South Carolina Law Review

Volume 48 | Issue 3 Article 10

Spring 1997

South Carolina Supreme Court Lays Down Bright-Line Rule: Counseling Notes Are Not Discoverable Under SCRCP 5(a)(1)(D)

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SOUTH CAROLINA SUPREME COURT LAYS DOWN BRIGHT-LINE RULE: COUNSELING NOTES ARE NOT DISCOVERABLE UNDER S.C. R. CRIM. P. 5(a)(1)(D)

In *State v. Trotter*[1] the South Carolina Supreme Court ruled that the counseling notes of a rape crisis counselor are not subject to disclosure under Rule 5(a)(1)(D)[2] of the South Carolina Rules of Criminal Procedure.[3] Because the issues of disclosure under a Rule 5(a)(1)(C)[4] or a *Brady* motion[5] were not raised, the court expressed no opinion on whether these mechanisms could be successfully employed to require discovery of counseling notes. Rather, the court resolved the *Trotter* case by technically interpreting Rule 5(a)(1)(D). This note explores the broader context and recent developments in this area.

In 1993 Ernest Trotter was convicted of numerous crimes relating to the sexual abuse of his natural born daughter (Daughter).[6] The abuse spanned a period of twenty-two years beginning when Trotter's daughter was four.[7] After her parents' divorce in 1982, Daughter continued to live with her father and even shared a bed with him. She alleged that at one point her father impregnated her, and as a result, she had an abortion.[8] Daughter further testified that she tried to leave her father several times, but he either found her or begged her to stay with him. She stated that she returned to her father out

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1. ___ S.C. ___, 473 S.E.2d 452 (1996).

2. S.C. R. Crim. P. 5(a)(1)(D) states:

> Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial.

3. *See Trotter*, ___ S.C. at ___, 473 S.E.2d at 455.

4. S.C. R. Crim. P. 5(a)(1)(C).

5. *See* Brady v. Maryland, 373 U.S. 83 (1963) (holding that due process rights are implicated when the prosecution withholds requested evidence that is material and favorable to the accused).

6. According to S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1976), it is unlawful to publish the name of a rape victim. Consistent reference to the victim in *Trotter* as "Daughter" is meant to recognize and reinforce the special spirit of confidentiality that *should* be afforded in such situations.

7. *Trotter*, ___ S.C. at ___, 473 S.E.2d at 453.

8. *Id.*

of fear for her safety and that of her two younger sisters who visited on weekends.[9] Daughter told no one about these incidents until she was twenty-three. When she was twenty-six, Daughter reported Trotter's abuses to law enforcement authorities.[10] Subsequently, Daughter voluntarily sought help for herself at a rape crisis center where Martha Busterna counseled her individually (thirty-five times) and in groups (eleven times).[11]

At trial, defense counsel extensively questioned Daughter regarding the apparent inconsistencies between her behavior and her accusations.[12] In response, the solicitor called Busterna as an expert witness to testify that Daughter's behavior was consistent with long-term sexual abuse. The defense objected and argued that pursuant to a previous Rule 5 motion, no results or reports of any physical or mental examinations had been disclosed.[13] The defense further persisted that had Busterna's counseling notes been disclosed as required by subsection (a)(1)(D), Busterna would have been identified as a possible witness.[14] The trial judge ruled, however, that no violation of Rule 5(a)(1)(D) occurred because Busterna did not "examine" the victim and did not prepare any "reports." Furthermore, because the solicitor called Busterna only in response to the defense counsel's extensive questioning and not for the prosecution's case-in-chief, the trial judge found that the solicitor was not required to disclose the witness.[15] The trial judge, however, did limit Busterna's testimony to clinical characterizations of incest victims.[16]

The South Carolina Court of Appeals viewed the matter differently and agreed with Trotter that there had been a "technical violation" of Rule 5. The court of appeals found, however, that Trotter suffered no prejudice because Busterna's testimony did not include any reference to "results or reports."[17] Thus, the appellate court upheld the conviction.[18]

On appeal to the South Carolina Supreme Court, Trotter reiterated his claim that the trial court had erred in allowing Busterna's testimony. In addition, he asserted that the "observations" of the victim made by Busterna

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9. *Id.*

10. *Id.*

11. *Id.* at 454.

12. *See, e.g.*, LENORE E. WALKER, TERRIFYING LOVE (1989) (describing the phenomenon of learned helplessness which explains why predictable responses, like escape, are avoided by sexually abused and physically battered women); ROBIN WARSHAW, I NEVER CALLED IT RAPE (1988) (noting that victims of simple rape are often silent about their ordeal and attempt to repair their lives without resorting to third-party advice or intervention).

13. *Trotter*, ___ S.C. at ___, 473 S.E.2d at 453.

14. *Id.*

15. *Id.* at 454.

16. *Id.*

17. *Id.*

18. *Id.*

in their counseling sessions comprised an "examination" and, therefore, they should have been disclosed pursuant to the Rule 5 motion.[19] Finally, Trotter argued that the court of appeals had erred in finding an absence of any prejudice as a result of the Rule 5(a)(1)(D) violation.[20]

The supreme court first addressed the issue of whether Rule 5(a)(1)(D) requires the prosecution to disclose the mere occurrence of a physical or mental examination. Careful reading of the rule shows that it only requires the prosecution to allow "the defendant to inspect and copy any *results or reports* of physical or mental examinations . . . ."[21] The court found that no examination reports or results were generated because Busterna provided only supportive counseling and performed no examination of Daughter.[22]

Notwithstanding its conclusion that no examination had taken place, the court buffered its decision by exploring the more complex issue of whether "counseling notes" similar to those compiled in the Daughter's interview would be discoverable as "results or reports." That is, even if there were an examination, would notes constitute results or reports for Rule 5 purposes? In considering this issue, the court examined the recent decision of the Supreme Court of Appeals of West Virginia in *State v. Roy*.[23] In *Roy* the defendant, convicted of statutory rape,[24] sought to discover the counseling records of the victim under Rule 16 of the West Virginia Rules of Criminal Procedure.[25] The West Virginia court found that counseling notes were not covered by its Rule 16(a)(1)(D). The court succinctly reasoned that the counseling notes "were not 'results or reports of physical or mental examinations'" but "merely notes made during a counseling session . . . ."[26]

The South Carolina court also relied upon *United States v. Iglesias*,[27] in which the Ninth Circuit defined report as "an official or formal statement of facts or proceedings" and result as "[a] conclusion or end to which any course or condition of things leads."[28] The *Trotter* court approved the position that

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19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. 460 S.E.2d 277 (W. Va. 1995).

24. *Id.* at 280.

25. *Id.* at 282. Rule 16(a)(1)(D) of the West Virginia Rules of Criminal Procedure and Rule 5(a)(1)(D) of the South Carolina Rules of Criminal Procedure are essentially indistinguishable from Rule 16(a)(1)(D) of the Federal Rules of Criminal Procedure.

26. *See Roy*, 460 S.E.2d at 283. The notes in *Roy* were taken down "during a counseling session precipitated by the impending divorce of the victim's mother and stepfather." *Id.*

27. 881 F.2d 1519 (9th Cir. 1989).

28. *See id.* at 1523 (citations omitted). It should be noted, however, that not all members of the court found these meanings to be definitive. As Judge Boochever commented in his dissent: "Just as the devil may quote scriptures, . . . a dissent can *also* cite from dictionaries." *Id.* at 1524 (emphasis added). Boochever discovered a definition of "report" to be "an account or statement

"notes taken during an interview, particularly a mental examination, are merely the raw data from which the expert may later draw the conclusions that are noted in a report or test result."[29]

In *Trotter* the supreme court essentially laid down a bright-line rule: "[C]ounseling sessions such as the ones in this case do not constitute physical or mental examinations. Even if they did, *notes* made from those examinations would not be subject to disclosure under Rule 5(a)(1)(D)."[30]

The ruling, however, raises the interesting question of whether counseling notes are discoverable by some other mechanism. Rule 5(a)(1)(C), which deals with documents and tangible objects, states:

> Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.[31]

The *Iglesias* majority, like the court in *Trotter*, did not attempt to analyze whether laboratory log notes were properly discoverable under Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure.[32] The *Iglesias* dissent, however, took precisely this position: that the notes might be discoverable under Rule 16(a)(1)(C).[33] The dissent emphasized that the Advisory Committee on Criminal Rules opined that Rule 16 "is intended to prescribe the minimum amount of discovery to which the parties are entitled."[34]

In many respects Rule 5(a)(1)(C) and Rule 5(a)(1)(D) are quite similar. On a cursory reading, it appears that Rule 5(a)(1)(D) merely substitutes the words "results or reports of physical or mental examinations" for the

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describing in detail an event, situation, or the like." *Id.* at 1524 (quoting Random House College Dictionary 1119 (rev. ed. 1980)). The *Trotter* court actually distilled the *Iglesias* definition of result into "a conclusion derived from facts gleaned during an examination." *Trotter*, ___ S.C. ___, ___, 473 S.E.2d 452, 455 (1996).

29. *Trotter*, ___ S.C. at ___, 473 S.E.2d at 455 (citing United States v. Marenghi, 893 F. Supp. 85, 98 (D. Me. 1995)).

30. *Id.* Given the narrow approach taken by the *Trotter* court, it would seem reasonable to assume that materiality to the defense (as required by the relevant sections of Rule 5) was viewed as a foregone conclusion.

31. S.C. R. Crim. P. 5(a)(1)(C).

32. *Iglesias*, 881 F.2d at 1519. Rule 5(a)(1)(C) of the South Carolina Rules of Criminal Procedure is essentially the same as Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure.

33. *Iglesias*, 881 F.2d at 1527.

34. *Id.* at 1525.

Rule 5(a)(1)(C) wording of "books, papers, documents, photographs, tangible objects . . . ."[35] On a more careful inspection, however, one notes that Rule 5(a)(1)(C) contains no due diligence requirement. Rule 5(a)(1)(D) expressly states that not only the "results or reports of physical or mental examinations" that are "within the possession, custody, or control of the prosecution" but also those whose "*existence . . . is known, or by the exercise of due diligence may become known, to the attorney for the prosecution*"[36] are discoverable. Thus, although Rule 5(a)(1)(C) initially appears to be a broader discovery tool, in certain circumstances it may actually limit the defensive arsenal. To be discoverable in a case such as *Trotter*, counseling notes need to be material to the defense and within the actual or, arguably, the constructive possession, custody, or control of the prosecution. In *State v. Gulledge*[37] the South Carolina Court of Appeals found that documents held by a third party were not within the possession, custody, or control of the prosecution.[38] Thus, unless a persuasive argument can be made for constructive possession, it appears that counseling notes held by a counselor might not be discoverable under Rule 5(a)(1)(C).[39]

If counseling notes are not discoverable under Rule 5, are they subject to disclosure as *Brady* material? In the seminal case of *Brady v. Maryland*,[40] the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . . ."[41] In *United States v. Bagley*,[42] one of *Brady's* progeny, the Court clarified the materiality standard of *Brady*, explaining that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[43]

In *Clark v. State*[44] the South Carolina Supreme Court specifically endorsed the *Bagley* standard.[45] And in *State v. Bryant*[46] the supreme court stated that "*Brady* requires that the State disclose evidence in its *posses-*

35. S.C. R. Crim. P. 5(a)(1)(C) and (D).
36. S.C. R. Crim. P. 5(a)(1)(D) (emphasis added).
37. ___ S.C. ___, 468 S.E.2d 665 (Ct. App. 1996).
38. *Id.* at 667.
39. Again, materiality to the defense seems a foregone conclusion. *See supra* note 30.
40. 373 U.S. 83 (1963).
41. *Id.* at 87.
42. 473 U.S. 667 (1985).
43. *Id.* at 682.
44. 315 S.C. 385, 434 S.E.2d 266 (1993).
45. *Id.* at 388, 434 S.E.2d at 268.
46. 307 S.C. 458, 415 S.E.2d 806 (1992).

sion . . . ."[47] If the defense's discovery request can meet all of these tests, then surely counseling notes may be discoverable as *Brady* material.[48]

As a final issue, even if found to be discoverable using one of the above mentioned devices, are or should counseling notes be privileged communications and, thus, barred from disclosure? South Carolina Code section 19-11-95[49] (concerning confidences of patients of mental illness or emotional conditions) prohibits a "provider"[50] from revealing a patient's confidences except in certain circumstances. The statute stipulates that a provider shall reveal "confidences when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding . . . ."[51]

Notably the statute does not grant an *absolute* privilege. If counseling notes are discoverable using a Rule 5(a)(1)(C) or *Brady* motion and if defense counsel can convince the court of "good cause," South Carolina's qualified privilege for confidences of patients of mental illness or emotional conditions would not bar disclosure of the notes. But one question remains: *Should* there be protection under the auspices of privilege?

In June 1996, the United States Supreme Court willingly examined the issue of absolute privilege in a psychotherapist-patient relationship.[52] In *Jaffee*

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47. *Id.* at 461, 415 S.E.2d at 808 (emphasis added) (citing Pennsylvania v. Ritchie, 480 U.S. 39 (1987)).

48. Actual application of these tests to the *Trotter* facts is an elementary exercise best left to the reader's imagination.

49. S.C. CODE ANN. § 19-11-95 (Law Co-op. 1976).

50. "Provider" is defined in S.C. CODE ANN. § 19-11-95(A)(1) as:

> a person licensed under the provisions of any of the following and who enters into a relationship with a patient to provide diagnosis, counseling, or treatment of a mental illness or emotional condition:
> (a) Chapter 55 of Title 40;
> (b) Chapter 75 of Title 40;
> (c) Section 40-63-70 as a licensed master social worker or a licensed independent social worker;
> (d) Section 40-33-10 as a registered nurse who meets the requirements of a clinical nurse specialist and who works in the field of mental health.

Most rape counselors at a level equal to Mrs. Busterna are licensed MSW's. Telephone Interview with Martha Busterna (Apr. 4, 1997).

51. S.C. CODE ANN. § 19-11-95(D)(1) (Law Co-op. 1976).

52. Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (holding that Rule 501 of the Federal Rules of Evidence incorporates the absolute privilege of confidentiality between patient and psychotherapist, as well as between a patient and a clinical social worker).

FED. R. EVID. 501 States:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court . . . the privilege of a witness . . . shall be governed by the principles of the common law as they be interpreted by the courts of the United States in the light of reason and experi-

v. Redmond the Court stated definitively that, at least in the federal courts, "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure . . . ."[53] *Jaffee* was a wrongful death and excessive force suit brought under 42 U.S.C. § 1983 against an Illinois policewoman. During pretrial discovery, the representative of defendant's estate sought access to counseling notes made in the course of numerous sessions between the policewoman and a licensed social worker.[54] The district court judge ordered disclosure; however, neither the social worker nor the policewoman complied. At trial, the judge instructed the jury that in light of defendant's refusal to turn over the notes, it could presume that the notes were unfavorable to defendant.[55] The Seventh Circuit reversed the jury verdict for the petitioner and remanded, concluding that Rule 501 "compelled recognition of a psychotherapist-patient privilege."[56] The Supreme Court granted certiorari to resolve the conflict among the courts of appeals as to whether the federal courts should recognize a psychotherapist-patient privilege under Rule 501.[57] Basing its decision on the "uniform judgment of the States,"[58] the Court reasoned that "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court."[59] The Court was willing to recognize the absolute nature of the privilege because it found that a "public good of transcendent importance" was served through the facilitation of confidential communication believed to be so necessary to the treatment of persons "suffering the effects of [] mental or emotional problem[s]."[60]

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experience . . . .

53. *Jaffee*, 116 S. Ct. at 1931.

54. *Id.* at 1926.

55. *Id.*

56. *Id.*

57. *Id.* at 1927.

58. *Id.* at 1930. The Court reasoned that the federal courts should recognize a psychotherapist-patient privilege because "some form" of privilege was already in existence in every state. *Id.* at 1929. The Court cited S.C. CODE ANN. § 19-11-95 in its survey of state privilege statutes. *Id.* at n.11. *But see infra* note 62.

59. *Id.*

60. *Id.* at 1929. The Court in *Jaffee* never directly addressed constitutional issues. Instead, "'reason and experience'" persuaded the Court that the protection of the psychotherapist-patient confidential communication "'promotes sufficiently important interests to outweigh the need for probative evidence . . . .'" *Id.* at 1928 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)). A number of state courts have ruled that a defendant does not have a constitutional right to demand disclosure of such communications. Catherine Barr, *Developments in Criminal Law: Restricted Access to Rape Counseling Records*, 41 B. B.J. January/February 1997, at 8, 24 n.36 (citing Colorado, Illinois and Pennsylvania case law). However, as Ms. Barr explains in her article, the Massachusetts Supreme Judicial Court in interpreting what appeared to be an absolute state sexual assault victim/sexual assault counselor confidential communication privilege recently narrowed but upheld a balancing of the victim's privacy rights and the defendant's constitutional

In 1995, South Carolina adopted evidence rules modeled after the Federal Rules of Evidence. South Carolina's Rule 501 modifies the federal rule by referring to the state's constitution and laws.[61] As discussed previously, South Carolina Code section 19-11-95 is the statutory treatment of patient/provider confidences. Because of this state's statutory restrictions, South Carolina courts would again be capable of refusing a request for nondisclosure on privilege grounds. That is, *Jaffee*'s federal common law is tempered by South Carolina Code section 19-11-95.[62] Although South Carolina's qualified privilege should provide a defendant access to counseling notes if the court can find "good cause," what now should the court interpret as good cause? In other words, what would a competent attorney argue in trying to preclude disclosure of counseling notes in circumstances similar to the *Trotter* case?

A recent Massachusetts case is illuminating. Decided in July 1996, *Commonwealth v. Fuller*[63] modified the procedures Massachusetts trial courts should use when counseling records and communications between a sexual assault victim and a sexual assault counselor are sought by a defendant.[64] In *Fuller* an alleged rape victim entered into counseling sessions with the Rape Crisis Center of Central Massachusetts, Inc.. The defendant sought the counseling records, and a lower court ordered the rape crisis center to produce the material for an in camera review.[65] The rape crisis center refused on the grounds that the communications were absolutely privileged under Massachusetts's law.[66] The lower court ruled that the defendant, by stating that the records might be relevant to the victim's veracity, had "'shown a

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right of confrontation. *Id.* at 8 (summarizing the court's ruling in Commonwealth v. Fuller, 423 Mass. 216 (1996)).

This author would be more comfortable living with the *Jaffee* decision had the court squarely addressed the encroaching constitutional issues.

61. S.C. R. EVID. 501 became effective on Sept. 3, 1995.

62. The *Jaffee* court surveyed the statutory law of the fifty states and noted that every state jurisdiction had "enacted into law *some* form of psychotherapist privilege." *Jaffee*, 116 S. Ct. at 1929 (emphasis added). In footnote 11 of the decision, the Court cites S.C. CODE ANN. § 19-11-95 (Law Co-op. 1976). *Id.* at 1929 n.11. The dissent, however, correctly pointed out that

> although the Court is technically correct that "the vast majority of States explicitly extend a testimonial privilege to licensed social workers," *ante*, at 1932, that uniformity exists only at the most superficial level. No State has adopted the privilege without restriction; the nature of the restrictions varies enormously from jurisdiction to jurisdiction; and 10 States, I reiterate, effectively reject the privilege entirely.

Jaffe, 116 S. Ct. at 1940 (Scalia, A., dissenting).

63. 667 N.E.2d 847 (Mass. 1996).

64. MASS. GEN. LAWS ANN. ch. 233, § 20J (West 1986 & Supp. 1997) provides in pertinent part that confidential communications between a victim of sexual assault and a sexual assault counselor "shall not be subject to discovery and shall be inadmissible in any criminal or civil proceeding without the prior written consent of the victim . . . ."

65. *Fuller*, 667 N.E.2d at 849.

66. *Id.*

legitimate need for access'" sufficient to justify an in camera review.[67] In vacating the order for production, the Supreme Judicial Court of Massachusetts delineated a standard to be used when deciding whether a defendant can compel disclosure of counseling records. The defendant must file a written motion seeking production "explaining in detail his reasons for doing so."[68] A judge must rule on the motion before the records can be ordered from the counselor, and the motion must be "the last step in a defendant's pretrial discovery." That is, the defense counsel must show that its own independent investigation indicates that the material is not available elsewhere.[69] Finally, an in camera review should only occur after the defendant "has demonstrated a good faith, specific, and reasonable basis for believing that the records will contain exculpatory evidence which is relevant and material to the issue of the defendant's guilt."[70]It is worth noting that Massachusetts' privilege statute appears even less open to interpretation than South Carolina's.[71]

State v. Trotter definitively answered one question: counseling notes of a rape crisis counselor are not discoverable under Rule 5(a)(1)(D).[72] The door is yet ajar, however, as to whether these notes are subject to disclosure under Rule 5(a)(1)(C) or as *Brady* material. Furthermore, the question of privilege, in light of recent national case law and scholarship,[73] is raised. Arguably, a matter for the General Assembly, the issue of privilege would be conspicuously absent were the *Trotter* scenario to come before a South Carolina court today. In the words of this country's Supreme Court, it is a matter of "transcendent importance."[74]

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67. *Id.* at 851.

68. *Id.* at 855.

69. *Id.*

70. *Id.*

71. *See supra*, text accompanying note 51 and note 64.

72. State v. Trotter, ___ S.C. ___, ___, 473 S.E.2d 452, 455 (1996).

73. *E.g.*, Catherine Barr, *Developments in Criminal Law: Restricted Access to Rape Counseling Records*, 41 B. B.J., January/February 1997 at 8; Euphemia B. Warren, Note, *She's Gotta Have It Now: A Qualified Rape Crisis Counselor-Victim Privilege*, 17 CARDOZO L. REV. 141 (1995).

74. Jaffee v. Redmond, 116 S.Ct. 1923, 1929 (1996).