

IN THE SUPREME COURT FLORIDA

Case No. SC02-1305

DAVID FAMIGLIETTI,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

**ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL
(*EN BANC*)**

**AMICUS BRIEF OF THE FLORIDA ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS AND ITS
MIAMI CHAPTER, IN SUPPORT OF PETITIONER**

**H. SCOTT FINGERHUT
FLORIDA BAR NO. 796727
H. SCOTT FINGERHUT, P.A.
THE 2400 BUILDING
2400 S. DIXIE HWY, 2ND FLOOR
MIAMI, FLORIDA 33133-3100
TELEPHONE: 305.285.0500**

**BENEDICT P. KUEHNE
FLORIDA BAR NO. 233293
SALE & KUEHNE, P.A.
BANK OF AMERICA TOWER, STE 3550
100 S.E. 2 STREET
MIAMI, FLORIDA 33131-2154
TELEPHONE: 305.789.5989**

CERTIFICATE OF INTERESTED PERSONS

The Florida Association of Criminal Defense Lawyers and its Miami Chapter, as *amicus curiae*, certify that the following persons and entities have or may have an interest in the outcome of this case:

1. ERIC COHEN
(Appellate counsel for petitioner)
2. HONORABLE PEDRO ECHARTE
(Trial judge)
3. H. SCOTT FINGERHUT
(Counsel for *amicus curiae*)
4. BENEDICT P. KUEHNE
(Counsel for *amicus curiae*)
5. OFFICE OF THE MIAMI-DADE STATE ATTORNEY
(Trial counsel for respondent)
6. ANA DAVIDE FERNANDEZ
(Trial counsel for petitioner)
7. PAULETTE R. TAYLOR, ASSISTANT ATTORNEY GENERAL
(Appellate counsel for respondent)
8. DAVID FAMIGLIETTI
(Petitioner)
9. Florida Association of Criminal Defense Lawyers
(Amicus curiae)
10. Florida Association of Criminal Defense Lawyers–Miami Chapter
(*Amicus curiae*)

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INTEREST OF THE *AMICUS CURIAE*

The Florida Association of Criminal Defense Lawyers and its Miami Chapter together file this brief of an *amicus curiae* in support of the position advanced by the petitioner, pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure. The Florida Association of Criminal Defense Lawyers ("FACDL") and its Miami Chapter were originally founded in the early 1970s, and subsequently expanded statewide, as organizations consisting of criminal defense lawyers and law professors who devote a significant portion of their professional lives to defending persons accused of crimes. FACDL is an organization dedicated to preserving the constitutional rights of *all* citizens, and has historically participated in cases that raise questions involving the criminal laws in an effort to represent and safeguard the public interest. As one of its principal purposes, FACDL works to promote the proper administration of justice. In *en banc* proceedings before the Third District Court of Appeal, FACDL was invited by the court to appear as an amicus.

ISSUE PRESENTED

Is the psychotherapist-patient privilege a qualified privilege, allowing a trial judge to determine whether the public interest in the fair administration of justice outweighs patient confidentiality in certain circumstances?

STATEMENT OF THE CASE AND FACTS

This cause turns purely on questions of law. The details underlying the appeal are well memorialized and not in dispute. FACDL and its Miami Chapter adopt as substantially correct the factual statement presented by petitioner.

SUMMARY OF THE ARGUMENT

Florida's psychotherapist-patient privilege is a limited or qualified privilege. Its protections are not absolute, but are sufficiently flexible to empower a trial court to evaluate confidential patient information protected by the privilege in order to determine if an accused is entitled to that information in furtherance of the constitutional right to a fair trial. The burden needed to initiate a judicial inquiry rests with the party requesting access to the privileged information. At a minimum, an *in camera* inquiry is required whenever an accused can show that the confidential psychotherapeutic materials appear likely to contain relevant or favorable information for the defense. That showing need not be made by sworn testimony or affidavit, provided the court is given a sufficient factual basis justifying the proponent's request. This construction of the psychotherapist-patient privilege is consistent with constitutional principles of due process.

ARGUMENT

FLORIDA'S QUALIFIED PSYCHOTHERAPIST-PATIENT PRIVILEGE MUST BE BALANCED WITH AN ACCUSED'S RIGHT TO OBTAIN FAVORABLE EVIDENCE, SUCH THAT *IN CAMERA* REVIEW OF PSYCHIATRIC RECORDS IS AUTHORIZED WHEN AN ACCUSED PROPOUNDS REASONABLE CAUSE THAT THE RECORDS ARE LIKELY TO CONTAIN IMPEACHMENT EVIDENCE.

A. Florida Courts Are Empowered To Protect Constitutional Guarantees.

Florida's psychotherapist-patient privilege is not absolute. Courts have the power and the duty to determine if the privilege requires confidentiality in individual cases when an accused asserts a specific need for the information. If compelling facts are presented which demonstrate a valid, case based reason to invade the privilege, then the public interest in the fair administration of justice warrants limited access to the otherwise confidential information. To hold, as a plurality of the *en banc* Third District did, that the psychotherapist-patient privilege is absolute and can never be invaded, is an invitation to mischief and unfairness. The courts of our state must be empowered to evaluate the need to access otherwise confidential information in order to promote fairness and encourage the search for the truth throughout our criminal justice system.

Florida law defines the psychotherapist-patient confidentiality as an evidentiary

privilege. The applicable statute, § 90.503(2) Florida Statutes (2001), provides that a patient has the privilege to “prevent any other person from disclosing confidential communications or records made for the purpose of diagnosis or treatment of the patient’s mental or emotional condition ...” The privilege does not confer absolute immunity, however. For instance, when necessary to give warning of a threat of physical harm, the privilege gives way. Thus, pursuant to § 456.059, Florida Statutes (2001), a treating psychotherapist is authorized to disclose otherwise confidential information when a “patient has made an actual threat to physically harm an identifiable victim or victims ...” Other exceptions are included in the privilege statute itself. Even the United States Supreme Court has recognized that the psychotherapist privilege is not absolute, but its waiver is dependent on the particular facts of a given case. *Jaffee v. Redmond*, 518 U.S. 1, 18 n. 1, 116 S. Ct. 1923 (1996) (“we do not doubt that there are situations in which the privilege must give way.”).¹

The qualified nature of Florida’s psychotherapist-patient privilege makes abundant good sense and is consistent with the general construction of privilege laws. Because privileges foreclose access to information, courts recognize that “[t]estimonial exclusionary rules and privileges contravene the fundamental principle that ‘the public

¹ The United States Court of Appeals for the First Circuit applied the “crime-fraud” exception to the psychotherapist-patient privilege. *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71 (1st Cir. 1999).

... has a right to every man's evidence.'" *Trammel v. United States*, 445 U.S. 40, 50, 100 S. Ct. 906, 912 (1980) (citations omitted). Thus, the context for exclusionary privileges is a general societal willingness to agree that the public good accomplished by excluding access to certain evidence "transcend[s] the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.* at 50.

Florida courts are well equipped to determine the scope and application of Florida's privilege laws in harmony with fundamental constitutional guarantees. It has been said that "[t]he science of government is the science of experiment." *Anderson v. Dunn*, 6 Wheat. 204, 226 (1821). Courts are given wide latitude in determining how to best resolve questions about legislative enactments. Thus, in a situation in which a request for access to confidential information comes into conflict with a statutory privilege, courts must consider the constitutional implications and determine which compelling interest controls. In so doing, the Constitution empowers a state, consistent with constitutional standards, "to seek whatever solutions it chooses to problems of law enforcement." *Arizona v. Evans*, 514 U.S. 1, 8, 115 S. Ct. 1185 (1995). Allowing the courts to balance competing interests is a time tested process that is readily accepted by the public.

Even then, state courts are free to interpret state constitutional provisions and accord greater protection by individual rights than the minimum protection guaranteed

by the United States Constitution. *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469 (1983).

The genius of our government provides that, within the sphere of constitutional action, the people -- acting not through the courts but through their elected representatives -- have the power to determine as conditions demand, what services and functions the public welfare requires.

Helvering v. Gerhardt, 304 U.S. 405, 427, 58 S. Ct. 969 (1938) (Black, J., concurring). Consequently, "the challenging task of crafting appropriate procedures for safeguarding liberty interests is entrusted to the 'laboratory' of the States ... in the first instance." *Cruzan v. Director, Mo. Department of Health*, 497 U.S. 261, 292, 110 S. Ct. 2841 (1990) (O'Connor, J., concurring).

In criminal law matters, courts typically utilize a flexible approach to problem resolution that empowers a court to weigh the potential benefits against the possible harm, in order to provide the optimal protection to the parties and, ultimately, to society. Hence, "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system...." *United States v. Nobles*, 422 U.S. 225, 241, 95 S. Ct. 2160 (1975). A defendant, for example, does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646 (1988)). *See also Chambers v. Mississippi*, 410 U.S. 284,

295, 93 S. Ct. 1038 (1973) (right of confrontation "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"); *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704 (1987). Nor does the Due Process Clause guarantee the right to introduce all relevant evidence in a criminal case. *Montana v. Egelhoff*, 518 U.S. 37, 42, 135, 116 S. Ct. 2013 (1996). But while the mere invocation of certain rights "cannot automatically and invariably outweigh countervailing public interests," *Taylor v. Illinois*, 108 S. Ct. at 655, "[i]t is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor." *Id.* at 655.

Consistent with these observations, the Supreme Court has held that precious constitutional rights are easily offended by too free a use of sanctions that *entirely* exclude an accused's material testimony, *id.* at 653 (emphasis added), and that the erroneous exclusion of critical, corroborative evidence may therefore violate the Sixth Amendment right to present a defense as well as the due process right to a fair trial, including a fair opportunity to defend against the prosecution's accusations. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038 (1973); *Washington v. Texas*, 388 U.S. 14, 18-19, 87 S. Ct. 1920 (1967). Therefore, "procedural rules mandating pretrial disclosure ... so long as seasonably promulgated, evenly balanced and rationally related to the trial process -- are at the core of the public interest." *See*

Chappee v. Vose, 843 F.2d 25, 28 (1st Cir. 1988). This is precisely because such rules are, by their very nature, "designed to vindicate the principle that the `ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.'" *Taylor*, 108 S. Ct. at 653 (quoting *United States v. Nixon*, 418 U.S. 683, 709, 94 S. Ct. 3090 (1974)).

B. The Psychotherapist-Patient Privilege Is Not Absolute.

The instant case presents no conflict between the Florida and the United States Constitutions. This is because the two are in harmony on the subject. There is not, and there has never been, an *absolute* bar to discoverability of potentially exculpatory information by an accused on trial in a criminal case, for to create one would offend a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Pennsylvania v. Ritchie*, 480 U.S. at 43 (quoting *Patterson v. New York*, 432 U.S. 197, 201-202, 97 S. Ct. 2319 (1977)).

In the *en banc* opinion, the rule announcing the absolute non-disclosure of an alleged victim's psychiatric records has the potential to violate an accused's confrontation, and ultimately compulsory process, rights under the Sixth Amendment, as well as the Fifth Amendment due process right to have the prosecution turn over material and favorable evidence. The strictures of these constitutional guarantees apply to the states through the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14,

17-19, 87 S. Ct. 1920 (1967); *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065 (1965). These guarantees are undoubtedly fundamental. *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038 (1973).

The Third District’s plurality holding that the § 90.503 privilege is absolute sharply interferes with a judge’s duty to evaluate the admissibility of arguably relevant evidence. Judges are vested with the authority to determine preliminary evidentiary questions, including matters involving statutory privileges. § 90.105(1), Fla. Stat. (2001). The relative need for information and the potential for harm if access to evidence is denied are at the core of a court’s evaluation of objections to requests for confidential material.

The Third District initially recognized that § 90.503 “contains three exceptions within its text and an additional one in section 455.2415, Florida Statutes (2001).” *State v. Famiglietti*, 2001 WL 717652, 26 Fla. L. Weekly D1601 (Fla. 3d DCA June 27, 2001). Its plain language includes three statutory exceptions, making § 90.503 a qualified or limited privilege.² Even § 456.059 expressly limits the same privilege in certain circumstances. The crime-fraud exception is a further restriction on its scope.

² The privilege is inapplicable to communications (a) relevant to compelled hospitalization, (b) made during a court-ordered examination, or (c) concerning the patient’s mental or emotional condition if an element of the claim or defense.

In re Grand Jury Proceedings (Gregory P. Violette), 183 F.3d 71 (1st Cir. 1999). In cases involving statutory or judicial exceptions, courts necessarily must determine the scope or application of the privilege in individual cases. *E.g.*, *Guerrier v. State*, 811 So. 2d 852, 855 (Fla. 5th DCA 2002) (“the Legislature did not envision the psychotherapist-patient privilege as absolute or immutable given the exceptions in sections 90.503 and 456.059”).

The opinion in *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n. 15, 107 S. Ct. 989 (1987), best explains the proper judicial analysis. In *Ritchie*, Pennsylvania established a child-protection agency separate from police and prosecutors. That agency then investigated a man accused of molesting his daughter. In seeking release of the agency's records in the ensuing child abuse prosecution, Ritchie argued that the agency had in its possession a variety of material and favorable documents, allegedly including his daughter's verbatim statements, medical reports, and an earlier abuse complaint she had raised. Because materials of this kind obviously could contain exculpatory materials, the Court did not hesitate in finding that an *in camera* review was warranted in determining if disclosure was required. *Ritchie*, 480 U.S. at 57.

In holding that the public interest in maintaining confidentiality and protecting certain types of sensitive information does not necessarily prevent disclosure in all circumstances, *Ritchie* applied *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194

(1963), to state investigative agencies not directly associated with police or prosecutors. It is long settled that the state has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. at 87.³

This court previously recognized that psychiatric records and communications involving victims can serve a valuable evidentiary role in criminal proceedings. *See State v. Jett*, 626 So. 2d 691 (Fla. 1993) (defendant was entitled to question psychotherapist regarding communications with alleged child victims). When circumstances so require, courts are willing to authorize the disclosure of otherwise privileged information. *See Mills v. State*, 476 So. 2d 172 (Fla. 1985), *cert. denied*, 475 U.S. 1031, 106 S. Ct. 1241 (1986) (providing for possibility of disclosure abrogating the attorney-client privilege under compelling circumstances). Courts simply do not accept the proposition that in a criminal case the accused is *per se* barred from attempting to discover potentially exculpatory material;⁴ that there is no

³ *Ritchie* expressed no opinion whether the result would be different if that statute prevented disclosure to anyone, including law enforcement and judicial personnel. 480 U.S. at 58 n. 14.

⁴ For example, in considering the disclosure of grand jury testimony in an ongoing criminal case – a class of information deemed highly confidential and exempt from disclosure, § 905.27, Fla. Stat. (2001) – courts nevertheless look to an accused’s showing of the need for and the beneficial nature of the information. *Jent v. State*, 408 So. 2d 1024, 1027-1028 (Fla.

standard of relevance an accused may demonstrate; or that under no circumstances may a judge review sensitive materials *in camera*.⁵

To deny a defendant *judicial review* of potentially exculpatory materials, let alone access thereto, unreasonably conflicts with fundamental principles of American justice. It is plain that to do so would calibrate the scales in a manner at odds with what *Taylor v. Illinois*, 484 U.S. at 410, has since taught. Furthermore, because judicial officers routinely receive and review confidential documents and information, it strains the structure of our judicial system to hold that an *in camera* disclosure of psychiatric records to a judge somehow violates a patient's confidentiality or compromises the legislative protection of mental health records.

1981), *cert. denied*, 457 U.S. 1111, 102 S. Ct. 2916 (1982).

⁵ When Florida prohibits disclosure in a criminal context, the circumstances are altogether distinguishable. For example, Florida constitutional law exempts clemency records from any disclosure not authorized by the Governor, evincing the executive's exclusive authority under Article IV, § 8, Fla. Const. There is no contrary federal law applicable to Florida via the Fourteenth Amendment. Moreover, an accused is not entitled to access because the clemency materials are collected not within the same basic time frame as the police investigation and trial, but are gathered well after the trial and appeals have ended. *Parole Commission v. Lockett*, 620 So. 2d 153 (Fla. 1993). The broad reach of *Brady* is generally conceived as applying "only to state-sponsored investigations during roughly the period of the investigations and later trial." *Asay v. Florida Parole Commission*, 649 So. 2d 859, 860 (Fla. 1994) (Kogan, J., specially concurring).

Florida's psychotherapist-patient privilege, while arguably intended to provide a high degree of protection for mental health records, is not absolute. Statutory circumstances exist which justify invasion of the privilege, such as when necessary to protect a person from specific harm. § 456.059, Fla. Stat. (2001). Allowing the courts to determine the contours of the privilege in a specific case advances the legislative protection codified in § 90.503, which was approved by the Legislature with defined exceptions to the privilege. § 90.503(4). Those exceptions inevitably will be evaluated by the courts in specific cases. Whether disclosure of otherwise confidential information in a given situation is proper should be weighed by the courts in the very same manner that judges are called upon on a daily basis to balance individual protections against the public interest. As District Judge Sorondo observed in his dissent from the *en banc* decision, an absolute bar to disclosure could result in significant abuse, including the possible conviction of innocent persons as well as the use of the courts to work an intentional injustice.

C. *In Camera* Review Should Be Within The Court's Discretion When Records Are Likely To Contain Relevant Evidence.

The approach used by the Fourth District in *State v. Pinder*, 678 So. 2d 410 (Fla. 4th DCA 1996), advances a balancing test to determine if a criminal defendant can obtain access to privileged communications with a sexual assault counselor.

Pinder's balancing analysis fairly states the law, and should guide this court in concluding that a defendant is entitled to show good cause why the psychotherapist-patient privilege is subject to a limited invasion in a given case.

In determining the contours of a balancing test, "[t]he issue then devolves to the need to articulate a standard that judges can apply to identify those circumstances in which disclosure of the victim's records privileged by statute is required to provide the defendant a fair trial." *Commonwealth v. Bishop*, 617 N.E.2d 990, 994-995 (Mass. 1993). What is sought to be achieved is a workable method to be applied by judges for the production of privileged information, which in turn is based on "a reasonable compromise between the competing societal interests, a fair trial and confidentiality of these records." *Katlein v. State*, 731 So. 2d 87, 90 (Fla. 4th DCA 1999).

In *Katlein*, where the murder of a police officer was at issue, the defendant challenged the discoverability of his mental health and substance abuse treatment records by a fellow inmate against whom *Katlein* intended to testify. Both statutes in that case, § 394.4615 (pertaining to mental health records) and § 397.501 (substance abuse services), permitted disclosure for "good cause" upon the court balancing the need for the information against the possible harm of revelation. *Katlein*, 731 So. 2d at 88. As in *Ritchie*, where the defendant was charged with sexually assaulting his daughter and attempted to discover abuse records otherwise subject to qualified

confidentiality, *Katlein* allowed disclosure pursuant to a court order.

Like *Katlein*, the Florida Legislature has qualified the psychotherapist privilege to a significant degree. As such, disclosure of a patient's records should be authorized when the patient is a victim in an ongoing prosecution and the records are material to an available defense or will assist the defendant in contesting the charges. The required showing by an accused must balance the accused's need for the evidence against the harm to the patient if disclosure is authorized. So long as an accused makes a showing, by proffer or evidence, that a victim's psychological records are material and favorable to the defense, a court should be authorized to conduct an *in camera* evaluation of the protected records.

Although courts differently define "materiality" when evaluating an accused's claim that documents contain material evidence requiring *in camera* review, the Supreme Court agrees that "[evidence] is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375 (1985) (opinion of Blackmun, J.); *see id.*, at 685 (opinion of White, J.). Thus, whether termed "reasonable risk," *Commonwealth v. Bishop*, 617 N.E.2d at 994-995 ("It may be said that the controverted privilege shall

be pierced in those cases in which there is a reasonable risk that nondisclosure may result in an erroneous conviction"), or "likely to contain certain relevant evidence," *Katlein*, at 91, a "good faith" factual basis, *People v. Gissendanner*, 399 N.E.2d 924, 928 (N.Y. 1979), alleging facts that, if true, "support the possibility of a specific asserted defense," *State v. Acosta*, 439 So. 2d 1024, 1027 n. 2 (Fla. 3d DCA 1983), or, as in *Pinder*, a "reasonable probability" ("a reasonable probability that the privileged matters contain material information necessary to his defense"), *Pinder*, at 417, the benchmark must not require too stringent a showing as would make it unlikely an accused could receive even an *in camera* review of potentially exculpatory material.

Too strict a standard places the truth-determining function grievously at risk. Outright exclusion of the evidence violates due process and renders a defendant's trial fundamentally unfair. *Montana v. Egelhoff*, 518 U.S. at 42. In other words, upon balancing all countervailing interests, "in certain circumstances a defendant must have access to privileged records so as not to undermine confidence in the outcome of trial." *Katlein*, at 89-90 (quoting *Commonwealth v. Bishop*, 617 N.E.2d at 990). Perhaps the simplest phrasing of the standard, set forth in *Ritchie*, is that "our cases establish, at a minimum, that criminal defendants have the right to ... put before a jury evidence that might influence the determination of guilt." *Ritchie*, 480 U.S. at 56. A trial court should deny a request for an *in camera* review only when *no* probability

exists that disclosure of the information would favor the accused's case.

It should be *easier* to get an in-camera hearing where the privilege is a qualified privilege, rather than an absolute one. We would add that if a trial court were to err on the side of the defendant in a criminal case in granting an in-camera hearing, any harm in that regard would be *de minimis* compared to erring in ordering that information to be revealed.

Katlein, at 88 (emphasis added).

In *Pinder*, equally intimate information absolutely privileged by statute was deemed discoverable when an accused established "a reasonable probability that the privileged matters contain information necessary to his defense." 678 So. 2d at 417. That standard is far too stringent here. Because of the qualified nature of the psychotherapist-patient privilege, a more reasoned threshold must apply to criminal accuseds. Either the trial court *in camera* or the parties should be given restricted access to the requested material in order to determine whether disclosure of the information to the trier of fact is required, as is all evidence, to ensure the accused receives a fair trial. *Ritchie*, 480 U.S. at 57. This standard includes a determination of relevance and balancing the probative value against unfair prejudice. *See Katlein*, at 90. The burden, while traditionally placed on the defendant, must be sufficiently flexible that any doubts are resolved in favor of disclosure. *Commonwealth v. Bishop*, 617 N.E. 2d at 998.

D. Fundamental Fairness Requires That Potentially Favorable Information Not Be Withheld From An Accused.

Determining the truth is a complicated business, and its achievement can be thwarted easily. *Chappee v. Vose*, 843 F.2d 25 (1st Cir. 1988). The complexity of present-day society requires that we constantly engage in balancing society's need to promote public peace through law enforcement against cherished long-fought and hard-won individual freedoms. In this quest, we must be forever vigilant to ensure that only the guilty are convicted and, even then, fairly so. "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." *McNabb v. United States*, 318 U.S. 332, 347, 63 S. Ct. 608 (1943). It was for these reasons the Supreme Court in *Ritchie* cautioned that "the state's confidentiality interests are a matter to be weighed in the *Brady* equation." *Asay v. Florida Parole Commission*, 649 So. 2d 859, 861 (Fla. 1994) (Kogan, J., specially concurring) (noting that "*Brady* must surely apply equally to the Clemency Board. No one seriously can argue an executive privilege to permit an innocent person to be executed.").

It is inconceivable that, in a criminal case, room shall not be left open even for the "rare instances where inadvertence or some other factor results in exculpatory

evidence gathered long after trial not being disclosed, possibly including information conclusively showing [i]nnocence." *Id.* Such a conclusion would deprive every criminally accused of the "procedural safeguards" which are the hallmark of our American justice system, a result none of us can countenance. The *en banc* Third District breached that benchmark, requiring this court to resurrect the guarantee of due process that was rejected by the lower tribunal.

CONCLUSION

The Florida Association of Criminal Defense Lawyers and its Miami Chapter offer their guidance to the Court in resolving the psychotherapist-patient privilege issues raised in this case.

Respectfully submitted,

H. SCOTT FINGERHUT
Florida Bar No. 796727
H. SCOTT FINGERHUT, P.A.
2400 South Dixie Highway
The 2400 Building, Second Floor
Miami, Florida 33133-3100
Telephone: 305-285-0500

BENEDICT P. KUEHNE
FLORIDA BAR NO. 233293
SALE & KUEHNE, P.A.
Bank of America Tower, Suite 3550
100 S.E. 2 Street
Miami, Florida 33131-2154
Telephone: 305-789-5989

*Counsel for the Amicus Curiae
Florida Association of Criminal
Defense Lawyers and Florida Association of Criminal
Defense Lawyers-Miami Chapter*

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief was delivered by

United States Mail this 12th day of July 2002, upon:

Paulette R. Taylor
Office of the Attorney General
Rivergate Plaza, Suite 950
444 Brickell Avenue
Miami, Florida 33131
(Counsel for Respondent)

Eric M. Cohen
Two Datan Center - Suite 1200
9130 S. Dadeland Blvd.
Miami, FL 33156
(Counsel for Petitioner)

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BENEDICT P. KUEHNE