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Hon. Vanessa Zecher
Hall of Justice
Dept. 40

(ENDORSED)
FILED
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DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY:  DEPUTY

Re: Letter brief re: psychotherapist-patient privilege

Dear Judge Zecher,

Thank you for permitting briefing on this important issue. Our position is explained below.

Facts

Sierra LaMar disappeared on March 16, 2012. Mr. Garcia-Torres is charged with her murder even though her body has never been found. The prosecution has presented evidence through witnesses, photos, and videos in an effort to demonstrate that Ms. LaMar had no reason to run away and “abandon” her family and friends. The defense has tried to present a contrary picture of Ms. LaMar’s mental state and, for example, has demonstrated that she was unhappy about moving to Morgan Hill and would have preferred to live in Fremont. In an attempt to further develop an alternative to the prosecution’s theory, the defense has subpoenaed records from two psychotherapists who treated Ms. LaMar.

According to the reports we were provided in discovery, the two therapists were interviewed by members of the Santa Clara County Sheriff’s Department and the FBI. The reports do not say if either professional obtained a release. But the description of the interviews reveals that both disclosed information to law enforcement directly related to Ms. LaMar’s treatment and to the therapist’s opinions and conclusions regarding her state of mind.

Assistant Public Defenders: ***

Issues and Analysis

1. Does the psychotherapist-patient privilege apply?

The privilege does not apply because the Evidence Code section 1027 exception controls. Evidence Code section 1014 creates a privilege for confidential communications between a therapist and her patient. An exception to the privilege is found in Evidence Code section 1027. Specifically, when the patient is under 16 years of age and the therapist believes the patient may have been the victim of a crime, the privilege is lifted both for the purposes of making a report to law enforcement and for the adjudication of any charges that may be forthcoming. (*People v. Caplan* (1987) 193 Cal.App.3d 543.) Section 1027 shifts the privilege from the patient to the therapist and requires that the therapist act in the patient's best interest. (*ibid.*)

Section 1027 applies because Sierra was under 16 years old, the therapists had reasonable cause to believe she was the victim of a crime, and they believed that disclosure was in Sierra's best interest. Thus, the disclosures to law enforcement did not violate the privilege and the privilege does not currently apply.

Section 1027 is not limited to child abuse cases. Indeed, the Law Review Commission Comments say that it applies when the child may be a victim of a crime and cites child abuse cases as an example. (Cal. Law Revision Com. com. on Evid. Code § 1027.) The Comments are persuasive evidence of the Legislature's intent. (*Brian W. v. Superior Court* (1978) 20 Cal.3d 618.) The fact that child abuse cases are mentioned only as an example and not as a limitation suggests that the exception has broader application. Thus, the privilege does not apply to the subpoenaed records.

2. If the Court determines the privilege applies, is there anyone who can assert it? And, if not, how does that fact impact the determination?

There is no one to assert the privilege and therefore it should not apply to prevent the defense from obtaining the records. The privilege belongs to the patient. (Evid. Code § 1013.) A patient is a person who visits a therapist for the purpose of treatment and/or diagnosis. (*Story v. Superior Court* (2003) 109 Cal.App.4th 1007.) Sierra meets this definition of patient.

The patient or the patient's guardian, conservator, or personal representative may assert the privilege. A deceased child's parent cannot assert it unless they are the personal representative; i.e., the executor of the estate. (*Boling v. Superior Court* (1980) 105 Cal.App.3d 430.) There is no such person in this case.

The Court may assert the privilege if the holder is not present to claim it. (Evid. Code § 916.) But it should not do so when the proponent of the evidence shows that no person authorized to claim the privilege exists. (ibid.) Here, if the Court determines that Sierra is deceased (and the prosecution would be hard-pressed to argue otherwise), there is no one who can claim the privilege. She did not have a guardian, a conservator, or a personal representative.

3. If the privilege applies, does Mr. Garcia-Torres's constitutional rights require that it be overcome?

The privilege is not absolute. It must not be applied in a manner that violates a criminal defendant's right to confront and cross-examine witnesses, to due process of law, to a fair trial, or to a reliable penalty determination. For example, the Supreme Court held in *Davis v. Alaska* (1974) 415 U.S. 308 that a witness's right to privacy could not operate to prevent the defendant from cross-examining the witness about potential bias. In addition, the Court held in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 that a defendant has a due process right to have the court conduct an in camera review of otherwise confidential material to determine if it should be released.

The California Supreme Court in *Hammon* limits these cases only to the extent that the review should take place in the trial court and not before trial. (*People v. Hammon* (1997) 15 Cal.4th 1117.) The evidence presented at trial thus far has made Ms. LaMar's mental state a key issue. The notes from her therapy sessions can reasonably be expected to provide insight into that mental state. The privilege should therefore give way to Mr. Garcia-Torres's constitutional rights.

Conclusion

The subpoenaed records do not fall until the protection of the psychotherapist-patient privilege because the Evidence Code section 1027 applies. Even if this Court were to find that the exception does not apply, the records should still be released because there is no one in existence who can claim the privilege. Finally, even if this Court were to believe the privilege applies, Mr. Garcia-Torres's constitutional rights require that the privilege give way the information be released.

Best regards,


Brian Matthews
Deputy Alternate Defender