUMMARY OF ARGUMENT

The trial court disclosed J.M.G.'s confidential psychiatrist-patient communications to the Sexual Offender Assessment Board ("SOAB"), in violation of 42 Pa.C.S.A. § 5944. This fact is undisputed. Despite jurisprudence supporting that psychiatrist-patient is absolute in this context, the Superior Court characterized the clear violation of privilege as harmless error. *Amici* submit this brief to educate this Honorable Court on the critical nature of this privilege, in opposition to the

notion that the state's disregard of the confidential nature of the psychiatrist-patient relationship can ever be harmless.

ARGUMENT

The juvenile justice system rests on the notion that young people who commit delinquent acts are amenable to rehabilitation and can develop competencies to become responsible and productive members of the community. *See* 42 Pa.C.S. § 6301(b)(2)(i). With proper services, the system returns youth to their homes, who then go on to live safely in their communities in adulthood. Mental health treatment is one integral service that can assist in returning young people home. When a court orders such services and then uses the privileged information obtained through treatment, it has detrimental effects on the young person's ability to develop competencies to rehabilitate and reintegrate.

Regardless of its influence on the court's decision in this matter, violating the psychiatrist-patient privilege can never be harmless error. As years of jurisprudence have recognized, echoing the professional opinion of treating psychiatrists, "treatment of the mentally ill is too important, and the assurance of confidentiality to central to it, to risk jeopardizing the whole" for a legal proceeding. Abraham S. Goldstein & Jay Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 118 AMER. J. PSYCH. 733, 735 (1962); *see also Jaffee v. Redmond*, 518 U.S. 1 (1996).

I. Effective Psychiatric Treatment Requires Absolute Confidentiality

Psychiatrist-patient privilege is absolute in the Commonwealth of Pennsylvania. *Commonwealth v. Wilson*, 602 A.2d 1290 (Pa. 1992); *see also Jaffee*, 518 U.S. 1 (recognizing that Federal Rule 501 creates an unconditional psychotherapist-patient privilege). This protection is not merely a matter of judicial efficiency, but a reasoned legislative choice, with Constitutional dimensions, that considers the importance of confidentiality in the psychiatrist-patient relationship. Courts have long recognized that, without confidentiality, the psychiatrist-patient relationship fails. *See, e.g.*, *Jaffee*, 518 U.S. 1; *Wilson*, 602 A.2d 1290; *In re Pittsburgh Action against Rape*, 428 A.2d 126, 145-46 (Pa. 1981) (Clark J., dissenting); *In re B*, 394 A.2d 419, 425 (Pa. Super. Ct. 1978); *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976); *see also Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 360 (Cal. 1976) (Clark J., dissenting).

Judicial recognition of the significance of the privilege echoes the value that the profession places on confidentiality. "Virtually every school of psychotherapy recognizes confidentiality as the *sine qua non* of effective therapy." *Pittsburgh Action against Rape*, 428 A.2d at 145-46 (citing R.M. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 610 (1964); Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447 (1938)). According to Professors

Elizabeth F. Loftus, John R. Paddock, and Thomas F. Guernsey, effective psychotherapy:

> (1) Does not pathologize or conceptualize patients as diseased, and instead reflects a collaborative relationship with a therapist that helps one 'make sense of' his or her gallant attempt to adapt to previous life experience as well as their genetic 'hardware';
>
> (2) Teaches people new ways to construe past, current, and future experiences, so they can live a richer, more rewarding and effective life;
>
> (3) Helps patients learn new thought patterns, behaviors, ways to appropriately regulate emotional expression, and responses to changes in relationships or predictable life transitions (e.g. birth of a child, death of a parent) based on well developed theory supported by empirical data; [and]
>
> (4) Accomplishes these *objectives in the context of an empathetic and genuinely caring relationship with the therapist.*

Elizabeth F. Loftus et al., *Patient-Psychotherapist Privilege: Access to Clinical Records in the Tangled Web of Repressed Memory Litigation*, 30 U. RICH. L. REV. 109, 144 (1996) (emphasis added) [hereinafter "Loftus, *Patient-Psychotherapist Privilege*"]. In other words, a psychiatrist's relationship with the patient is itself a professional value.

The risk of jeopardizing the relationship threatens treatment effectiveness at three different junctions: the patient's willingness to receive

psychotherapy, the patient's willingness to reveal information during treatment, and the treatment's effectiveness outside of the therapeutic context.

A. Willingness to Receive Treatment

Without assured confidentiality, those requiring treatment "will be deterred from seeking assistance." *Pittsburgh Action against Rape*, 428 A.2d at 145 (Clark J., dissenting). The body of empirical research indicates that confidentiality increases the likelihood that people will seek psychotherapeutic help. *See* Lofuts (citing Jacob J. Lindenthal & Claudewell S. Thomas, *Psychiatrists, the Public, and Confidentiality*, 170 J. OF NERVOUS & MENTAL DISEASE 319, 321 (1982); Thomas V. Merluzzi & Cheryl Brischetto, *Breach of Confidentiality and Perceived Trustworthiness of Counselors*, 30 J. OF COUNS. PSYCH. 245, 250-51 (1983); David J. Miller & Mark H. Thelen, *Knowledge and Beliefs about Confidentiality in Psychotherapy*, 17 PROF. PSYC.: RES. & PRACT. 15, 17-18 (1986); Donald Schmid et al., *Confidentiality in Psychiatry: A Study in the Patient's View*, 34 HOSP. & COMM. PSYCH. 353, 354-55 (1983)). This is true even of those compelled to receive treatment by the juvenile courts. Mere attendance at therapeutic sessions alone does not make the patient a willing participant, one whose buy-in is necessary for the therapeutic process. *See generally*, Loftus, *Patient-Psychotherapist Privilege* at 125.

B. Full Disclosure

The psychotherapist-patient privilege is designed to protect disclosures made during treatment without fear of public exposure. *See Commonwealth v. Carter*, 821 A.2d 601 (Pa. Super. Ct. 2003); *In re T.B.*, 75 A.3d 485 (Pa. Super. Ct. 2013). "[S]uccessful psychotherapy depends on the patient's willingness to discuss 'facts, emotions, memories, and fears,' public disclosure of which 'may cause embarrassment or disgrace.'" *Jaffee*, 518 U.S. at 10; *Pittsburgh Action against Rape*, 428 A.2d at 145. Even those subject to involuntary treatment merit this protection: "Regardless of a patient's psychiatric diagnosis, psychotherapists typically believe that the intensity and extent of emotional pain, shame, and inadequacy felt by many persons in treatment must be understood thoroughly, carefully, and accurately for therapy to help the person feel better and function more effectively in the world." Loftus, *Patient-Psychotherapist Privilege* at 125; *see also In re B.*, 394 A.2d at 425 ("The nature of the psychotherapeutic process is such that disclosure to the therapist of the patient's most intimate emotions, fears, and fantasies is required.")

Yet full disclosure is difficult to attain:

> The right to protect one's beliefs and thoughts from intrusion by others is . . . one of the most comprehensive rights known to civilized men. . . . 'If there is a quintessential zone of human privacy, it is the mind. Our ability to exclude others from our mental process is intrinsic to the human personality.'

In re T.M., 731 A.2d 1276, 1280 (Pa. 1999) (internal citations omitted). The *T.M.* decision exemplifies not only the Constitutional dimensions of the psychiatrist-patient privilege codified at 42 Pa.C.S.A. § 5944, but also the reluctant shell a psychiatrist must break through for successful therapy. The promise of confidence is critical:

> The patient in psychotherapy knows that such revelations will be expected if the process is to be beneficial. In laying bare one's entire self, however, the patient rightfully expects that such revelations will remain a matter of confidentiality exclusively between patient and therapist.

Id.

Thus, "[f]rom the perspective of the psychologist, if patients do not feel that they can be honest, the information gathered during an assessment or a treatment session may lack accuracy and reliability, which can lead to ineffective diagnosis and treatment." Christina N. Massey & Lauren C. Miller, *Considerations Related to Psychologist-Patient Privilege in Requests for Reverse Transfer Hearings*, 45 J. AMER. ACAD. OF PSYCH & LAW 380, 381-82 (2017). "In extreme cases, if the reliability of the patient's account is significantly compromised, the treatment strategy that is chosen may be so ineffective that it may, in fact, result in a worsening of symptoms and an unintended poor prognosis." *Id.* at 382.

C. Successful Treatment

Effective treatment requires that a patient maintain trust in the relationship with the psychiatrist—which includes confidence in the private nature of the relationship. Loftus, *Patient Psychotherapist Privilege at* 126-27 ("The treatment crucible *is* the patient and therapist's relationship." (emphasis in original)). Empirical research supports that the quality of the patient's relationship with the psychiatrist is reflected in the success of treatment: successful treatment requires mutuality, collaboration, understanding, and *trust. Id.* (citing LORNA S. BENJAMIN, INTERPERSONAL DIAGNOSIS AND TREATMENT OF PERSONALITY DISORDERS (2ND ED. 1996); SHELDON CASHDAN, OBJECT RELATIONS THERAPY: USING THE RELATIONSHIP (1988); JEFFERSON M. FISH, PLACEBO THERAPY (1973); JEROME D. FRANK, PERSUASION AND HEALING: A COMPARATIVE STUDY OF PSYCHOTHERAPY (1991); Arthur K. Shapiro & Louis A. Morris, *The Placebo Effect in Medical and Psychological Therapies*, reprinted in HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE 369 (Sol L. Garfield & Allan E. Bergin eds., 2d ed. 1978); G.T. Evans & Ian M. Evans, The Therapist-Client Relationship in Behavior Therapy, reprinted in EFFECTIVE PSYCHOTHERAPY, A HANDBOOK OF RESEARCH 544, 553 (Alan S. Gurman & Andrew M. Razin eds., 1977); Sean O'Connell, *The Placebo Effect and Psychotherapy*, 20 PSYCHOTHERAPY THEORY, RES. & PRAC. 337, 339,

342-43 (1983); Carl R. Rogers, *The Necessary and Sufficient Conditions of Therapeutic Personality Change*, 21 J. CONSULTING PYSCH. 95, 95-100 (1957)).

II. Disclosing Privileged Communications between a Psychiatrist and Patient is Never Harmless

Act 21 proceedings provide no exception to the well-recognized psychotherapist-patient privilege. *See In re T.B.*, 75 A.3d at 492-97. To ensure utmost protection of privileged information, the panel in T.B. determined that a court must "redact all statements, evaluations, and summaries made for treatment purposes" prior to forwarding documents to the SOAB for an act 21 evaluation if "the juvenile was not represented by counsel and informed of his right against self-incrimination." *Id.* at 497. In the instant case, the court concluded that the trial court violated J.MG.'s psychotherapist-patient privilege. Superior Court Op. at 9. Yet, the court incorrectly concluded that this violation was harmless. *Id.* at 12-13. *See Commonwealth v. Rush*, 605 A.2d 792, 794 (Pa. 1992) ("An error cannot be held harmless unless the appellate court determines that the error could not have contributed to the verdict.").

Holding that a violation of the patient-psychiatrist privilege is harmless upends the system. The imprimatur of the state in disclosing privileged information, present in this case, is especially damaging to the psychiatrist-patient relationship, rendering any promise of confidentiality worthless. *See Jaffee*, 518 at

13 ("[A]ny State's promise of confidentiality would have little value if the patient were aware the privilege would not be honored in a federal court.").

The harm of the error from an evidentiary standpoint is irrelevant. As the United States Supreme Court has recognized, confidentiality in this context is not contingent on a trial judge's later evaluation of the evidentiary usefulness of the privileged communication. *Jaffee*, 518 U.S. at 17. "[I]f the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. 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.'" *Id.* at 18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

To be sure, if this Court endorses the position that violation of the privilege can be harmless, then this Court should also expect that psychiatric treatment provided to individuals who have committed sex offenses as children will be ineffective. When confidential communications are disclosed to SOAB, whose goal is to determine whether the patient has a "mental abnormality or personality disorder," they distort the psychiatrist-patient relationship to "pathologize or conceptualize patients as diseased," in direct contradiction of the purpose of treatment. *See* Loftus, *Patient-Psychotherapist Privilege* at 144.

Disclosure, then, is by definition harmful error: without the prospect of confidentiality in their treatment, young people are deprived of the precise services that would allow them to safely return to their communities. Neither the treating psychiatrist, nor the courts, nor SOAB can effectively opine on whether a young person will require involuntary treatment to prevent a future act of sexual violence if that individual never received effective treatment to begin with.

CONCLUSION

Amici's experience supports the underlying assumptions of the juvenile justice system that, with appropriate treatment, young people who have committed delinquent offenses can safely return to their communities and thrive in adulthood. But treatments must be effective to achieve that goal. Jeopardizing the relationship between patients and their psychotherapists by failing to appropriately condemn a violation of psychiatrist-patient privilege threatens the programs we rely on to support rehabilitation. For this reason and those discussed herein, *amici* respectfully request this Court reverse the decision below.

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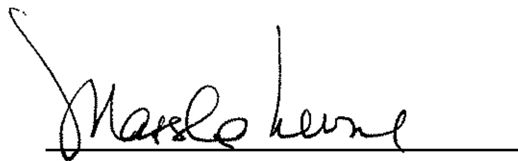

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Dated: March 27, 2019

CERTIFICATE OF COMPLIANCE

I, Lisa Bolotin Swaminathan, hereby certify that the foregoing brief complies with the word count limitation of Rules 531 and 2135 of the Pennsylvania Rules of Appellate Procedure. This brief contains 2,314 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

/s/ Lisa Bolotin Swaminathan
Lisa Bolotin Swaminathan

CERTIFICATE OF SERVICE

I, Lisa Bolotin Swaminathan, hereby certify that on this 27th day of March, 2019, I caused a true and correct copy of the foregoing Brief of Amici Curiae to be served by electronic filing.

/s/ Lisa Bolotin Swaminathan
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