S004769/Crim. 26408

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	)
	)
v.	)
	)
GEORGE HERBERT WHARTON,	)
	)
Defendant and Appellant.	)
	)

APPLICATION TO FILE BRIEF AMICUS CURIAE
AND
BRIEF OF AMICI CURIAE
CALIFORNIA PSYCHIATRIC ASSOCIATION,
CALIFORNIA ASSOCIATION OF MARRIAGE AND FAMILY THERAPY,
CALIFORNIA CHAPTER OF NATIONAL ASSOCIATION OF SOCIAL WORKERS,
ET AL.
IN SUPPORT OF DEFENDANT/APPELLANT

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GEORGE HERBERT WHARTON, Defendant and Appellant.	)	S004769/Crim. 26408

APPLICATION TO FILE BRIEF AMICUS CURIAE

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 Association of Marriage and Family Therapists, National Association of Social Workers, the California Chapter of N.A.S.W., American Association for Marriage and Family Therapy, and National Federation of Societies for Clinical Social Work, Inc. hereby request leave to file the attached brief amicus curiae in support of appellant's contention that admission into evidence of confidential communications between appellant and his psychotherapists was error. Amici are familiar with the issue as presented in this case and with the arguments of both sides as

set forth in the pleadings filed in the trial court and in appellant's opening brief.

The trial judge in this case ruled that communications appellant made to his psychotherapists could be elicited at his trial merely because those psychotherapists had warned the ultimate victim that appellant might be a danger to her. This ruling, if not reversed, will have a far-reaching effect on the treatment of persons with mental or emotional problems, and 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 and scope of the psychotherapist-patient privilege issue in this case. Amici's store of clinical and scientific knowledge in 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.

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 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 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 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 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.

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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GEORGE HERBERT WHARTON, Defendant and Appellant.	S004769/Crim. 26408

BRIEF OF AMICI CURIAE CALIFORNIA PSYCHIATRIC ASSOCIATION, CALIFORNIA ASSOCIATION OF MARRIAGE AND FAMILY THERAPY, CALIFORNIA CHAPTER OF NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL FEDERATION OF SOCIETIES FOR CLINICAL SOCIAL WORK, INC., NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND AMERICAN ASSOCIATION FOR MARRIAGE AND FAMILY THERAPY IN SUPPORT OF DEFENDANT/APPELLANT

STATEMENT OF FACTS

In early 1986, George Wharton and Linda Smith, who had been cohabiting for about one year, were living together in an apartment in Santa Barbara. Toward the end of January, Mr. Wharton called the Franklin Mental Health Center in Santa Barbara and requested an appointment, which was then scheduled for January 27, 1986.

When Mr. Wharton came in for his appointment on January 27, he was seen by Dr. Judy Hamilton, then a post-doctoral psychology intern at the Center. Mr. Wharton was tense and

anxious (RT 202); he indicated he needed help with the anger he felt (RT 703).

Mr. Wharton had, Dr. Hamilton wrote in her notes, a "fear of hurting his current girlfriend" (i.e., Ms. Smith). (RT 690.) When Dr. Hamilton asked Mr. Wharton what he meant by this, Wharton said he was afraid he would hit her. (RT 691, 701.) Dr. Hamilton wrote that Mr. Wharton had a "fear of hurting her, Linda, two to three times a week." (RT 691, 693.) Dr. Hamilton asked Mr. Wharton what he did when he had this fear, and Wharton said he would hit the wall or walk away. (RT 702.) Mr. Wharton also told Dr. Hamilton that "[s]ometimes she's frightened of me. I need to get away from her and find solitude." (RT 707.) Mr. Wharton said that he became aggressive under the influence of alcohol. (RT 709.)

Dr. Hamilton wrote in her notes, "thoughts often of murder," but she did not remember why she wrote these words. (RT 691, 704.) Mr. Wharton did not use the word "murder," nor did she remember him using the word "kill" or talking about a fear of killing anyone. (RT 701.)

Toward the end of the January 27 session, Dr. Hamilton concluded that Mr. Wharton should be seen by a psychiatrist on a semi-emergency basis. (RT 202, 704, 719.) Thus, Dr. Bellenden Hutcheson was brought into the session. (RT 202.) Dr. Hutcheson concluded that he should see Mr. Wharton again as soon as possible. (RT 202.)

Mr. Wharton saw Dr. Hamilton for a second session on February 3. (RT 694.) Dr. Hamilton indicated that Mr. Wharton "feels he is losing more control of his anger [and] feeling more irritable." (RT 695, 702.) Mr. Wharton did not say these feelings were directed at any specific person. (RT 702.) Dr. Hamilton suggested that Mr. Wharton bring Ms. Smith along to the next session to discuss the possibility of harm. (RT 707.) Mr. Wharton agreed, and an appointment was scheduled. (RT 707.) In the session, Mr. Wharton also indicated that his apartment had been burglarized during the week and that when he and Ms. Smith put remaining valuables in the car to be taken to the bank, the car was burglarized as well. (RT 714.)

On the same day, Dr. Hamilton contacted Ms. Smith and told her that she was in a very dangerous situation and that she should get away from Mr. Wharton. (RT 684.) Ms. Smith said he had tied her up, held a knife to her stomach, and hit her. (RT 685.) She also said, "If I leave him I'll be lonely" and "he would kill me." (RT 685.) Dr. Hamilton told her she should get police protection; Ms. Smith replied, "Well, I've tried that," but that she did not think it would work. (RT 685.)

Mr. Wharton met next with the psychiatrist, Dr. Hutcheson, on February 6. (RT 719.) Mr. Wharton admitted having auditory hallucinations that became worse under stress. (RT 203.) Dr. Hutcheson later testified that Mr. Wharton "can differentiate the auditory hallucinations from himself -- orders to kill, et cetera." (RT 203.) Mr. Wharton said he stayed away

from knives and guns because he might use them on himself or others. (RT 203-204, 208.) Dr. Hutcheson diagnosed Mr. Wharton as paranoid schizophrenic, but did not take steps to have him hospitalized, nor did he seek to have another session with Mr. Wharton. (RT 719, 720.) Dr. Hutcheson did prescribe drugs for Mr. Wharton's migraine headaches and his lancinating pain in the head. (RT 720.)

On February 7 and 14, Mr. Wharton had his third and fourth sessions with Dr. Hamilton. (RT 696.) In the February 14 session, Mr. Wharton indicated he "feels manipulated by Linda" and that she "gives him mixed messages." (RT 696-697, 703, 715.) He also stated that Ms. Smith had found the items stolen in the burglary. (RT 715.)

About one week after Mr. Wharton's fourth session with Dr. Hamilton, Mr. Wharton killed Linda Smith. The killing took place in the apartment they shared. Mr. Wharton was later arrested and charged with her murder.

The issue in the subsequent criminal proceedings was not whether Mr. Wharton had killed Ms. Smith, but rather what Wharton's level of responsibility was. It was the prosecutor's theory that Mr. Wharton killed Ms. Smith intentionally, and with premeditation and deliberation, and therefore was guilty of first degree murder.

In pursuit of this theory, the prosecutor successfully moved, over defense objections, for "a [court] order determining that [Drs. Hutcheson and Hamilton] are competent to testify to

certain alleged [sic] privileged information," including "any statements made by the defendant Wharton that caused them to make the Tarasoff warning."[1] (CT 357, 359.) The motion was granted. (CT 468.) The judge who granted the motion, and the prosecutor who brought it, relied on the exception to the psychotherapist-patient privilege provided by Evidence Code section 1024.[2]

Drs. Hutcheson and Hamilton thereafter testified at the trial, informing the jury of what Wharton had told them during the therapy sessions. (RT 201-209, 689-721.) In arguing for a conviction of first-degree premeditated and deliberate murder, and later for a death sentence, the prosecutor relied heavily on

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[1] The attorney for Drs. Hutcheson and Hamilton indicated that "due to the expected opposition by the defendant and their exposure to civil liability, [Hutcheson and Hamilton] join with the People in seeking [a] court[] order sanctioning such disclosure." (CT 379.)

[2] That section provides that "[t]here is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened harm." (Evid. Code, § 1024.)

the psychotherapists' testimony as to the statements Wharton had made to them.[3]

The jury found Mr. Wharton guilty of first degree murder and later determined that he should be sentenced to death.

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[3] One major thrust of the prosecutor's argument was as follows:

> "Two weeks before the murder when [Wharton is] talking to Dr. Hamilton, she writes in her notes, 'Patient has fear of hurting current girlfriend Linda Smith.' He stated he was afraid he would hit her, January 27th, okay?
>
> "Now, how many homicide cases do you have where you have a statement a defendant makes two weeks ahead of time when you're trying to prove premeditation and deliberation? How many times do you think you have a case where someone tells his shrink, two weeks ahead of time, they're thinking of hurting the person they end up murdering? Premeditation and deliberation requires you to have think [sic] about what you're doing. Well, at least from the 27th he was thinking about it. . . . [T]his is strong, strong evidence of premeditation and deliberation. He's thinking about it, knows he has a problem along these lines, he's thinking about it two weeks ahead of time." (RT 1309-1311.)

Later, the prosecutor used the therapists' testimony in another way. Drs. Hamilton and Hutcheson had "warned him," the prosecutor said, referring to Wharton. And he continued:

> "They told him to be careful. They tell him booze, drugs, weapons and Linda, 'There's a problem, George. Avoid her. Leave if necessary. Back away.' And he doesn't do it. He doesn't do it.
>
> "Now, how can a guy claim heat of passion or no premeditation and deliberation under facts like that? . . . What more do you need where someone is told by their own therapist there's a problem and they continue to put themselves in that situation?" (RT 1313-1314.)

The prosecutor characterized "the things that Mr. Wharton says himself to his psychiatrist" as being "much more important" than other evidence in the case. (RT 1288.)

SUMMARY OF ARGUMENT

Neither at trial nor in this Court has Mr. Wharton claimed that Drs. Hutcheson and Hamilton breached any law or duty in giving a warning to Linda Smith. The issue he presents to this Court is only whether the trial court was correct when it ruled that Evidence Code section 1024 allowed the prosecution to discover and use at his criminal trial the confidential communications between Mr. Wharton and his psychotherapists, including communications not disclosed to Ms. Smith as part of the psychotherapists' warning to her.

Amici agree that the psychotherapists acted properly in warning Ms. Smith of threatened danger. (See Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425 (Tarasoff).) But the fact that the therapists properly warned of danger from their patient is a very different question from whether the therapists may later be compelled to testify against the patient in an action that is designed not to prevent the danger, but to punish the patient criminally. A ruling by this Court that a psychotherapist-patient relationship may indeed be used as a source of obtaining incriminating information is contrary to the Legislature's intent in enacting both the psychotherapist-patient privilege (Evid. Code, § 1014) and the "dangerous to self or others" exception to that privilege (Evid. Code, § 1024).

The damage would be to more than relations between coequal branches of government. A decision by this Court upholding the ruling of the trial court below would be

devastating to the efforts of the therapeutic profession to minimize and prevent physical violence, because it would drastically reduce the willingness of persons with violence-related problems to seek professional assistance to deal with those problems. The consequences of such persons' unwillingness to seek treatment would be unfortunate for society as a whole, because many crimes that could have been averted would in fact occur.

The Legislature has recognized both the benefit to society from therapeutic intervention and the need for confidentiality in the patient-psychotherapist relationship. Indeed, these are the reasons why the psychotherapist-patient privilege was established in the first place. The Legislature specifically noted that "[u]nless a patient . . . is assured that [his disclosures] can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment . . . depends. . . . Although it is recognized that the granting of the privilege may operate in cases to withhold relevant information, the interest of society will be better served if psychiatrists are able to assure patients that their confidences will be protected." (Sen. Committee, Comment to Evid. Code, § 1014, 1965 Enactment; emphasis added.)

A decision upholding the trial court's ruling would also be a disservice to the potential victims of violent crime. Under Tarasoff, psychotherapists will warn such persons of the

threat of danger, so that they may take steps of their own to avert it. The knowledge that such warnings may occur does not have a large impact on the willingness of patients to enter treatment or to participate fully. But if in the Wharton case this Court were to rule that the circumstances that give rise to the need for a "Tarasoff" warning also compel the therapist to become available to testify in criminal proceedings against the patient, then many potentially violent persons will refuse treatment or decline to participate fully. This, in turn, will result not only in the loss of the opportunity to prevent the violence through therapy, but in the loss of the opportunity to learn of the danger at all and thus of the chance to warn the potential victim.[4]

In this brief, amici argue that the testimony of Drs. Hamilton and Hutcheson was inadmissible in whole (Section I) or

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[4] Unlike the possibility of a Tarasoff warning, the knowledge that one's psychotherapist might reveal confidences in some future criminal proceeding would have a large impact on the willingness of potentially dangerous patients to seek treatment or to participate fully. An individual who volunteers for psychotherapy because he fears he may harm others is terrifyingly aware that he may do violence, and desperate to avoid doing so. Few patients are deterred from therapy by the prospect that their psychotherapist may warn potential victims, because such a warning has much in common with the patient's own reason for seeking treatment -- an urgent desire to prevent harm. Yet the patient's sense of urgency -- and his willingness to accept the risk of a warning to potential victims -- is fed by uncertainty over his ability to refrain from causing the harm. A person seeking treatment to prevent violent behavior believes that this behavior may in fact occur. Self-aware, potentially dangerous persons may be willing to risk a warning to prevent violence, but they are unlikely to risk criminal liability for future violence which they themselves fear may be unpreventable.

substantial part (Section II), even though, at the time Ms. Smith was warned, Drs. Hamilton and Hutcheson had a reasonable belief that she was in danger.

First, amici argue that Evidence Code section 1024's "dangerous to self or others" exception to the psychotherapist-patient privilege, by its plain words and all available indicia of legislative intent, does not authorize disclosure at Mr. Wharton's trial of any of his communications with his therapists, including even those communications that had been disclosed in the course of the Tarasoff warnings to Ms. Smith.

Second, even if section 1024 were interpreted to authorize the disclosure at trial of those communications that had been revealed in the course of warning Ms. Smith, it would still have been error to allow the prosecutor to elicit psychotherapist-patient communications that had not been disclosed in the course of the warning.[5]

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[5] These communications included not only Wharton's statements relating to his state of mind, but also his statements to Dr. Hamilton about having been burglarized and then finding the stolen items, and Dr. Hamilton's advice to Wharton to avoid drugs and alcohol and to take a walk when he began to feel anger.

I. EVIDENCE CODE SECTION 1024 -- THE "DANGEROUS TO HIMSELF OR OTHERS" EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE -- DID NOT AUTHORIZE DISCLOSURE OF MR. WHARTON'S CONFIDENTIAL COMMUNICATIONS AT HIS CRIMINAL TRIAL.[6]

California statute provides that, subject to certain exceptions, a person who consults a psychotherapist for treatment of his mental or emotional condition has a "privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist." (Evid. Code, §§ 1011, 1014.)

In codifying the psychotherapist-patient privilege, the Legislature recognized both that the interests of society are advanced when troubled individuals turn to psychotherapy for assistance and that confidentiality in the psychotherapist-patient relationship is necessary to ensure effective assistance. "A broad privilege should apply to both psychiatrists and certified psychologists. Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Unless a patient . . . is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment . . . depends. . . . [Thus, although] the granting of the privilege may operate in particular cases to withhold relevant information,

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[6] Some of what follows under this heading has been adapted from a brief filed in this Court in People v. (William) Clark. (No. S004662/Crim. 24342.)

the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected." (Senate Comm. Comment, Evid. Code, § 1024, 1965 Enactment.[7]) The Legislature was specifically concerned that persons who "are seriously disturbed and constitute threats to other persons in the community" should be covered by the privilege. (Ibid.)

In the proceedings below, the trial court allowed the prosecution to overcome Wharton's psychotherapist-patient privilege and to call Drs. Hamilton and Hutcheson as witnesses to testify to many of their confidential communications with Mr. Wharton. In support of this ruling, the trial court and the prosecution relied on Evidence Code section 1024, which provides that "[t]here is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened harm."

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[7] See In re Lifschutz (1970) 2 Cal.3d 415, 421-22 [recognizing the crucial role that confidentiality plays in effective psychotherapy].

The trial court's ruling was erroneous. Evidence Code section 1024[8] was not triggered as a result of either the formal criminal proceedings against Mr. Wharton or the therapists' extrajudicial warning given to Linda Smith. As a result, no confidential communications between Wharton and his therapists -- including any disclosed to Ms. Smith -- could be elicited at his criminal trial.

As amici will demonstrate, section 1024's exception to the psychotherapist-patient privilege applies only when a psychotherapist reasonably believes that the patient is presently dangerous to a threatened victim and that disclosure is necessary to prevent the threatened harm. It is undisputed that, at the time of the criminal proceedings against Mr. Wharton, the psychotherapists did not believe either that he was then dangerous to Ms. Smith or that the disclosures were necessary to prevent threatened danger. Thus, section 1024 could not be invoked as a result of the criminal proceedings against Mr. Wharton.

Nor could section 1024 be invoked as a result of the psychotherapists' extra-judicial warnings to Ms. Smith, because section 1024 is inapplicable to such an extra-judicial event. Section 1024's exception to the privilege can come into play only at a "proceeding . . . in which, pursuant to law, testimony is

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[8] All references in this brief to sections are to the California Evidence Code, unless specifically indicated otherwise.

compelled to be given," and a Tarasoff warning is obviously not such a "proceeding." (§§ 901, 910.) Although the therapists had a reasonable belief that Ms. Smith was in danger, and even though they had a duty to warn and properly did warn Ms. Smith of the danger she was in, this duty was a common law duty, as Tarasoff made clear. (17 Cal.3d at pp. 435, 441 fn. 13.) The duty did not arise under Evidence Code section 1024.

Finally, the fact that the therapists warned Ms. Smith because of their common law or ethical duty did not cause Mr. Wharton to lose his Evidence Code privilege at the subsequent criminal proceedings. The Tarasoff decision and the Legislature's expressed purpose in enacting the privilege make clear that a limited disclosure for purposes of warning a potential victim does not prevent the patient from invoking the privilege in subsequent criminal proceedings even as to communications disclosed in the course of the Tarasoff warning.

A. Section 1024's exception to the psychotherapist-patient privilege did not come into play as the result of the formal criminal proceedings brought against Mr. Wharton.

Every person has a duty to testify in legal proceedings when called as a witness. (§ 911.) Exceptions to this general rule have been created in order to further certain significant relationships in which confidentiality is expected: the relationships between husband and wife, doctor and patient, attorney and client, and psychotherapist and patient. Thus, the

Evidence Code provides that a psychotherapist shall not be required to disclose confidential communications in a legal proceeding, unless (insofar as relevant to the present case) "the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." (§ 1024.)

Because section 1024 is written in the present tense ("the psychotherapist has reasonable cause to believe that the patient is ... dangerous), a plain reading of the statute compels the conclusion that the relevant issue is the therapist's belief that the patient poses a danger to an individual at the time of the proceeding at which the disclosure is to occur. Similarly, the phrase "disclosure of the communication is necessary to prevent the threatened danger" means that the relevant issue is whether disclosure is necessary at the time of and in connection with the proceedings in which the psychotherapist is called to testify. Neither condition was satisfied at the trial or pre-trial proceedings in Mr. Wharton's case. Thus, nothing in those proceedings would allow section 1024 to be invoked.

The Comments of the Law Revision Commission regarding section 1024 support this conclusion. In fact, the Comments demonstrate that section 1024 was intended to be entirely inapplicable at criminal proceedings. The Comments state:

> "This section provides a narrower exception to the psychotherapist-patient privilege than

> the comparable exceptions provided by section 982 (privilege for confidential marital communications) and section 1004 (physician-patient privilege). Although this exception might inhibit the relationship between the patient and his therapist to a limited extent, it is essential that appropriate action be taken if the psychotherapist becomes convinced during the course of treatment that the patient is a menace to himself or others and the patient refuses to permit the psychotherapist to make the disclosure necessary to prevent the threatened danger."

These Comments establish several important points. First, section 1024 was intended to provide an exception comparable to those provided by sections 982 and 1004. Sections 982 and 1004 provide an exception to the marital-communications, or spousal, privilege and physician-patient privilege, respectively, for testimony in specific types of proceedings:

> "There is no privilege under this article in a proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition." (§ 982; emphasis added.)

> "There is no privilege under this article in a proceeding to commit the patient or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition." (§ 1004; emphasis added.)

These exceptions to the marital-communications and physician-patient privileges apply only to proceedings conducted for the benefit of the person to be protected by the exception (the patient), such as commitments of the mentally ill or appointment of a conservator under Probate Code section 1751.

(See Law Revision Comm. Comments to §§ 982, 1004.) The "comparable" exception in section 1024 must therefore also be read as applying only in proceedings conducted for the benefit of the persons to be protected by the section: proceedings to prevent the threatened harm to a "readily identifiable" person. (See Thompson v. County of Alameda (1980) 27 Cal.3d 741, 752-753.)[9]

Indeed, section 1024 is intended to provide a narrower exception than those provided for the physician-patient and spousal privileges. In discussing the differences between the psychotherapist-patient privilege and the physician-patient privilege, the Senate Committee commented that "[t]here is an exception in the physician-patient privilege for commitment or guardianship proceedings for the patient. Evidence Code § 1004. Section 1024 provides a considerably narrower exception in the psychotherapist-patient privilege." (Senate Comm. Comment, Evid. Code, § 1014, 1965 Enactment, emphasis added.) And as noted above, the Law Revision Commission issued a similar comment in connection with section 1024, stating that it "provides a narrower exception" to the psychotherapist-patient privilege than the comparable exceptions to the marital-communications and physician-patient privileges.

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[9] One may view section 1024 as being for the benefit of both the potential victim and the patient, whose commitment or other restraint will prevent him or her from committing a criminal act with all it consequences.

An interpretation of section 1024 that would allow it to be invoked in criminal court proceedings (or most civil proceedings) would make section 1024 a much broader exception than section 1004 or 982. However, to effectuate the Legislature's intent correctly, section 1024 must be interpreted so as to be "considerably narrower" than the comparable exception for the physician-patient privilege and also "narrower" than the marital-communication privilege. Thus, the exception must apply only in proceedings designed to prevent potential harm to the patient or to the person or property of another, and only when the psychotherapist is convinced of the patient's current dangerousness and of the necessity for disclosure at that time to prevent the danger.[10] (Mavroudis v. Superior Court (1980) 102 Cal.App.3d 594, 603 [section 1024 "apparently was designed to enable the therapist to initiate commitment proceedings and to

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[10] In an article that this Court cited extensively in Tarasoff, supra, 17 Cal.3d at pages 437, 439, 440 fn. 12, 441 & fn. 13, one commentator has queried: "[H]ow can section 1024 constitute a narrower exception than sections 982 and 1004 unless the phrase 'in a proceeding to commit the patient' is implied?" (Fleming and Maximov, The Patient or His Victim: The Therapist's Dilemma (1974) 62 Cal.L.Rev. 1025, 1062 fn. 196.)

testify in those proceedings when he determines the patient may present a danger to himself or others"].)[11]

B. Section 1024's exception to the psychotherapist-patient privilege did not come into play when Dr. Hamilton gave warnings to Ms. Smith, nor was the privilege lost for any other reason as the result of that warning.

The exception to the psychotherapist-patient privilege provided by section 1024 is part of Division 8 of the Evidence Code, which covers sections 900 through 1070. The provisions of Division 8 are, by explicit statute, applicable only to legal "proceedings." (Evid. Code, § 910.) A "proceeding" is defined in Division 8 as any action, hearing, investigation, inquest, or inquiry "in which, pursuant to law, testimony can be compelled to be given." (Evid. Code, § 901.)

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[11] It is noteworthy that the privilege protecting physician-patient communications is entirely inapplicable to criminal cases, while the privilege protecting psychotherapist-patient communications does apply to such cases. As the Legislature has explained,

> "This difference in the scope of the two privileges is based on the fact that the Law Revision Commission has been advised that proper psychotherapy often is denied a patient solely because he 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. The Commission has also been advised that research in this field will be unduly hampered unless the privilege is available in criminal proceedings." (Senate Comm. Comment, Evid. Code, § 1014, 1965 Enactment.)

The Legislature's intent of encouraging free communications with the psychotherapist would be undermined if the privilege did not apply in cases such as Mr. Wharton's.

When Mr. Wharton's psychotherapists warned Ms. Smith of Wharton's potential danger, they did so during a conversation over the telephone. That conversation was clearly not any type of legal proceeding in which, "pursuant to law, testimony can be compelled to be given." As a result, Evidence Code section 1024 did not apply to this conversation, and the conversation could not have caused Mr. Wharton's psychotherapist-patient privilege to be overcome by section 1024 at a subsequent trial.[12]

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[12] Several courts have apparently overlooked this basic point concerning section 1024. In People v. Hopkins (1975) 44 Cal.App.3d 669, the defendant confessed to therapists immediately after committing an assault. The therapists informed the police. Without considering sections 901 and 910, the court held that section 1024 allowed the confession to be admitted at trial, since the therapists had reason to believe that the defendant was dangerous at the time he spoke to them.

In People v. Gomez (1982) 134 Cal.App.3d 874, the court held that statements the defendant had made to student interns serving with the family court services, threatening to kill his estranged wife's boyfriend, were admissible in a murder prosecution. The court held that student interns did not come within the psychotherapist-patient privilege, but that, even if they did, section 1024 applied. The court reasoned that certain communications are not privileged at all under section 1024; therefore, they are admissible even though the threatened victim is dead and disclosure is no longer necessary in order to protect the victim. Again, the court ignored sections 901 and 910.

Gomez relied on the decision on Mavroudis v. Superior Court, supra, 102 Cal.App.3d 594. Mavroudis involved a Tarasoff-type suit. The plaintiffs sought a writ of mandate to compel the trial court to order the defendants to produce certain psychiatric records. The Court of Appeal held that section 1024 authorized disclosure of the records if the trial court found, upon in camera inspection, that the therapist determined or reasonably should have determined that the patient had presented a serious danger of violence to the plaintiffs. The records were held not to be privileged even though, at the time of trial, disclosure was no longer necessary to prevent the threatened danger.

Clearly, the therapists did have a duty to warn Ms. Smith of danger, but that duty did not arise from section 1024. Rather, a therapist's duty to keep confidences and make disclosures outside of a proceeding is a separate matter of professional ethical responsibility and common law duty.

> "Confidentiality relates to matters of professional ethics. Privilege is a legal right imposed by statute to protect the client from public disclosure of confidences by testimony from the witness stand without his permission. (Fleming and Maximov, The Patient or His Victim: The Therapist's Dilemma, supra, 62 Cal.L.Rev. at p. 1032 fn. 30.)

This Court's decision in Tarasoff v. Regents of University of California, supra, 17 Cal.3d 425, demonstrates the distinction between a patient's Evidence Code privileges and a therapist's extrajudicial duties to keep confidences or make disclosures. In Tarasoff, the parents of a girl who had been killed by the patient sued the therapist, claiming he had a duty to warn them that the patient had threatened to kill their daughter. The therapist claimed that no such duty existed. The Court rejected the therapist's claim, holding that "the confidential character of patient-therapist communications must yield to the extent to which disclosure is essential to avert danger to others." (17 Cal.3d at p. 442.)

In deciding that the therapist in Tarasoff could, and should, reveal confidential communications, the Court did not use section 1024 as the direct source of such a duty. Rather, it looked to an established "special relationship" exception to the

common law rule that one person owed no duty to control the conduct of another, and "[a]pplied this exception to the present case." (17 Cal.3d at p. 435, emphasis added.) The Court relied on section 1024 only for guidance as to how the Legislature chose to balance the public policy considerations in an analogous situation. (Id. at 440-441.)[13]

Finally, the fact that the therapists warned Ms. Smith because of their common law or ethical duties did not cause Mr. Wharton to lose his Evidence Code privilege. For just as the Evidence Code does not control the psychotherapist's actions outside of legal proceedings, the therapist's outside actions do not control the application of the privilege inside the courtroom. A therapist's extrajudicial disclosure of communications, even if consistent with his or her ethical or common law duties, cannot waive the evidentiary privilege. Only the "holder" of the privilege may waive it by extrajudicial disclosure (Evid. Code, § 912), and the holder of the

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[13] Tarasoff, supra, 17 Cal.3d at p. 441 fn. 13, quoted the following language from Fleming and Maximov, supra, 62 Cal.L.Rev. at p. 1063:

> "[T]he statute can be relied upon ... for the purpose of countering the claim that the needs of confidentiality are paramount and must therefore defeat any such hypothetical duty [to potential victims]. In this more modest perspective, the Evidence Code's 'dangerous patient' exception may be invoked with some confidence as a clear expression of legislative policy concerning the balance between the confidentiality values of the patient and the safety values of his foreseeable victims."

psychotherapist-patient privilege is the patient, not the therapist (Evid. Code, § 1013).

Tarasoff itself clearly demonstrates that no loss of the privilege may be inferred from the giving of a "Tarasoff warning." The Tarasoff decision carefully points out that extrajudicial disclosures must be limited so as to protect the patient's interest in privacy and confidentiality:

> "[T]he therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger." (Id. at p. 441, emphasis added.)

If this Court were now to rule that a psychotherapist's extrajudicial warnings to a potential victim would nullify the patient's privilege in later court proceedings, such a ruling would strip the therapist of the ability to disclose "discreetly." The disclosure could not remain "discreet" because the very act of warning the victim would mean the therapist could be compelled to reveal his patient's communications in any and all public proceedings thereafter.

Tarasoff's requirement of discreet disclosures is itself fully supported by the underlying purpose of the psychotherapist-patient privilege. In enacting the privilege, the Legislature recognized that a "broad privilege" is necessary even though "the granting of the privilege may operate in particular cases to withhold relevant information," because "the interests of society

will be better served if psychiatrists are able to assure patients that their confidences will be protected." (Senate Comm. Comment to § 1014, 1965 Enactment.) The Legislature specifically contemplated that such confidentiality would, in at least some instances, be afforded to persons who "are seriously disturbed and constitute threats to other persons in the community." (Ibid.) The Legislature dealt with such danger by enacting section 1024's limited and narrow exception so as to allow the therapist to take "appropriate action . . . necessary to prevent the danger" (Law Revision Comm. Comment to § 1024), but it did not authorize the privilege to be lost for any other purpose.

The only way to give recognition and effect to both of the Legislature's stated policies -- providing confidentiality to persons who are "seriously disturbed and constitute threats to other persons in the community" while still permitting the therapist to take "appropriate action necessary to prevent the danger" -- is to adhere to the Tarasoff ruling: to allow therapists to make disclosures when necessary to avert present danger, but to forbid any other use of such disclosures. No other ruling would carry out the Legislature's policies or conform with Tarasoff's requirement that necessary warnings be given "discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger."

If any doubts remain as to the proper conclusion to be drawn in this case, those doubts should be resolved in favor of coverage by the privilege. In In re Lifschutz (1970) 2 Cal.3d 415, 437, this Court pointed out that "the statutory psychotherapist-patient privilege 'is to be liberally construed in favor of the patient.' [Citations.]" (See also Roberts v. Superior Court (1973) 9 Cal.3d 330, 337 ["because of the potential encroachment upon constitutionally protected rights of privacy by the compelled disclosure of confidential communications between the patient and his psychotherapist [citation] trial courts should carefully control compelled disclosures in this area. Thus, the psychotherapist-patient privilege is to be liberally construed in favor of the patient. [Citation.]"].)

Both Lifschutz and Roberts involved the "patient-litigant" exception to the psychotherapist-patient privilege, but the rule is not limited to that context. For example, in People v. Stritzinger (1983) 34 Cal.3d 505, in ruling that the "child-abuse reporting" exception to the privilege was inapplicable to that case, this Court "beg[a]n by recognizing our obligation to construe narrowly any exception to the psychotherapist-patient privilege: we must apply such an exception only when the patient's case falls squarely within its ambit. [Citation.]" (Id. at p. 513; emphasis added.)

The Lifschutz-Roberts-Stritzinger line of cases requires that the exception in section 1024 be construed

narrowly, and the psychotherapist-patient privilege in section 1014 liberally, in favor of the patient, Mr. Wharton. These cases thus reinforce, and are reinforced by, the Tarasoff requirement of "discreet disclosures." They add yet one more important source of support for amici's argument that not even the communications disclosed in the course of the "Tarasoff warning" given to Ms. Smith could properly be disclosed at his subsequent criminal trial.

II. EVIDENCE CODE SECTION 1024 DOES NOT OPERATE TO REMOVE THE PRIVILEGE FROM COMMUNICATIONS NOT DISCLOSED IN THE WARNING.

Even if Evidence Code section 1024 were interpreted to authorize use in criminal proceedings of confidential communications that were disclosed in the course of a Tarasoff warning (but see ante, Part I), nevertheless that conclusion would not authorize the use at trial of confidential communications that were not so disclosed.[14] As amici will demonstrate, this conclusion follows from at least two separate lines of analysis. First, it follows from the language and legislative history of section 1024 and the cases interpreting the privilege. (Post, Part II.A.) Second, it follows from prior decisions concerning the constitutional underpinnings of the psychotherapist-patient privilege, which make it unlikely the

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[14] Because the issue is basically a factual question rather than a legal one, amici do not here address appellant's argument that no "communication" was disclosed in the Tarasoff warning. (A.O.B, at p. 56.)

Legislature would have sought to strip the protection of the privilege from undisclosed communications. (Post, Part II.B.)

A. The language, legislative history, and prior case law concerning Evidence Code section 1024 and the psychotherapist-patient privilege make clear that disclosure of some communications does not remove the protection of the privilege from the undisclosed communications.

The point of departure, and indeed the most significant referent, for determining the meaning of a statute are the words in the statute itself. Careful consideration of the words of Evidence Code section 1024 indicates that the privilege is lost under that section only as to communications that are actually disclosed as necessary to prevent the threatened danger.

Section 1024 provides that there is no privilege if the psychotherapist has reasonable cause to believe that the patient is dangerous and that "disclosure of the communication is necessary to prevent the threatened danger." (Emphasis added.) The Legislature's use of the underscored phrase "the communication" in the statute is significant. It indicates that the privilege is lost (at most) only for "the communication" the disclosure of which is necessary to prevent the threatened danger. Of necessity, this means that if a communication has not been thus disclosed, it remains covered by the privilege.

The position taken by the court and prosecutor below was, essentially, that the disclosure of any communication by the therapist forfeited the privilege as to all communications, even those that were not disclosed -- indeed, even those

communications that occurred after the therapists had warned Ms. Smith. This position is not supported by the words of the statute. If the Legislature had intended to codify such a provision, it would have provided for loss of the privilege when "disclosure of a communication" or "disclosure of any communication" is necessary to prevent the threatened danger. But the Legislature used no such wording. Instead, it called for the loss of the privilege only when "disclosure of the communication" is necessary to prevent the danger. The choice of the limiting words "the communication" indicates the Legislature's intent to restrict a patient's loss of the privilege under section 1024 to "the communication" whose disclosure is necessary to prevent the danger.[15]

The Comment of the Law Revision Commission to section 1024 reinforces this conclusion. There, the Commission stated that section 1024's exception to the privilege was intended to inhibit only "to a limited extent" the relationship between patient and psychotherapist and that the exception was essential when a dangerous patient refuses to permit the psychotherapist to "make the disclosure necessary to prevent the threatened danger." If, however, the therapist's decision to make a limited "disclosure necessary to prevent the threatened danger" would

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[15] The Legislature's use of the phrase "the communication" not only demonstrates that the privilege is lost solely as to "the communication" sought to be admitted, but also it mandates that trial courts proceed communication-by-communication when determining which psychotherapist-patient communications have in fact been disclosed to prevent the threatened danger.

nevertheless result in the total loss of the privilege -- even as to undisclosed statements and subsequent statements -- then the psychotherapist-patient relationship would be inhibited far more than "to a limited extent." Indeed, given that diagnosis and treatment depend upon assurances that a patient's confidences "will be held in utmost confidence" and that "proper psychotherapy is often denied a patient solely because he 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" (Senate Comm. Comment, § 1014, 1965 Enactment,)[16], the

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[16] This court has "recognized the contemporary value of the psychiatric profession, and its potential for the relief of emotional disturbances and of the inevitable tensions produced in our modern, complex society. [Citations.] That value is bottomed on a confidential relationship; but the doctor can be of assistance only if the patient may freely relate his thoughts and actions, his fears and fantasies, his strengths and weaknesses, in a completely uninhibited manner." (People v. Stritzinger, supra, 34 Cal.3d at p. 514, emphasis added.)

Similarly, in recognizing a federal psychotherapist-patient privilege, the Sixth Circuit Court of Appeals explained that "[t]he interests promoted by a psychotherapist-patient privilege are extensive. As the Advisory Committee Notes stated: 'confidentiality is the sine qua non for successful treatment.' 56 F.R.D. at 242, quoting Report No. 45, Group For the Advancement of Psychiatry 92 (1960). . . . The interest of the patient in exercising his rights is also society's interest, for society benefits from its members active enjoyment of their freedom. Moreover, society has an interest in successful treatment of mental illness because of the possibility that a mentally ill person will pose a danger to the community." (In re Zuniga (6th Cir. 1983) 714 F.2d 632, 639.)

damage to the relationship from an interpretation contrary to amici's would obviously be devastating.[17]

In sum, the language of section 1024 and the Law Revision Commission's Comment thereto are in accord and fully support amici's contention that section 1024 does not authorize the forfeiture of the privilege as to confidential communications that were not actually disclosed by the therapist as necessary to prevent the threatened danger.

But, as noted earlier, if there remains any doubt as to the matter, that doubt should be resolved in favor of coverage by the privilege. "[T]he statutory psychotherapist-patient privilege 'is to be liberally construed in favor of the patient.'" (In re Lifschutz, supra, 2 Cal.3d at p. 437; Roberts v. Superior Court, supra, 9 Cal.3d at 337.) "[E]ven when the balance tips in favor of disclosure, constitutional concerns require a strict circumscription of the scope of the disclosure."

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[17] The prosecutor in Mr. Wharton's case filed a motion to "determine competency of witnesses" that applied to "any statements made by the defendant Wharton that caused them [the therapists] to make the Tarasoff warning." (See, e.g., CT 359.) While the motion covered both previously disclosed and previously undisclosed statements, it did not appear to apply to undisclosed statements that did not "cause" the Tarasoff warning.

Perhaps the latter limitation on the prosecutor's motion was intended to make the motion appear more reasonable, but it was an entirely self-imposed limitation. There is in fact no legal basis for distinguishing between undisclosed statements that were relied on by the therapists and undisclosed statements that were not relied on. Neither section 1024 nor the Comment thereto draws such a line or hints that this distinction between undisclosed matters was ever contemplated by the Legislature as a basis for forfeiting the protection of the privilege.

(Cutter v. Brownbridge (1986) 183 Cal.3d 836, 843.) The courts have an "obligation to construe narrowly any exception to the psychotherapist-patient privilege: we must apply such an exception only when the patient's case falls squarely within its ambit." (People v. Stritzinger, supra, 34 Cal.3d at p. 513.) These general rules of construction relating to the psychotherapist-patient privilege are further reinforced in the criminal context by the familiar rule that "the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute . . . ." (Ex parte Rosenheim (1890) 83 Cal. 388, 391; emphasis added.) Together, the Lifschutz-Roberts-Stritzinger rule and the Rosenheim rule require that the exception in section 1024 be construed narrowly, and that the psychotherapist-patient privilege in section 1014 be applied liberally in favor of the patient.

The Lifschutz and Rosenheim rules are of even greater significance in the present case because Mr. Wharton was charged with a capital crime. "In death cases doubts . . . should be resolved in favor of the accused." (Andres v. United States (1948) 333 U.S. 740, 752.)

As a matter of law, Mr. Wharton's psychotherapist-patient privilege remained conclusively intact as to communications not disclosed in the course of the Tarasoff warning.

B. A conclusion that undisclosed psychotherapist-patient communications can be used against a defendant in a criminal trial would conflict with the state and federal constitutions; at the least, the issue raises serious constitutional problems that the Legislature is presumed, in the absence of evidence to the contrary, to have intended to avoid.

It is elementary that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." (United States v. Delaware & Hudson Co. (1909) 213 U.S. 366, 407-08; see, e.g., People v. Davis (1981) 29 Cal.3d 814, 829.) Serious constitutional questions would arise if section 1024 were interpreted so as to authorize the use in court of statements that Mr. Wharton made to his psychotherapists and that had never been disclosed to avert threatened danger.

As this Court recognized in Stritzinger, supra, 34 Cal.3d at page 511, "The psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy. (Cal. Const., art. I, § 1; In re Lifschutz, supra, 2 Cal.3d at pp. 431-432, citing Griswold v. Connecticut (1965) 381 U.S. 479, 484 [citation]; Caesar v. Mountanos (9th Cir. 1976) 542 F.2d 1064, 1070.)" Thus, Mr. Wharton's

psychotherapist-patient privilege is "embraced by the right to privacy." (Ibid.)[18]

To determine whether Mr. Wharton's right of privacy was violated when the prosecutor elicited his undisclosed communications, this court must "inquire whether the [state] had demonstrated a compelling governmental interest in [disclosure of the communications during Mr. Wharton's trial] and whether this interest could be accomplished by less intrusive means." (Long Beach City Employees Assn. v. City of Long Beach, supra, 41 Cal.3d at p. 948, fn. 12; Britt v. Superior Court (1978) 20 Cal.3d 844.) Or, as the Court stated in White v. Davis (1975) 13 Cal.3d 757, 776, "'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,' [citation]. The [encroachment] must be shown 'necessary, and not merely rationally related, to the accomplishment of a permissible state

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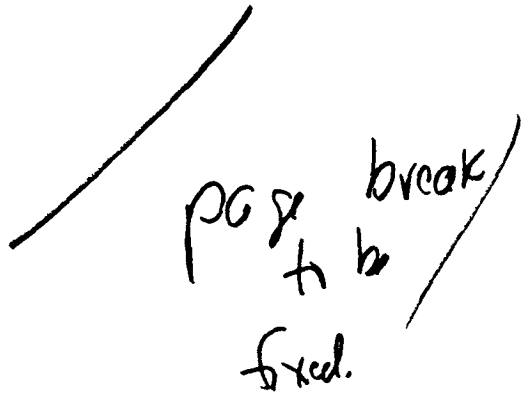
[18] In examining the right of privacy found in article I, section 1, of the California Constitution, this Court recently recognized "the importance of mental privacy." (Long Beach City Employees Assn. v. City of Long Beach (1986) 41 Cal.3d 937, 943, emphasis in original.) In support of this recognition, the Court pointed to the election ballot argument: "'The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects . . . our thoughts, our emotions, our expressions, our personalities, . . . This right should be abridged only when there is a compelling public need. . . .'" (Ibid., emphasis added.)

See also Vinson v. Superior Court (1987) 43 Cal.3d 833, 841 ["California accords privacy the constitutional status of an 'inalienable right,' on a par with defending life and possessing property. (Citations.)"].

policy.'" (Quoting Griswold v. Connecticut, supra, 381 U.S. at p. 497 (conc. opn. of Goldberg, J.).)

Since Mr. Wharton's right of privacy was infringed when the prosecutor revealed his privileged communications, the burden is on the state to demonstrate that (1) the infringement was justified by a compelling governmental interest, and (2) the interest could not have been satisfied by less intrusive means. The infringement in the present case satisfied neither of these requirements.

In his pretrial motion, the prosecutor alluded to the governmental interests he sought to invoke. He cited first to



Welfare and Institutions Code section 5328,[19] and then to Evidence Code section 1024. But Welfare and Institutions Code section 5328 in no way justifies an in-court intrusion into Mr. Wharton's undisclosed statements. Indeed, it is not a rule concerning the admissibility of evidence at all. As the Courts of Appeal for the First, Second, Fifth and Sixth Appellate Districts have held,

> "Disclosure pursuant to Welfare and Institutions Code 5328, subdivision (f) is in turn subject to an evidentiary limitation. Use of the records is prohibited by the psychotherapist-patient privilege (Evid. Code, § 1014) which operates independently of the Welfare and Institutions Code privilege." (People

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[19] Insofar as here relevant, Welfare & Institutions Code § 5328 provides:

> "All information and records obtained in the course of providing services under Division 4 (commencing with Section 4000), Division 4.1 (commencing with Section 4400), Division 4.5 (commencing with Section 4500), Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), Division 7 (commencing with Section 7100), to either voluntary or involuntary recipients of services shall be confidential. Information and records obtained in the course of providing similar services to either voluntary or involuntary recipients prior to 1969 shall also be confidential. Information and records shall be disclosed only in any of the following cases: . . .
>
> "(f) To the courts, as necessary to the administration of justice. . . .
>
> "(s) When the patient, in the opinion of his or her psychotherapist, presents a serious danger of violence to a reasonably foreseeable victim or victims, then any of the information or records specified in this section may be released to that person or persons and to law enforcement agencies as the psychotherapist determines is needed for the protection of that person or persons. For purposes of this subdivision, 'psychotherapist' means anyone so defined within Section 1010 of the Evidence Code. . . ."

v. Pack (1988) 201 Cal.App.3d 679, 684; People v. Boyette (1988) 201 Cal.App.3d 1527, 1531; Mavroudis v. Superior Court, supra, 102 Cal.App.3d at p. 602; People v. Gardner (1984) 151 Cal.App.3d 134, 141.)[20]

The state interest embodied in section 1024 and the Law Revision Commission Comments is the prevention of threatened danger to a foreseeable and readily identifiable person. (See Thompson v. County of Alameda, supra, 27 Cal.3d at pp. 752-753.) However, while this interest may be a compelling one where there is such an identifiable person who might be protected by a disclosure of a confidential communication, the interest is neither compelling nor furthered in the unique circumstances of appellant's criminal trial, where there was no such person to be protected. The undisclosed communications in Mr. Wharton's case were elicited by the prosecution not "to prevent the threatened harm" (Evid. Code, § 1024) but rather to determine Mr. Wharton's criminal liability for a past act. The state interest sought to be advanced by section 1024 was thus not furthered by the elicitation at Mr. Wharton's trial of his previously undisclosed communications.

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[20] The prosecutor also cited subdivision (s) of Welfare and Institutions Code section 5328. This subdivision closely parallels Evidence Code section 1024; it permits release of records only to "a reasonably foreseeable victim or victims" or to law enforcement agencies if "needed for the protection of that person or persons." This subdivision obviously did not apply at Mr. Wharton's trial for the death of Ms. Smith. Moreover, subdivision (s) is subject to the same evidentiary limitation as just discussed for subdivision (f). (See In re S. W. (1978) 79 Cal.App.3d 719.)

The Legislature itself has made clear that when there is no threatened danger to prevent, the state's interest is subordinate to the need for confidentiality in the psychotherapist-patient relationship. As the Law Revision Commission Comment to section 1014 states,

> "Many . . . persons [in need of psychiatric treatment] are seriously disturbed and constitute threats to other persons in the community. . . . Although 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."[21]

The situation is analogous to those that confronted this Court in In re Lifschutz, supra, 2 Cal.3d 415, and Britt v. Superior Court, supra, 20 Cal.3d 844. In both cases, the Court rejected an argument that, under the patient-litigant exception to the psychotherapist-patient privilege, a patient would, by instituting a claim for physical or mental injury, automatically

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[21] See also People v. Pack, supra, 201 Cal.App.3d at page 686 ["That the privileged documents may contain relevant evidence is not a reason for disclosure. In considering the psychotherapist-patient privilege, the Legislature expressly recognized that the interests of society were better served by an assurance of confidentiality. (Citation.)"].

The only situation in which the Legislature has articulated a compelling state interest in a disclosure of previously undisclosed confidential communications between therapist and patient is when a therapist reasonably believes that disclosure of the communication is necessary to prevent threatened danger. (Evid. Code, § 1024.) But this interest was unavailable to the state in Mr. Wharton's case because there was no claim (and none could in fact be made) that the psychotherapists reasonably believed it was necessary to disclose at trial the hitherto undisclosed communications in order to prevent harm to Ms. Smith.

waive his privilege as to all protected communications. In Lifschutz, the Court concluded that the result of accepting such an argument "would clearly be an intolerable and overbroad intrusion into the patient's privacy, not sufficiently limited to the legitimate state interest embodied in the provision, . . ." (Lifschutz, supra, 2 Cal.3d at p. 435.) Thus, the Lifschutz court held that

> "the 'automatic' waiver of privilege contemplated by [the patient-litigant exception] must be construed not as a complete waiver of the privilege but only as a limited waiver concomitant with the purposes of the exception. . . . [C]ommunications which are not directly relevant to those specific conditions do not fall within the terms of section 1016's exception and therefore remain privileged. Disclosure cannot be compelled with respect to other aspects of the patient-litigant's personality even though they may, in some sense, be 'relevant' to the substantive issues of litigation. . . ." (Ibid., fn. omitted, emphasis added; see Britt, supra, 20 Cal.3d at pp. 863-864.)

The Britt court, following the holding in Lifschutz, went on to elaborate that "in the context of litigation discovery . . . as in all others, such disclosure of [constitutionally protected] activities must be justified by a compelling state interest and must be precisely tailored to avoid undue infringement of constitutional rights." (Britt, supra, 20 Cal.3d at pp. 864-865, emphasis added.)

In light of Lifschutz and Britt, the disclosure of psychotherapist-patient communications under Evidence Code section 1024 must be limited by the principle that "the [loss] of privilege contemplated by [section 1024] must be construed not as a complete [loss] of the privilege but only as a limited [loss]

concomitant with the purposes of [section 1024]." (See Lifschutz, supra, 2 Cal.3d at p. 435; Britt, supra, 20 Cal.3d at p. 863.) Without such a limitation, the court risks "an intolerable and overbroad intrusion into the patient's privacy . . . ." (Britt, supra, 20 Cal.3d at p. 863.)

Since the purpose of section 1024 is to avert threatened danger by allowing psychotherapists to reveal confidential communications to the "limited extent" necessary to prevent the danger (Evid. Code, §1024 and Comment thereto), a fortiori communications that the psychotherapist does not believe are necessary to disclose in order to prevent the threatened danger are outside the purpose of section 1024. Such communications remain constitutionally privileged.

The record reveals that the vast majority of the communications elicited at Mr. Wharton's trial fall into this category of privileged communications. Indeed, the prosecutor was able to elicit information totally unrelated to Mr. Wharton's dangerousness. He revealed statements about how Mr. Wharton and Ms. Smith were burglarized. He also elicited information about dangerousness that the therapists never disclosed to Ms. Smith when they warned her, such as Mr. Wharton's fear of hurting Ms. Smith, his fear of using knives and guns on others, and his auditory hallucinations about "orders to kill." Indeed, the

prosecutor elicited information that was not learned until after the therapists warned Linda.[22]

By no stretch of the imagination was the prosecutor's elicitation of testimony from the psychotherapists precisely tailored to avoid undue infringement of Mr. Wharton's right to privacy. Using section 1024 to allow such sweeping elicitation of confidential communications violates the fundamental constitutional right of privacy and the corresponding principle that such rights may not be abridged in the absence of a compelling state interest and a precisely tailored means of advancing that interest.

CONCLUSION

For the foregoing reason, amici urge this Court to rule that appellant's statements to his psychotherapists were inadmissible as a matter of law at his criminal trial.

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[22] For example, although Dr. Hamilton stated that she warned Smith on February 3, 1986 (4 RT 684), her testimony revealed communications Mr. Wharton made on February 14, 1986. (4 RT 696-697, 714-716.)

It is significant that not only did the prosecutor elicit such information from the therapists, but he also had each therapist walk from the witness stand to a board marked "Exhibit 10" and write out these statements in front of the jury. (2 RT 204, 208; 4 RT 693, 695, 697, 698.) Such a tactic no doubt firmly embedded Mr. Wharton's communications in the minds of the jurors.