No. SJC-07182

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS

v.

DAVID FULLER

v.

RAPE CRISIS CENTER OF CENTRAL MASSACHUSETTS, INC.,

Appellant.

ON DIRECT APPEAL FROM AN ORDER OF THE
SUPERIOR COURT OF WORCESTER COUNTY

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND THE MASSACHUSETTS CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS IN SUPPORT OF APPELLANT

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND THE MASSACHUSETTS CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS IN SUPPORT OF APPELLANT

Amici respectfully submit this brief in support of Appellant, urging this Court to reverse the Superior Court's order holding Appellant in contempt of court for failing to produce a victim's confidential rape crisis counseling records.

INTEREST OF THE AMICI

The National Association of Social Workers (NASW) is a professional membership organization comprised of more than 155,000 social workers with chapters in every state, the District of Columbia, New York City, Puerto Rico the Virgin Islands and an international chapter. The Massachusetts Chapter of NASW has over 8,400 members, including licensed clinical social workers at the appellant, Rape Crisis Center of Central Massachusetts, Inc., who provided treatment to the rape victim whose confidential records are at issue in this case.

Created in 1955 by the merger of seven predecessor social work organizations, the NASW has as its purpose to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. In furtherance of its purposes, the NASW promulgates professional standards and criteria including *Standards for the Practice of Clinical Social Work* and *Guidelines for Clinical Social Work Supervision*, conducts research, publishes studies of interest to the profession, provides continuing education and enforces the *NASW Code of Ethics*. The NASW also sponsors a voluntary credentialing program to enhance the professional standing of social workers including the NASW Diplomate in Clinical Social Work and the Qualified Clinical Social Work credentials.

Amici have a strong interest in the issues presented in this case. The *Code of Ethics* and *Standards of Practice* adopted and enforced by amici and the laws of nearly every state, including the State of Massachusetts, require clinical social workers to maintain the confidentiality of communications with their patients, recognizing that such confidentiality is essential for the diagnosis and treatment of mental and emotional conditions. In Massachusetts, this privilege is bolstered by a virtually absolute statutory privilege for rape crisis counseling. If this Court were to affirm the order of the Superior Court, which fails to recognize these privileges, clinical social workers would face the dilemma of being ordered to violate state law as well as established professional standards which are crucial to their provision of effective mental health services.

This appeal raises the issue of whether, in the ordinary course of a criminal prosecution, a rape crisis counseling center should be compelled to disclose confidential counseling records regarding the treatment and services provided to a victim of sexual violence. Amici do not duplicate the arguments of the parties, but focus instead on how compelled disclosure of these sensitive materials would interfere with the therapeutic process, violate the rights of patients and, ultimately, deter crime victims from either reporting crimes to the authorities or seeking treatment for their injuries. As amici demonstrate, confidentiality in therapeutic counseling is a core principle in the mental health professions, deserving of the Court's most stringent protection.

SUMMARY OF ARGUMENT

I. The relationship of trust between psychotherapists and patients is built on the fundamental understanding that virtually all communications between them will be kept confidential. In this sense, it is not unlike the clergy-penitent relationship, since the patient is expected to share her innermost thoughts and feelings in the confidence that her disclosures will not be revealed. Expert opinion and empirical data establish that without the promise of confidentiality, patients will be less likely to seek therapy. If patients do seek therapy under the threat of exposure, they will be less likely to disclose to the therapist all of the thoughts and feelings that might be relevant to their treatment.

II. This Commonwealth, the federal government and other states have all recognized the importance of preserving the confidentiality of psychotherapist-patient communications. The Commonwealth has adopted by statute an absolute privilege for rape crisis counseling communications. It has also adopted a psychotherapist-patient privilege applicable to social workers. Congress has enacted a variety of statutes requiring the confidentiality of mental health communications. In addition, every state and the District of Columbia have adopted some form of psychotherapist-patient privilege, 44 of which expressly apply the privilege to communications with a social worker. Twenty states have adopted specific sexual assault counseling privileges, six of which have adopted expressly absolute privileges.

III. The defendant's rights to a fair trial under the federal and state constitutions may be fundamental, but they are not absolute. Defendants' rights to obtain potentially exculpatory information give way to many other privileges, such as the attorney-client privilege and the clergy-penitent privilege, without any resulting constitutional violation. The rape crisis

counseling privilege is no less important, and involves the shielding of no more relevant information than other privileges that would prevent a defendant from obtaining information. Indeed, counseling records usually contain less reliable information than other evidentiary sources.

In addition, the victim who seeks counseling has constitutional rights at stake. Her right to privacy has been widely recognized as a fundamental right no less important than the defendant's constitutional rights. Even though the defendant has a right to a fair trial, which is an issue as between him and the state, he does not have the right to compel the state to violate the constitutional rights of another citizen, the victim.

Finally, even seen as a burden on the defendant's constitutional rights, the absolute statutory privilege for rape crisis counseling communications is justified because it serves a compelling state interest employing the narrowest possible means. The Commonwealth has a compelling interest in encouraging those in need, especially rape victims, to seek counseling. It also has a compelling interest in encouraging rape victims to report the crime to the authorities. The privilege at stake in this case serves these interests directly, by making clear to rape victims that they can expect protection for the confidentiality of their communications with therapists even if they do report the rape to the authorities. Put another way, the privilege promises that victims will not be punished either for seeking counseling or for reporting the crime.

The Court should apply the absolute statutory privilege for rape crisis counseling communications to reverse the order of the Superior Court.

ARGUMENT

I. CONFIDENTIALITY IS CRITICAL TO THE SUCCESS OF MENTAL HEALTH TREATMENT AND FURTHERS IMPORTANT SOCIETAL GOALS.

This case presents a striking example of a discrete class of therapist-patient relationship: that of the rape crisis counselor and rape victim. This case demonstrates that without confidentiality, not only rape crisis counseling, but psychotherapy in general is compromised. Effective psychotherapy proceeds from the patient's trust in the therapist which, in turn, requires a credible promise of confidentiality.

A. The Confidential Basis of Communications Between Therapist and Patient.

The relationship between psychotherapist and patient is unlike any other dynamic between two people.1/ The patient reveals more than objective fact; she reveals who she is at the core. That is not an easy task for anyone, much less a rape victim. It requires courage, commitment, confidence and, most importantly, trust in the therapist who hears the patient's revelations.

> The psychiatric patient confides more utterly than anyone else in the world. [She] exposes to the therapist not only what her words directly express; [she] lays bare [her] entire self, [her] dreams, [her] fantasies, [her] sins, and [her] shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and they cannot get help except on that condition. * * * It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.2/

The patient's relationship to a therapist is not unlike the priest-penitent relationship. The penitent offers what is most deeply kept inside, what burdens the conscience. The penitent offers

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1/ Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 185 (1960).

2/ Guttmacher & Weihofen, *Psychiatry and the Law* 272 (1952), quoted in *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955).

these intimate and confidential thoughts because she believes the priest will keep that communication with the trust of God. Of course, the penitent is protected by the seal of confession and thus knows that what is confessed will never be revealed.

Similarly, the psychotherapist-patient relationship provides a setting in which patients reveal intimate thoughts, as painful as confession of sin, namely mental anguish and fear. In the case of a rape victim, the pain is evident; the fear palpable. Few patients would reveal absolutely everything about themselves without assurance that what they say will not be repeated.

Even Sigmund Freud conceived of psychoanalysis as a secular form of confession:

> [The patient] is to tell us not only what he can say authentically and willingly, what will give him relief like a confession, but everything else as well that his self observation yields him, everything that comes into his head, even if it is *disagreeable* for him to say it, even if it seems *unimportant* or actually *nonsensical*.3/

Accordingly, the ethical norms of the therapeutic community require respect for the confidentiality of a client except in the most extreme circumstances:

> Any information related to the fact that an individual has sought mental health services is generally considered confidential. The fact that the person is, or has been, in treatment is confidential. Communications by the client during treatment, observations by the therapist, the results of psychological testing and laboratory testing, diagnosis, and prognosis are confidential. Even the fact that someone had one consultation session with a therapist is confidential.4/

3/ Freud, *An Outline of Psychoanalysis*, in *Standard Edition of the Complete Psychological Works of Sigmund Freud* 141 (1964) (emphasis in original), quoted in Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. Rev. 893, 896 (1982).

4/ Weiner, B., & Wettstein, R., *Legal Issues in Mental Health Care* (1993) Plenum Press, New York, at 203.

B. Patients Will Not Seek Treatment Without Confidentiality.

The psychotherapist-patient relationship is based on trust and confidence.5/ Simply put, if a patient cannot trust a therapist, the patient will not seek therapy:

> Without the promise of confidentiality, provided primarily through the clinician's professional ethics but also the law, many individuals in need of treatment would be afraid to seek it. It is even clearer that once in treatment, clients would be affected by the absence of confidentiality. Research has shown that clients expect confidentiality in treatment and wish to be informed of its extent and limits. Every client, however well motivated, has to overcome the resistance to therapeutic exploration. These resistances seek support from every possible source, including the possibility of unwanted disclosure outside the treatment setting.6/

The fear of public disclosure is substantial. The patient risks psychological harm from public revelations of mental disorders.7/ In addition, mental illness carries a social stigma. Commentators routinely note that "people view mental illness as more embarrassing than physical illness."8/ Government surveys have concluded that "the public generally fears and dislikes the mentally ill and believes them to be unpredictable and untrustworthy."9/ So strong

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5/ Lamkin, *Should Psychotherapist-Patient Privilege Be Recognized?*, 18 Am. J. Trial Advoc. 721 (1995).

6/ Weiner & Wettstein at 201-202. *See also* Slovenko, *Psychiatry and a Second Look*, *supra* n.3, at 187.

7/ Shuman & Weiner, *The Psychotherapist-Patient Privilege* 112 (1987).

8/ Shuman & Weiner, *The Privilege Study*, *supra* n.5 at 897, citing Guttmacher & Weihofen, *Psychiatry and the Law*, *supra* n.2 at 271; *Developments in the Law, Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1193, 1200 (1974).

9/ Cerveny & Kent, *Evidence Law: The Psychotherapist-Patient Privilege in Federal Courts*, 59 Notre Dame L. Rev. 791, 798 (1984), citing H.E.W., *Public Opinions and Attitudes About Mental Health* (Gov't Printing Office 1963).

is the public's fear of stigma that many people choose to pay their own therapy bills rather than submit them to insurers whose records may be available to an employer.10/

The fear of stigma also causes psychological harm. As one expert put it, "subjecting a psychiatric patient to fear of public disclosure and stigmatization is a form of patient abuse."11/ Where the patient has been raped, exposure of her most private thoughts and feelings would constitute yet another violation, revealing far more intimate matters than in most other cases. Any doubt about the confidentiality of rape crisis counseling would thus stand as a barrier to the patient; deterring her from seeking help.

It is not in society's interest to place painful barriers in the way of effective therapy for crime victims or anyone else. If people who need help do not seek therapy or go about it in a guarded, ineffective way, they may fail to address psychological problems that could ultimately disable them for the rest of their lives. Although it is impossible to quantify this risk, common sense suggests that society will be better served if those needing mental health services are encouraged to obtain it, rather than frightened away by the threat of exposure.

Rape victims are understandably subject to a wide range of emotions. For some, the experience is shattering to the personality and presents a real risk of suicide. Suicidal ideations can be extremely powerful, and suicidal patients need immediate and effective intervention to prevent death or serious injury. Barriers to treatment are not acceptable in these circumstances.

10/ Domb, *I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege*, 5 J.L. & Health 209, 222 (1990/91), citing Note, *The Case for a Federal Psychotherapist-Patient Privilege That Protects Patient Identity*, 1985 Duke L.J. 1217, 1228 (1985).

11/ Slovenko, *Accountability and Abuse of Confidentiality in the Practice of Psychiatry*, 2 Int'l J. L. & Psychiatry 431, 442 (1979).

The Commonwealth's interest in preserving the life and health of victims is too great to justify piercing the confidentiality of therapy relationships.

Leading studies confirm that people will be more likely to seek therapy or be more open in therapy if they can expect confidentiality. One study revealed that of 108 randomly selected potential patients, "42 percent of the sample reported they would be less likely to be open in therapy than if their communications would be absolutely protected."12/ Another study surveyed teachers and school administrators, 83 percent of whom said they did not want to reveal to state authorities whether they had ever sought mental health treatment.13/ In addition, a study of college students showed strong support for the confidentiality of psychotherapist-patient communications.14/

Similarly, a study of the effect of asking about mental health treatment on state bar applications found that "students anticipating bar examinations and the extensive inquiry that accompanies them may avoid professional mental health consultation for fear of 'damaging' their

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12/ Appelbaum, Kapen, Walters, Lidz, & Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psychiatry L. 109, 110 (1984), citing Comment, *Functional Overlap between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1126 (1962).

13/ *Ibid.*, citing Rosen, *Do Potential Community Mental Health Center Clients Want Privacy?*, unpublished manuscript, cited in Noll & Rosen, *Privacy, Confidentiality, and Informed Consent in Psychotherapy*, in *Psychiatric Patient Rights and Patient Advocacy: Issues and Evidence* (1982).

14/ Stevens & Shearer, *An Assessment of Nonprofessionals' View on Confidentiality*, unpublished manuscript, cited in Noll & Rosen, *Privacy, Confidentiality, and Informed Consent* in *Psychotherapy, Psychiatric Patient Rights and Patient Advocacy: Issues and Evidence* (1982).

record and delaying their admission while an investigation of fitness ensues."15/ *See also Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430, 437-38 (E.D. Va. 1995).

The success of psychotherapy depends on the patient's full disclosure; without it the therapy is ineffective. As the Group for the Advancement of Psychiatry found in 1960, the psychotherapist's "capacity to help his patients is completely dependent upon their willingness to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patient of confidentiality and, indeed privileged communication."16/

II. THE COMMONWEALTH AND THE NATION HAVE RECOGNIZED THE IMPORTANCE OF PRESERVING THE CONFIDENTIALITY OF MENTAL HEALTH COMMUNICATIONS.

A. The Commonwealth Has Afforded Rape Crisis Counseling an Absolute Privilege.

The policy of this Commonwealth is unequivocal: rape crisis counseling records are accorded an absolute privilege by statute:

> A sexual assault counsellor shall not disclose [confidential communications with a victim of sexual assault], without the prior written consent of the victim; provided, however, that nothing in this chapter shall be construed to limit the defendant's right of cross-examination of such counsellor in a civil or criminal proceeding if such counsellor testifies with such written consent.
>
> Such confidential communications shall not be subject to discovery and shall be inadmissible in any criminal or civil proceeding without the prior written consent of the victim to whom the report, record, working paper or memorandum relates.

15/ Edson, *Mental Health Status Inquiries On Bar Applications: Overbroad and Intrusive*, 43 U. Kan. L. Rev. 869, 880 (1995), citing Maher & Blum, *A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants*, 23 Ind. L. Rev. 821, 826-827 (1990).

16/ Cerveny & Kent, *Evidence Law*, *supra* n.11 at 797, quoting 4 Group for the Advancement of Psychiatry, *Reports and Symposiums*, No. 45, at 95 (1960).

M.G. L.A. 233 § 20J. Massachusetts also has adopted statutes protecting the confidentiality of patient communications to a social worker17/ and to other mental health professionals18/ in court proceedings. This Court should effectuate the legislative policies of the Commonwealth to protect the confidentiality of rape crisis counseling and in encouraging mental health patients to seek therapy.

B. National Policy Supports Protecting the Confidentiality of Mental Health Communications.

1. Federal Government Policy Supports Confidentiality.

Congress has recognized the need for mental health confidentiality in the Mental Health Systems Act of 1980, Pub. L. No. 96-398, 94 Stat. 1565, *codified as amended at* 42 U.S.C. § 9401 *et seq.* (1995). The Bill of Rights in that Act explicitly confirms the patient's "right to confidentiality" of mental health records. 42 U.S.C. § 9501(1)(H). Such records also are exempt from the Freedom of Information Act's disclosure requirements (Pub. L. No. 89-554, 80 Stat. 383, codified as amended at 5 U.S.C. § 552(b)(6)) and subject to the Privacy Act of 1974's mandate that federal agencies promulgate special rules restricting their disclosure (Pub. L. No. 93-579, 88 Stat. 1897, codified as amended at 5 U.S.C. §§ 552a(b), 552a(f)). See, *e.g.*, 20

17/ *See* Mass. Gen. L. ch. 112, § 135B:

> Except as hereinafter provided, in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings, a client shall have the privilege of refusing to disclose and of preventing a witness from disclosing, any communication, wherever made, between said client and a social worker licensed pursuant to the provisions of section one hundred and thirty-two of chapter one hundred and twelve, or a social worker employed in a state, county or municipal governmental agency, relative to the diagnosis or treatment of the client's mental or emotional condition.

18/ *See* Mass. Gen. L. ch. 233, § 20B.

C.F.R. § 401.105(e) (requiring confidentiality of information maintained by, *inter alia*, any "psychological" professional under Social Security contract); 45 C.F.R. § 1304.3-8(b) (Health and Human Services regulation requiring confidentiality of mental health care information).

In connection with the Mental Health Systems Act, Congress explained:

> The Committee recognizes the need to assure the confidentiality and privacy of the treatment relationship in the field of mental health. It is an accepted premise that the capacity of a mental health professional to help his or her patient is strongly related to the patient's willingness to talk freely and openly. That willingness is in turn often dependent on the patient's belief that his or her communications are confidential. The Committee realizes that it would be quite difficult to provide mental health treatment without being able to assure the patient of confidentiality, privacy, and indeed, *privileged communication*. The Committee believes that *the treatment relationship is comparable to that of a priest/penitent or lawyer/client*.
>
> Patients not only disclose the very depths of their consciousness, but also their unconscious fears, feelings and attitudes. The Committee believes that confidentiality is a sine qua non for successful mental health treatment. Without a secure environment in which patients can communicate with the confidence that they are free from others knowing what may be said, all of mental health care would be destroyed.

S. Rep. No. 712, 96th Cong., 2d Sess. 93 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3372, 3460 (emphasis supplied).

Congress reiterated this judgment in the Protection and Advocacy for Mentally Ill Individuals Act of 1986, Pub. L. No. 99-319, 100 Stat. 478, *codified as amended at* 42 U.S.C. §§ 10801-10851. Congress restated the Bill of Rights that it had adopted in 1980, including the patient's "right to confidentiality" of mental health information. 42 U.S.C. § 10841(1)(H). The statute also requires that the confidentiality of patient information be maintained throughout mental health protection and advocacy systems. 42 U.S.C. § 10806(a).

2. Every State Recognizes the Rape Crisis Counseling Or Psychotherapist-Patient Privilege.

Twenty states and the District of Columbia expressly protect the confidentiality of the counseling records and communications of rape crisis centers, and in six states that privilege is absolute.19/ All fifty states and the District of Columbia have adopted a privilege for psychotherapists and other mental health professionals.20/ Pet. Br. at 31. The District of

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19/ *See, e.g.*, Alaska Stat. § 09.25.400 (domestic violence and sexual assault counselor); Cal. Evid. Code § 1036 *et seq.* (sexual assault victim-counselor privilege); Colo. Rev. Stat. Ann. § 13-90-107 (domestic violence and sexual assault victim's advocate); Conn. Gen. Stat. § 52-146k (battered women's or sexual assault counselor); D.C. Code Ann. § 6-2002, 6-2003 (rape crisis or sexual abuse counselor); Fla. Stat. Ann. § 90.5035 (sexual assault counselor); Haw. R. Evid. 505.5 (sexual assault crisis center); 735 ILCS 5/8-802.1 (rape crisis counselor); Iowa Code Ann.§ 236A.1 (victim counselor); Ky. R. Evid. 506 (sexual assault counselor); Me. Rev. Stat. Ann. tit. 16, § 53-A (rape crisis center and sexual assault counselor); Mich. Comp. Laws Ann. § 600.2157a (sexual assault and domestic violence counselor); Minn. Stat. Ann. § 595.02 (sexual assault counselor); N.H. Rev. Stat. Ann. § 173-C:1 *et seq.* (rape crisis center and sexual assault counselor); N.Y. Civ. Prac. L. & R. § 4510 (rape crisis counselor); Okla. Stat. Ann. tit. 43A, § 3-313 (domestic vilence and sexual assault shelter); 42 Pa. Cons. Stat. § 5945.1 (sexual assault counselor); Utah Code Ann. § 78-3c-1 *et seq.* (sexual assault counselor); Vt. Stat. Ann. Tit. 12, § 1614 (crisis worker for victims of sexual assault and abuse); Wash. Rev. Code Ann. § 70.125.065 (rape crisis center); Wyo. Stat. § 1-12-116 (family violence and sexual assault advocate). Some states, such as Montana, have interpreted the general protections of their privilege laws to specifically include records of and communications with a rape victim counselor. See *State v. Muir*, 867 P.2d 1094 (Mont. 1994).

Of these states, the statutory protections of Colorado, Connecticut, Florida, Illinois, Michigan and Pennsylvania are absolute.

20/ *See* Ala. Code § 34-26-2; Alaska R. Evid. 504; Alaska Stat. § 08.86.200; Ariz. Rev. Stat. Ann. § 32-2085; Ark. R. Evid. 503; Cal. Evid. Code § 1010 *et seq.*; Colo. Rev. Stat. Ann. § 13-90-107(g); Conn. Gen. Stat. § 52-146c; D.C. Code Ann. § 14-307; Del. R. Evid. 503; Fla. Stat. Ann. § 90.503; Ga. Code § 24-9-21; Haw. R. Evid. 504.1; Idaho Code § 54-2314; 740 ILCS 110/1 *et seq.*; Ind. Code Ann. § 25-33-1-17; Iowa Code Ann. § 622.10; Kan. Stat. Ann. § 74-5323; Ky. R. Evid. 506, 507; Ky. Rev. Stat. § 421.215; La. Code Evid. Ann. Art. 510; La. Rev. Stat. Ann. § 13:3734, § 37:2363; Me. Rev. Stat. Ann. tit. 32, § 7005; Md. Code Ann., Cts. & Jud. Pro. § 9-109; Mass. Gen. L. ch. 233, § 20B; (continued...)

Columbia and forty-four states expressly include a privilege for confidential communications to a social worker.21/

20/(...continued)
Mich. Comp. Laws Ann. § 330.1750; Minn. Stat. Ann. § 595.02; Miss. Code Ann. § 73-31-29; Mo. Rev. Stat. § 337.055; Mont. Code Ann. § 26-1-807; Neb. Rev. Stat. § 27-504; Nev. Rev. Stat. § 49.215 *et seq.*; N.H. Rev. Stat. Ann. § 330-A:19; N.J. Stat. Ann. § 45:14B-28; N.M. Stat. Ann. §61-9-18; N.Y. Civ. Prac. L. & R. § 4507; N.C. Gen. Stat. § 8-53.3; N.D. R. Evid. 503; Ohio Rev. Code Ann. §§ 2317.02, 4732.19; Okla. Stat. Ann. tit. 12, § 2503; Or. Rev. Stat. § 40.230; 42 Pa. Cons. Stat. § 5944; R.I. Gen. Laws § 5-37.3-4, § 5-37.3-6; S.C. Code Ann. § 44-22-90; S.D. Codified Laws Ann. § 36-26-30; Tenn. Code Ann. § 24-1-207, § 63-11-213; Tex. R. Evid. 509; Tex. Rev. Civ. Stat. Ann. § 611.002; Utah R. Evid. 506; Utah Code Ann. § 58-60-102; Vt. R. Evid. 503; Vt. Stat. Ann. Tit. 12, § 1612; Va. Code Ann. § 8.01-400.2; Wash. Rev. Code Ann. § 18.8.110; W. Va. Code § 30-30-12; Wis. Stat. Ann. § 905.04; Wyo. Stat. § 33-27-113.

21/ *See* Ariz. Rev. Stat. Ann. § 32-3283 (privilege for communications with a certified behavioral health professional which is defined in § 32-3251 to include social workers); Ark. Code Ann. § 17-39-107 (creating a privilege for communications with licensed certified social workers); Cal. Evid. Code § 1012; Colo. Rev. Stat. Ann. § 13-90-107; Conn. Gen. Stat. Ann. § 52-146q (privilege for communications with persons certified as independent social workers); Del. Code Ann. tit. 24, § 3913 (privilege for communications with licensed clinical social workers); D.C. Code Ann. § 14-307 (privilege for communications with physicians or mental health professional, defined at § 6-2001 to include licensed social workers); Fla. Stat. Ann. § 90.503 (privilege for communications with psychotherapists, defined to include licensed clinical social workers); Ga. Code Ann. § 24-9-21 (privilege for communications with certain categories of licensed psychotherapists, including licensed clinical social workers); Idaho Code § 54.3213; 225 ILCS 20/16, 740 ILCS 110/10 (privilege for communication with a therapist); Ind. Code Ann. § 25-23.6-6-1 (privilege for communications with social worker or clinical social worker; Iowa Code Ann. § 622.10 (privilege extending to communications with mental health professional generally); Kan. Stat. Ann. § 65-6315; Ky. R. Evid., Rule 507 (privilege for communications with psychotherapists, defined to include clinical social workers); La. Code Evid. Ann. Art. 510 (privilege for communications iwth psychotherapists, including licensed mental health counselors and board certified social workers under the laws of any state or nation); Me. Rev. Stat. Ann. tit. 32, § 7005; Md. Code Ann., Cts. & Jud. Proc. § 9-121 (privilege for communications with licensed social worker); Mass. Gen. L. ch. 112, § 135A; Mich. Comp. Laws Ann. § 339.1610 (privilege for communications with social worker); Minn. Stat. Ann. § 595.02(g) (privilege for communications with licensed social worker engaged in psychological treatment); Miss. Code Ann. § 73-30-17, § 73-53-29; Mo. Rev. Stat. § 337.540, § 337.636; Mont. Code Ann. § 37-22-401 (privilege for communications with (continued...)

III. SOCIETY'S INTEREST IN PROVIDING CONFIDENTIAL COUNSELING TO RAPE VICTIMS OUTWEIGHS A CRIMINAL DEFENDANT'S ASSERTED RIGHT TO COUNSELING RECORDS.

The appellant has amply demonstrated that, in this case, the victim has a constitutional right to privacy which is at least as important as, if not more important than the defendant's right to search for exculpatory evidence. Amici adopt and endorse the arguments of the appellant and

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21/(...continued)

licensed social worker); Neb. Rev. Stat. § 71-1,335 (privilege for communications with mental health practitioners, defined to include licensed social workers); Nev. Rev. Stat. §§ 49.215-.254; N.H. Rev. Stat. Ann. § 330-A:19 (privilege for patient communications with certain certified practitioners, including certified clinical social workers), N.H. R. Evid. 503; N.J. Stat. Ann. § 45:15BB-13 (privilege for communications with licensed or certified social worker); N.M. Stat. Ann. § 61-31-24 (privilege for communications with licensed social worker); N.Y. Civ. Prac L. & R. 4508 (privilege for communications with registered and certified social worker); N.C. Gen. Stat. § 8-53.7 (privilege for communications with certified social worker); Ohio Rev. Code Ann. § 2317.02(G) (privilege for communications with licensed social workers); Okla. Stat. Ann. tit. 59, § 1261; Or. Rev. Stat. § 40.250, Rule 504-4; R.I. Gen Laws § 5-39.1-4; S.C. Code Ann. § 44-22-90; S.D. Codified Laws Ann. § 36-26-30 (privilege for communications with social worker); Tenn. Code Ann. § 63-23-107 (privilege for communications with licensed or certified social worker); Tex. R. Evid. 510; Utah Code Ann. § 58-60-144, Utah R. Evid. 506; Vt. R. Evid. 503 (privilege for communications with mental health professional, defined to include social workers); Va. Code Ann. § 8.01-400.2 (privilege for communications with licensed clinical social worker); W. Va. Code § 30-30-12 (privilege for communications with licensed social workers); Wis. Stat. Ann. § 905.04 (privilege for communications with licensed social workers); Wyo. Stat. § 33-38-109.

Six states do not recognize a statutory privilege applicable to clinical social workers in a litigation context, although these states recognize related privileges. *See* Ala. Code. § 34-8A-21 (placing confidential communications between a client and a licensed professional counselor or certified counselor associate in the same category as attorney-client privilege); Ala. R. Evid. 503A (West Supp. 1995) (eff. Jan. 1, 1996) (same); Alaska Stat. § 08.95.900(a) (providing privilege for social workers but creating exception for discovery in connection with litigation); Haw. Rev. Stat. § 626-1 (silent); N.D. Cent. Code § 31-01-06.3 (privilege for communications with addiction counselor); 23 Pa. Cons. Stat. § 6116 (privilege for communications with domestic violence counselor) and 42 Pa. Cons. Stat. § 5945.1 (privilege for communications with sexual assault counselor); Wash. Rev. Code Ann. § 18.19.180 (privilege for counselors which includes clinical social workers but with exception for subpoenaed evidence).

will not repeat those arguments here except to frame the issue. Rather, we focus below on how the information we have presented supports the appellant's argument.

A. Criminal Defendants Do Not Have An Absolute Right To Information Simply Because It Might Be Exculpatory.

Appellant accurately states that defendants' rights "under the Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights have been characterized as fundamental, but not absolute." App. Br. at 18 (citations omitted). We agree that the absolute right to confidentiality of rape crisis counseling patients cannot be infringed, even in the face of the Constitutional rights of the accused. *Id.* at 27-28. As the appellant makes clear, there are many instances in which defendants are denied access to potentially exculpatory information where the need for confidentiality is no greater than here, such as the spousal privilege, the attorney-client privilege, the priest-penitent privilege, the identity of informants, a surveillance location and Department of Social Service records. The Court ought to afford this protection to the psychotherapist-patient relationship as well, especially in a context where the patient is a rape victim.

B. The Balance Weighs Heavily In Favor Of Protecting The Confidentiality of Counseling Records.

Weighed against the Commonwealth's interest is the desire of defendants to have access to information that may be exculpatory. However, to deny access to counseling information will not have a significant impact on the search for truth. Indeed, the probative value of therapy communications is highly speculative. The statements patients make in therapy do not always correspond to reality. As noted above, Freud encouraged patients to say anything coming to mind, from the undesirable to the irrational. See Section I, *supra*. As Dr. Slovenko has pointed

out, "[i]n psychotherapy, the patient reports whatever goes through his mind. Saying all is the desideratum."22/ The focus of psychotherapy is often to induce feelings or statements which the patient may not even realize he possesses or is capable of, so that "treatment is directed primarily toward the feelings and attitudes which are unacceptable to the patient and others."23/ Thus, what a person receiving counseling says is not always what she believes or what corresponds to reality, for frequently the statements "are not 'facts.' Psychic reality is not the same thing as actual reality."24/

In addition, piercing the confidentiality of psychotherapy will not only harm victims, it will violate their rights. As the appellant demonstrates at length, mental health patients have a constitutional right to privacy which is a fundamental right, and which protects a person's confidential communications with a spouse, children, an attorney, clergy and medical providers. *E.g.* App. Br. at 10-11. Thus, even though the defendant's right to information is based on the Fourteenth Amendment, he does not have the right to cause the state, through a contempt order, to violate the constitutional rights of another citizen. This is especially true here, where a Massachusetts statute makes clear that the policy of this Commonwealth is to protect the victim's right to privacy.

Balancing constitutional rights is not a scientific process, but here the task is not difficult. The victim's right to privacy protects not only the victim in question, but also the integrity of the Commonwealth's promise to all rape victims that they can have confidential therapy. By

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22/ Slovenko, *Psychiatry and a Second Look*, *supra* n.3 at 186.

23/ *Id.* at 194.

24/ *Ibid.*

extension, it similarly protects all therapy patients. Moreover, the victim faces an infringement of her right simply because she had the temerity to either seek treatment, or report a crime.

On the other side of the scale is the defendant, who seeks information. His rights at trial are not affected. He may cross-examine the victim as he sees fit. He may discover all of her non-privileged conversations and use them for impeachment purposes. He also has access to any and all other evidence that the state may have discovered. While the defendant certainly suffers some disadvantage from losing access to confidential records, nondisclosure of confidential rape crisis counseling records ordinarily will not "plac[e] beyond the [defendant's] reach a range of direct evidence relevant to proving [his case.]" *Herbert v. Lando*, 441 U.S. 153, 169 (1979). Thus, it is not clear that the defendant loses any constitutionally protected right at all. This simply cannot outweigh the certain violation of the victim's constitutional privacy rights.

C. The Commonwealth Has A Compelling Interest In Preserving the Confidentiality of Rape Crisis Counseling Records.

Appellant suggests that if the Court is not inclined to afford absolute protection to rape crisis counseling records then it ought to apply the strictest scrutiny to any request for the disclosure of these records. In addition, amici observe that the Commonwealth can justify Section 20J even under the strictest scrutiny. Although the statute is in tension with certain rights of the defendant, that alone is not fatal. We submit that Section 20J serves a compelling state interest and is narrowly drawn to serve that interest. As such, the statute should be enforced as drafted, providing absolute protection to rape victims.

As demonstrated in Section II, society has rendered a normative judgment: in this country, the people's interest in securing confidential counseling for mental health patients, especially for rape victims, is "compelling." As shown in Section I, this interest is well founded on sound

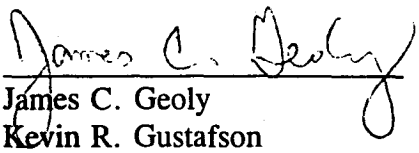
psychological principles and empirical data. Without the "seal" of confidentiality, patients will not seek therapy, or will not be able to fully benefit from therapy. In the case of a rape victim, the consequence may be that she simply will not report the crime, in order to guarantee the confidentiality of her counseling. This is even worse for society, since the rapist will be free to pursue other innocent victims.

Section 20J is sufficiently narrow to serve the Commonwealth's compelling interests without unnecessarily trampling on the rights of others. It only deals with post-rape counseling, and it only protects communications made in the counseling setting. Virtually all of a victim's other communications are discoverable. The statute does protect all rape crisis counseling communications, even those that may be relevant to the accusation (and even those that may be exculpatory), but this is necessary to serve the Commonwealth's compelling interest -- the interest in permitting access to treatment. If the statute contemplated disclosure to the defendant of any information at all, then all the harms discussed in Section I would occur. Since total confidentiality is required in order to avoid deterring treatment or deterring the reporting of crime, the statute is drawn as narrowly it can be.

CONCLUSION

The order of the Superior Court should be reversed and the case remanded with instructions to vacate the judgment of contempt.

Respectfully submitted for Amici Curiae National Association of Social Workers and the Massachusetts Chapter of the National Association of Social Workers, by their attorneys,



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May 3, 1996

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Amici Curiae National Association of Social Workers and the Massachusetts Chapter of the National Association of Social Workers was served on May 3, 1996, by first-class mail, postage prepaid, upon each of the following counsel for the parties:

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