#2016-014

Carolyn A. Koegler

From: Hon. William Delker
Sent: Thursday, April 19, 2018 2:23 PM
To: Chief Justice Robert J Lynn; Carolyn A. Koegler
Subject: In Camera Review

I know I have been a broken record on this issue. I am sure that I have worn out my welcome long ago on this debate. That said, I am not ready to throw the towel in just yet.

I have reviewed Pennsylvania v. Ritchie, State v. Gagne, State v. Cressy, and In re State (State v. MacDonald) again in preparation for the June 1 meeting. I am more convinced than ever that rule-making is not the proper way to resolve the debate we have been having on this issue over the last many months. I believe that these cases, which I have attached for ease of reference, establish that *in camera* review without the involvement of defense counsel has constitutional dimensions. It is the result of a careful weighing and balancing of interests of the privilege holder against the defendant's right to a fair trial. MacDonald makes this particularly clear. In light of this, I believe that promulgating a rule that would change this constitutional balance is beyond the scope of the Advisory Committee's authority. I also have concern that we exceed our jurisdiction by attempting to modify the privileges created by the legislature through statute. See State v. Carter, 167 N.H. 161, 169–70 (2014) ("legislative power to address matters of court procedure is precluded only if the legislation at issue compromise[s] the core adjudicatory functions of the judiciary to resolve cases fairly and impartially and to protect the constitutional rights of all persons who come before the courts." (quotation omitted)).

While the propose rule for *in camera* review may fall within the category of procedures governing "core adjudicatory functions of the judiciary to resolve cases fairly and impartially and to protect the constitutional rights of all persons who come before the courts," id., I believe that this issue should be left to the adversary process. In other words, if a change is necessary, that should be done based on the adversary process where both sides can fully brief and argue the case law and policy reasons in the context of a concrete case. Every aspect of this rule (from the initial threshold to trigger review, to who should be involved in the review, to when records can be used at trial) has a constitutional dimension. By codifying the current state of the law in a rule, we risk thwarting the development of the law through the common law process to address the specific circumstances of individual cases.

For these reasons, I urge the Advisory Committee to abandon all efforts to promulgate a rule (whether it is my proposal, Attorney Johnson's proposal, or Attorney Warecki's proposal). If the Advisory Committee recommends adoption of any version of the rule, I strongly urge that recommendation be accompanied by oral argument to give all interested parties an opportunity to brief these matters. While the Committee has had extensive debate and heard from a number of people interested in the issue, we have never formally received briefing and argument in the manner relied on by the Supreme Court in certain situations. See In re Proposed New Hampshire Rules of Civil Procedure (Petition of New Hampshire Bar Ass'n), 139 N.H. 512, 513, 659 A.2d 420, 420 (1995). This process would add considerable value to the decision.

Thank you for your patience.


Pennsylvania v Ritchie.rtf


State v Gagne.rtf


State v Cressey.rtf


In re State.rtf

Will Delker
Supervisory Judge

107 S.Ct. 989
Supreme Court of the United States

PENNSYLVANIA, Petitioner
v.

George F. RITCHIE.
No. 85–1347.

Argued Dec. 3, 1986.

Decided Feb. 24, 1987.

Synopsis
Defendant was convicted before the Court of Common Pleas, Criminal Division, No. CC7903887A, Allegheny County, of rape, involuntary sexual intercourse, incest, and corruption of minor, and defendant appealed. The Superior Court, No. 137 Pittsburgh 1981, 324 Pa.Super. 557, 472 A.2d 220, vacated and remanded for further proceedings. The Commonwealth appealed. The Supreme Court of Pennsylvania, No. 69 W.D. Appeal Docket 1984, McDermott, J., 509 Pa. 357, 502 A.2d 148, remanded. State sought writ of certiorari. The Supreme Court, Justice Powell, held that: (1) defendant was entitled to have Pennsylvania Children and Youth Services file reviewed by trial court to determine whether it contained information that probably would have changed outcome of trial, and (2) defense counsel was not entitled to examine confidential information in Children and Youth Services file. Furthermore, Justice Powell, with the Chief Justice and two other Justices concurring, and one Justice concurring in result, held that failure to disclose Children and Youth Services file did not violate the confrontation clause.

Affirmed in part, reversed in part, and remanded for further proceedings.

Justice Blackmun filed opinion concurring in part and concurring in judgment.

Justice Brennan, with whom Justice Marshall joined, filed dissenting opinion.

Justice Stevens, with whom Justices Brennan, Marshall, and Scalia, joined, filed dissenting opinion.

West Headnotes (21)

[1] **Federal Courts**
Review of state courts

Normally, finality doctrine contained in statute governing Supreme Court review of decision of highest court of state is not satisfied if state court still must conduct further substantive proceedings before rights of parties as to federal issues are resolved. 28 U.S.C.A. § 1257(3).

6 Cases that cite this headnote

[2] **Federal Courts**
Review of state courts

Although Supreme Court is without jurisdiction to review interlocutory judgment, jurisdiction is proper where federal claim has been finally decided, with further proceedings on merits in state court to come, but in which later review of federal issue could not be had whatever ultimate outcome of case. 28 U.S.C.A. § 1257(3).

6 Cases that cite this headnote

[3] **Courts**
Previous Decisions in Same Case as Law of the Case

Law of case principles are not bar to Supreme Court's jurisdiction.

1 Cases that cite this headnote

[4] **Federal Courts**
Criminal matters

Existence of several proceedings in Pennsylvania courts did not preclude review of issue concerning extent to which State's interest in confidentiality of its investigative files concerning child abuse must yield to criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence, where Sixth Amendment issue had been finally decided by highest court of Pennsylvania, and unless Supreme Court reviewed decision, harm that State sought to avoid, the disclosure of confidential files, would occur regardless of result on remand. U.S.C.A. Const.Amends. 6, 14; 28 U.S.C.A. § 1257(3).

97 Cases that cite this headnote

[5] **Criminal Law**
Right of Accused to Confront Witnesses
Criminal Law
Cross-examination and impeachment

Confrontation clause provides two types of protection for criminal defendant: right physically to face those who testify against him, and right to conduct cross-examination. (Per Justice Powell, with the Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amend. 6.

301 Cases that cite this headnote

[6] **Witnesses**
Cross-Examination to Show Interest or Bias

Right to cross-examine includes opportunity to show that witness is biased, or that testimony is exaggerated or unbelievable. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amend. 6.

74 Cases that cite this headnote

[7] **Criminal Law**
Failure to produce or disclose witnesses or evidence

Confrontation clause is not constitutionally compelled rule of pretrial discovery. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amend. 6.

67 Cases that cite this headnote

[8] **Criminal Law**
Cross-examination and impeachment

Right of confrontation is trial right, designed to prevent improper restrictions on types of questions that defense counsel may ask during cross-examination. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amend. 6.

189 Cases that cite this headnote

[9] **Criminal Law**
Information or Things, Disclosure of
Criminal Law
Impeaching evidence

Ability to question adverse witnesses does not include power to require pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amend. 6.

111 Cases that cite this headnote

[10] **Criminal Law**
Right of Accused to Confront Witnesses
Criminal Law
Cross-examination and impeachment

Normally right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amend. 6.

74 Cases that cite this headnote

[11] **Criminal Law**
Cross-examination and impeachment

Confrontation clause only guarantees opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, defense might wish. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amend. 6.

171 Cases that cite this headnote

[12] **Criminal Law**
Failure to produce or disclose witnesses or evidence

Confrontation clause was not violated by withholding Pennsylvania Children and Youth Services' child abuse investigative file from defendant; defense counsel was able to cross-examine all trial witnesses fully. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amend. 6.

135 Cases that cite this headnote

[13] **Witnesses**
Right of Accused to Compulsory Process

Criminal defendants have right under compulsory process clause to government's assistance in compelling attendance of favorable witnesses at trial and right to put before jury evidence that might influence determination of guilt. U.S.C.A. Const.Amend. 6.

237 Cases that cite this headnote

[14] **Witnesses**
Right of Accused to Compulsory Process

Sixth Amendment compulsory process provides no greater protection in areas governing defendant's right to discover identity of witnesses, or to require government to produce exculpatory evidence, than protections afforded by due process. U.S.C.A. Const.Amends. 6, 14.

111 Cases that cite this headnote

[15] **Criminal Law**
Materiality and probable effect of information in general

Government has obligation to turn over evidence in its possession that is both favorable to accused and material to guilt or punishment. U.S.C.A. Const.Amends. 5, 14.

230 Cases that cite this headnote

[16] **Criminal Law**
Materiality and probable effect of information in general

Evidence is material to guilt or punishment only if there is reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different.

459 Cases that cite this headnote

[17] **Privileged Communications and Confidentiality**
Juvenile records

Public interest in protecting sensitive information such as that in Pennsylvania Children and Youth Services child abuse records does not necessarily prevent disclosure in all circumstances.

34 Cases that cite this headnote

[18] **Criminal Law**
Examination by court; inspection in camera
Criminal Law
Errors and irregularities in preliminary proceedings
Privileged Communications and Confidentiality
Juvenile records

Defendant charged with child abuse was entitled to have Pennsylvania Children and Youth Services file reviewed by trial court to determine whether file contained information that probably would have changed outcome of his trial; furthermore, if file did contain such information, defendant was entitled to new trial, but, if records contained no such information, or if nondisclosure was harmless beyond reasonable doubt, lower court would be free to reinstate prior conviction. U.S.C.A. Const.Amend. 14.

328 Cases that cite this headnote

[19] **Criminal Law**
Documents or tangible objects
Criminal Law
Records

Defendant's right to discover exculpatory evidence does not include unsupervised authority to search through Commonwealth's files and make determination as to materiality of information. U.S.C.A. Const.Amend. 14.

326 Cases that cite this headnote

[20] **Criminal Law**
Examination by court; inspection in camera
Privileged Communications and Confidentiality
Juvenile records

Interest of defendant charged with child abuse, as well as that of Commonwealth of Pennsylvania, in insuring fair trial could be fully protected by requiring that Pennsylvania Children and Youth Services child abuse file be submitted only to trial court for in camera review; to allow full disclosure to defense counsel of file would sacrifice unnecessarily Commonwealth's compelling interest of protecting child abuse information.

347 Cases that cite this headnote

[21] **Criminal Law**
Time and manner of required disclosure

Duty to disclose exculpatory information is ongoing.

58 Cases that cite this headnote

***39 **991** *Syllabus**

Respondent was charged with various sexual offenses against his minor daughter. The matter was referred to the Children and Youth Services (CYS), a protective service agency established by Pennsylvania to investigate cases of suspected child mistreatment and neglect. During pretrial discovery, respondent served CYS with a subpoena, seeking access to the records related to the immediate charges, as well as certain earlier records compiled when CYS investigated a separate report that respondent's children were being abused. CYS refused to comply with the subpoena, claiming that the records were privileged under a Pennsylvania statute which provides

that all CYS records must be kept confidential, subject to specified exceptions. One of the exceptions is that **992 CYS may disclose reports to a "court of competent jurisdiction pursuant to a court order." At an in-chambers hearing in the trial court, respondent argued that he was entitled to the information because the CYS file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence. Although the trial judge did not examine the entire CYS file, he refused to order disclosure. At the trial, which resulted in respondent's conviction by a jury, the main witness against him was his daughter, who was cross-examined at length by defense counsel. On appeal, the Pennsylvania Superior Court held that the failure to disclose the daughter's statements contained in the CYS file violated the Confrontation Clause of the Sixth Amendment. The court vacated the conviction and remanded for further proceedings to determine whether a new trial should be granted. On the State's appeal, the Pennsylvania Supreme Court held that, by denying access to the CYS file, the trial court order had violated both the Confrontation and the Compulsory Process Clauses of the Sixth Amendment, and that the conviction must be vacated and the case remanded to determine if a new trial was necessary. The court concluded that defense counsel was entitled to review the entire file for any useful evidence.

Held: The judgment is affirmed in part and reversed in part, and the case is remanded.

509 Pa. 357, 502 A.2d 148 (1985), affirmed in part, reversed in part, and remanded.

Justice POWELL delivered the opinion of the Court as to Parts I, II, III–B, III–C, and IV, concluding that:

*40 1. This Court does not lack jurisdiction on the ground that the decision below is not a "final judgment or decree," as required by 28 U.S.C. § 1257(3). Although this Court has no jurisdiction to review an interlocutory judgment, jurisdiction is proper where a federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had whatever the ultimate outcome of the case. Here, the Sixth Amendment issue will not survive for this Court to review regardless of the outcome of the proceedings on remand. The Sixth Amendment issue has been finally decided by the highest court of Pennsylvania, and unless this Court reviews that decision, the harm that the State seeks to avoid—the disclosure of the confidential file—will occur regardless of the result on remand. Pp. 996–998.

2. Criminal defendants have the right under the Compulsory Process Clause to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt. However, this Court has never held that the Clause guarantees the right to discover the *identity* of witnesses, or to require the government to produce exculpatory evidence. Instead, claims such as respondent's traditionally have been evaluated under the broader protections of the Due Process Clause of the Fourteenth Amendment. Compulsory process provides no greater protections in this area than those afforded by due process, and thus respondent's claims more properly are considered by reference to due process. Pp. 1000–1001.

3. Under due process principles, the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. Although the public interest in protecting sensitive information such as that in CYS records is strong, this interest does not necessarily prevent disclosure in all circumstances. Because the Pennsylvania Legislature contemplated *some* use of CYS records in judicial proceedings, there is no reason to believe that relevant information would not be disclosed when a court of competent jurisdiction determined that the information was "material" to the accused's **993 defense. The Pennsylvania Supreme Court thus properly ordered a remand for further proceedings. Respondent is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the CYS file contains no such information, or if the nondisclosure is harmless beyond a reasonable doubt, the trial court will be free to reinstate the prior conviction. Pp. 1001–1002.

*41 4. The Pennsylvania Supreme Court erred in holding that defense counsel must be allowed to examine the confidential information. A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search the State's files and make the determination as to the materiality of the information. Both respondent's and the State's interests in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for *in camera* review. To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the State's compelling interest in protecting its child abuse information. Pp. 1002–1004.

Justice POWELL, joined by THE CHIEF JUSTICE, Justice WHITE, and Justice O'CONNOR, concluded in Part III–A that the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS file violated the Confrontation Clause. There is no merit to respondent's claim that by denying him access to the information necessary to prepare his defense, the trial court interfered with his right of cross-examination guaranteed by the Clause. Respondent argued that he could not effectively question his daughter because, without the CYS material, he did not know which types of questions would best expose the weaknesses in her testimony. However, the Confrontation Clause is not a constitutionally compelled rule of pretrial discovery. The right of confrontation is a *trial* right, guaranteeing an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish. Pp. 998–1000.

Justice BLACKMUN concluded that the Confrontation Clause may be relevant to limitations placed on a defendant's pretrial discovery. There may well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness. A State cannot avoid Confrontation Clause problems simply by deciding to hinder the defendant's right to effective cross-examination, on the basis of a desire to protect the confidentiality interests of a particular class of individuals, at the pretrial, rather than at the trial, stage. However, the procedure the Court has set out for the lower court to follow on remand is adequate to address any confrontation problem. Pp. 1004–1006.

POWELL, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–B, III–C, and IV, in which REHNQUIST, C.J., and WHITE, BLACKMUN, and O'CONNOR, JJ., joined, and an opinion with respect to Part III–A, in which REHNQUIST, C.J., and WHITE and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. ——. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, ***42** *post,* p. ——. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and SCALIA, JJ., joined, *post,* p. 1009.

Attorneys and Law Firms

Edward Marcus Clark argued the cause for petitioner. With him on the briefs was *Robert L. Eberhardt.*

John H. Corbett, Jr., by invitation of the Court, 478 U.S. 1019, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. With him on the brief was *Lester G. Nauhaus.**

* Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *John K. Van de Kamp,* Attorney General, *Steve White,* Chief Assistant Attorney General, *Arnold Overoye,* Assistant Attorney General, *Joel Carey,* Supervising Deputy Attorney General, and *Karen Ziskind,* Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Duane Woodard* of Colorado, *Joseph Lieberman* of Connecticut, *Corinne Watanabe,* Acting Attorney General of Hawaii, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *David Armstrong* of Kentucky, *William J. Guste, Jr.,* of Louisiana, *James E. Tierney* of Maine, *Hubert H. Humphrey III* of Minnesota, *Edwin L. Pittman* of Mississippi, *Michael Greely* of Montana, *Stephen E. Merrill* of New Hampshire, *Lacy H. Thornburg* of North Carolina, *Mike Turpen* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *Mike Cody* of Tennessee, *David L. Wilkinson* of Utah, *Jeffrey L. Amestoy* of Vermont, *William A. Broadus* of Virginia, *Kenneth O. Eikenberry* of Washington, *Charlie Brown* of West Virginia, and *Archie G. McClintock* of Wyoming; for the County of Allegheny, Pennsylvania, on behalf of Allegheny County Children and Youth Services by *George M. Janocsko* and *Robert L. McTiernan;* for the Appellate Committee of the District Attorneys' Association of California by *Ira Reiner, Harry B. Sondheim,* and *Arnold T. Guminski;* for the Pennsylvania Coalition Against Rape et al. by *Nancy D. Wasser;* and for the Sunny von Bulow National Victim Advocacy Center, Inc., et al. by *Frank Gamble Carrington, Jr., David Crump,* and *Ann M. Haralambie.*

Opinion

Justice POWELL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–B, III–C, and IV, and an opinion with respect to Part III–A, in which THE CHIEF JUSTICE, Justice WHITE, and Justice O'CONNOR join.

The question presented in this case is whether and to what extent a State's interest ****994** in the confidentiality of its investigative ***43** files concerning child abuse must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence.

I

As part of its efforts to combat child abuse, the Commonwealth of Pennsylvania has established Children and Youth Services (CYS), a protective service agency charged with investigating cases of suspected mistreatment and neglect. In 1979, respondent George Ritchie was charged with rape, involuntary deviate sexual intercourse, incest, and corruption of a minor. The victim of the alleged attacks was his 13–year-old daughter, who claimed that she had been assaulted by Ritchie two or three times per week during the previous four years. The girl reported the incidents to the police, and the matter then was referred to the CYS.

During pretrial discovery, Ritchie served CYS with a subpoena, seeking access to the records concerning the daughter. Ritchie requested disclosure of the file related to the immediate charges, as well as certain records that he claimed were compiled in 1978, when CYS investigated a separate report by an unidentified source that Ritchie's children were being abused.[1] CYS refused to comply with the subpoena, claiming that the records were privileged under Pennsylvania law. The relevant statute provides that all reports and other information obtained in the course of a CYS investigation must be kept confidential, subject to 11 specific exceptions.[2] One of those exceptions is that the agency may *44 disclose the reports to a "court of competent jurisdiction pursuant to a court order." Pa.Stat.Ann., Tit. 11, § 2215(a)(5) (Purdon Supp.1986).

Ritchie moved to have CYS sanctioned for failing to honor the subpoena, and the trial court held a hearing on the motion in chambers. Ritchie argued that he was entitled to the information because the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence. He also requested disclosure of a medical report that he believed was compiled during the 1978 CYS investigation. Although the trial judge acknowledged that he had not examined the entire CYS file, he accepted a CYS representative's assertion that there was no medical report in the record.[3] The judge then denied the motion and refused to order CYS to disclose the files.[4] See App. 72a.

**995 At trial, the main witness against Ritchie was his daughter. In an attempt to rebut her testimony, defense counsel *45 cross-examined the girl at length, questioning her on all aspects of the alleged attacks and her reasons for not reporting the incidents sooner. Except for routine evidentiary rulings, the trial judge placed no limitation on the scope of cross-examination. At the close of trial Ritchie was convicted by a jury on all counts, and the judge sentenced him to 3 to 10 years in prison.

On appeal to the Pennsylvania Superior Court, Ritchie claimed, *inter alia,* that the failure to disclose the contents of the CYS file violated the Confrontation Clause of the Sixth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment.[5] The court agreed that there had been a constitutional violation, and accordingly vacated the conviction and remanded for further proceedings. 324 Pa.Super. 557, 472 A.2d 220 (1984). The Superior Court ruled, however, that the right of confrontation did not entitle Ritchie to the full disclosure that he sought. It held that on remand, the trial judge first was to examine the confidential material *in camera,* and release only the verbatim statements made by the daughter to the CYS counselor. But the full record then was to be made available to Ritchie's lawyer, for the limited purpose of allowing him to argue the relevance of the statements. The court stated that the prosecutor also should be allowed to argue that the failure to disclose the statements was harmless error. If the trial judge determined that the lack of information was prejudicial, *46 Ritchie would be entitled to a new trial. *Id.,* at 567–568, 472 A.2d, at 226.

On appeal by the Commonwealth, the Supreme Court of Pennsylvania agreed that the conviction must be vacated and the case remanded to determine if a new trial is necessary. 509 Pa. 357, 502 A.2d 148 (1985). But the court did not agree that the search for material evidence must be limited to the daughter's verbatim statements. Rather, it concluded that Ritchie, through his lawyer, is entitled to review the entire file to search for any useful evidence.[6] It stated: "When materials gathered become an arrow of inculpation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it." *Id.,* at 367, 502 A.2d, at 153. The Pennsylvania Court concluded that by denying access to the file, the trial court order had violated both the Confrontation Clause and the Compulsory Process Clause. The court was unpersuaded by the Commonwealth's argument that the trial judge already had examined the file and determined that it contained no relevant information. It ruled that the constitutional infirmity in the trial court's order was that Ritchie was unlawfully denied the opportunity to have the records reviewed by "the eyes and the perspective of an advocate," who may see relevance in places that a neutral judge would not. *Ibid.*

In light of the substantial and conflicting interests held by the Commonwealth and Ritchie, we granted certiorari. 476 U.S. 1139, 106 S.Ct. 2244, 90 L.Ed.2d 690 (1986). We now affirm in part, reverse in part, and **996 remand for proceedings not inconsistent with this opinion.

*47 II

[1] Before turning to the constitutional questions, we first must address Ritchie's claim that the Court lacks jurisdiction, because the decision below is not a "final judgment or decree." See 28 U.S.C. § 1257(3); *Market Street R. Co. v. Railroad Comm'n of California,* 324 U.S. 548, 551, 65 S.Ct. 770, 772, 89 L.Ed. 1171 (1945). Normally the finality doctrine contained in § 1257(3) is not satisfied if the state courts still must conduct further substantive proceedings before the rights of the parties as to the federal issues are resolved. *Ibid.; Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 123–127, 65 S.Ct. 1475, 1477–1480, 89 L.Ed. 2092 (1945). Ritchie argues that under this standard the case is not final, because there are several more proceedings scheduled in the Pennsylvania courts: at a minimum there will be an *in camera* review of the file, and the parties will present arguments on whether the lack of disclosure was prejudicial; after that, there could be a new trial on the merits. Ritchie claims that because the Sixth Amendment issue may become moot at either of these stages, we should decline review until these further proceedings are completed.

[2] Although it is true that this Court is without jurisdiction to review an interlocutory judgment, it also is true that the principles of finality have not been construed rigidly. As we recognized in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), there are at least four categories of cases in which jurisdiction is proper even when there are further proceedings anticipated in the state court. One of these exceptions states that the Court may consider cases:

> "[W]here the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.... [I]n these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the ***48** governing state law would not permit him again to present his federal claims for review." *Id.,* at 481, 95 S.Ct., at 1039.

We find that the case before us satisfies this standard because the Sixth Amendment issue will not survive for this Court to review, regardless of the outcome of the proceedings on remand. If the trial court decides that the CYS files do not contain relevant information, or that the nondisclosure was harmless, the Commonwealth will have prevailed and will have no basis to seek review. In this situation Ritchie's conviction will be reinstated, and the issue of whether defense counsel should have been given access will be moot. Should Ritchie appeal the trial court's decision, the Commonwealth's only method for preserving the constitutional issue would be by cross-claims. Thus the only way that *this* Court will be able to reach the Sixth Amendment issue is if Ritchie eventually files a petition for certiorari on the trial court's adverse ruling, and the Commonwealth files a cross-petition. When a case is in this procedural posture, we have considered it sufficiently final to justify review. See, *e.g., New York v. Quarles,* 467 U.S. 649, 651, n. 1, 104 S.Ct. 2626, 2629, n. 1, 81 L.Ed.2d 550 (1984); *South Dakota v. Neville,* 459 U.S. 553, 558, n. 6, 103 S.Ct. 916, 919, n. 6, 74 L.Ed.2d 748 (1983).

[3] Alternatively, if Ritchie is found to have been prejudiced by the withholding and is granted a new trial, the Commonwealth still will be unable to obtain a ruling from this Court. On retrial Ritchie either will be convicted, in which case the Commonwealth's ability to obtain review again will rest on Ritchie's willingness to appeal; or he will be acquitted, in which case the Commonwealth will be barred from seeking review by the Double Jeopardy Clause. See *ibid.; California v. Stewart,* 384 U.S. 436, 498, n. 71, 86 S.Ct. 1602, 1640, n. 71, 16 L.Ed.2d 694 (1966) (decided with *Miranda* ****997** *v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Therefore, if this Court does not consider the constitutional claims now, there may well be no opportunity to do so in the future.[7]

***49** [4] The Sixth Amendment issue has been finally decided by the highest court of Pennsylvania, and unless we review that decision, the harm that the Commonwealth seeks to avoid—the disclosure of the entire confidential file—will occur regardless of the result on remand. We thus cannot agree with the suggestion in Justice STEVENS' dissent that if we were to dismiss this case and it was resolved on other grounds after disclosure of the file, "the Commonwealth would not have been harmed." *Post,* at 1010. This hardly could be true, because of the acknowledged public interest in ensuring the confidentiality of CYS records. See n. 17, *infra.* Although this consideration is not dispositive, we have noted that "statutorily created finality requirements ***50** should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Mathews v. Eldridge,* 424 U.S. 319, 331, n. 11, 96 S.Ct. 893, 901, n. 11, 47 L.Ed.2d 18 (1976). We therefore reject Ritchie's claim that the Court lacks jurisdiction, and turn to the merits of the case before us.[8]

*51 **998 III

The Pennsylvania Supreme Court held that Ritchie, through his lawyer, has the right to examine the full contents of the CYS records. The court found that this right of access is required by both the Confrontation Clause and the Compulsory Process Clause. We discuss these constitutional provisions in turn.

A

[5] The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination. *Delaware v. Fensterer,* 474 U.S. 15, 18–19, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (*per curiam*). Ritchie does not allege a violation of the former right. He was not excluded from any part of the trial, nor did the prosecutor improperly introduce out-of-court statements as substantive evidence, thereby depriving Ritchie of the right to "confront" the declarant. See *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Cf. *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). Instead, Ritchie claims that by denying him access to the information necessary to prepare his defense, the trial court interfered with his right of cross-examination.

[6] Ritchie argues that he could not effectively question his daughter because, without the CYS material, he did not know which types of questions would best expose the weaknesses in her testimony. Had the files been disclosed, Ritchie argues that he might have been able to show that the daughter made statements to the CYS counselor that were inconsistent with her trial statements, or perhaps to reveal that the girl acted with an improper motive. Of course, the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or *52 unbelievable. *United States v. Abel,* 469 U.S. 45, 50, 105 S.Ct. 465, 468, 83 L.Ed.2d 450 (1984); *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). Because this type of evidence can make the difference between conviction and acquittal, see *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959), Ritchie argues that the failure to disclose information that might have made cross-examination more effective undermines the Confrontation Clause's purpose of increasing the accuracy of the truth-finding process at trial. See *United States v. Inadi, supra,* 475 U.S., at 396, 106 S.Ct., at 1126.

The Pennsylvania Supreme Court accepted this argument, relying in part on our decision in *Davis v. Alaska, supra.* In *Davis* the trial judge prohibited defense counsel from questioning a witness about the latter's juvenile criminal record, because a state statute made this information presumptively confidential. We found that this restriction on cross-examination violated the Confrontation Clause, despite Alaska's legitimate interest in protecting the identity of juvenile offenders. 415 U.S., at 318–320, 94 S.Ct., at 1111–1112. The Pennsylvania Supreme Court apparently interpreted our decision in *Davis* to mean that a statutory privilege cannot be maintained when a defendant asserts aneed, prior to trial, for the protected information that **999 might be used at trial to impeach or otherwise undermine a witness' testimony. See 509 Pa., at 365–367, 502 A.2d, at 152–153.

[7] [8] [9] [10] [11] If we were to accept this broad interpretation of *Davis,* the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view. The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. See *California v. Green,* 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970) ("[I]t is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"); *Barber v. Page,* 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968) ("The right to confrontation is basically a trial *53 right"). The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.[9] Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. *Delaware v. Fensterer,* 474 U.S., at 20, 106 S.Ct., at 294. In short, the Confrontation Clause only guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.,* at 20, 106 S.Ct., at 294 (emphasis in original). See also *Ohio v. Roberts, supra,* 448 U.S., at 73, n. 12, 100 S.Ct., at 2543, n. 12 (except in "extraordinary cases, no inquiry into 'effectiveness' [of cross-examination] is required").

We reaffirmed this interpretation of the Confrontation Clause last Term in *Delaware v. Fensterer, supra.* In that

case, the defendant was convicted in part on the testimony of the State's expert witness, who could not remember which scientific test he had used to form his opinion. Although this inability to recall frustrated defense counsel's efforts to discredit the testimony, we held that there had been no Sixth Amendment violation. The Court found that the right of confrontation was not implicated, "for the trial court did not limit the scope or nature of defense counsel's cross-examination in any way." 474 U.S., at 19, 106 S.Ct., at 294. *Fensterer* was in full accord with our earlier decisions that have upheld a Confrontation Clause infringement claim on this issue only ***54** when there was a specific statutory or court-imposed restriction at trial on the scope of questioning.[10]

****1000** [12] The lower court's reliance on *Davis v. Alaska* therefore is misplaced. There the state court had prohibited defense counsel from questioning the witness about his criminal record, even though that evidence might have affected the witness' credibility. The constitutional error in that case was *not* that Alaska made this information confidential; it was that the defendant was denied the right "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." 415 U.S., at 318, 94 S.Ct., at 1111. Similarly, in this case the Confrontation Clause was not violated by the withholding of the CYS file; it only would have been impermissible for the judge to have prevented Ritchie's lawyer from cross-examining the daughter. Because defense counsel was able to cross-examine all of the trial witnesses fully, we find that the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS file violated the Confrontation Clause.

***55** B

The Pennsylvania Supreme Court also suggested that the failure to disclose the CYS file violated the Sixth Amendment's guarantee of compulsory process. Ritchie asserts that the trial court's ruling prevented him from learning the names of the "witnesses in his favor," as well as other evidence that might be contained in the file. Although the basis for the Pennsylvania Supreme Court's ruling on this point is unclear, it apparently concluded that the right of compulsory process includes the right to have the State's assistance in uncovering arguably useful information, without regard to the existence of a state-created restriction—here, the confidentiality of the files.

1

[13] This Court has had little occasion to discuss the contours of the Compulsory Process Clause. The first and most celebrated analysis came from a Virginia federal court in 1807, during the treason and misdemeanor trials of Aaron Burr. Chief Justice Marshall, who presided as trial judge, ruled that Burr's compulsory process rights entitled him to serve a subpoena on President Jefferson, requesting the production of allegedly incriminating evidence.[11] *United States v. Burr,* 25 F.Cas. 30, 35 (No. 14,692d) (CC Va.1807). Despite the implications of the *Burr* decision for federal criminal procedure, the Compulsory Process Clause rarely was a factor in this Court's decisions during the next 160 years.[12] More recently,however, ***56** the Court has articulated some of the specific rights secured by this part of the Sixth Amendment. Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.[13]

[14] This Court has never squarely held that the Compulsory Process Clause guarantees ****1001** the right to discover the *identity* of witnesses, or to require the government to produce exculpatory evidence. But cf. *United States v. Nixon,* 418 U.S. 683, 709, 711, 94 S.Ct. 3090, 3108, 3109, 41 L.Ed.2d 1039 (1974) (suggesting that the Clause may require the production of evidence). Instead, the Court traditionally has evaluated claims such as those raised by Ritchie under the broader protections of the Due Process Clause of the Fourteenth Amendment. See *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See also *Wardius v. Oregon,* 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). Because the applicability of the Sixth Amendment to this type of case is unsettled, and because our Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review, we adopt a due process analysis for purposes of this case. Although we conclude that compulsory process provides no *greater* protections in this area than those afforded by due process, we need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment. It is enough to conclude that on these facts, Ritchie's claims more properly are considered by reference to due process.

*57 2

[15] [16] It is wellsettled that the government 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, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Brady v. Maryland, supra,* 373 U.S., at 87, 83 S.Ct., at 1196. Although courts have used different terminologies to define "materiality," a majority of this Court has agreed, "[e]vidence 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." *United States v. Bagley,* 473 U.S., at 682, 105 S.Ct., at 3383 (opinion of BLACKMUN, J.); see *id.,* at 685, 105 S.Ct., at 3385 (opinion of WHITE, J.).

At this stage, of course, it is impossible to say whether any information in the CYS records may be relevant to Ritchie's claim of innocence, because neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file. The Commonwealth, however, argues that no materiality inquiry is required, because a statute renders the contents of the file privileged. Requiring disclosure here, it is argued, would override the Commonwealth's compelling interest in confidentiality on the mere speculation that the file "might" have been useful to the defense.

[17] Although we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances. This is not a case where a state statute grants CYS the absolute authority to shield its files from all eyes. Cf. 42 Pa.Cons.Stat. § 5945.1(b) (1982) (unqualified statutory privilege for communications between sexual assault counselors and victims).[14] Rather, the Pennsylvania *58 law provides that the information shall be disclosed in certain circumstances, including when CYS is directed to do so by court order. Pa.Stat.Ann., Title 11, § 2215(a)(5) (Purdon Supp.1986). Given that the Pennsylvania Legislature contemplated *some* use of CYS records in judicial proceedings, we cannot conclude that the statute prevents all disclosure in criminal prosecutions. In the absence of any apparent state policy to the contrary, we therefore have no reason to believe that relevant information would not **1002 be disclosed when a court of competent jurisdiction determines that the information is "material" to the defense of the accused.

[18] We therefore affirm the decision of the Pennsylvania Supreme Court to the extent it orders a remand for further proceedings. Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the records maintained by CYS contain no such information, or if the nondisclosure was harmless beyond a reasonable doubt, the lower court will be free to reinstate the prior conviction.[15]

*59 C

This ruling does not end our analysis, because the Pennsylvania Supreme Court did more than simply remand. It also held that defense counsel must be allowed to examine all of the confidential information, both relevant and irrelevant, and present arguments in favor of disclosure. The court apparently concluded that whenever a defendant alleges that protected evidence might be material, the appropriate method of assessing this claim is to grant full access to the disputed information, regardless of the State's interest in confidentiality. We cannot agree.

[19] A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files. See *United States v. Bagley, supra,* 473 U.S., at 675, 105 S.Ct., at 3380; *United States v. Agurs, supra,* 427 U.S., at 111, 96 S.Ct., at 2401. Although the eye of an advocate may be helpful to a defendant in ferreting out information, *Dennis v. United States,* 384 U.S. 855, 875, 86 S.Ct. 1840, 1851, 16 L.Ed.2d 973 (1966), this Court has never held—even in the absence of a statute restricting disclosure—that a defendant alone may make the determination as to the materiality of the information. Settled practice is to the contrary. In the typical case where a defendant makes only a general request for exculpatory material under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention.[16] the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance. See *Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) ("There *60 is no general constitutional right to discovery in a criminal case, and *Brady* did not create one").

[20] [21] We find that Ritchie's interest (as well as that of the Commonwealth) in **1003 ensuring a fair trial can

be protected fully by requiring that the CYS files be submitted only to the trial court for *in camera* review. Although this rule denies Ritchie the benefits of an "advocate's eye," we note that the trial court's discretion is not unbounded. If a defendant is aware of specific information contained in the file (*e.g.*, the medical report), he is free to request it directly from the court, and argue in favor of its materiality. Moreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.

To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child-abuse information. If the CYS records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected. Recognizing this, the Commonwealth—like all other States[17]—has made a commendable effort to assure victims ***61** and witnesses that they may speak to the CYS counselors without fear of general disclosure. The Commonwealth's purpose would be frustrated if this confidential material had to be disclosed upon demand to a defendant charged with criminal child abuse, simply because a trial court may not recognize exculpatory evidence. Neither precedent nor common sense requires such a result.

IV

We agree that Ritchie is entitled to know whether the CYS file contains information that may have changed the outcome of his trial had it been disclosed. Thus we agree that a remand is necessary. We disagree with the decision of the Pennsylvania Supreme Court to the extent that it allows defense counsel access to the CYS file. An *in camera* review by the trial court will serve Ritchie's interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations. The judgment of the Pennsylvania Supreme Court is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BLACKMUN, concurring in part and concurring in the judgment.

I join Parts I, II, III–B, III–C, and IV of the Court's opinion. I write separately, however, because I do not accept the plurality's conclusion, as expressed in Part III–A of Justice POWELL's opinion, that the Confrontation Clause protects only a defendant's trial rights and has no relevance to pretrial discovery. In this, I am in substantial agreement with much of what Justice BRENNAN says, *post,* in dissent. In my view, there might well be a confrontation violation ***62** if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness.

The plurality recognizes that the Confrontation Clause confers upon a defendant a right to conduct cross-examination. ****1004** *Ante,* at 998. It believes that this right is satisfied so long as defense counsel can *question* a witness on any proper subject of cross-examination. For the plurality, the existence of a confrontation violation turns on whether counsel has the opportunity to conduct such questioning; the plurality in effect dismisses—or, at best, downplays—any inquiry into the effectiveness of the cross-examination. *Ante,* at 999. Thus, the plurality confidently can state that the Confrontation Clause creates nothing more than a trial right. *Ante,* at 999.

If I were to accept the plurality's effort to divorce confrontation analysis from any examination into the effectiveness of cross-examination, I believe that in some situations the confrontation right would become an empty formality. As even the plurality seems to recognize, see *ante,* at 999, one of the primary purposes of cross-examination is to call into question a witness' credibility. This purpose is often met when defense counsel can demonstrate that the witness is biased or cannot clearly remember the events crucial to the testimony. The opportunity the Confrontation Clause gives a defendant's attorney to pursue any proper avenue of questioning a witness makes little sense set apart from the goals of cross-examination.

There are cases, perhaps most of them, where simple

questioning of a witness will satisfy the purposes of cross-examination. *Delaware v. Fensterer,* 474 U.S. 15, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (*per curiam*) is one such example. There the Court rejected a Confrontation Clause challenge brought on the ground that an expert witness for the prosecution could not remember the method by which he had determined that some hair of the victim, whom Fensterer was accused of killing, had been ***63** forcibly removed. Although I did not join the summary reversal in *Fensterer* and would have given the case plenary consideration, see *id.,* at 23, 106 S.Ct., at 296, it is easy to see why cross-examination was effective there. The expert's credibility and conclusions were seriously undermined by a demonstration that he had forgotten the method he used in his analysis. Simple questioning provided such a demonstration, and was reinforced by the testimony of the defendant's own expert who could undermine the other expert's opinion. See *id.,* at 20, 106 S.Ct., at 295.[1]

There are other cases where, in contrast, simple questioning will not be able to undermine a witness' credibility and in fact may do actual injury to a defendant's position. *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), is a specific example. There defense counsel had the juvenile record of a key prosecution witness in hand but was unable to refer to it during his cross-examination of the witness because of an Alaska rule prohibiting the admission of such a record in a court proceeding. *Id.,* at 310–311, 94 S.Ct., at 1107–1108. The juvenile record revealed that the witness was on probation for the same burglary for which Davis was charged. Accordingly, the possibility existed that the witness was biased or prejudiced against Davis, in that he was attempting to turn towards Davis the attention of the police that would otherwise have been directed against him. ***64** Although Davis' counsel was permitted to "question" the witness as to bias, any attempt to point to the reason for that bias was denied. *Id.,* at 313–314, 94 S.Ct., at 1108–1109.

****1005** In the Court's view, this questioning of the witness both was useless to Davis and actively harmed him. The Court observed: "On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination." *Id.,* at 318, 94 S.Ct., at 1111. The Court concluded that, without being able to refer to the witness' juvenile record, "[p]etitioner was thus denied the right of effective cross-examination." *Ibid.*

The similarities between *Davis* and this case are much greater than are any differences that may exist. In cross-examining a key prosecution witness, counsel for Davis and counsel for respondent were both limited to simple questioning. They could not refer to specific facts that might have established the critical bias of the witness: Davis' counsel could not do so because, while he had the juvenile record in hand, he could not refer to it in light of the Alaska rule, see *id.,* at 311, n. 1, 94 S.Ct., at 1108, n. 1; respondent's attorney had a similar problem because he had no access at all to the CYS file of the child-abuse victim, see *ante,* at 994, and n. 2. Moreover, it is likely that the reaction of each jury to the actual cross-examination was the same—a sense that defense counsel was doing nothing more than harassing a blameless witness.

It is true that, in a technical sense, the situations of Davis and Ritchie are different. Davis' counsel had access to the juvenile record of the witness and could have used it but for the Alaska prohibition. Thus, the infringement upon Davis' confrontation right occurred at the trial stage when his counsel was unable to pursue an available line of inquiry. Respondent's attorney could not cross-examine his client's daughter with the help of the possible evidence in the CYS ***65** file because of the Pennsylvania prohibition that affected his pretrial preparations. I do not believe, however, that a State can avoid Confrontation Clause problems simply by deciding to hinder the defendant's right to effective cross-examination, on the basis of a desire to protect the confidentiality interests of a particular class of individuals, at the pretrial, rather than at the trial, stage.

Despite my disagreement with the plurality's reading of the Confrontation Clause, I am able to concur in the Court's judgment because, in my view, the procedure the Court has set out for the lower court to follow on remand is adequate to address any confrontation problem. Here I part company with Justice BRENNAN. Under the Court's prescribed procedure, the trial judge is directed to review the CYS file for "material" information. *Ante,* at 1002. This information would certainly include such evidence as statements of the witness that might have been used to impeach her testimony by demonstrating any bias towards respondent or by revealing inconsistencies in her prior statements.[2] When reviewing confidential records in future cases, trial courts should be particularly aware of the possibility that impeachment evidence of a key prosecution witness could well constitute the sort whose unavailability to the defendant would undermine confidence in the outcome of the trial. As the Court points out, moreover, the trial court's obligation to review the confidential record for material information is ongoing.

***66 **1006** Impeachment evidence is precisely the type of information that might be deemed to be material only well into the trial, as, for example, after the key witness has testified.[3]

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

I join Justice STEVENS' dissenting opinion regarding the lack of finality in this case. I write separately to challenge the Court's narrow reading of the Confrontation Clause as applicable only to events that occur at trial. That interpretation ignores the fact that the right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial. In this case, the trial court properly viewed Ritchie's vague speculations that the agency file might contain something useful as an insufficient basis for permitting general access to the file. However, in denying access to the prior statements of the victim the court deprived Ritchie of material crucial to any effort to impeach the victim at trial. I view this deprivation as a violation of the Confrontation Clause.

This Court has made it plain that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination," *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). "[P]robably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case," *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). The Court therefore has scrupulously guarded against "restrictions imposed by law or by the trial court on the scope of ***67** cross-examination." *Delaware v. Fensterer,* 474 U.S. 15, 18, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (*per curiam*).

One way in which cross-examination may be restricted is through preclusion at trial itself of a line of inquiry that counsel seeks to pursue. See *ante,* at ——, n. 9 (citing cases). The logic of our concern for restriction on the ability to engage in cross-examination does not suggest, however, that the Confrontation Clause prohibits *only* such limitations.* A crucial avenue of cross-examination also may be foreclosed by the denial of access to material that would serve as the basis for this examination. Where denial of access is complete, counsel is in no position to formulate a line of inquiry potentially grounded on the material sought. Thus, he or she cannot point to a specific subject of inquiry that has been foreclosed, as can a counsel whose interrogation at trial has been limited by the trial judge. Nonetheless, there occurs as effective a preclusion of a topic of cross- ****1007** examination as if the judge at trial had ruled an entire area of questioning off limits.

***68** The Court has held that the right of cross-examination may be infringed even absent limitations on questioning imposed at trial. *Jencks v. United States,* 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957), held that the defendant was entitled to obtain the prior statements of persons to government agents when those persons testified against him at trial. Impeachment of the witnesses was "singularly important" to the defendant, we said, *id.,* at 667, 77 S.Ct., at 1012, and the reports were essential to the impeachment effort. Thus, we held that a defendant is entitled to inspect material "with a view to use on cross-examination" when that material "[is] shown to relate to the testimony of the witness." *Id.,* at 669, 77 S.Ct., at 1014. As I later noted in *Palermo v. United States,* 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959), *Jencks* was based on our supervisory authority rather than the Constitution, "but it would be idle to say that the commands of the Constitution were not close to the surface of the decision." 360 U.S., at 362–363, 79 S.Ct., at 1229–1230 (BRENNAN, J., concurring in result). In *Palermo,* I specifically discussed the Confrontation Clause as a likely source of the rights implicated in a case such as *Jencks.* 360 U.S., at 362, 79 S.Ct., at 1229.

The Court insists that the prerequisite for finding a restriction on cross-examination is that counsel be prevented from pursuing a specific line of questioning. This position has similarities to an argument the Court rejected in *Jencks.* The Government contended in that case that the prerequisite for obtaining access to witnesses' prior statements should be a showing by the defendant of an inconsistency between those statements and trial testimony. We rejected that argument, noting, "[t]he occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, ... the accused is helpless to know or discover conflict without inspecting the reports." 353 U.S., at 667–668, 77 S.Ct., at 1012–1013. Cf. *United States v. Burr,* 25 F.Cas. 187, 191 (No. 14,694) (CC Va. 1807) ("It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld?"). Similarly, ***69** unless counsel has access to prior statements of a witness, he or she cannot identify what subjects of inquiry have been

foreclosed from exploration at trial. Under the Court's holding today, the result is that partial denials of access may give rise to Confrontation Clause violations, but absolute denials cannot.

The Court in *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), also recognized that pretrial events may undercut the right of cross-examination. In *Wade,* we held that a pretrial identification lineup was a critical stage of criminal proceedings at which the Sixth Amendment right to counsel was applicable. This holding was premised explicitly on concern for infringement of Confrontation Clause rights. The presence of counsel at a lineup is necessary, the Court said, "to preserve the defendant's right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id.,* at 227, 87 S.Ct., at 1932. If counsel is excluded from such a proceeding, he or she is at a serious disadvantage in calling into question an identification at trial. The "inability effectively to reconstruct at trial any unfairness that occurred at the lineup" may then "deprive [the defendant] of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.,* at 232, 87 S.Ct., at 1934. The Court continued:

> "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, *the accused is deprived of that right of cross-examination which is an essential* ****1008** *safeguard to his right to confront the witnesses against him. Pointer v. Texas,* 380 U.S. 400 [85 S.Ct. 1065, 13 L.Ed.2d 923." *Id.,* at 235, 87 S.Ct., at 1936 (emphasis added).

Since a lineup from which counsel is absent is potentially prejudicial, and "since presence of counsel itself can often avert prejudice *and assure a meaningful confrontation at trial* ", *id.,* at 236, 87 S.Ct., at 1937 (emphasis added) (footnote omitted), the ***70** Court in *Wade* concluded that a pretrial lineup is a stage of prosecution at which a defendant is entitled to have counsel present.

The exclusion of counsel from the lineup session necessarily prevents him or her from posing any specific cross-examination questions based on observation of how the lineup was conducted. The Court today indicates that this inability would preclude a finding that cross-examination has been restricted. The premise of the Court in *Wade,* however, was precisely the opposite: the very problem that concerned the Court was that counsel would be foreclosed from developing a line of inquiry grounded on actual experience with the lineup.

The Court suggests that the court below erred in relying on *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), for its conclusion that the denial of access to the agency file raised a Confrontation Clause issue. While *Davis* focused most explicitly on the restriction at trial of cross-examination, nothing in the opinion indicated that an infringement on the right to cross-examination could occur *only* in that context. Defense counsel was prevented from revealing to the jury that the government's witness was on probation. The immediate barrier to revelation was the trial judge's preclusion of counsel's effort to inquire into the subject on cross-examination. Yet the reason that counsel could not make such inquiry was a state statute that made evidence of juvenile adjudications inadmissible in court. Any counsel familiar with the statute would have no doubt that it foreclosed any line of questioning pertaining to a witness' juvenile record, despite the obvious relevance of such information for impeachment purposes. The foreclosure would have been just as effective had defense counsel never sought to pursue on cross-examination the issue of the witness' probationary status. The lower court thus properly recognized that the underlying problem for defense counsel in *Davis* was the prohibition on disclosure of juvenile records.

***71** The creation of a significant impediment to the conduct of cross-examination thus undercuts the protections of the Confrontation Clause, even if that impediment is not erected at the trial itself. In this case, the foreclosure of access to prior statements of the testifying victim deprived the defendant of material crucial to the conduct of cross-examination. As we noted in *Jencks,* a witness' prior statements are essential to any effort at impeachment:

> "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." 353 U.S., at 667, 77 S.Ct., at 1013.

The right of a defendant to confront an accuser is intended fundamentally to provide an opportunity to subject *accusations* to critical scrutiny. See *Ohio v. Roberts,* 448 U.S. 56, 65, 100 S.Ct. 2531, 2538, 65 L.Ed.2d 597 (1980) ("underlying purpose" of Confrontation Clause is "to

augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence"). Essential to testing a witness' account of events is the ability to compare that version with other versions the witness has earlier recounted. **1009 Denial of access to a witness' prior statements thus imposes a handicap that strikes at the heart of cross-examination.

The ability to obtain material information through reliance on a due process claim will not in all cases nullify the damage of the Court's overly restrictive reading of the Confrontation Clause. As the Court notes, *ante,* at ——, evidence is regarded as material only if there is a reasonable probability that it might affect the outcome of the proceeding. Prior *72 statements on their face may not appear to have such force, since their utility may lie in their more subtle potential for diminishing the credibility of a witness. The prospect that these statements will not be regarded as material is enhanced by the fact that due process analysis requires that information be evaluated by the trial judge, not defense counsel. *Ante,* at ——. By contrast, *Jencks,* informed by confrontation and cross-examination concerns, insisted that defense counsel, not the court, perform such an evaluation, "[b]ecause only the defense is adequately equipped to determine the effective use for the purpose of discrediting the Government's witness and thereby furthering the accused's defense." *Jencks, supra,* 353 U.S., at 668–669, 77 S.Ct., at 1013–1014. Therefore, while Confrontation Clause and due process analysis may in some cases be congruent, the Confrontation Clause has independent significance in protecting against infringements on the right to cross-examination.

The Court today adopts an interpretation of the Confrontation Clause unwarranted by previous case law and inconsistent with the underlying values of that constitutional provision. I therefore dissent.

Justice STEVENS, with whom Justice BRENNAN, Justice MARSHALL, and Justice SCALIA join, dissenting.

We are a Court of limited jurisdiction. One of the basic limits that Congress has imposed upon us is that we may only review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. The purposes of this restriction are obvious, and include notions of efficiency, judicial restraint, and federalism. See *Construction Laborers v. Curry,* 371 U.S. 542, 550, 83 S.Ct. 531, 536, 9 L.Ed.2d 514 (1963); *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 2092 (1945). Over the years the Court has consistently applied a strict test of finality to determine the reviewability of state-court decisions remanding cases for further proceedings, and the reviewability of pretrial discovery orders. Given the plethora of such decisions and orders and *73 the fact that they often lead to the settlement or termination of litigation, the application of these strict rules has unquestionably resulted in this Court's not reviewing countless cases that otherwise might have been reviewed. Despite that consequence—indeed, in my judgment, because of that consequence—I regard the rule as wise and worthy of preservation.

I

In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the Court recognized some limited exceptions to the general principle that this Court may not review cases in which further proceedings are anticipated in the state courts. One of these exceptions applies "where the federal claim has been finally decided, with further proceedings in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.,* at 481, 95 S.Ct., at 1039. The concern, of course, is that the petitioning party not be put in a position where he might eventually lose on the merits, but would have never had an opportunity to present his federal claims for review. *Ibid.* The most common example of this phenomenon is where a State seeks review of an appellate court's order that evidence be suppressed. In such a case, if the State were forced to proceed to trial prior to seeking review in this Court, it could conceivably lose its case at trial, and, because **1010 of the double jeopardy rule, never have a chance to use what we might have held to be admissible evidence. See, *e.g., New York v. Quarles,* 467 U.S. 649, 651, n. 1, 104 S.Ct. 2626, 2629, n. 1, 81 L.Ed.2d 550 (1984).

This case does not fit into that exception. Were we to decline review at this time there are three possible scenarios on remand. First, the Children and Youth Services (CYS) might refuse to produce the documents under penalty of contempt, in which case appeals could be taken, and this Court could obtain proper jurisdiction. See *United States v. Ryan,* 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971). Alternatively, if CYS were to produce the documents, the trial court might find the error to be *74 harmless, in which case Ritchie's conviction would stand and the Commonwealth would not have been harmed by our having declined to review the case at this stage. Finally, the trial court could determine that Ritchie's lack of access to the documents was

constitutionally prejudicial, and thus order a new trial. If the Commonwealth would then have no recourse but to proceed to trial with the risk of an unreviewable acquittal, I agree that the *Cox* exception would apply. Under Pennsylvania law, however, the Commonwealth would have the opportunity for an immediate interlocutory appeal of the new trial order.

Pennsylvania Rule of Appellate Procedure 311(a)(5) affords the Commonwealth a right to an interlocutory appeal in criminal cases where it "claims that the lower court committed an error of law." An argument that the trial court erred in evaluating the constitutionally harmless-error issue would certainly qualify under that provision.[1] Moreover, the Commonwealth could, if necessary, reassert the constitutional arguments that it now makes here. Although the claims would undoubtedly be rejected in Pennsylvania under the law-of-the-case doctrine, that would not bar this Court from reviewing the claims. See *Barclay v. Florida,* 463 U.S. 939, 946, 103 S.Ct. 3418, 3422, 77 L.Ed.2d 1134 (1983); *Hathorn v. Lovorn,* 457 U.S. 255, 261–262, 102 S.Ct. 2421, 2425–2426, 72 L.Ed.2d 824 (1982); see ***75** generally R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 132 (6th ed. 1986).

The fact that the Commonwealth of Pennsylvania cannot irrevocably lose this case on the federal constitutional issue without having an opportunity to present that issue to this Court takes this case out of the *Cox* exception that the Court relies upon. Nonetheless, the Court makes the astonishing argument that we should hear this case now because if Ritchie's conviction is reinstated on remand, "the issue of whether defense counsel should have been given access will be moot," and the Court will lose its chance to pass on this constitutional issue. *Ante,* at 997. This argument is wholly contrary to our long tradition of avoiding, not reaching out to decide, constitutional decisions when a case may be disposed of on other grounds for legitimate reasons. See *Ashwander v. TVA,* 297 U.S. 288, 346–347, 56 S.Ct. 466, 482–483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); *Rescue Army v. Municipal Court,* 331 U.S. 549, 571, 67 S.Ct. 1409, 1421, 91 L.Ed. 1666 (1947). Indeed, the Court has explained that it is precisely the policy against unnecessary constitutional adjudication that demands strict application of the finality requirement. *Republic Natural* ****1011** *Gas Co. v. Oklahoma,* 334 U.S. 62, 70–71, 68 S.Ct. 972, 977–978, 92 L.Ed. 1212 (1948).

II

The Court also suggests that a reason for hearing the case now is that, if CYS is forced to disclose the documents, the confidentiality will be breached and subsequent review will be too late. *Ante,* at 997, and n. 7. This argument fails in light of the longstanding rule that if disclosure will, in and of itself, be harmful, the remedy is for the individual to decline to produce the documents, and immediately appeal any contempt order that is issued. This rule is exemplified by our decision in *United States v. Ryan,* 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971), a case in which a District Court denied a motion to quash a subpoena *duces tecum* commanding the respondent to produce certain documents located in Kenya. The Court of Appeals held that the order was appealable but we reversed, explaining:

> ***76** "Respondent asserts no challenge to the continued validity of our holding in *Cobbledick v. United States,* 309 U.S. 323 [60 S.Ct. 540, 84 L.Ed. 783] (1940), that one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey. Respondent, however, argues that *Cobbledick* does not apply in the circumstances before us because, he asserts, unless immediate review of the District Court's order is available to him, he will be forced to undertake a substantial burden in complying with the subpoena, and will therefore be 'powerless to avert the mischief of the order.' *Perlman v. United States,* 247 U.S. 7, 13 [38 S.Ct. 417, 419, 62 L.Ed. 950] (1918).
>
> "We think that respondent's assertion misapprehends the thrust of our cases. Of course, if he complies with the subpoena he will not thereafter be able to undo the substantial effort he has exerted in order to comply. But compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review. But we have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal. *Cobbledick v. United States, supra; Alexander v. United States,* 201 U.S. 117 [26 S.Ct. 356, 50 L.Ed. 686] (1906); cf. *United States v. Blue,* 384 U.S. 251 [86 S.Ct. 1416, 16 L.Ed.2d 510]

(1966); *77 *DiBella v. United States,* 369 U.S. 121 [82 S.Ct. 654, 7 L.Ed.2d 614] (1962); *Carroll v. United States,* 354 U.S. 394 [77 S.Ct. 1332, 1 L.Ed.2d 1442] (1957). Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle." *Id.,* 402 U.S., at 532–533, 91 S.Ct., at 1581–1582.

In the case before us today, the Pennsylvania Supreme Court has instructed the trial court to order CYS to produce certain documents for inspection by the trial court and respondent's counsel. Although compliance with the order might be burdensome for a different reason than the burden of obtaining documents in Kenya, the burden of disclosure is sufficiently troublesome to CYS that it apparently objects to compliance.[2] But as was true in the *Ryan* **1012 case, it has not yet been given the chance to decide whether to comply with the order and therefore has not satisfied the condition for appellate review that we had, until today, consistently imposed.[3]

*78 III

Finally, the Court seems to rest on the rationale that because this respondent has already been tried, immediate review in this particular case will expedite the termination of the litigation. See *ante,* at 997, n. 7. I am not persuaded that this is so—if we had not granted certiorari, the trial court might have reviewed the documents and found that they are harmless a year ago—but even if it were, the efficient enforcement of the finality rule precludes a case-by-case inquiry to determine whether its application is appropriate. Only by adhering to our firm rules of finality can we discourage time-consuming piecemeal litigation.

Of course, once the case is here and has been heard, there is natural reluctance to hold that the Court lacks jurisdiction. It is misguided, however, to strain and find jurisdiction in the name of short-term efficiency when the long-term effect of the relaxation of the finality requirement will so clearly be inefficient. If the Court's goal is expediting the termination of litigation, the worst thing it can do is to extend an open-ended invitation to litigants to interrupt state proceedings with interlocutory visits to this Court.

I would therefore dismiss the writ because the judgment of the Supreme Court of Pennsylvania is not final.

All Citations

480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 55 USLW 4180, 22 Fed. R. Evid. Serv. 1

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Although the 1978 investigation took place during the period that the daughter claimed she was being molested, it is undisputed that the daughter did not tell CYS about the assaults at that time. No criminal charges were filed as a result of this earlier investigation.

2 The statute provides in part:

> "(a) Except as provided in section 14 [Pa.Stat.Ann., Tit. 11, § 2214 (Purdon Supp.1986)], reports made pursuant to this act including but not limited to report summaries of child abuse ... and written reports ... as well as any other information obtained, reports written or photographs or X-rays taken concerning alleged instances of child abuse in the possession of the department, a county children and youth social service agency or a child protective service shall be confidential and shall only be made available to:
>
> "(5) A court of competent jurisdiction pursuant to a court order." Pa.Stat.Ann., Tit. 11, § 2215(a) (Purdon Supp.1986). At the time of trial the statute only provided five exceptions to the general rule of confidentiality, including the exception for court-ordered disclosure. The statute was amended in 1982 to increase the number of exceptions. For example, the records now may be revealed to law enforcement officials for use in criminal investigations. § 2215(a)(9). But, the identity of a person who reported the abuse or who cooperated in the investigation may not be released if the disclosure would be detrimental to that person's safety. § 2215(c).

3 The trial judge stated that he did not read "50 pages or more of an extensive record." App. 72a. The judge had no knowledge of the case before the pretrial hearing. See *id.*, at 68a.

4 There is no suggestion that the Commonwealth's prosecutor was given access to the file at any point in the proceedings, or that he was aware of its contents.

5 The Sixth Amendment of the United States Constitution protects both the right of confrontation and the right of compulsory process:

> "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor."

Both Clauses are made obligatory on the States by the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 403–406, 85 S.Ct. 1065, 1067–1069, 13 L.Ed.2d 923 (1965) (Confrontation Clause); *Washington v. Texas,* 388 U.S. 14, 17–19, 87 S.Ct. 1920, 1922–1923, 18 L.Ed.2d 1019 (1967) (Compulsory Process Clause).

6 The court noted that the trial court should take "appropriate steps" to guard against improper dissemination of the confidential material, including, for example, "fashioning of appropriate protective orders, or conducting certain proceedings *in camera.*" 509 Pa., at 368, n. 16, 502 A.2d, at 153, n. 16. These steps were to be taken, however, subject to "the right of [Ritchie], through his counsel, to gain access to the information." *Ibid.*

7 As Justice STEVENS' dissent points out, *post,* at ——, there is a third possibility. If the trial court finds prejudicial error and orders a retrial, the Commonwealth may attempt to take an immediate appeal of this order. See Pa.Rule App.Proc. 311(a). Justice STEVENS' dissent suggests that because the Commonwealth can raise the Sixth Amendment issue again in this appeal, respect for the finality doctrine should lead us to dismiss. But even if we were persuaded that an immediate appeal would lie in this situation, it would not necessarily follow that the constitutional issue will survive. The appellate court could find that the failure to disclose was harmless, precluding further review by the Commonwealth. Alternatively, the appellate court could agree that the error was prejudicial, thus permitting the Commonwealth to claim that the Sixth Amendment does not compel disclosure. But as Justice STEVENS' dissent recognizes, the Pennsylvania courts already have considered and resolved this issue in their earlier proceedings; if the Commonwealth were to raise it again in a new set of appeals, the courts below would simply reject the claim under the law-of-the-case doctrine. Law-of-the-case principles are not a bar to this Court's jurisdiction, of course, and thus Justice STEVENS' dissent apparently would require the Commonwealth to raise a fruitless Sixth Amendment claim in the trial court, the Superior Court, and the Pennsylvania Supreme Court still another time before we regrant certiorari on the question that is now before us.

The goals of finality would be frustrated, rather than furthered, by these wasteful and time-consuming procedures. Based on the unusual facts of this case, the justifications for the finality doctrine—efficiency, judicial restraint, and federalism, see *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 2092 (1945); *post,* at —— – —— would be ill served by another round of litigation on an issue that has been authoritatively decided by the highest state court.

8 Nothing in our decision in *United States v. Ryan,* 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971), requires a different result. In that case the respondent was served with a subpoena requiring him to produce business records for a grand jury. The District Court denied a motion to quash, and respondent appealed. We concluded that the District Court order was not appealable. *Id.,* at 532, 91 S.Ct., at 1581. We rejected the contention that immediate review was necessary to avoid the harm of disclosing otherwise protected material, noting that parties who face such an order have the option of making the decision "final" simply by refusing to comply with the subpoena.

Although there are similarities between this case and *Ryan,* the analogy is incomplete. In *Ryan* the Court was concerned about the "necessity for expedition in the administration of the criminal law," *id.,* at 533, 91 S.Ct., at 1587, an interest that would be undermined if all pretrial orders were immediately appealable. *Ryan* also rests on an implicit assumption that unless a party resisting discovery is willing to risk being held in contempt, the significance of his claim is insufficient to justify interrupting the ongoing proceedings. That is not the situation before us. Here the trial *already* has taken place, and the issue reviewed by the Commonwealth appellate courts. The interests of judicial economy and the avoidance of delay, rather than being hindered, would be best served by resolving the issue. Cf. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477–478, 95 S.Ct. 1029, 1037–1038, 43 L.Ed.2d 328 (1975) (exceptions to finality doctrine justified in part by need to avoid economic waste and judicial delay).

We also reject Ritchie's suggestion that we should dismiss this action and allow the case to return to the trial court, so that the Commonwealth can formally refuse to comply with the Pennsylvania Supreme Court decision and be held in contempt. Here we are not faced merely with an individual's assertion that a subpoena is unduly burdensome, but with a holding of a State Supreme Court that the legislative interest in confidentiality will not be given effect. The Commonwealth's interest in immediate review of this case is obvious and substantial. Contrary to Justice STEVENS' dissent, we do not think that the finality doctrine requires a new round of litigation and appellate review simply to give

the Commonwealth "the chance to decide whether to comply with the order." *Post,* at 996–997. See n. 7, *supra.* To prolong the proceedings on this basis would be inconsistent with the "pragmatic" approach we normally have taken to finality questions. See generally *Bradley v. Richmond School Bd.,* 416 U.S. 696, 722–723, n. 28, 94 S.Ct. 2006, 2021–2022, n. 28, 40 L.Ed.2d 476 (1974) ("This Court has been inclined to follow a 'pragmatic approach' to the question of finality") (citation omitted).

9 This is not to suggest, of course, that there are no protections for pretrial discovery in criminal cases. See discussion in Part III–B, *infra.* We simply hold that with respect to this issue, the Confrontation Clause only protects a defendant's trial rights, and does not compel the pretrial production of information that might be useful in preparing for trial. Also, we hardly need say that nothing in our opinion today is intended to alter a trial judge's traditional power to control the scope of cross-examination by prohibiting questions that are prejudicial, irrelevant, or otherwise improper. See *Delaware v. Van Arsdall,* 475 U.S. 673, 678, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986).

10 See, *e.g., Delaware v. Van Arsdall, supra* (denial of right to cross-examine to show bias); *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (denial of right to impeach own witness); *Smith v. Illinois,* 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968) (denial of right to ask witness' real name and address at trial); *Douglas v. Alabama,* 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965) (denial of right to cross-examine codefendant). Moreover, the Court normally has refused to find a Sixth Amendment violation when the asserted interference with cross-examination did not occur at trial. Compare *McCray v. Illinois,* 386 U.S. 300, 311–313, 87 S.Ct. 1056, 1062–1064, 18 L.Ed.2d 62 (1967) (no Confrontation Clause violation where defendant was denied the chance to discover an informant's name at pretrial hearing), with *Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) (on the facts presented, Government required to disclose informant's name at trial). See generally Westen, The Compulsory Process Clause, 73 Mich.L.Rev. 71, 125–126 (1974) ("The right of confrontation is exclusively a 'trial right'.... It does not ... require the government to produce witnesses whose statements are not used at trial, or to produce the underlying information on which its witnesses base their testimony") (footnotes omitted) (hereinafter Westen).

11 The evidence consisted of a letter that was sent to President Jefferson by General James Wilkinson that allegedly showed that Burr was planning to invade Mexico and set up a separate government under his control. After being ordered to do so, Jefferson eventually turned over an edited version of the letter. For an excellent summary of the *Burr* case and its implications for compulsory process, see Westen 101–108.

12 The pre–1967 cases that mention compulsory process do not provide an extensive analysis of the Clause. See *Pate v. Robinson,* 383 U.S. 375, 378, n. 1, 86 S.Ct. 836, 838, n. 1, 15 L.Ed.2d 815 (1966); *Blackmer v. United States,* 284 U.S. 421, 442, 52 S.Ct. 252, 256, 76 L.Ed. 375 (1932); *United States v. Van Duzee,* 140 U.S. 169, 173, 11 S.Ct. 758, 760, 35 L.Ed. 399 (1891); *Ex parte Harding,* 120 U.S. 782, 7 S.Ct. 780, 30 L.Ed. 824 (1887). See generally Westen 108, and n. 164.

13 See, *e.g., Chambers v. Mississippi, supra; Cool v. United States,* 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972) (*per curiam*); *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Cf. *Webb v. Texas,* 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) (*per curiam*) (decision based on Due Process Clause).

14 We express no opinion on whether the result in this case would have been different if the statute had protected the CYS files from disclosure to *anyone,* including law-enforcement and judicial personnel.

15 The Commonwealth also argues that Ritchie is not entitled to disclosure because he did not make a particularized showing of what information he was seeking or how it would be material. See Brief for Petitioner 18 (quoting *United States v. Agurs,* 427 U.S. 97, 109–110, 96 S.Ct. 2392, 2400–2401, 49 L.Ed.2d 342 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense ... does not establish 'materiality' in the constitutional sense")). Ritchie, of course, may not require the trial court to search through the CYS file without first establishing a basis for his claim that it contains material evidence. See *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982) ("He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense"). Although the obligation to disclose exculpatory material does not depend on the presence of a specific request, we note that the degree of specificity of Ritchie's request may have a bearing on the trial court's assessment on remand of the materiality of the nondisclosure. See *United States v. Bagley,* 473 U.S. 667, 682–683, 105 S.Ct. 3375, 3383–3384, 87 L.Ed.2d 481 (1985) (opinion of BLACKMUN, J.).

16 See Fed.Rule Crim.Proc. 16(d)(2); Pa.Rule Crim.Proc. 305(E) ("If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule [mandating disclosure of exculpatory evidence], the court may ... enter such ... order as it deems just under the circumstances").

17 The importance of the public interest at issue in this case is evidenced by the fact that all 50 States and the District of Columbia have statutes that protect the confidentiality of their official records concerning child abuse. See Brief for State of California *ex rel.* John K. Van de Kamp et al. as *Amici Curiae* 12, n. 1 (listing illustrative statutes). See also Besharov, The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect, 23 Vill.L.Rev. 458, 508–512 (1978).

1 Accordingly, the remark from *Delaware v. Fensterer,* which the plurality would use, *ante,* at 999, as support for its argument that confrontation analysis has little to do with inquiries concerning the effectiveness of cross-examination, actually suggests the opposite. The Court observed in *Fensterer* that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." 474 U.S., at 20, 106 S.Ct. at 294 (emphasis in original). This remark does not imply that concern about such effectiveness has no place in analysis under the Confrontation Clause. Rather, it means that when, as in *Fensterer,* simple questioning serves the purpose of cross-examination, a defendant cannot claim a confrontation violation because there might have been a more effective means of cross-examination.

2 In *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court rejected any distinction between exculpatory and impeachment evidence for purposes of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). 473 U.S., at 676, 105 S.Ct., at 3380. We noted that nondisclosure of impeachment evidence falls within the general rule of *Brady* "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence.' " *Id.,* at 677, 105 S.Ct., at 3381, quoting *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). We observed moreover, that, while a restriction on pretrial discovery might not suggest as direct a violation on the confrontation right as would a restriction on the scope of cross-examination at trial, the former was not free from confrontation concerns. 473 U.S., at 678, 105 S.Ct., at 3381.

3 If the withholding of confidential material from the defendant at the pretrial stage is deemed a Confrontation Clause violation, harmless-error analysis, of course, may still be applied. See *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986).

* The Court contends that its restrictive view is supported by statements in *California v. Green,* 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970), and *Barber v. Page,* 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968), that the right to confrontation is essentially a trial right. Neither statement, however, was intended to address the question whether Confrontation Clause rights may be implicated by events outside of trial. In *Green,* the Court held that it was permissible to introduce at trial the out-of-court statements of a witness available for cross-examination. The Court rejected the argument that the Confrontation Clause precluded the admission of all hearsay evidence, because the ability of the defendant to confront and cross-examine the witness at trial satisfied the concerns of that Clause. 399 U.S., at 157, 90 S.Ct., at 1934. In *Barber,* the Court held that, where a witness could be called to testify, the failure to do so was not excused by the fact that defense counsel had an opportunity to cross-examine the witness at a preliminary hearing. The Court held that, since the Confrontation Clause is concerned with providing an opportunity for cross-examination at trial, the failure to afford such an opportunity when it was clearly available violated that Clause. Thus, neither *Green* nor *Barber* suggested that the right of confrontation attached exclusively at trial.

1 See *Commonwealth v. Blevins,* 453 Pa. 481, 482–483, 309 A.2d 421, 422 (1973) (whether "the testimony offered at trial by the Commonwealth was insufficient to support the jury's finding" is appealable issue of law); *Commonwealth v. Melton,* 402 Pa. 628, 629, 168 A.2d 328, 329 (1961) (citing case "where a new trial is granted to a convicted defendant on the sole ground that the introduction of certain evidence at his trial was prejudicial error" as example of appealable issue of law); *Commonwealth v. Durah-El,* 344 Pa.Super. 511, 514, n. 2, 496 A.2d 1222, 1224, n. 2 (1985) (whether trial counsel provided ineffective assistance of counsel is appealable as asserted "error of law"); *Commonwealth v. Carney,* 310 Pa.Super. 549, 551, n. 1, 456 A.2d 1072, 1073, n. 1 (1983) (whether curative instruction was sufficient to remedy improper remark of prosecution witness is appealable as asserted "error of law").

2 It is not clear to what extent counsel for the Commonwealth in this case represents CYS, or whether he only represents the Office of the District Attorney of Allegheny County. CYS is certainly not a party to this case; in fact it has filed an *amicus curiae* brief expressing its views. That CYS is not a party to the case makes it all the more inappropriate for the Court to relax the rule of finality in order to spare CYS the need to appeal a contempt order if it fails to produce the documents.

3 The Court has recognized a limited exception to this principle where the documents at issue are in the hands of a third party who has no independent interest in preserving their confidentiality. See *Perlman v. United States,* 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918); see also *United States v. Ryan,* 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971). This case presents a far different situation. As far as the disclosure of the documents go, it is CYS, not the

prosecutor, that claims a duty to preserve their confidentiality and to implement Pennsylvania's Child Protective Services Law. See Brief for Allegheny County, Pennsylvania, on behalf of Allegheny County Children and Youth Services as *Amicus Curiae* in Support of Petitioner 2.

Nor does this case come within the exception of *United States v. Nixon,* 418 U.S. 683, 691–692, 94 S.Ct. 3090, 3099–3100, 41 L.Ed.2d 1039 (1974), where the Court did not require the President of the United States to subject himself to contempt in order to appeal the District Court's rejection of his assertion of executive privilege. As Judge Friendly explained, the rationale of that decision is unique to the Presidency and is "wholly inapplicable" to other government agents. See *National Super Suds, Inc. v. New York Mercantile Exchange,* 591 F.2d 174, 177 (CA2 1979); see also *Newton v. National Broadcasting Co.,* 726 F.2d 591 (CA9 1984); *United States v. Winner,* 641 F.2d 825, 830 (CA10 1981); *In re Attorney General of the United States,* 596 F.2d 58, 62 (CA2), cert. denied, 444 U.S. 903, 100 S.Ct. 217, 62 L.Ed.2d 141 (1979); but see *In re Grand Jury Proceedings (Wright II),* 654 F.2d 268, 270 (CA3), cert. denied, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981); *Branch v. Phillips Petroleum Co.,* 638 F.2d 873, 877–879 (CA5 1981).

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136 N.H. 101
Supreme Court of New Hampshire.

The STATE of New Hampshire
v.
Denis GAGNE.

No. 91–359.
|
Aug. 14, 1992.

Synopsis
Defendant was convicted in the Superior Court, Merrimack County, Mohl, J., of felonious sexual assault and he appealed. The Supreme Court, Johnson, J., held that defendant was entitled to in camera review of child abuse records of the victims in order to determine whether they contained relevant material.

Remanded.

West Headnotes (3)

[1] **Constitutional Law**
Particular Items or Information, Disclosure of

Due process considerations require trial court to balance state's interest in protecting confidentiality of child abuse records against defendant's right to obtain evidence helpful to his defense. U.S.C.A. Const.Amend. 14; Const. Pt. 1, Art. 15; RSA 169–C:25, subd. 3, 329:26, 330–A:19.

11 Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Juvenile records

In determining whether in camera review is warranted with respect to child abuse records which defendant seeks and which are alleged to be confidential, courts cannot expect defendants to articulate the precise nature of the confidential records without having access to them and, in order to trigger in camera review of confidential or privileged records, defendant must establish reasonable probability that the records contain information that is material and relevant to his defense. U.S.C.A. Const.Amend. 14; Const. Pt. 1, Art. 15; RSA 169–C:25, subd. 3, 329:26, 330–A:19.

45 Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**
Juvenile records

Sexual assault defendant established reasonable possibility that child abuse records might contain information material and relevant to the defense, warranting in camera inspection, by alleging that they might contain information explaining why one of the victims was taken into protective custody when defendant was arrested, whether contradictions existed and statements made by one of the victim's mothers against the defendant, whether ongoing statements made by one of the victims regarding sexual assault contained inconsistencies which could be used for impeachment, whether one of the victims might have been sexually abused by other adults and thereby have knowledge that the average six or seven-year-old would not have, and whether the Department of Children and Youth Services' counselors had prepared the victims for trial.

33 Cases that cite this headnote

Attorneys and Law Firms

****899 *102** John P. Arnold, Atty. Gen. (Ward E. Scott, attorney, on the brief, and John A. Stephen, attorney,

orally), for the State.

W. Kirk Abbott, Jr., Asst. Appellate Defender, Concord, by brief and orally, for defendant.

Opinion

JOHNSON, Justice.

The defendant, Denis Gagne, was convicted by a jury of aggravated felonious sexual assault, RSA 632–A:2. On appeal, he contends that the Superior Court (*Mohl,* J.) violated his due process rights under part I, article 15 of the State Constitution and the fourteenth amendment to the Federal Constitution when it refused to conduct an *in camera* review of confidential records in the possession of the New Hampshire Division for Children and Youth Services (DCYS). We remand for further proceedings in accordance with this opinion.

The defendant was found guilty of having coerced two minor girls into engaging in fellatio with him in September 1989. The DCYS conducted an investigation pursuant to an abuse and neglect ***103** action against the defendant prior to the trial. The DCYS's entire investigatory file is confidential under the Child Protection Act, *see* RSA 169–C:25, III (Supp.1991), and any counseling and medical records contained therein are also subject to a limited privilege, *see N.H. R. Ev.* 503; RSA 330–A:19 (Supp.1991) (psychologist-patient privilege); ****900** RSA 329:26 (Supp.1991) (physician-patient privilege). Thus, neither the prosecution nor the defendant had access to the DCYS file.

The defendant filed a pretrial motion for discovery requesting, among other things, "[a]ny and all statements of witnesses, reports, and records, in the custody of the [DCYS] ... and [a]ny and all reports or results ... of any psychiatric or psychological examination of the alleged victims in this case." The defendant contended that such material was "necessary for counsel to adequately and effectively prepare to confront and cross-examine the witnesses" and was "relevant to the credibility, reliability, bias or motive of any witness the State may call."

The trial court conducted a hearing on the merits of the defendant's discovery motion. At the hearing, the victims' guardians ad litem asserted the statutory privilege with regard to the materials contained in the DCYS file but did not object to submitting such materials under seal to the trial court for an *in camera* inspection. The defendant argued that the DCYS file was "relevant and necessary to the preparation of trial in this case." Specifically, defense counsel contended that, based on information obtained during the course of her investigation, she had reason to believe that the file contained information potentially explaining the following matters: (1) why one of the victims was taken into protective custody when the defendant was arrested; (2) whether contradictions existed in statements made by one of the victim's mothers against the defendant; (3) whether "ongoing statements" made by one of the victims regarding the sexual assault contained inconsistencies which could be used for impeachment; (4) whether one of the victims had been sexually abused by other adults and thereby had "knowledge that the average six or seven-year-old would not have"; and (5) the extent to which DCYS counselors had prepared the victims for trial.

The trial court denied the defendant access to any materials contained in the DCYS file except for "statements [made] by the minor victims." The court also refused to review the file *in camera* in the following order:

> "Defendant must make a showing that the confidential files and information regarding the victims are essential and ***104** reasonably necessary to his defense in this case. *State v. Farrow,* 116 N.H. 731, 733 [366 A.2d 1177] (1976). Moreover, such a showing is required to warrant the Court's conducting an *in camera* review of the records. *State v. Lewis,* 129 N.H. 787, 799 **[533** A.2d 358] (1987).
>
> Defendant takes the position that there *may* be information that is important to his defense of the charges against him, or that the requested records may lead to exculpatory evidence. At a minimum, defendant contends the Court must review the material *in camera.* However, apart from the generalized assertion of relevance and materiality in the defendant's motion and in argument on the motion, the defendant does not provide the Court with specific reasons why the otherwise privileged material is necessary for his defense."

(Emphasis in original.) The defendant appeals from this order, arguing that his due process rights were violated. He claims that *Farrow's* "essential and reasonably necessary" standard is too demanding for purposes of triggering an *in camera* review.

There are two distinct issues involved in a case where a defendant desires to obtain privileged information. The issues, however, are intertwined. The first issue is what showing must the defendant make to the trial court in order *to obtain a review* of the privileged information. The second issue is what showing must the defendant

make in order *to use* the privileged information in the actual trial of his case, assuming the review of the privileged information has revealed evidence that could be potentially useful.

Turning to the second issue, we held in *State v. Farrow,* 116 N.H. 731, 366 A.2d 1177 (1976), that under the sixth amendment to the Federal Constitution, the trial ****901** court must permit defendants *to use* privileged material if such material is "essential and reasonably necessary to permit counsel to adequately cross-examine for the purpose of showing unreliability and bias." *Id.* at 733, 366 A.2d at 1179. In *State v. Lewis,* 129 N.H. 787, 533 A.2d 358 (1987), the defendant sought privileged information concerning the victim's homosexuality. The defendant, during trial, had described a non-aggressive homosexual advance by the victim prior to the victim being murdered. The State *never* disputed the defendant's account; therefore, the fact that the victim was a homosexual was not a fact in dispute. Hence, we held that the trial court's refusal to permit the ***105** review of the victim's medical records was proper, "when, as here, there is no basis to infer that the records were 'essential and reasonably necessary' to corroborate testimony on an issue in dispute." *Id.* at 799, 533 A.2d at 365–66 (citing *State v. Farrow supra*). In short, there was no dispute in *Lewis* that the victim was a homosexual; thus, the victim's records would not reveal facts *for use* at trial that could aid the defendant in his defense.

As to the first issue, the defendant relies primarily on *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), a case remarkably similar to the case before us. In *Ritchie,* the United States Supreme Court held that, under the due process clause of the fourteenth amendment, the defendant was entitled to have the trial court conduct a preliminary review of a Pennsylvania child welfare agency's investigatory records. The agency's records, referred to as the "CYS file," like those of the DCYS in this case, were subject to a limited statutory privilege. *See* 23 *Pa.Cons.Stat.Ann.* § 6339. The Court, balancing the State's interest in protecting confidential information against the defendant's interest in obtaining potentially helpful evidence, stated that "[a]n *in camera* review by the trial court will serve [the defendant's] interest without destroying the [State's] need to protect the confidentiality of those involved in child-abuse investigations." *Ritchie, supra* at 61, 107 S.Ct. at 1003. Prior to judicial review, the Court reasoned, "it is impossible to say whether any information in the [agency's] records may be relevant to [the defendant's] claim of innocence, because neither the prosecution nor defense counsel has seen the information, and the trial judge ... had not reviewed the full file."

[1] [2] We agree that due process considerations require trial courts to balance the State's interest in protecting the confidentiality of child abuse records against the defendant's right to obtain evidence helpful to his defense. An *in camera* review of such records provides a "useful intermediate step between full disclosure and total nondisclosure." *United States v. Gambino,* 741 F.Supp. 412, 414 (S.D.N.Y.1990). In determining whether an *in camera* review is warranted, however, trial courts cannot realistically expect defendants to articulate the precise nature of the confidential records without having prior access to them. Thus, we hold that in order to trigger an *in camera* review of confidential or privileged records, the defendant must establish a reasonable probability that the records contain information that is material and relevant to his defense.

This approach is similar to the approaches taken by other courts in the wake of *Ritchie. See, e.g.,* ***106** *State v. Howard,* 221 Conn. 447, 457, 604 A.2d 1294, 1300 (1992) (defendant must show "reasonable ground to believe" that failure to produce records may impair ability to impeach witness); *Stripling v. State,* 261 Ga. 1, 401 S.E.2d 500, 505 (defendant must make "reasonably specific request for relevant and competent information"), *cert. denied,* 502 U.S. 985, 112 S.Ct. 593, 116 L.Ed.2d 617 (1991); *People v. Votava,* 223 Ill.App.3d 58, 75, 165 Ill.Dec. 546, 58, 584 N.E.2d 980, 992 (1991) (defendant must "sufficiently demonstrate that the requested records are material and relevant to the witness's credibility"); *State v. Hutchinson,* 597 A.2d 1344, 1347 (Me.1991) (court must find that records "may be necessary for the determination of any issue" before the court); *Zaal v. State,* 326 Md. 54, 80, 602 A.2d 1247, 1261 (1992) (defendant must show "some relationship ... between the charges, the information sought, and the likelihood that relevant information will be obtained as a result of reviewing the records"); ****902** *Commonwealth v. Jones,* 404 Mass. 339, 343–44, 535 N.E.2d 221, 224 (1988) (defendant must "demonstrate a realistic and substantial possibility that [records] contained information helpful to his defense"); *People v. Arnold,* 177 A.D.2d 633, 634, 576 N.Y.S.2d 339, 340 (1991) (defendant must establish "reasonable likelihood that the records might contain material bearing on the reliability and accuracy of the witness's testimony...."); *In Interest of K.K.C.,* 143 Wis.2d 508, 511, 422 N.W.2d 142, 144 (1988) (defendant must "make[ ] a preliminary showing that the files contain evidence material to his defense").

[3] Applying the *Ritchie* principles to the arguments presented at the discovery hearing in this case, we find that defense counsel established a reasonable probability

that the DCYS file contained information that may have been material and relevant to the defense. As noted earlier, counsel made five specific arguments concerning relevant evidence which, according to information obtained independently by counsel, may have been contained in the DCYS file.

We remand so that the trial court may conduct an *in camera* review of the DCYS file. As in *Ritchie,* and under the particular facts of this case, the *in camera* review shall be made without the presence of counsel, since counsel for the defendant need not be present to assist the trial court in "recogniz[ing] exculpatory evidence," and there is a danger that the names of persons who have spoken to the DCYS in confidence will be disclosed. *Ritchie, supra* at 60–61, 107 S.Ct. at 1002–03. If the trial court discovers evidence that the defendant could have used at trial which would have been "essential and reasonably necessary" to the defense, it should order a new trial unless the ***107** court finds the error, of not admitting the evidence, was in fact harmless beyond a reasonable doubt.

Remanded.

All concurred.

All Citations

136 N.H. 101, 612 A.2d 899

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Declined to Follow by State v. McIntosh, Kan., December 6, 2002

137 N.H. 402
Supreme Court of New Hampshire.

The STATE of New Hampshire
v.
Wayne CRESSEY.

No. 92–018.
|
July 15, 1993.

Synopsis
Defendant was convicted in the Carroll Superior Court, Mohl, J., of aggravated felonious sexual assault and felonious sexual assault of children under his care, and he appealed. The Supreme Court, Brock, C.J., held that: (1) testimony of expert in areas of psychology and child sexual abuse was not sufficiently reliable to be admitted as evidence that children were sexually abused; (2) trial court should have conducted further inquiry when defendant sought to introduce evidence of prior consensual sexual conduct by one child in light of state's evidence that child had engaged in sexual intercourse; (3) private psychologist's notes were subject to in camera review by trial court; and (4) counsel did not have to participate in in camera review of psychologist's notes.

Reversed and remanded.

West Headnotes (9)

[1] **Criminal Law**
Battered or abused children

Testimony by expert in areas of psychology and child sexual abuse was not sufficiently reliable to be admitted in criminal trial as evidence that children in defendant's care were sexually abused; psychological evaluations of children dealt almost exclusively in vague psychological profiles and symptoms, and unquantifiable evaluation results, there was no recognizable, logical nexus between many identified symptoms and conclusion that children had been sexually abused, information relied upon had to be subjectively interpreted by expert, and it was not clear that even thorough cross-examination could effectively expose any unreliable elements or assumptions in expert's testimony. Rules of Evid., Rule 702.

34 Cases that cite this headnote

[2] **Criminal Law**
Subjects of Expert Testimony

Subsumed in requirements of evidentiary rule dealing with experts is premise that expert testimony must be reliable to be admissible. Rules of Evid., Rule 702.

1 Cases that cite this headnote

[3] **Criminal Law**
Discretion

Determination of whether particular expert testimony is reliable and admissible rests, in first instance, within sound discretion of trial court. Rules of Evid., Rule 702.

7 Cases that cite this headnote

[4] **Criminal Law**
Battered or abused children

In context of determining whether expert's testimony was sufficiently reliable to be admissible in prosecution for sexual abuse, expert's statement that children exhibited symptoms consistent with those of sexually abused children did not in any way limit her testimony and was not appreciably different from statement that children in instant case were sexually abused. Rules of Evid., Rule 702.

29 Cases that cite this headnote

[5] **Infants**
Prior sexual history, experience, or abuse; rape shield
Sex Offenses
Minor victims

When state in sexual abuse prosecution offered medical testimony that condition of child's hymen and vagina was consistent with that of child who had sexual intercourse, and defendant sought to offer evidence of victim's prior consensual sexual experiences, trial court should have made further inquiry to evaluate evidence offered by defendant and determine whether due process considerations required admission of evidence concerning victim's prior consensual sexual conduct, despite potential prejudicial effect on victim. RSA 632–A:1 et seq., 632–A:6; U.S.C.A. Const.Amends. 5, 14.

12 Cases that cite this headnote

[6] **Sex Offenses**
Prior conduct involving persons other than accused

Rape shield law prohibits admission of evidence regarding victim's prior consensual sexual activity with persons other than defendant except when defendant's right to due process so requires. RSA 632–A:1 et seq., 632–A:6; U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

[7] **Constitutional Law**
Right to present evidence in general

Right to due process clearly ensures defendant's opportunity to present relevant evidence offering alternative explanation to medical or physical evidence relied on by state to prove that sexual intercourse has taken place. RSA 632–A:1 et seq., 632–A:6; U.S.C.A. Const.Amends. 5, 14.

1 Cases that cite this headnote

[8] **Constitutional Law**
Proceedings concerning disclosure
Privileged Communications and Confidentiality
Psychologists

Fact that psychologist who examined child victim of sexual abuse was employed by private mental health facility rather than state agency did not relieve trial court from conducting in camera review of psychologist's notes if defendant was able to establish reasonable probability that notes contained information relevant and material to defense; defendant's due process rights were no less worthy of protection simply because information sought was maintained by nonpublic entity. U.S.C.A. Const.Amends. 5, 14.

12 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**
Juvenile records

In camera review of agency records dealing with child victims of sexual abuse would be without presence of counsel inasmuch as there was presumption that trial court would be capable of accurately evaluating contents of records without assistance of counsel.

4 Cases that cite this headnote

Attorneys and Law Firms

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Asst. Atty. Gen., orally), for the State.

W. Kirk Abbott, Jr., Asst. Appellate Defender, Concord, by brief and orally, for defendant.

Opinion

BROCK, Chief Justice.

The defendant, Wayne Cressey, was convicted of three counts of aggravated felonious sexual assault, RSA 632–A:2 (1986 & Supp.1989) (amended 1992), and one count of felonious sexual assault, RSA 632–A:3 (1986), after a jury trial in the Superior Court (*Mohl,* J.). On appeal, the defendant argues that the trial court erred in admitting the testimony of the State's expert psychologist to prove that the child victims had been sexually abused. We reverse the convictions on this ground and, therefore, address the defendant's other claims on appeal only to the extent that they are likely to arise again in a new trial.

The defendant and his wife, Betsy Cressey, were given custody of their nieces, Lisa, Julie, and Lorie, while living in Ossipee in 1983. The children's father had been institutionalized since an automobile accident in 1981. The children's mother was killed in another automobile accident in 1982. In 1985, Betsy Cressey also died from complications of injuries sustained in an automobile accident. Lisa, Julie, and Lorie remained in the defendant's care, and he eventually remarried in 1987.

***404** At trial, Lisa testified that the defendant began to sexually abuse her when she was approximately eight years old. The pattern of abuse that continued over the next six years included acts of sexual touching, fellatio, and intercourse. Lisa's sister, Julie, also testified that when she was eleven years old she was involved in two sexual encounters with the defendant, which included sexual touching and digital penetration.

Lisa had not mentioned the defendant's abusive acts to anyone until October 1989, when she disclosed them to a woman for whom she babysat. She was fourteen years old at the time. Lisa testified that the defendant had warned her not to tell anyone about the incidents because she would be separated from her sisters and he would go to jail. Julie had not disclosed any incidents of sexual abuse until February 1991, shortly before a trial was scheduled to begin on the charges involving Lisa. In her interviews with police and counselors prior to that time, Julie had denied having sexual contact with the defendant.

[1] The defendant's first claim on appeal is that the trial court erred in admitting the testimony of the State's expert witness, Dr. Kathleen Bollerud. Dr. Bollerud is an expert in the areas of psychology and child sexual abuse. She interviewed Lisa and Julie prior to trial, and her testimony ****698** was a substantial part of the State's case-in-chief. She testified in general about the effects that sexual abuse has on children and about the symptoms and behaviors commonly exhibited by sexually abused children. She testified in particular about the interviewing techniques she used with Lisa and Julie and about her evaluation of each child. Ultimately Dr. Bollerud stated that the symptoms exhibited by each child were consistent with those of a sexually abused child.

[2] To evaluate the admissibility of Dr. Bollerud's expert testimony, we must return to the basic evidentiary rules regarding experts. New Hampshire Rule of Evidence 702 states:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Subsumed in the requirements of Rule 702 is the premise that expert testimony must be reliable to be admissible. For only if the expert's testimony is reliable can it assist the jury in understanding the evidence or determining a fact in issue. The requirement that an expert's ***405** testimony be reliable is reflected in the evidentiary practices of properly establishing an expert's qualifications, *see, e.g., State v. Coleman,* 133 N.H. 713, 715–16, 584 A.2d 755, 757 (1990), and subjecting technical evidence to the scrutiny of the test set forth in *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923), *see State v. Vandebogart (DNA),* 136 N.H. 365, 373, 616 A.2d 483, 489 (1992).

[3] We therefore recognize that an expert's testimony must rise to a threshold level of reliability to be admissible under New Hampshire Rule of Evidence 702. *Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, ——, 113 S.Ct. 2786, ——, 125 L.Ed.2d 469 (1993). (We do not reach the issue addressed in *Daubert,* however, of whether the *Frye* test has been superseded in New Hampshire by our adoption of New Hampshire Rule of Evidence 702.) The reliability of evidence is of a special concern when offered through expert testimony because such testimony involves the potential risks that a jury may disproportionately defer to the statements of an expert if

the subject area is beyond the common knowledge of the average person, and that a jury may attach extra importance to an expert's opinion simply because it is given with the air of authority that commonly accompanies an expert's testimony. The determination of whether particular expert testimony is reliable and admissible rests, in the first instance, within the sound discretion of the trial court. *Cf. Johnston v. Lynch,* 133 N.H. 79, 88, 574 A.2d 934, 939 (1990).

The importance of Dr. Bollerud's testimony, coupled with the air of authority it gains from being presented by a highly qualified expert, requires us to scrutinize her methods and conclusions carefully in assessing the reliability of her statements. In reaching her conclusions, Dr. Bollerud relied on several different types of information. She interviewed each child, asking open-ended questions about their lives, backgrounds, family situations, and the alleged abuse. Dr. Bollerud then used a disassociative events scale to identify and assess any of the children's behaviors that could be interpreted as manifestations of disassociative behavior resulting from post-traumatic stress. The disassociative events scale used by Dr. Bollerud consists of a checklist of twenty-eight possible indicators of disassociative behavior, such as depersonalization, hypervigilance, and numbing.

Finally, Dr. Bollerud evaluated the children through a technique of art therapy. She testified that this technique involves the children being asked to do a standard series of drawings, which serve to "reveal the unconscious psychological world of the child." Dr. Bollerud first asked each child to draw a person, then a person of the opposite sex of the person in the first drawing, and then a picture of the child's ***406** family. Finally she asked the children to draw themselves before, during, and after the abuse. She then interpreted the drawings, ****699** analyzing the characters and scenes that were drawn, as well as the types of lines and drawing styles in each drawing. Dr. Bollerud testified that a child drawing a person of the opposite sex in the first drawing, drawings of people with no secondary sex characteristics, drawings of people with no hands, feet, or arms, and the presence of genitals in a drawing are some of the many potential indicators of abuse.

As a result of her information gathering, Dr. Bollerud found Lisa to be exhibiting the specific symptoms of "feeling that her body was not her own; forgetting time; having amnesias; feeling as if she was in another world; describing nightmares and dreams about sexuality; flashbacks; being intensely preoccupied with sexual abuse"; and having a fragmented sense of self. Dr. Bollerud also found indicators of sexual abuse in Lisa's drawings, including her drawing a person of the opposite sex in the first drawing; a lack of secondary sex characteristics; missing hands and arms, with more missing in the drawings of herself and the defendant; the drawing of genitalia and sexual acts with the defendant when asked to draw the abuse; the drawing of a transparent figure; and an "adoration in her ability to draw as she was drawing the more emotionally charged pictures."

With respect to her evaluation of Julie, Dr. Bollerud found her not to be suffering from a disassociative disorder, although she did manifest some symptoms of post-traumatic stress such as hypervigilance, efforts to avoid thinking about what had happened to her in the past, a fear of males, and compulsive overeating. Dr. Bollerud also testified that some of the pictures that Julie drew had no indicators of sexual abuse. Other drawings, however, contained a figure with empty, uncolored eyes; figures with heavy belts around their waists; some figures lacking in secondary sex characteristics or having misshapen feet; and black marks representing her "gross feelings" after the abuse. Dr. Bollerud noted these characteristics as indicators of sexual abuse or emotional distress.

From all of the information gathered and observations made during her evaluations of Lisa and Julie, Dr. Bollerud ultimately testified that the children exhibited symptoms consistent with those of children who have been sexually abused. She emphasized in her testimony that her approach in evaluating children suspected of being sexually abused is to consider a wide variety of factors and gather as much information as possible, using a number of different means. She acknowledged that she did not, nor could not, rely solely on one ***407** behavior or response to conclude that a child has been sexually abused. Instead, she viewed all of the results, interpreted them in light of her expertise in the field, and based her conclusions on all the information before her.

We hold that Dr. Bollerud's expert testimony is not sufficiently reliable to be admitted in a criminal trial as evidence that Lisa and Julie were sexually abused. By this opinion we do not seek to disparage the work being done in psychology and the behavioral sciences, for we can surely see its value; however, we are bound to recognize that the separate fields of behavioral science and criminal justice are different enough in their foundations and goals that what may be considered helpful information in one may not be so valued in the other. Generally speaking, the psychological evaluation of a child suspected of being sexually abused is, at best, an inexact science. Dr.

Bollerud, herself, acknowledged at trial that the evaluation of such a child is partly a science and partly an art form. As this opinion explains below, a psychological evaluation of a potentially abused child does not present the verifiable results and logical conclusions that work to ensure the reliability required in the solemn matter of a criminal trial.

[4] As a preliminary matter, we reject the State's assertions that the scope of Dr. Bollerud's testimony was somehow limited by her statements in conclusion that the children exhibited symptoms *consistent* with those of sexually abused children. We see no appreciable difference between this type of statement and a statement ****700** that, in her opinion, the children were sexually abused. Even if some difference could be identified, our review of the record below reveals that the manner in which Dr. Bollerud's testimony was presented in its entirety reflects no such limitation and clearly would lead a jury to conclude that Dr. Bollerud believed the children were sexually abused.

The following analysis of Dr. Bollerud's testimony properly concentrates on the parts of the psychological evaluations extending beyond the children's recountings of the abusive incidents. Expert psychological evidence can only be admissible in a case such as this if it is at least partly based on factors in addition to and independent of the victim's accounts. Otherwise, the expert's conclusions are of no value to the jury because they present no new evidence and are merely vouching for the credibility of the child victim witness. We understand that Dr. Bollerud reached her conclusions by considering many factors in addition to the victims' statements about the abuse. Her reliance on the children's accounts was substantial, however, for ***408** even she conceded that she could not reach a conclusion that a child had been sexually abused, based only on a consideration of secondary factors without a verbal account from the child. Our purpose in reviewing Dr. Bollerud's testimony is to determine whether these secondary factors, when viewed in conjunction with the children's recountings, form a reliable ground on which Dr. Bollerud can offer an opinion that the children were sexually abused.

Reviewing Dr. Bollerud's methods and conclusions in the context of their presentation as evidence in a criminal trial raises a number of specific concerns with respect to the reliability of her testimony. Our first concern is that the evaluations of the children deal almost exclusively in vague psychological profiles and symptoms, and unquantifiable evaluation results. There is much criticism attacking the attempts to compile a list of symptoms and behaviors to serve as an accurate indicator of whether a child has been sexually abused. *See Commonwealth v. Dunkle,* 529 Pa. 168, 602 A.2d 830, 832–36 (1992) (citing articles); *State v. J.Q.,* 252 N.J.Super. 11, 33–35, 599 A.2d 172, 184–85 (1991) (citing articles), *aff'd,* 130 N.J. 554, 617 A.2d 1196 (1993); *State v. Rimmasch,* 775 P.2d 388, 401–02 (Utah 1989) (citing articles); *see also* Myers *et al., Expert Testimony in Child Sexual Abuse Litigation,* 68 Neb.L.Rev. 1, 67–68 (1989). "The consensus among scholars is that there are as yet no scientifically reliable indicators of child sexual abuse." *State v. J.Q.,* 252 N.J.Super. at 33, 599 A.2d at 184. There are no symptoms or behaviors that occur in every case of child abuse, nor are there symptoms or behaviors that are found exclusively in child abuse cases. *See* Myers, *supra* at 62. The symptoms cited by Dr. Bollerud in this case are far from establishing a clear profile by which an abused child can be accurately identified. Many of the symptoms considered to be indicators of sexual abuse, such as nightmares, forgetfulness, and overeating, could just as easily be the result of some other problem, or simply may be appearing in the natural course of the children's development.

The inherent uncertainty in the use of this vague symptomology is increased by the absence of standardized tests and readily quantifiable results as parts of the psychological evaluations. No standardized tests were administered to Lisa and Julie, as Dr. Bollerud testified that they have not been found to be helpful in determining whether a child has been sexually abused. The responses given by the children also were not quantified through any normative scoring procedure that would enable them to be compared to a standard set of results reflecting the responses of the general population of children, or even of a large grouping of known sexually abused children. The disassociative ***409** events scale, for instance, which when used as a research tool yields a quantifiable result along a scale, was used in this case only as a clinical evaluative tool, producing no quantifiable results that could then be compared to a standardized norm. Without a more accurate means of assessing the implications of those symptoms exhibited by the children, and without the ability to ****701** somehow compare the results of Dr. Bollerud's analysis of the children with an objective standard, the reliability of the psychological evaluations overall comes into question.

Our second area of concern regarding the reliability of Dr. Bollerud's testimony compounds the problems noted above that are inherent in the evaluator's need to rely on a vague symptomology and unquantifiable results. Although symptoms may be vague and inconsistent from case to case, this does not necessarily prevent them from logically leading to a certain conclusion. The problem

present in this case, however, is the absence of any recognizable, logical nexus between many of the identified symptoms and the conclusion that the children have been sexually abused. Many of the factors considered by Dr. Bollerud, while they may accurately indicate that the children's mental health may be suffering to some degree, do not necessitate a finding that the children have been sexually abused. To the extent that disassociative behavior may result from post-traumatic stress, the manifestations of disassociative behavior in Lisa may have been caused by incidents of sexual abuse, or could have been caused by the traumatic deaths of her mother and aunt, and the institutionalization of her father. The existence of the disassociative behavior, by itself, proves little. In addition, many of the indicators that were noted during the evaluations as signs of abuse, when viewed independently, do not even suggest that anything is wrong with the children, much less lead to a logical conclusion that they have been sexually abused. The fact that the children drew pictures of males when asked to draw a person does not put in motion any logical series of deductions that leads to a conclusion that the children were sexually abused. Without being able to identify this logical nexus, we have no way of accurately knowing whether the drawing of a male is an indicator of child abuse or the result of a fifty-fifty chance. Ultimately, we have no way of independently verifying Dr. Bollerud's conclusions.

Our third concern regarding the reliability of Dr. Bollerud's testimony stems from the problems we have previously mentioned. Much of the information relied upon by Dr. Bollerud begins to take on some sort of meaning only when it is interpreted and evaluated by ***410** someone in her field of expertise. Dr. Bollerud testified that her psychological evaluations are partly an art form, and that her interpretation and evaluation of the available information is somewhat subjective. We realize that Dr. Bollerud is not evaluating the children as a lay person would, and that her training in methodologies and adherence to professional guidelines and practices tend to improve the consistency and accuracy of her evaluations. Nevertheless, the fact that this type of interpretive step must take place adds yet another variable to the whole evaluative process, which can only make the results less certain. Moreover, because this final interpretive step occurs in Dr. Bollerud's mind, drawing on her experiences and personal knowledge, it is all the more unverifiable.

Finally, we are not convinced that a thorough cross-examination can effectively expose any unreliable elements or assumptions in Dr. Bollerud's testimony. The methodology used in the psychological evaluations makes her presentation of evidence effectively beyond reproach. Dr. Bollerud's conclusions do not rest on one particular indicator or symptom, but rather on her interpretation of all the factors and information before her. So even though the defendant may be able to discredit several of the indicators, symptoms, or test results, the expert's overall opinion is likely to emerge unscathed. An expert using this methodology may candidly acknowledge any inconsistencies or potential shortcomings in the individual pieces of evidence she presents, but can easily dismiss the critique by saying that her evaluation relies on no one symptom or indicator and that her conclusions still hold true in light of all the other available factors and her expertise in the field. In such a case, the expert's conclusions are as impenetrable as they are unverifiable.

****702** It would be disingenuous for this court to imply through its opinion that Dr. Bollerud's testimony is entirely bereft of probative or useful information, or founded solely on illogical considerations, for such is not the case. Aside from the children's recountings of the incidents of sexual abuse, Dr. Bollerud did consider several factors, such as age-inappropriate sexual behavior and knowledge, and obsessions with sexual abuse, that may suggest that sexual abuse did occur. Factors such as these have a close logical association with sexual abuse. *See* Myers, *supra* at 59. Absent an alternative explanation for their appearance, such as the victim's involvement in other sexually oriented activities, these factors may be quite probative of whether a child has been sexually abused. If otherwise admissible, such factors could be offered independently at trial to prove that sexual abuse did occur. We do not believe, however, that the presence ***411** of such factors is an adequate ground on which an expert may affirmatively state that a child has been sexually abused. The relevance of this type of information is not beyond the ken of the average juror. Therefore, a jury should be able to draw its own conclusions from the evidence without an expert offering an opinion on the ultimate issue. *See Vincent v. Public Serv. Co. of N.H.*, 129 N.H. 621, 625, 529 A.2d 397, 399 (1987).

In sum, we cannot allow an expert to present conclusions on such important issues in a criminal trial without greater assurances of the testimony's reliability. We cannot consider the admission of Dr. Bollerud's testimony in this case to be harmless error. Her testimony was lengthy, comprehensive, and directly linked to a determination of the guilt or innocence of the defendant. We cannot say beyond a reasonable doubt that her testimony did not affect the verdict, *see State v. Elwell*, 132 N.H. 599, 607, 567 A.2d 1002, 1007 (1989), and therefore reverse the defendant's convictions.

Our holding in this case does not render expert psychological testimony useless in all child sexual abuse cases. There are cases in which an expert may play a valuable role as an educator, supplying the jury with necessary information about child sexual abuse in general, without offering an opinion as to whether a certain child has been sexually abused. Dr. Bollerud testified partially for this purpose when she detailed and explained the elements of the child sexual abuse accommodation syndrome. *See generally* Summit, *The Child Sexual Abuse Accommodation Syndrome,* 7 Child Abuse and Neglect 177 (1983). As Dr. Bollerud testified, this syndrome consists of five characteristics commonly found in sexually abused children: secrecy; helplessness; entrapment and accommodation; delayed, inconsistent, and unconvincing disclosure of incidents of sexual abuse; and retraction of the initial disclosure. The child sexual abuse accommodation syndrome was not intended to be a diagnostic device capable of detecting whether a child has been sexually abused. *State v. J.Q.,* 252 N.J.Super. at 28, 599 A.2d at 181. Rather, it proceeds from the premise that a child has been sexually abused and seeks to explain the resulting behaviors and actions of the child. *See People v. Bowker,* 203 Cal.App.3d **385,** 249 Cal.Rptr. 886, 892 (1988).

Several of the common behaviors mentioned by Dr. Bollerud, such as a child's delayed disclosure of abuse, inconsistent statements about abuse, and recantation of statements about abuse, may be puzzling or appear counterintuitive to lay observers when they consider the suffering endured by a child who is continually being abused. ***412** These behaviors also present an obvious opportunity for a defendant to superficially attack the testimony of a child victim witness during cross-examination or to argue against the child's credibility in closing statements before the jury. Therefore, expert testimony explaining the peculiar behaviors commonly found in sexually abused children may aid a jury in accurately evaluating the credibility of a child victim witness. In addressing this issue, the Connecticut Supreme Court recognized that "the overwhelming majority of courts have held that, where the defendant has sought to impeach the testimony of the minor victim based on inconsistencies, partial disclosures, or recantations relating to the alleged ****703** incidents, the state may present expert opinion evidence that such behavior by minor sexual abuse victims is common." *State v. Spigarolo,* 210 Conn. 359, 377–78, 556 A.2d 112, 122 (citing cases), *cert. denied,* 493 U.S. 933, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989); *see State v. J.Q.,* 252 N.J.Super. at 28–33, 599 A.2d at 181–84 (citing cases and articles). For these reasons, we hold that the State may offer expert testimony explaining the behavioral characteristics commonly found in child abuse victims to preempt or rebut any inferences that a child victim witness is lying. This expert testimony may not be offered to prove that a particular child has been sexually abused, and a defendant is entitled to a limiting instruction that so states.

We now turn to the defendant's other claims on appeal. Although we reverse the convictions on his first claim of error, we will address his other claims in the interest of judicial economy to the extent they are likely to arise again in a second trial.

[5] The defendant argues that his due process rights and right to confrontation were violated when he was prohibited from presenting testimony at trial regarding Lisa's prior consensual sexual activity. The defendant sought to introduce this evidence in response to the State's medical testimony that the condition of Lisa's hymen and vagina was consistent with that of a child who has had sexual intercourse. The defense had some evidence through a former friend of Lisa's that Lisa had had sexual experiences with three males other than the defendant prior to her medical examination. The trial court concluded that the State's medical testimony did not "open the door" for any inquiry by the defense into Lisa's past sexual activity.

[6] [7] New Hampshire's rape shield law, RSA 632–A:6 (1986) (amended 1992), prohibits the admission of evidence regarding a victim's prior consensual sexual activity with persons other than the defendant in a prosecution under RSA chapter 632–A, except when a defendant's right to due process so requires. ***413** *State v. Howard,* 121 N.H. 53, 58–59, 426 A.2d 457, 460–61 (1981). The right to due process clearly ensures a defendant's opportunity to present relevant evidence offering an alternative explanation to medical or physical evidence relied on by the State to prove that sexual intercourse has indeed taken place. *See State v. LaClair,* 121 N.H. 743, 746, 433 A.2d 1326, 1329 (1981). In this case, the trial judge, at the very least, should have made a further inquiry under *State v. Howard* to evaluate the evidence proffered by the defendant and determine whether due process considerations required the admission of evidence concerning Lisa's prior consensual sexual conduct, despite the potential prejudicial effect on Lisa.

[8] The defendant next argues that the trial court erred in failing to conduct an ***in camera*** review of a psychologist's notes from her **counseling** sessions with one of the children to determine whether they contained evidence that would aid the defendant's case. Instead of

conducting an ***in camera*** review, the trial judge relied upon the psychologist's representation that her files did not contain information exculpatory to the defendant. The trial court explained the departure from its previous practice of conducting an ***in camera*** review of confidential records from the New Hampshire Division for Child and Youth Services (DCYS) on the ground that DCYS records are under the control of a State agency, whereas the psychologist, whose notes were in question, was employed by a private mental health facility. As a reading of *State v. Gagne,* 136 N.H. 101, 612 A.2d 899 (1992), makes clear, this is a distinction without a difference.

In *Gagne,* we held that a defendant's due process rights require a court to conduct an *in camera* review of confidential or privileged records where the defendant establishes a reasonable probability that the records contain information relevant and material to his defense. *Id.* at 105, 612 A.2d at 901. *Gagne* did not distinguish between the privileged records of a State agency and the privileged records of a private organization. The rationale in *Gagne,* balancing the rights of a criminal defendant against the interests and benefits of confidentiality, applies equally in both cases. A record is no less privileged simply because it belongs to a State agency. ****704** Likewise, a defendant's rights are no less worthy of protection simply because he seeks information maintained by a non-public entity. We therefore hold that in the event of a retrial, the trial court must conduct an *in camera* review of the psychologist's privileged records should the defendant establish a reasonable probability that the records contain information relevant and material to his defense.

***414** [9] Finally, the defendant argues that the trial court erred in not allowing defense counsel to participate in the *in camera* review of the victims' DCYS records. In *Gagne,* we instructed the trial court on remand to conduct an *in camera* review of a confidential DCYS file. Relying on *Pennsylvania v. Ritchie,* 480 U.S. 39, 60–61, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987), we stated that "the *in camera* review shall be made without the presence of counsel, since counsel for the defendant need not be present to assist the trial court in recognizing exculpatory evidence, and there is a danger that the names of persons who have spoken to the DCYS in confidence will be disclosed." *Gagne,* 136 N.H. at 106, 612 A.2d at 902 (quotation and brackets omitted). On appeal, the defendant attempts to argue that the reasons behind excluding counsel from the *in camera* review in *Gagne* do not apply in this case because the names of everyone who spoke with the DCYS eventually will be disclosed when they testify at trial. The defendant cannot know if everyone who has spoken with the DCYS will testify at trial, nor can he be sure that the scope of their testimony will be as broad as the information contained in the DCYS records. A substantial interest in protecting confidentiality still exists in this case, and we affirm our presumption in *Gagne* that the trial court is capable of accurately evaluating the contents of the records without the assistance of counsel. *Id.*

Reversed and remanded.

All concurred.

All Citations

137 N.H. 402, 628 A.2d 696

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162 N.H. 64
Supreme Court of New Hampshire.

Petition of STATE of New Hampshire (State of New Hampshire v. Richard **MacDonald**).

No. 2010–550.
|
Argued: Feb. 17, 2011.
|
Opinion Issued: May 17, 2011.

Synopsis
Background: State filed a petition for writ of certiorari, challenging an order of the Superior Court, Brown, J., granting parties in criminal case access to medical and mental health records of alleged mentally defective sexual assault victim, and seeking to limit the release of records to only those deemed appropriate after **in camera** inspection.

Holdings: The Supreme Court, Hicks, J., held that:

[1] alleged sexual assault victim did not impliedly waive physician-patient and psychotherapist-patient privilege because state elected to proceed with criminal prosecution in which victim's mental limitations were at issue, and

[2] the trial court was required to conduct an **in camera** inspection of medical and mental health records prior to releasing such records.

Reversed and remanded.

West Headnotes (12)

[1] **Certiorari**
Nature and scope of remedy in general
Certiorari
Discretion as to grant of writ

Certiorari is an extraordinary remedy that is not granted as a matter of right, but rather at the discretion of the court. Sup.Ct. Rules, Rule 11.

3 Cases that cite this headnote

[2] **Certiorari**
Nature and scope of remedy in general

The Supreme Court exercises its power to grant the writ of certiorari sparingly and only where to do otherwise would result in substantial injustice. Sup.Ct. Rules, Rule 11.

1 Cases that cite this headnote

[3] **Certiorari**
Scope and Extent in General

Certiorari review is limited to whether the trial court acted illegally with respect to jurisdiction, authority, or observance of the law, or unsustainably exercised its discretion or acted arbitrarily, unreasonably, or capriciously. Sup.Ct. Rules, Rule 11.

3 Cases that cite this headnote

[4] **Criminal Law**
Certiorari

The Supreme Court would grant certiorari review to state on petition challenging superior court order granting parties in criminal case access to medical and mental health records of alleged mentally defective sexual assault victim, and seeking to limit the release of records to only those deemed appropriate after **in camera** inspection; certiorari was the only avenue by which the state could seek relief from the order. RSA 606:10; Sup.Ct. Rules, Rule 11.

Cases that cite this headnote

[5] **Criminal Law**
Preliminary proceedings
Criminal Law
Reception and Admissibility of Evidence

The Supreme Court reviews a trial court's decision on the management of discovery and the admissibility of evidence under an unsustainable exercise of discretion standard; to meet this standard, the state must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of its case.

Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**
Purpose of privilege
Privileged Communications and Confidentiality
Psychotherapists

The purpose behind the physician-patient privilege and the psychotherapist-patient privilege is to encourage full disclosure by the patient for the purpose of receiving complete medical and psychiatric treatment; they recognize that much of what a physician learns from his patient may be both embarrassing and of little real consequence to society. RSA 330–A:32.

1 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**
Privileged Communications and Confidentiality
Privileged Communications and Confidentiality
Waiver of privilege

There are generally two means by which disclosure of privileged information may occur: (1) the court finds a waiver of the privilege, or (2) the court orders a piercing of the privilege.

1 Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**
Acts constituting waiver
Privileged Communications and Confidentiality
Waiver of privilege

Alleged mentally defective sexual assault victim did not impliedly waive physician-patient privilege or psychotherapist-patient privilege so as to permit unrestricted access to her medical records by parties in criminal sexual assault, even though the state elected to proceed with criminal prosecution in which victim's mental limitations, if any, were an element of the pending charge. RSA 329:26, 330–A:32.

2 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**
In camera review
Privileged Communications and Confidentiality
In camera review

Trial court was required to conduct an **in camera** inspection of medical and mental health records of alleged mentally defective sexual assault victim before releasing such records to parties in criminal prosecution in which victim's mental limitations, if any, were an element of the pending charge, in order to determine whether the privileges at issue should be abrogated. RSA 329:26, 330–A:32.

Cases that cite this headnote

[10] **Privileged Communications and Confidentiality**
Medical or hospital records or information

To establish essential need for disclosure of privileged medical records, the party seeking the privileged records must prove both that the targeted information is unavailable from another source and that there is a compelling justification for its disclosure. RSA 329:26, 330–A:32.

3 Cases that cite this headnote

[11] **Constitutional Law**
Particular Items or Information, Disclosure of
Privileged Communications and Confidentiality
Mode or form of communications; documents in general

Before establishing essential need for the information contained in privileged records, the party seeking to pierce the privilege must first establish a reasonable probability that the records contain information that is material and relevant to the party's defense or claim; this initial showing of reasonable probability is necessary to protect both the victim's privacy interests in the confidential records and the defendant's due process interests in obtaining potentially exculpatory information. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[12] **Privileged Communications and Confidentiality**
Mode or form of communications; documents in general
Privileged Communications and Confidentiality
In camera review

The "reasonable probability" showing required to pierce a privilege establishes an initial, minimum standard that the defendant has to meet before the trial court undertakes an **in camera** review of records sought and a determination of whether the privilege should be abrogated.

1 Cases that cite this headnote

Attorneys and Law Firms

****814** Michael A. Delaney, attorney general (Susan P. McGinnis, senior assistant attorney general, on the brief and orally), for the State.

Samdperil & Welsh, PLLC, of Exeter (Richard E. Samdperil on the memorandum of law and orally), for the defendant.

Opinion

HICKS, J.

***65** The State filed a petition for writ of certiorari, *see Sup.Ct. R.* 11, challenging an order of the Superior Court (*Brown,* J.) granting the parties access to medical and mental health records of K.H. We reverse and remand.

The record supports the following facts. In July 2009, the Strafford County Grand Jury indicted the defendant, Richard MacDonald, on one count of aggravated felonious sexual assault, alleging that he engaged ****815** in sexual penetration with K.H., a person whom he knew to be mentally defective. *See* RSA 632–A:2, 1(h) (2007). On April 16, 2010, the defendant filed a motion seeking an ***in camera*** review of K.H.'s medical and mental health records from five stays at the New Hampshire Hospital. The defendant also requested an ***in camera*** review of records from Community Partners or other providers for the twelve months preceding the alleged ***66** assault. The State did not object to the documents being provided to the court for ***in camera*** review. On April 26, the trial court granted the defendant's motion.

On June 29, the court issued an order noting that the New Hampshire Hospital had "provided 2,002 pages of admission records for" K.H., but that the records did not "encompass all that were requested." It then ruled:

> The Defendant is charged with Aggravated Felonious Sexual Assault, the State having alleged that the victim

> was mentally defective. The Court assumes without having reviewed the records produced to date that portions of the records may well be relevant to the State and Defense since the victim's mental limitations, if any, are an element of the pending charge. With the above in mind the Court shall provide to Counsel a complete set of the records produced to date and will supplement such upon receipt of additional records from the New Hampshire State Hospital, Community Partners and[/]or other providers.
>
> Counsel shall keep the records produced confidential and not share them with third parties and return the records for court destruction at the conclusion of the prosecution. Confidentiality means for *Counsel's eyes only*. Counsel shall flag what they deem to be relevant for the Court[']s consideration as to admissibility. A closed hearing will be calendared to address admissibility issues.

On July 8, the State moved for reconsideration of the court's ruling, requesting that the court conduct an ***in camera*** review consistent with its earlier order and "[r]elease only those records deemed appropriate after" the ***in camera*** review. The defendant objected. On July 15, the trial court summarily denied the State's motion. The State then filed this petition for writ of certiorari challenging the trial court's ruling. Trial of this matter has been stayed and both parties have agreed not to review the disputed records until we have rendered a decision on the State's petition.

[1] [2] [3] Certiorari is an extraordinary remedy that is not granted as a matter of right, but rather at the discretion of the court. *Petition of State of N.H. (State v. Laporte),* 157 N.H. 229, 230, 950 A.2d 147 (2008); *see Sup.Ct. R.* 11. We exercise our power to grant the writ sparingly and only where to do otherwise would result in substantial injustice. *Laporte,* 157 N.H. at 230, 950 A.2d 147. Certiorari review is limited to whether the trial court acted illegally with respect to jurisdiction, authority or observance of the law, or unsustainably exercised its discretion or acted arbitrarily, unreasonably, or capriciously. *Id.*

[4] Here, we grant review because certiorari is the only avenue by which the State may seek relief from the order granting the parties complete access ***67** to K.H.'s medical and mental health records. *See* RSA 606:10 (2001) (specifying the circumstances in which the State may appeal to the supreme court in a criminal case).

[5] The State argues that the records at issue are privileged and, thus, "the court was required to conduct an ***in camera*** review to determine whether there was an 'essential need' for disclosure of the ****816** records, and to release only those portions of the records that were relevant and responsive to the purpose for which the disclosure was ordered." We review a trial court's decision on the management of discovery and the admissibility of evidence under an unsustainable exercise of discretion standard. *State v. Amirault,* 149 N.H. 541, 543, 825 A.2d 1120 (2003). To meet this standard, the State must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of its case. *See id.*

Neither party disputes that the records the defendant seeks are subject to the physician-patient privilege and the psychotherapist-patient privilege. The most recent codification of the physician-patient privilege, RSA 329:26 (Supp.2010), states in pertinent part:

> The confidential relations and communications between a physician or surgeon licensed under provisions of this chapter and the patient of such physician or surgeon are placed on the same basis as those provided by law between attorney and client, and, except as otherwise provided by law, no such physician or surgeon shall be required to disclose such privileged communications.

See N.H. R. Ev. 503(a). The psychotherapist-patient privilege is codified at RSA 330–A:32 (2004) and states in relevant part:

> The confidential relations and communications between any person licensed under provisions of this chapter and such licensee's client are placed on the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communications to be disclosed, unless such disclosure is required by a court order.

See N.H. R. Ev. 503(b).

[6] The purpose behind these privileges is to encourage full disclosure by the patient for the purpose of receiving complete medical and psychiatric treatment. *State v. Kupchun,* 117 N.H. 412, 415, 373 A.2d 1325 (1977)

(discussing RSA 329:26 and RSA 330–A:19, former psychologist-patient privilege). The privileges recognize that much of what a physician learns from his patient may be both embarrassing and of little real consequence to society. *Nelson v. Lewis,* 130 N.H. 106, 109, 534 A.2d 720 (1987) (discussing the nature of the physician-patient ***68** privilege). With respect to the psychotherapist-patient privilege, we have found the public policy behind this privilege "may be even more compelling than that behind the usual physician-patient privilege." *In the Matter of Berg & Berg,* 152 N.H. 658, 664, 886 A.2d 980 (2005). "Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him." *Id.* (quotation omitted). For these reasons, we have continually sought to safeguard the statutory protections afforded the confidential relationship between physicians and patients and therapists and patients. *See In re Grand Jury Subpoena (Medical Records of Payne),* 150 N.H. 436, 444, 448, 839 A.2d 837 (2004) (physician-patient privilege); *Kupchun,* 117 N.H. at 415, 373 A.2d 1325 (physician-patient privilege and former therapist-patient privilege).

Relying upon *Desclos v. Southern New Hampshire Medical Center,* 153 N.H. 607, 903 A.2d 952 (2006), the State argues that the trial court applied the wrong standard in determining whether to disclose the records at issue. *Desclos* involved a medical negligence action in which the plaintiff alleged that the defendant failed to recognize her symptoms of a spinal cord injury and, as a result, she suffered irreversible ****817** quadriplegia. *Desclos,* 153 N.H. at 609, 903 A.2d 952. While *Desclos* involved civil litigation, neither RSA 329:26 nor RSA 330–A:32 contains any indication that the legislature intended to distinguish between civil and criminal matters. *See State v. Elwell,* 132 N.H. 599, 603, 567 A.2d 1002 (1989) (discussing former physician-patient privilege law), *superseded in part on other grounds by* RSA 329:26. Therefore, as we have in the past, we will follow our prior cases, despite their civil character. *See id.*

In *Desclos,* the defendants sought all of the plaintiff's psychiatric and psychological records prior to the date of her injury, arguing they were "relevant to her damage and liability claims." *Desclos,* 153 N.H. at 609, 903 A.2d 952. The trial court granted the defendants access to the records, ruling that the records were "clearly relevant to the issue of damages ... and are reasonably calculated to lead to the discovery of admissible evidence." *Id.* (quotation omitted). The trial court further ruled that "by the nature of the plaintiff's claim for loss of enjoyment of life and pain and suffering, she has waived the psychotherapist-patient privilege." *Id.* (quotation and brackets omitted).

The plaintiff brought an interlocutory appeal of the trial court's ruling, arguing that the court's order violated "the psychotherapist-patient privilege, and that she did not waive the privilege simply by claiming generic damages that are likely to arise from the injuries caused by the medical negligence alleged." *Id.* We found that the "trial court applied an incorrect standard for discovery of privileged material" as "[r]elevance ***69** alone is not the standard for determining whether or not privileged materials should be disclosed." *Id.* at 611, 903 A.2d 952.

Similarly, in this case, the trial court stated that it "assume[d] without having reviewed the records produced to date that portions of the records may well be relevant to the State and Defense since the victim's mental limitations, if any, are an element of the pending charge." This was error. *See Desclos,* 153 N.H. at 611, 903 A.2d 952; *Super. Ct. R.* 35(b)(1).

[7] As we stated in *Desclos,* there are generally "two means by which disclosure of privileged information may occur: (1) the court finds a waiver of the privilege; or (2) the court orders a piercing of the privilege." *Desclos,* 153 N.H. at 611, 903 A.2d 952 (citation omitted). The State argues that in the absence of prior court review, neither of these means provided the court with the discretion to disclose all of the records at issue in this case. In contrast, the defendant contends that since he has already received certain discharge summaries related to K.H.'s stay at the New Hampshire Hospital and the records at issue are "actually required for resolution of the issue (i.e., whether the victim was mentally defective) any privilege should be considered impliedly waived or pierced as it pertains to these particular records." We address each argument in turn.

I. Implied Waiver

[8] We have held that a party waives the privilege "by putting the confidential communications at issue by injecting the privileged material into the case." *Id.* at 612, 903 A.2d 952 (psychotherapist-patient privilege); *Elwell,* 132 N.H. at 607, 567 A.2d 1002 (physician-patient privilege). Indeed, in the civil context, "[t]here is broad agreement ... that the *holder* of a psychotherapist-patient privilege will impliedly waive the privilege by bringing a cause of action that requires use of the privileged material to prove the elements of the case." *Desclos,* 153 N.H. at 613, 903 A.2d 952 (emphasis added).

****818** The defendant urges us to "recognize that a similar

implied waiver of [the] physician/psychotherapist-patient privilege applies in the criminal context, just as [we] ha[ve] recognized the implied waiver of the attorney-client privilege when a defendant claims ineffective assistance of counsel." The defendant's proposition is misplaced, however, because in civil or ineffective assistance of counsel cases, it is the holder of the privilege who puts otherwise privileged material at issue. *See id.* at 612–15, 903 A.2d 952 (medical negligence case); *Petition of Dean,* 142 N.H. 889, 890–91, 711 A.2d 257 (1998) (ineffective assistance of counsel case). We decline to hold that an alleged victim's medical records are put at issue simply because the State elects to proceed with a criminal prosecution. *Cf. Elwell,* 132 N.H. at 607, 567 A.2d 1002 (holding that "[a] criminal defendant does not put his medical condition at issue simply by ***70** proclaiming his innocence"). Were we to conclude that an alleged victim impliedly waives her privilege based upon the State's accusation against the defendant, we would effectively nullify the privilege. We do not believe the legislature intended such a result. *Cf. id.*

II. Piercing the Privilege

[9] [10] [11] [12] The defendant next argues that the records were properly ordered disclosed because the circumstances warranted piercing the privilege. We have found that "the privileges in question are not absolute and must yield when disclosure of the information concerned is considered essential." *Kupchun,* 117 N.H. at 415, 373 A.2d 1325. "To establish essential need, the party seeking the privileged records must prove both that the targeted information is unavailable from another source and that there is a compelling justification for its disclosure." *In re Search Warrant (Med. Records of C.T.),* 160 N.H. 214, 222, 999 A.2d 210 (2010) (quotation omitted). "Before establishing essential need for the information contained in the privileged records, however, the party seeking to pierce the privilege must first 'establish a reasonable probability that the records contain information that is material and relevant to' the party's defense or claim." *Desclos,* 153 N.H. at 616, 903 A.2d 952 (quoting *State v. Gagne,* 136 N.H. 101, 105, 612 A.2d 899 (1992)). This initial showing of reasonable probability is necessary to protect both the victim's privacy interests in the confidential records and the defendant's due process interests in obtaining potentially exculpatory information. *See id.* The "reasonable probability" showing also establishes an initial, minimum standard that the defendant has to meet before the trial court undertakes an ***in camera*** review and a determination of whether the privilege should be abrogated. *See id.*

Here, the State does not dispute that the defendant has met this initial burden under *Gagne.* Therefore, the court was required to conduct an ***in camera*** review to determine whether the privileges at issue should be abrogated. Its failure to do so was error. Accordingly, we remand the case for the trial court to conduct an **in camera** review of the records to ascertain which, if any, of the records should be disclosed. *See Gagne,* 136 N.H. at 106, 612 A.2d 899.

Reversed and remanded.

DALIANIS, C.J., and DUGGAN, CONBOY and LYNN, JJ., concurred.

All Citations

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