

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, )  
 )  
 Plaintiff and Respondent, )  
 )  
 v. )  
 )  
 WILLIAM JOHN CLARK, )  
 )  
 Defendant and Appellant. )  
 )

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APPLICATION OF AMICI CURIAE  
TO FILE BRIEF IN SUPPORT OF PETITION FOR REHEARING  
OR REQUEST FOR MODIFICATION OF OPINION

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BRIEF OF AMICI CURIAE  
CALIFORNIA PSYCHIATRIC ASSOCIATION,  
CALIFORNIA ASSOCIATION OF MARRIAGE AND FAMILY THERAPISTS,  
CALIFORNIA CHAPTER OF NATIONAL ASSOCIATION OF SOCIAL WORKERS,  
ET AL.  
IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING  
OR, IN THE ALTERNATIVE,  
REQUEST OF AMICI CURIAE FOR MODIFICATION OF OPINION

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TABLE OF CONTENTS

APPLICATION OF AMICI CURIAE TO FILE BRIEF  
IN SUPPORT OF PETITION FOR REHEARING OR  
REQUEST FOR MODIFICATION OF OPINION . . . . . 1A

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION  
FOR REHEARING OR REQUEST FOR MODIFICATION OF OPINION . . . . . 1

I. THE COURT'S DECISION ON THE PSYCHOTHERAPIST-PATIENT  
PRIVILEGE WAS DICTUM. . . . . 4

II. THE COURT'S DECISION ON THE MERITS TRANSFORMS A  
NON-HOLDER OF A PRIVILEGE INTO A HOLDER AND NEGATES  
THE LEGISLATURE'S AUTHORITY OVER THE RULES REGARDING  
ADMISSIBILITY OF EVIDENCE IN COURT. . . . . 4

III. THE COURT'S DECISION ON THE MERITS ALSO CONTRAVENES THE  
LEGISLATURE'S EXPRESS INTENTIONS IN ENACTING THE  
PSYCHOTHERAPIST-PATIENT PRIVILEGE. . . . . 8

CONCLUSION . . . . . 13

**TABLE OF AUTHORITIES**

**CASES**

In re Lifschutz  
(1970) 2 Cal.3d 415 . . . . . 12

Roberts v. Superior Court  
(1973) 9 Cal.3d 330 . . . . . 5, 12

Rudnick v. Superior Court  
(1974) 11 Cal.3d 924 . . . . . 5

Tarasoff v. Regents of University of California  
(1976) 17 Cal.3d 425 . . . . .1, 3, 7, 8, 10 11, 12, 13

**STATUTES**

Evid. Code, §300 . . . . .6, 7  
    910 . . . . .9  
    912 . . . . .5, 7, 8  
    1012 . . . . .6, 7  
    1013 . . . . .5  
    1014 . . . . .6, 7, 9, 13  
    1024 . . . . .2, 8

Sen. Comm. Comm., 1965 Enactment, §1014 . . . . .9, 12

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, )  
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 v. ) S004662/Crim. 24342  
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**BRIEF OF AMICI CURIAE  
CALIFORNIA PSYCHIATRIC ASSOCIATION,  
CALIFORNIA ASSOCIATION OF MARRIAGE AND FAMILY THERAPISTS,  
AMERICAN ASSOCIATION FOR MARRIAGE AND FAMILY THERAPY  
CALIFORNIA CHAPTER OF NATIONAL ASSOCIATION OF SOCIAL WORKERS,  
NATIONAL ASSOCIATION OF SOCIAL WORKERS  
CALIFORNIA SOCIETY FOR CLINICAL SOCIAL WORK  
NATIONAL FEDERATION OF SOCIETIES FOR CLINICAL SOCIAL WORK  
IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING  
OR, IN THE ALTERNATIVE,  
REQUEST OF AMICI CURIAE FOR MODIFICATION OF OPINION**

In the course of its decision in People v. Clark, this Court was confronted with the question of whether certain threatening-appearing statements that appellant Clark had made to a court-appointed psychotherapist were properly admitted at this trial after they had been disclosed by the therapist during a "Tarasoff<sup>1</sup> warning" to the endangered persons.

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<sup>1</sup> Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, )  
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Defendant and Appellant. )  
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S004662/Crim. 24342

**APPLICATION OF AMICI CURIAE  
TO FILE BRIEF IN SUPPORT OF PETITION FOR REHEARING  
OR REQUEST FOR MODIFICATION OF OPINION**

TO THE HONORABLE MALCOLM M. LUCAS, CHIEF JUSTICE OF CALIFORNIA,  
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME  
COURT:

Amici curiae California Psychiatric Association,  
California Chapter of National Association of Social Workers,  
California Association of Marriage and Family Therapists,  
National Federation of Societies for Clinical Social Work, Inc.,  
National Association of Social Workers, American Association for  
Marriage and Family Therapy, and California Society for Clinical  
Social Work hereby seek leave to file the attached brief/motion  
in the above-entitled case, requesting the Court to reconsider  
its ruling allowing admission into evidence of confidential  
communications between appellant and his psychotherapists. Amici

Appellant claimed on appeal that admission of the statements at his trial was improper under the psychotherapist-patient privilege and the attorney-client privilege. This Court ruled that the statements were not made inadmissible by the psychotherapist-patient privilege, but that their admission was forbidden by the attorney-client privilege (although the latter error was harmless). (Slip opn. at pp. 48-58.) It is the Court's discussion of the psychotherapist-patient privilege that is of concern to amici.

In holding that admission of the statements did not violate the psychotherapist-patient privilege (hereinafter, "the privilege"), the Court deemed it irrelevant whether the privilege had been waived or whether an exception to the privilege (such as the "dangerous patient" privilege of Evidence Code section 1024<sup>2</sup>) applied. (Slip opn. at pp. 51-52.) Rather, the Court ruled, the statements were "no longer confidential" at the time of trial because they "ha[d] been revealed to third persons in a communication that is not itself privileged." (Slip opn. at p. 51.) The Court stated that the purpose underlying the privilege is not to prevent the use of a patient's statements against him in legal proceedings but to prevent the unnecessary disclosure of statements made in confidence to a therapist and

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<sup>2</sup> All references hereafter to sections are to the Evidence Code unless specifically indicated otherwise.

are familiar with the issue as presented in this Court's opinion.

The Court in this case ruled that communications appellant made to his psychotherapists could be elicited at his trial merely because those communications had been disclosed in a warning to the victim. As will be demonstrated in the attached brief, the Court's conclusion contradicted the Legislature's intent in several ways: it deprived the privilege holder of his right to claim the privilege; it overruled the Legislature's determination in section 1014 as to the limited bases for terminating the protections of the privilege; and it undermined the goals the Legislature intended to achieve when it enacted the psychotherapist-patient privilege in the first place. The Court's ruling, if not modified, will have a far-reaching effect on the treatment of persons with mental or emotional problems, particularly those who may pose a danger to themselves or others if not treated.

Amici believe there is a need for additional argument concerning the applicability of the psychotherapist-patient privilege to this case. Amici's store of clinical and scientific knowledge and their members' collective experience in treating persons with mental or emotional problems can provide the Court with valuable assistance in resolving the issue presented in this case.

thereby to facilitate treatment. (Slip opn. at p. 51.)<sup>3</sup> Once Mr. Clark's confidential statements had been disclosed to third persons in the course of a Tarasoff warning, the Court felt that the purpose of the therapeutic relationship could no longer be achieved and that therefore the purpose of facilitating treatment would not be served by protecting those confidences at trial.

Amici respectfully submit that the Court's decision is contrary to precedent and to the clear intent of the Legislature in enacting the Evidence Code. Because the discussion of the psychotherapist-patient privilege was unnecessary to the decision in the case, amici request that the Court either modify its opinion so as to delete that discussion or grant a rehearing so that the question of law can be briefed more fully than is possible in the time available for a petition for rehearing.

We note that the issue addressed here is extensively briefed in the pending appeal in People v. Wharton, where there is argument not only from a defendant and the People but also from six psychotherapeutic organizations, including most of those who are on the current brief. We respectfully urge the Court to use that case to resolve the issue.

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<sup>3</sup> Statements to the same effect appear in the second paragraph of the Court's discussion of the attorney-client privilege. (Slip opn. at p. 53.)

## INTEREST OF AMICI CURIAE

The California Psychiatric Association (CPA) is a district branch of the American Psychiatric Association (APA). The APA, founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Almost 30,000 of the approximately 35,000 psychiatrists in the United States are APA members. With 2,500 members, the California Psychiatric Association is the principal professional organization representing psychiatrists in California.

The APA has participated as amicus curiae in numerous cases involving mental health issues. Among them are Allen v. Illinois, 478 U.S. 364 (1986); Ake v. Oklahoma, 470 U.S. 63 (1985); Barefoot v. Estelle, 463 U.S. 880 (1983); Youngberg v. Romeo, 457 U.S. 307 (1982); Mills v. Rogers, 457 U.S. 291 (1982); Estelle v. Smith, 451 U.S. 454 (1981); Perham v. J.F., 442 U.S. 584 (1979); Addington v. Texas, 441 U.S. 418 (1979); and O'Connor v. Donaldson, 422 U.S. 563 (1975).

The CPA contributes amicus briefs only when it has specific knowledge to share with the Court that it is peculiarly well suited to provide. The CPA regards this as one of those cases. The subject matter of the case is closely related to the CPA's core concerns of ensuring the quality of diagnosis, care and treatment of such persons.

The National Association of Social Workers, Inc. (NASW), a non-profit professional association of 125,000 members, is the largest association of social workers in the United

**I. THE COURT'S DECISION ON THE PSYCHOTHERAPIST-PATIENT PRIVILEGE WAS DICTUM.**

The statements whose admissibility was addressed by this Court in its discussion of the psychotherapist-patient privilege are the same statements that were at issue in the next subsection of the Court's opinion, which dealt with the attorney-client privilege. (Slip opn. at pp. 52-58.) In the latter subsection, the Court held that the statements were admitted in violation of the attorney-client privilege but that the error was harmless. In light of this ruling, the Court's discussion of the psychotherapist-patient privilege was unnecessary because it could not have affected the outcome of the appeal. The challenged statements would be no more or less prejudicial if they been admitted in violation of the psychotherapist-patient privilege than they were because their admission violated the attorney-client privilege. Thus, the discussion of the psychotherapist-patient privilege issue was dictum and can be deleted from the opinion.

**II. THE COURT'S DECISION ON THE MERITS TRANSFORMS A NON-HOLDER OF A PRIVILEGE INTO A HOLDER AND NEGATES THE LEGISLATURE'S AUTHORITY OVER THE RULES REGARDING ADMISSIBILITY OF EVIDENCE IN COURT.**

Reduced to its essentials, the Court's holding on the psychotherapist-patient privilege is that petitioner's confidential communications lost their privileged status because the therapist disclosed them in a non-confidential communication. But the holder of the privilege is the patient, not the

States. One of 55 units, the California Chapter of NASW has nearly 11,000 members, a significant proportion of whom practice in the mental health field. The Association is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession and improving the quality of life through utilization of social work knowledge and skills. Issues of therapist-patient confidentiality are of primary concern to the Association and to its members in the State of California.

The California Association of Marriage and Family Therapists (CAMFT) is a voluntary, non-profit corporation, organized within California, and representing approximately 15,000 members. The majority of CAMFT's members are licensed by the state of California as marriage, family and child counselors (MFCCs). The remainder of CAMFT's members are MFCC registered interns and trainees, or persons licensed in another mental health discipline. The primary purposes of this professional association are to advance marriage and family therapy as an art, a science and a mental health profession, to set and maintain professional standards for marriage and family therapy, and to advocate and work to achieve public and private policies for the advancement of family life.

CAMFT considers this case to be of critical importance to licensed marriage, family and child counselors (covered by the psychotherapist-patient privilege pursuant to Evidence Code

therapist. (Evid. Code, § 1013; see also Roberts v. Superior Court (1973) 9 Cal.3d 330, 341 ["The statutory physician-patient privilege is that of the patient and not that of the physician. . . . The same rule applies to the psychotherapist."].) Thus, the first problem with the Court's ruling is that it allows a non-holder of the privilege to destroy the holder's privilege. This is an unprecedented ruling, at least where the holder of the privilege has not consented to the disclosure. "An unconsented-to disclosure of a confidential communication between physician and patient is not a waiver of the privilege and in no way removes the information from the class of confidential communication." (Rudnick v. Superior Court (1974) 11 Cal.3d 924, 932, fn. 11.)

Even if the therapist had been a joint holder of the privilege, her disclosure would not have caused Mr. Clark to lose the privilege's protections. "Where two or more persons are joint holders of a privilege provided by Section . . . 1014 . . . , a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege." (Evid. Code, § 912, subd. (b), emphasis added.) If a joint holder of a privilege could not deprive Mr. Clark of the right to claim the privilege, then surely his privilege could not be lost as the result of a disclosure by a non-holder.

It may be that the Court intended to expand upon prior case law and hold that an unconsented-to disclosure by a non-

Section 1010, et seq) and other psychotherapists, as well as to the consumers of their services and society in general.

The National Federation of Societies for Clinical Social Work is a tax-exempt, nonprofit organization dedicated to enhancing the quality and availability of clinical social work services throughout the United States. The activities of the National Federation include setting standards for practice, and promulgating a Code of Ethics for practitioners.

The American Association for Marriage and Family Therapy (AAMFT) is the national professional association representing marital and family therapists in the United States and in Canada. The more than 16,000 members of the AAMFT have met a series of rigorous educational and training requirements recognized as the standard in the marriage and family therapy field. Founded in 1942, AAMFT is involved with the problems, needs and changing patterns of marital and family relationships. The Association works to increase understanding, research and education in this field by ensuring that public needs are met by well trained practitioners with specific education and training in marriage and family therapy. AAMFT also sponsors conferences, publishes a professional journal and a newspaper and administers an array of other programs, in the public interest, to promote the practice and discipline of marriage and family therapy.

The issue in this appeal -- confidentiality of communications between therapist and patient -- goes to the heart of the therapeutic relationship, which in turn is central to the

holder causes a confidential communication to lose the protection of a privilege in court if the non-holder had a duty to disclose the communication. This could be a valid conclusion if supported by the Evidence Code, but it requires the Court to look to the Evidence Code for the answer. After all, it is the Evidence Code that governs what evidence may be admitted in court. (See § 300 and Comment thereto.) And when the Evidence Code is examined for support, we find none. Indeed, an examination of the Evidence Code reveals that the Court's holding contradicts the entire legislative scheme underlying the Evidence Code: the Legislature intended the Evidence Code to contain the exclusive grounds for determining when a privilege ceases to protect confidential communications, and yet this Court's opinion found the statutory list of limitations on the privilege to be irrelevant to its conclusion that Mr. Clark's statements were no longer confidential.

Section 1014 expressly gives a patient the right "to prevent another from disclosing" any "confidential communication between patient and psychotherapist," subject only to waiver under section 912 or one of the exceptions provided in sections 1010-1027. There is no doubt that each of appellant Clark's statements was "information . . . transmitted between a patient and his psychotherapist in the course of that relationship and in confidence . . . ." (See § 1012.) Each statement was therefore a "confidential communication between patient and

effectiveness of all psychotherapy. All clinical social workers, and all their patients, have a vital interest in preserving the confidentiality of patient communications to the maximum possible extent.

The California Society for Clinical Social Work is a tax-exempt, state-wide, non-profit organization dedicated to enhancing the interests and quality of practice of clinical social workers. Society members adhere to stringent practice standards and a code of ethics.

Since confidentiality of communications between therapist and patient is the cornerstone of effective psychotherapy and counseling, we support the preservation of such confidentiality to the maximum extent possible.

WHEREFORE, amici respectfully request that their motion to file the accompanying brief of amici curiae be granted.

psychotherapist" within the meaning of the privilege.<sup>4</sup> (§ 1014.) There is also no doubt that the statutory privilege "applies in every action before the Supreme Court or . . . superior court." (§ 300.) Consequently, appellant "ha[d] a privilege . . . to prevent another [person] from disclosing" those confidential communications at his trial in superior court unless a waiver occurred or one of the exceptions referred to in section 1014 applied. (§ 1014.) Thus, the question presented by this case was whether one of those special situations (waiver or an exception) applied.

This Court, however, ruled that it was irrelevant "whether the psychotherapist-patient privilege has been waived or the exception that would permit compelled disclosure in a legal proceeding applies." (Slip opn. at p. 51-52.) This ruling is fundamentally in error. The Legislature has clearly provided in section 1014 that once a determination is made that Clark's communications amounted to "information . . . transmitted between a patient and his psychotherapist in the course of that relationship and in confidence" (§ 1012), the only question remaining is whether the exceptions in section 912 or Article 7 of the Evidence Code apply. Thus, if this Court felt it necessary to address the psychotherapist-patient privilege issue

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<sup>4</sup> The Court's opinion implicitly recognized this fact when it concluded that appellant's privilege was "no longer confidential" once the Tarasoff warning was given. (Slip opn. at pp. 51, 52.)

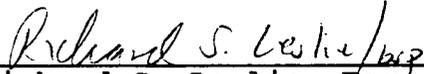
Respectfully submitted,

Dated: April 19, 1990



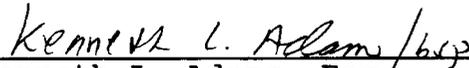
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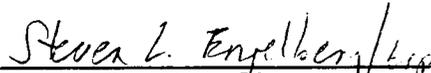
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at all (see above), the question it should have resolved -- indeed, the only question left for it to decide -- was the question its opinion labelled "irrelevant" (slip opn. p. 51-52), i.e., the question of the applicability of the dangerous-patient exception of section 1024 or the waiver provisions of section 912. The only way a court could deem this question to be irrelevant is by denying the Legislature's authority to enact a comprehensive Evidence Code.

**III. THE COURT'S DECISION ON THE MERITS ALSO CONTRAVENES THE LEGISLATURE'S EXPRESS INTENTIONS IN ENACTING THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.**

Even if the Court were correct that the Evidence Code's exceptions to the privilege were irrelevant, nevertheless the Court grievously erred in its determination that a Tarasoff warning strips a confidential communication of all protections of the privilege. The Court's ruling contradicts, and entirely undermines, the Legislature's expressly stated goals in enacting the psychotherapist-patient privilege in the first place.

We do not intend here to set forth all of the evidence of legislative intent that is discussed in depth by the appellant and amici curiae in People v. Wharton. We believe that that issue is best resolved in the context of the Wharton case, or on rehearing. Rather, we only want to make the more limited point that the reasoning used by the Court in reaching its conclusion of non-confidentiality is in fact contrary to the Legislature's policy goals in enacting the privilege.

The reasons given in support of the Court's conclusion that appellant's statements were "no longer confidential" after the giving of a warning are as follows: "The purpose underlying Evidence Code section 1014 [i.e., the privilege] is not to prevent the use of a defendant's statements against him in legal proceedings. It exists to prevent the unnecessary disclosure of statements made in confidence . . . and thereby to facilitate treatment." (Slip opn. at p. 51; see also slip opn. at p. 52.) The Court stated that "the purpose of promoting the therapeutic relationship can no longer be achieved once the therapist has revealed the confidential communications to third parties." (Slip opn. at p. 53.) Thus, because a disclosure was made in Mr. Clark's case, the purpose of the privilege would not be served by protecting the confidences in court.

In fact, virtually every step in the Court's reasoning is inconsistent with legislative intent or with precedent. First, the Legislature did in fact intend to prevent the use of a defendant's statements against him in "legal proceedings." The Comment of the Senate Committee at the time of the enactment of section 1014 stated that "[t]he psychotherapist-patient privilege applies in all proceedings." (Ibid., emphasis added; see also § 910 and comment thereto.) The privilege was specifically intended to apply "in a criminal proceeding." (Senate Comm. Comm., 1965 Enactment, § 1014.) The Legislature singled out "persons [who] are seriously disturbed and constitute threats to other persons in the community" as being "in need of

treatment;" and it accorded the protections of the privilege to communications from these and other persons because the Legislature understood that treatment "is dependent upon . . . full disclosure" and that a patient often "will not talk freely to a psychotherapist for fear that the latter may be compelled in a criminal proceeding to reveal what he has been told." (Ibid., emphasis added.)

Second, although the Legislature clearly wanted dangerous persons to participate fully in therapy, its ultimate objective was not to promote an individual therapeutic relationship or to protect the patient's right to privacy; rather, its primary goal was to protect society as a whole. And it knew that exclusion of evidence "in criminal cases" was necessary to protect society as a whole. As the Senate Committee's Comment states, "[a]lthough it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected." (Ibid.) And this protection "applies in criminal cases." (Ibid.)

Finally, this Court's assertion that "the purpose of promoting the therapeutic relationship can no longer be achieved once the therapist has revealed the confidential communications to third parties" (slip opn. at p. 53) was explicitly rejected by this Court in Tarasoff itself. Tarasoff refused to accept the "assumption" that a mere warning of danger would undermine

"effective therapy for potentially violent patients." (17 Cal.3d at p. 440, fn. 12.)

Tarasoff was well advised in rejecting the claim that a mere warning would harm therapy. For, as appellant and amici in People v. Wharton have pointed out, a warning is usually consistent with why the patient sought therapy in the first place (as is true in Wharton). Thus, the Legislature's goal of full disclosure is not thwarted by a ruling that a patient's statements to a therapist may be disclosed in a warning to potential victims.

But it is an entirely different matter to promulgate a rule that the therapist must testify against the patient at a criminal trial if he is charged with a crime. It is true, as the Court's opinion indicates, that because such testimony occurred well after the therapy was over for Mr. Clark, it did not likely have an adverse impact on the therapeutic relationship in his case. But a rule permitting such testimony will have enormous deterrent effect on other violent persons currently in therapy or considering therapy in the future. At least, that is what the Legislature believed when it enacted the privilege: it determined that "the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected," despite the fact that this meant that "the privilege may operate in particular cases" -- including "in

criminal cases" -- to withhold relevant privileged information.<sup>5</sup>  
(Sen. Comm. Comm., 1965 Enactment, § 1014.)

In sum, the Court's conclusion that the psychotherapist-patient privilege was inapplicable to Mr. Clark's statements is based on its misapprehension of the goals of the Legislature in enacting the privilege. While the opinion states that "[t]he purpose underlying Evidence Code section 1014 is not to prevent the use of a defendant's statements against him in legal proceedings," in fact the Legislature did have such a goal quite clearly in mind. Moreover, while it is true that enactment of the privilege may "promot[e] the therapeutic relationship," the Court has ignored, and indeed thwarted, the Legislature's ultimate and primary goal. The ultimate goal is to protect the interests of society, and the Legislature sought to achieve this by enacting a privilege which, although it would "operate in particular cases to withhold information," would "assure patients that their confidences will be protected" in criminal court proceedings so that they would participate in treatment. Finally, although this Court's opinion states that the mere giving of a warning undermines the therapeutic relationship, in fact Tarasoff itself expressly concluded the opposite.

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<sup>5</sup> This Court has on several occasions indicated much the same thing. "It would be too much to expect [therapy patients] to [fully confide in their therapists] 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." (In re Lifschutz (1970) 2 Cal.3d 415, 431; accord Roberts v. Superior Court (1973) 9 Cal.3d 330, 340.)

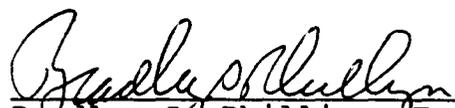
## CONCLUSION

The dictum in the Clark opinion concerning the psychotherapist-patient privilege is based upon fundamental misapprehensions concerning the availability and reasons for the privilege. The Court's conclusion that the privilege is lost when a non-holder of the privilege discloses confidential communications contradicts the Legislature's intent in several ways: it deprives the privilege holder of his right to claim the privilege; it overrules the Legislature's determination in section 1014 as to the limited bases for terminating the protections of the privilege; and it undermines the goals the Legislature intended to achieve when it enacted the psychotherapist-patient privilege in the first place.

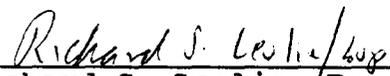
The applicability of the privilege in criminal court proceedings after a Tarasoff warning has been issued is a complex question that depends upon a careful analysis of the Legislature's intent and prior case law. The reasoning used in the Court's opinion misconstrues precedent and the legislative policy goals underlying the privilege in a portion of the opinion that is dictum. Amici respectfully request that the Court either grant a rehearing or modify its opinion so as to delete the discussion of the privilege and allow the issue to be considered in light of the arguments made in this brief and the briefs on file in People v. Wharton.

Respectfully submitted,

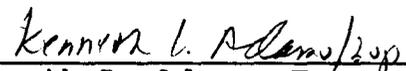
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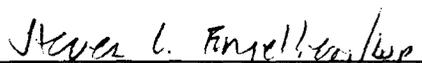
  
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