

IN THE
COURT OF APPEALS
OF THE STATE OF ALASKA

No. 7768

STATE OF ALASKA,

Petitioner,

v.

R. H. and MITCHELL H. WETHERHORN,

Respondents.

ON A PETITION FOR REVIEW
FROM THE SUPERIOR COURT OF
THE THIRD JUDICIAL DISTRICT

BRIEF FOR AMICI CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION
ALASKA PSYCHOLOGICAL ASSOCIATION

DONALD N. BERSOFF
Ennis, Friedman, Bersoff & Ewing
1200 Seventeenth Street, N.W.
Suite 511
Washington, D.C. 20036
(202/775-8100)

Counsel for Amici Curiae

October 17, 1983

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	11
INTEREST OF <u>AMICI CURIAE</u>	1
SUMMARY OF ARGUMENT.....	3
PRELIMINARY STATEMENT.....	5
ARGUMENT.....	6
I. JUDICIAL DEFERENCE TO DULY AUTHORIZED LEGISLATION, RULES OF EVIDENCE PROMULGATED BY THIS STATE'S HIGHEST COURT, AND CONSTITUTIONAL LAW REQUIRE THAT ALASKA'S PSYCHOTHERAPIST-PATIENT PRIVILEGE PROVISIONS BE STRICTLY ENFORCED WITH RESPECT TO THE TREATMENT OF CHILD ABUSERS.....	6
A. Alaska's Psychotherapist-Patient Privilege Provisions Are Based Upon Sound Social Policy Considerations.....	6
B. Alaska's Psychotherapist-Patient Privilege Provisions Also Have Their Roots in the U.S. and Alaska Constitutions.....	14
C. Provisions Which Protect Individual Rights And Which Have Their Underpinnings In Federal And State Constitutions Can Only Be Defeated By An Extremely Strong Competing State Interest.....	18
D. No Substantial State Interest Exists Which Justifies The Creation Of A Judicial Exception To The Alaska Psychotherapist-Patient Privilege Provisions.....	20
II. COMPELLED DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS RELATED TO ALLEGED CRIMES DURING COURT-ORDERED PSYCHOTHERAPY VIOLATES THE PRIVILEGE AGAINST SELF- INCRIMINATION.....	28
III. THE PROPER APPLICATION OF ALASKA'S PRIVILEGED COMMUNICATION PROVISIONS AND THE FAIR ADMINISTRATION OF COURT-ORDERED PSYCHOTHERAPY REQUIRE SENSITIVITY TO THE ETHICAL AND PROFESSIONAL STANDARDS OF PSYCHOLOGY.....	34
CONCLUSION.....	38

TABLE OF AUTHORITES

CASES:

Page

<u>Allred v. State</u> , 554 P.2d 411 (Alaska 1976).....	
<u>Battie v. Estelle</u> , 655 F.2d 692 (5th Cir. 1981).....	
<u>Boddie v. Connecticut</u> , 401 U.S. 371 (1971).....	
<u>Breese v. Smith</u> , 501 P.2d 159 (Alaska 1972).....	
<u>Caesar v. Mountanos</u> , 542 F.2d 1064 (9th Cir. 1976), <u>cert.</u> <u>denied</u> , 430 U.S. 954 (1977).....	
<u>Carey v. Populations Servs. Int'l</u> , 431 U.S. 678 (1977).....	
<u>City and County of San Francisco v. Superior Court</u> , 37 Cal.2d 277, 231 P.2d 26 (1951).....	
<u>Couch v. United States</u> , 409 U.S. 322 (1973).....	
<u>Counselman v. Hitchcock</u> , 142 U.S. 547 (1892).....	
<u>Doe v. Bolton</u> , 410 U.S. 179 (1973).....	
<u>Estelle v. Smith</u> , 451 U.S. 454 (1981).....	
<u>Falcon v. Alaska Pub. Offices Comm'n.</u> 570 P.2d 469 (Alaska 1977).....	
<u>Fisher v. United States</u> , 425 U.S. 391 (1976).....	
<u>Griswold v. Connecticut</u> , 381 U.S. 479 (1965).....	
<u>Hoffman v. United States</u> , 341 U.S. 479 (1951).....	
<u>In re B.</u> , 394 A.2d 419 (Pa. 1979).....	
<u>In re Brenda H.</u> , 402 A.2d 169 (N.H. 1979).....	
<u>In re Doe</u> , 711 F.2d 1187 (2d Cir. 1983).....	
<u>In re Gault</u> , 387 U.S. 1 (1967).....	
<u>In re Lifschutz</u> , 2 Cal.3d 415, 467 P.2d 557, 85 Cal. Rprr. 829 (1970).....	

<u>In re Pebsworth</u> , 705 F.2d 261 (7th Cir. 1983).....	
<u>In re Subpoena Served Upon Zuniga</u> , 52 U.S.L.W. 2107 (6th Cir. August 23, 1983).....	
<u>Katz v. United States</u> , 389 U.S. 347 (1967).....	
<u>Leyra v. Denno</u> , 347 U.S. 556 (1954).....	
<u>Lora v. Bd. of Educ.</u> , 74 F.R.D. 565 (E.D. N.Y. 1977).....	
<u>Loveless v. State</u> , 592 P.2d 1206 (Alaska 1979), <u>on remand</u> , 634 P.2d 941 (Alaska App. 1981).....	
<u>McConkey v. State</u> , 504 P.2d 823 (Alaska 1972).....	
<u>McKenna v. Fargo</u> , 451 F.Supp. 1355 (D. N.J. 1978), <u>aff'd</u> , 601 F.2d 573 (3rd Cir. 1979).....	
<u>Malloy v. Hogan</u> , 378 U.S. 1 (1964).....	
<u>Mapp v. Ohio</u> , 367 U.S. 643 (1961).....	
<u>Matter of Farber</u> , 78 N.J. 259, 394 A.2d 330 (1978), <u>cert. denied</u> 439 U.S. 997 (1978).....	
<u>McConkey v. State</u> , 504 P.2d 823 (Alaska 1972).....	
<u>McKenna v. Fargo</u> , 451 F. Supp. 1355 (D. N.J. 1978), <u>aff'd</u> , 601 F.2d 573 (3d Cir. 1979).....	
<u>Meyer v. Nebraska</u> , 262 U.S. 390 (1923).....	
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966).....	
<u>Parham v. J.L.</u> , 442 U.S. 584 (1979).....	
<u>Paris Adult Theatre I v. Slaton</u> , 413 U.S. 49 (1973).....	
<u>Paul v. Davis</u> , 424 U.S. 693 (1976).....	
<u>Perry v. Fiumano</u> , 61 A.D.2d 512, 403 N.Y.S.2d 382 (1978).....	
<u>Pierce v. Society of Sisters</u> , 268 U.S. 510 (1925).....	
<u>Planned Parenthood of Cent. Mo. v. Danforth</u> , 428 U.S. 52 (1976).....	

<u>Post v. State</u> , 580 P.2d 304 (Alaska 1978).....	
<u>Ravin v. State</u> , 537 P.2d 494 (Alaska 1975).....	
<u>Roe v. Wade</u> , 410 U.S. 113 (1973).....	
<u>Schade v. State</u> , 512 P.2d 907 (Alaska 1973).....	
<u>Schmerber v. California</u> , 384 U.S. 757 (1966).....	
<u>Scott v. State</u> , 519 P.2d 774 (Alaska 1974).....	
<u>Stanley v. Georgia</u> , 394 U.S. 557 (1969).....	
<u>State v. Corbin</u> , 15 Or. App. 536, 516 P.2d 1314 (1973).....	
<u>State v. Gotfrey</u> , 598 P.2d 1325 (Utah 1979).....	
<u>State ex rel. Juvenile Dep't of Clatsop Cty. v. Martin</u> , 533 P.2d 780 (Or. 1975).....	
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968).....	
<u>Taylor v. United States</u> , 222 F.2d 398 (D.C. Cir. 1955).....	
<u>Trammel v. United States</u> , 445 U.S. 40 (1980).....	
<u>United States v. Burr</u> , 25 Fed. Cas. 38 (No. 14692e (C.C.D. Va. 1807)).....	
<u>United States v. Calandra</u> , 414 U.S. 338 (1974).....	
<u>United States v. Dionosio</u> , 410 U.S. 1 (1973).....	
<u>United States v. Julian</u> , 469 F.2d 371 (10th Cir. 1972).....	
<u>United States v. Nixon</u> , 418 U.S. 683 (1974).....	
<u>United States v. Nobles</u> , 422 U.S. 225 (1975).....	
<u>United States v. Wade</u> , 388 U.S. 218 (1967).....	
<u>United States v. Washington</u> , 431 U.S. 181 (1977).....	
<u>United States ex rel. Edney v. Smith</u> , 425 F. Supp. 1038 (E.D. N.Y. 1976), <u>aff'd</u> , 556 F.2d 556 (2d Cir.), <u>cert. denied</u> , 431 U.S. 958 (1977).....	

<u>Wade v. United States</u> , 426 F.2d 64 (9th Cir. 1970).....	
<u>Whalen v. Roe</u> , 429 U.S. 589 (1977).....	
<u>Wisconsin v. Yoder</u> , 406 U.S. 205 (1972).....	

LEGISLATIVE MATERIALS:

<u>U.S. Const. amend. V</u>	
<u>Fed. R. Evid. 501</u>	
<u>Alas. Const. art. I, § 9</u>	
<u>Alas. Const. art. I, § 22</u>	
<u>Alas. Stat. § 08.86.170</u>	
<u>Alas. Stat. § 08.86.200</u>	
<u>Alas. Stat. § 47.17.010</u>	
<u>Alas. R. Evid. 504</u>	
<u>Alas. R. Evid. 504(a)(3)(B)</u>	
<u>Alas. R. Evid. 504(d)(5)(6)</u>	

OTHER AUTHORITIES:

<u>F. Alexander, The Medical Value of Psychoanalysis</u> (1936).....	
<u>APA, Directory</u> (1981).....	
<u>APA, Ethical Principles of Psychologists</u> , 36 <u>Am. Psychol.</u> 633 (1981).....	
<u>APA, Guidelines for Conditions of Employment of</u> <u>Psychologists</u> , 27 <u>Am. Psychol.</u> 331 (1972).....	
<u>APA, Report of the Task Force on the Role of Psychology</u> <u>in the Criminal Justice System</u> , 33 <u>Am. Psychol.</u> 1099 (1978) reprinted in <u>Who Is the Client</u> (J. Monahan, ed. 1980).....	

- APA, Specialty Guidelines for the Delivery of Services
by Clinical Psychologists, 36 Am. Psychol. 640 (1981).....
- APA, Standards for Providers of Psychological Services,
32 Am. Psychol. 495 (1977).....
- APA, Task Force on Privacy and Confidentiality: Final Report
(1977).....
- Bersoff & Jain, A Practical Guide to Privilege
Communications for Psychologists in The Role
of the Forensic Psychologist (G. Cooke ed. 1980).....
- Chafee, Privileged Communications: Is Justice Served or
Obstructed by Closing the Doctor's Mouth on the
Witness Stand?, 52 Yale L. J. 607 (1943).....
- DeKraai & Sales, Privileged Communications of Psychologists,
13 Prof. Psychol. 372 (1982).....
- Denicola & Sandler, Training Abusive Parents in
Cognitive-Behavioral Techniques, 11 Behav. Therapy
263 (1980).....
- Epstein, Steingarten, Weinstein & Nashel, Panel Report:
Impact of Law on the Practice of Psychotherapy,
5 J. Psychiat. & L. 7 (1977).....
- Everstine, Everstine, Heyman, True, Frey, Johnson &
Seiden, Privacy and Confidentiality in Psychotherapy,
35 Am. Psychol. 828 (1980).....
- Fisher, The Psychotherapeutic Professions and the Law
of Privileged Communications, 10 Wayne L. Rev. 609
(1964).....
- Fisher, The Psychotherapeutic Professions and the Law of
Privileged Communications, 10 Wayne L. Rev. 609 (1964).....
- Foster, Pretrial Psychiatric Disclosures, 51 N.Y.U. L. Rev.
1090 (1976).....
- Goldstein and Katz, Psychiatrist-Patient privilege:
The GAP Proposal and the Connecticut Statute,
118 Am. J. Psychiat 733 (1962).....

- Group for the Advancement of Psychiatry, Confidentiality and Privileged Communications in the Practice of Psychiatry, Report No. 45 (1960).....
- Guernsey, The Psychotherapist-Patient Privilege in Child Placement: A Relevancy Analysis, 26 Vill. L. Rev. 955 (1981).....
- M. Guttmacher & H. Weihofen, Psychiatry and the Law (1952).....
- Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410 (1974).....
- Jagim, Wittman, & Noll, Mental Health Professionals' Attitudes toward Confidentiality, Privilege, and Third-Party Disclosure, 9 Prof. Psychol. 458 (1978).....
- Jagim, Wittman, Noll, Mental Health Professional's Attitudes toward Confidentiality, Privilege and Third-Party Disclosure, 9 Prof. Psychol. 458 (1978).....
- Katz, Howe & McGrath, Child Neglect Laws in America, 9 Family L. Q. 1 (1975).....
- L. Levy, Origins of the Fifth Amendment (1968).....
- Louisell, The Psychologist in Today's Legal World: Part II, 41 Minn. L. Rev. 731 (1957).....
- Louisell & Sinclair, Reflections on the Law of Privileged Communication: The Psychotherapist-Patient Privilege in Perspective, 59 Calif. L. Rev. 30 (1971).....
- McNamara, The Hierarchy of Evidentiary Privileges in New Hampshire, 20 N.H.B.J. 1 (1978).....
- Meyer & Willage, Confidentiality and Privileged Communication in Psychotherapy in New Directions in Psycholegal Research (P. Lipsett & B. Sales eds. 1980)...
- Minnesota Developments, Constitutional Law: Davis v. Alaska Applied to Hold that Physician-Patient Privilege Must Give Way to Accused's Right to Confrontation, 60 Minn. L. Rev. 1086 (1976).....
- Pound, Interests of Personality, 28 Harv. L. Rev. 343 (1915).....

Requested Excerpts of Transcript of Child in Need of Aid Hearing at 5, lines 5-8.....	
Reubhausen & Brim, <u>Privacy and Behavioral Research</u> , 65 <u>Colum. L. Rev.</u> 1184 (1965).....	
Saltzburg, <u>Privileges and Professionals</u> , 66 <u>Va. L. Rev.</u> 597 (1980).....	
Shah, <u>Privileged Communications, Confidentiality and Privacy</u> , 1 <u>Prof. Psychol.</u> 56 (1969).....	
Shuman & Weiner, <u>The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege</u> , 60 <u>N.C. L. Rev.</u> 893 (1982).....	
Siegel, <u>Privacy, Ethics, and Confidentiality</u> , 10 <u>Prof. Psychol.</u> 249 (1979).....	
R. Slovenko, <u>Psychotherapy, Confidentiality and Privileged Communication</u> (1966).....	
Starr, <u>Child Abuse</u> , 34 <u>Am. Psychol.</u> 872 (1979).....	
Suarez & Hunt, <u>The Patient-Litigant Exception in Psychotherapist-Patient Privilege Cases: New Considerations for Alaska and California Since In re Lifschutz</u> , 1 <u>U.C.L.A.-Alas. L. Rev.</u> 2 (1971).....	
Swoboda, Elwork, Sales & Levine, <u>Knowledge of and Compliance with Privileged Communication and Child-Abuse- Reporting Laws</u> , 9 <u>Prof. Psychol.</u> 448 (1978).....	
<u>To Establish a National Center on Child Abuse and Neglect, to Provide Financial Assistance for A Demonstration Program for the Prevention, Identification, and Treatment of Child Abuse and Neglect and for Other Purposes, 1973: Hearings on S. 1191 Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare, 93rd Cong., 1st Sess. (1973).....</u>	
8 <u>J. Wigmore, Evidence</u> , § 2285 (McNaughton rev. 1961).....	
Wolfe, Sandler & Kaufman, <u>A Competency-Based Parent Training Program for Child Abusers</u> , 49 <u>J. Consulting & Clinical Psychol.</u> 633 (1981).....	
Woods & McNamara, <u>Confidentiality: Its Effect on Interviewee Behavior</u> , 11 <u>Prof. Psychol.</u> 714 (1980).....	

IN THE
COURT OF APPEALS
OF THE STATE OF ALASKA

No. 7768

STATE OF ALASKA,

Petitioner,

v.

R. H. and MITCHELL H. WETHERHORN,

Respondents.

ON A PETITION FOR REVIEW
FROM THE SUPERIOR COURT OF
THE THIRD JUDICIAL DISTRICT

BRIEF FOR AMICI CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION
ALASKA PSYCHOLOGICAL ASSOCIATION

INTEREST OF AMICI CURIAE

With the consent of the Petitioner and Respondents, the American Psychological Association (APA) and the Alaska Psychological Association submit this Brief Amici Curiae. The amici are voluntary, nonprofit, scientific and professional organizations which are vitally concerned with the outcome of this case. Respondent Dr. Wetherhorn is a member of the amici Associations.

The APA, with over 57,000 members, has been the major association of psychologists in the United States since 1892. Its purpose, as reflected in APA bylaws, is to "advance psychology as a science and profession, and as a

means of promoting human welfare. . . ." The Alaska Psychological Association with almost 100 members, is an affiliate of the APA. It represents the scientific and professional interests of psychologists within Alaska, including clinical, academic, and research psychologists working in public and private institutional settings as well as in independent practice.

This case raises several important questions material to the interests of both users and providers of psychological services. Mental health professionals working in the criminal justice system often find themselves in a complex and challenging situation. Their obligation to the persons they treat, to the profession of which they are a part, to the court, to the criminal justice system and society generally may create mixed and inconsistent responsibilities -- as the specific facts of this case dramatically illustrate.

Amici are pleased to present their views on the important questions raised by this case, which have been a matter of concern to this Association for some time.¹ In its starkest form, this case represents a collision between the government's right to vigorously prosecute alleged wrongdoers and the accused's right to the dual protections of privileged communications law and the constitutional barriers that preclude the state from proving its case against the accused from his own mouth. As Chief Justice Marshall reminded us 175 years ago:

When two principles come into conflict with each other,
the court must give them both reasonable construction, so as

¹ See APA, Task Force on Privacy and Confidentiality: Final Report Recommendation 3 (1977) cited in Siegel, Privacy, Ethics, and Confidentiality, 10 Prof. Psychol. 249, 255 (1979): "In those areas where statutory protection for clinical-therapeutic and other personal data exists, that protection should be strengthened and refined."

to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded.

United States v. Burr, 25 Fed. Cas. 38 (No. 14692e (C.C.D. Va. 1807)).

Acknowledging this case's complexities, amici seek to provide this Court with a broader perspective than the parties may offer, to help it render a decision that carefully and thoughtfully advances the administration of justice and accurately reflects the proper application of the law and its underlying policies.

SUMMARY OF ARGUMENT

The state seeks to compel a psychologist licensed in this jurisdiction to testify to a grand jury and at trial about admissions made by his client during the course of a professional relationship. These admissions were disclosed during voluntarily sought psychotherapy and court-ordered treatment conducted by the same psychologist.

Point I. The confidential communications made during voluntarily sought therapy are protected by this state's psychotherapist-patient privilege provisions. We believe there are sound legal, psychological, and social policy reasons why the psychotherapist-patient privilege should not be abrogated in this case. The success of psychotherapy is dependent on the establishment of trust between client and therapist, a condition that can only be developed in an atmosphere of confidentiality. The creation of the privilege that protects private revelations from disclosure reflects the consensual judgment by Alaska's legislature and its Supreme Court that

the need for confidentiality outweighs the criminal justice's systems need for evidence from this source. Moreover, the privilege has its roots in both the federal and Alaska constitutions. Provisions which protect individual rights, which have been established by the legislature, and reinforced by the judicial system's highest tribunal can only be defeated by extremely strong state interests. Amici believe the prosecution cannot meet its burden in this regard.

Point II. The disclosures sought during court-compelled psychotherapy are barred by the privilege against self-incrimination. The admissions which the prosecution seeks to discover and introduce are testimonial, incriminating, and compelled; they are thereby unobtainable from the mouth of the accused in the absence of the waiver. Because the accused has not placed his own mental status in issue, he has not waived the privilege. As importantly, there is no evidence that he was apprised, prior to court-ordered treatment, of his right to remain silent or that statements he made during court-compelled therapy could be used against him in a criminal proceeding. Under those conditions, the state may not force the psychotherapist to disclose potentially incriminating statements made by his client.

Point III. The proper application of Alaska's privileged communications provisions require adherence to the relevant professional and ethical standards that guide the behavior of psychologists in difficult situations such as the one presented here. Requiring the psychologist to testify about the matters the prosecution seeks to make public would violate those standards.

Adoption of the positions advanced in here would reinforce the respect this state has for the privacy of its inhabitants, genuinely serve the

highest principles of criminal justice, and comport with the ethical and professional obligations of the psychologists who serve their clients.

PRELIMINARY STATEMENT

Unlike the prosecution, see Brief for Petitioner at 8-11, amici view the issues in this case narrowly. Amici recognize that psychologists in Alaska, among other mental health professionals and educators, are required to report incidences of child abuse, including sexual exploitation, to public authorities. See Alaska Stat. § 47.17.010. Such laws are now in effect in all 50 states and the District of Columbia, see Katz, Howe & McGrath, Child Neglect Laws in America, 9 Family L. Q. 1 (1975),² and they serve important interests of children and the state. The key question is whether psychologists, treating alleged abusers who voluntarily seek therapy or who are compelled to undergo treatment, may be forced to disclose confidential communications between themselves and their clients related to facts and admissions of abuse so that the state may more easily obtain criminal convictions of those clients. This brief is devoted to an examination of that question.

² See also Swoboda, Elwork, Sales & Levine, Knowledge of and Compliance with Privileged Communication and Child-Abuse-Reporting Laws, 9 Prof. Psychol. 448, 450 (1978): "The first line of defense against child abuse is, obviously, identification. Only by knowing which children are being abused can they be treated and protected in the future."

ARGUMENT

I. JUDICIAL DEFERENCE TO DULY AUTHORIZED LEGISLATION, RULES OF EVIDENCE PROMULGATED BY THIS STATE'S HIGHEST COURT, AND CONSTITUTIONAL LAW REQUIRE THAT ALASKA'S PSYCHOTHERAPIST-PATIENT PRIVILEGE PROVISIONS BE STRICTLY ENFORCED WITH RESPECT TO THE TREATMENT OF CHILD ABUSERS

A. Alaska's Psychotherapist-Patient Privilege Provisions Are Based Upon Sound Social Policy Considerations.

There are a variety of reasons why courts and legislatures protect certain communications from compelled disclosure. The major reason relevant to this case is to encourage persons seeking to engage in relationships the functions of which are deemed extremely significant to society, and which are dependent for their success on full mutual communication by the participants unchilled by the fear of revelation.³ Under this rationale, the majority of states -- including Alaska -- have created a psychotherapist-patient privilege. De Kraif & Sales, Privileged Communications of Psychologists, 13 Prof. Psychol. 373 (1982).

Alaska Stat. § 08.86.200 (1982) provides that "A psychologist or psychological associate may not reveal to another person a communication made

³ A second reason is to guarantee the integrity of the system of government exemplified by the right of the United States to prevent public dissemination of information which would genuinely endanger national security. A third is to insulate the individual from unwarranted governmental intrusion, as in the protection against self-incrimination. The former is not applicable to this case; the latter is discussed more fully in Point II of this brief. See Fisher, The Psychotherapeutic Professions and the Law of Privileged Communications, 10 Wayne L. Rev. 609, 610 (1964).

to the psychologist or psychological associate by a client about a matter concerning which the client has employed the psychologist or psychological associate in a professional capacity." To erase any concern whether this statute merely codifies the ethical responsibility of psychologists not to reveal the private communications of their clients and serves "only as an 'anti-gossip measure'", Allred v. State, 554 P.2d 411, 415 (Alaska 1976), or also creates a privilege against unconsented disclosures in judicial proceedings, the state recently adopted Alaska R. Evid. 504 (1979), Alaska's equivalent of a psychotherapist-patient privilege statute. This provision states that "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental, or emotional conditions . . . among himself, or his . . . psychotherapist. . . ." A psychotherapist is defined, among others, as "a person licensed or certified as a psychologist or psychological examiner under the laws of any State or nation or reasonably believed by the patient so to be, while similarly engaged." Id. at 504(a)(3)(B).⁴

In Allred v. State, 554 P.2d 411, 420 (Alaska 1976), Alaska's highest court developed a two-pronged test for the application of the psychotherapist-patient privilege:

⁴ This statute substantially tracks Proposed Fed. R. Evid. 504, see 56 F.R.D. 183, 240 (1973), endorsed by an 8-1 vote of the Supreme Court but ultimately rejected by Congress for a single, more general rule. See Fed. R. Evid. 501. It was the proposed rule that was eventually adopted by Alaska Supreme Court. However, Alaska evinced even more protection for the client by indicating that the privilege was to be applied even when the psychologist was not only licensed in fact but in situations where the client reasonably believed the psychologist was licensed but was not. This protection was missing in the proposed federal rule.

The first criterion focuses upon the professional status of the person to whom the communication is made. . . . [T]he evidentiary privilege should extend only to communications made to a psychiatrist or licensed psychologist.⁵ The second criterion focuses upon the type of communication in question. We believe that the evidentiary privilege should extend to communications made in the course of intensive, deep psychotherapy, of the type which requires confidentiality for its success.

Both of these criteria, as well as the requirements of § 08.86.200, are clearly met in this case. Dr. Wetherhorn, the psychologist and one of the respondents here, is licensed by Alaska.⁶ Affidavit of Mitchell Wetherhorn (May 5, 1983); see also Amicus Curiae R. H.'s Response to Petition for Review at 5 (May 27, 1983) and APA, Directory at 1190 (1981). R. H., Dr. Wetherhorn's client and the second Respondent in this case, had been seeing his therapist for intensive psychotherapy both prior to the report of child abuse, and after the juvenile court's order compelling R. H. to undergo treatment with the same psychologist. Affidavit of Mitchell Wetherhorn (May 5, 1983); Brief for Petitioner at 4. Thus, the privileged communications protections are undeniably applicable here. The only question is whether an exception should be granted under the facts of this case.⁷

⁵ But now see n. 4, supra, and accompanying text.

⁶ Alaska provides for the licensure of psychologists in Alaska Stat. § 08.86.170.

⁷ Amici believe the state's attempt to apply the exemptions of Alaska R. Evid. 504(d)(5), (6), Brief for Petitioner at 22-27, is tortured and untenable. However, we leave it to Respondents to confront fully the state's argument.

Although many modern statutory privileges, including the physician-patient privilege have been criticized⁸ the psychotherapist-patient privilege has been distinguished as one, which like the attorney-client privilege, serves such uniquely important societal interests as to deserve full judicial and legislative support.⁹ Of course, the administration of justice and the ascertainment of truth in legal proceedings depends upon the court's ability to hear and receive all material and relevant evidence. But society also recognizes that there are certain communications which are important to our social system and which depend for their full effectiveness on the total mutual confidence and trust of the participating parties. Such

⁸ See, e.g., Chafee, Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?, 52 Yale L. J. 607, 609-610 (1943); R. Slovenko, Psychotherapy, Confidentiality, and Privileged Communication 20-24 (1966); Minnesota Developments, Constitutional Law: Davis v. Alaska Applied to Hold that Physician-Patient Privilege Must Give Way to Accused's Right to Confrontation, 60 Minn. L. Rev. 1086, 1095 and n.36 (1976); see also United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1040-1041 (E.D. N.Y. 1976), aff'd, 556 F.2d 556 (2d Cir.), cert. denied, 431 U.S. 958 (1977). But see Trammel v. United States, 445 U.S. 50, 51 (1980): The physician-patient privilege is "rooted in the imperative need for trust and confidence. . . . The physician must know all that a patient can articulate in order to identify and treat disease; barriers to full disclosure would impair diagnosis and treatment."

⁹ See generally Bersoff & Jain, A Practical Guide to Privilege Communications for Psychologists in The Role of the Forensic Psychologist (G. Cooke ed. 1980); Goldstein & Katz, Psychiatrist-Patient privilege: The GAP Proposal and the Connecticut Statute, 118 Am. J. Psychiat 733 (1962). See also United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1043 (E.D. N.Y. 1976): "Whatever merit the privacy arguments have in favor of a general physician-patient privilege, the persuasiveness is increased where the . . . relationship implicated is between psychotherapist and patient"; accord State ex rel. Juvenile Dep't. of Clatsop Cty. v. Martin, 533 P.2d 780, 781 (Or. 1975): "We find that most of the recent authorities, including some of those which are critical of the physician-patient privilege, support the need for a privilege in communications between a psychotherapist and his patient . . . and regardless of whether the psychotherapist is privately employed or is employed by the state."

communications should be protected as a matter of public policy against revelation in a formal proceeding. The fundamental test as to whether certain information and knowledge can be withheld by witnesses in legal proceedings is whether "the injury to the relationship resulting from disclosure would be greater than the loss to justice if the information were considered privileged." Shah, Privileged Communications, Confidentiality and Privacy, 1 Prof. Psychol. 56, 58 (1969).¹⁰

By definition and practice, the psychotherapeutic relationship is one which depends for its success upon the creation of an atmosphere in which embarrassing facts, fantasies, feelings, and thoughts will be freed from censorship. A major element universally recognized as necessary to the success of psychotherapy is the willingness for unreserved self-revelation. See Fisher at 618-620 and supporting references cited therein.¹¹ Inherent in psychotherapy is a "profound prying into the most hidden aspects of personality and character, a prying often productive of disclosure of secrets heretofore unknown, even to the conscious mind of the patient himself." Louisell, The Psychologist in Today's Legal World: Part II, 41 Minn. L. Rev. 731, 745 (1957). The person seeking help from a professional psychologist confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly

¹⁰ See also Fisher, The Psychotherapeutic Professions and the Law of Privileged Communications, 10 Wayne L. Rev. 609, 611 (1964) [hereinafter Fisher]: "[T]here is one, and only one, justification -- that the relationship is rendered ineffective either because the person is frightened into non-disclosure during its course, and, that the effect of such an absence of privilege is undesirable in light of the importance of the relationship to society."

¹¹ Regardless of the theoretical basis for the particular form of psychotherapy, this requirement is accepted by almost all mental health professionals. See Fisher at 619 n.24.

express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say . . . may be revealed to the whole world from a witness stand.

M. Guttmacher & H. Weihofen, Psychiatry and the Law 272 (1952), cited in Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955).

Because of the intimacy of psychotherapy and the consequent fear of disclosure, "the concept of confidentiality of client-therapist communications is at the core of the psychotherapeutic relationship." Jagim, Wittman, & Noll, Mental Health Professionals' Attitudes toward Confidentiality, Privilege, and Third-Party Disclosure, 9 Prof. Psychol. 458, 458-459 (1978).¹² Perhaps more than any other act engaged in by psychologists, psychotherapy is "dependent on absolute confidentiality." Caesar v. Mountanos, 542 F.2d 1064, 1067 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977). Doubt that this secrecy will be abridged can interfere with the development of what has been acknowledged as the hallmark of psychotherapy -- "the establishment of a relationship of trust between client and therapist . . . [a] relationship [that] must be carefully protected through the course of the psychotherapeutic experience." Everstine, Everstine, Heyman, True, Frey, Johnson & Seiden, Privacy and Confidentiality in Psychotherapy, 35 Am. Psychol. 828, 828 (1980).¹³ Public disclosure would discourage "the

¹² In this study, of 64 psychologists, psychiatrists, social workers, and counselors surveyed, 98% agreed that confidentiality was "essential in maintaining a positive therapeutic relationship." Id. at 462.

¹³ "This relationship has been deemed so essential by some that it has been argued that psychotherapy is rendered worthless in its absence." DeKraai & Sales, Privileged Communications of Psychologists, 13 Prof. Psychol. 372, 372 (1982) citing Epstein, Steingarten, Weinstein & Nashel, Panel Report: Impact of Law on the Practice of Psychotherapy, 5 J. Psychiat. & L. 7 (1977).

psychologically handicapped [from] seek[ing] and fully cooperat[ing] in psychotherapeutic counseling." Lora v. Bd. of Educ., 74 F.R.D. 565, 571 (E.D. N.Y. 1977). "The possibility that the psychotherapist could be compelled to reveal those communications to anyone, let alone to broadcast them in a legal proceeding, can deter persons from seeking needed treatment and destroy treatment in progress." Caesar v. Mountanos, 542 F.2d 1064, 1071-1072 (9th Cir. 1976) (Hufstedler, J., dissenting).¹⁴ In that light, persons seeking psychotherapy have "justifiable expectations of confidentiality." In re Lifschutz, 2 Cal.3d 415, 467 P.2d 557, 567, (1970).¹⁵

These principles have been recognized and strongly endorsed by Alaska's highest court. After reviewing Wigmore's four canons for judging the desirability of creating an evidentiary privilege,¹⁶ the court concluded

¹⁴ On this issue the majority and the dissent were in agreement. The point of departure concerned whether the psychotherapist-patient privilege was absolute or was waived when the patient put her mental status in issue. The dissent argued for an absolute privilege but the majority upheld California's patient-litigation exception. In the instant case, R. H. is not placing his mental status in issue.

¹⁵ "[T]here is widespread agreement that confidentiality is a sine qua non for successful . . . treatment" of patients with emotional and behavioral problems. Group for the Advancement of Psychiatry, Confidentiality and Privileged Communications in the Practice of Psychiatry: Report No. 45 at 92 (1960). See In re Subpoena Served Upon Zuniga, 52 U.S.L.W. 2107 (6th Cir. August 23, 1983); see also Goldstein & Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, 118 Am. J. Psychiat. 733, 735 (1962): "Treatment of the mentally ill is too important and the assurance of confidentiality too central to it, to risk jeopardizing the whole because of the relevance of some patients' statements to some legal proceedings."

¹⁶ The oft-quoted criteria are: "(1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. (3) The relation must be one which in the

that "the psychotherapeutic relationship satisfies each of these canons."

Allred v. State, 554 P.2d 411, 417-418 (Alaska 1976):¹⁷

First, communications to a therapist in the course of therapy are inherently confidential. . . .

Second, inviolability of the confidence is essential to achievement of the psychotherapeutic goal. . . .¹⁸ Third, the relationship between psychotherapist and patient is unquestionably one which should be fostered. . . .

Finally, in balancing injury to the relation, by fear of disclosure, against the benefit to justice by compelling disclosure, the scales weigh heavily in favor of confidentiality. . . . [T]he goals of therapy may be frustrated if the privilege does not attach. . . . [A]bsence of a privilege would make it doubtful whether either psychotherapists or their patients could communicate effectively if it were thought that what they said could be disclosed compulsorily in a court of law.

In sum, the state of Alaska has established an evidentiary privilege against disclosure of confidences uttered by clients to treating psychologists. That privilege is based on sound principles consensually accepted by legal scholars, the courts of this state and other jurisdictions, and theoreticians and practitioners in psychology and psychiatry. Any exceptions would severely limit the privilege and critically damage the practice of psychotherapy.

16 Continued

opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. 8 J. Wigmore, Evidence, § 2285 (McNaughton rev. 1961) (emphasis in original).

¹⁷ Accord In re Doe, 711 F.2d 1187, 1193 (2d Cir. 1983).

¹⁸ "Without foreknowledge that confidentiality will attach, the patient will be extremely reluctant to reveal to the therapist the details of his past life and his introspective thoughts and feelings. Without the patient's confidence a [therapist]'s efforts are worthless." Id. at 417.

**B. Alaska's Psychotherapist-Patient Privilege Provisions
Also Have Their Roots in the U.S. and Alaska
Constitutions.**

In addition to the psychological, judicial, and legislative support for the psychotherapist-patient privilege, the client's "interest in keeping . . . confidential revelations from public purview, in retaining this substantial privacy . . . draws sustenance from our constitutional heritage." In re Lifschutz, 85 Cal. Rptr. 829, 839, 467 P.2d 557, 567 (1970).¹⁹

Although no explicit guarantee of a right to privacy is found in the federal constitution, zones of privacy have been created by the more specific guarantees of the first,²⁰ e.g., Stanley v. Georgia, 394 U.S. 557 (1969); third, e.g., Katz v. United States, 389 U.S. 347 (1967), fourth, e.g., Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); fifth, e.g., Roe v. Wade, 410 U.S. 113 (1973); Miranda v. Arizona, 384 U.S. 436 (1966); and ninth amendments, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Mapp v. Ohio, 367 U.S. 643 (1961). Despite the acknowledged vagueness of the precise contours and dimensions of the right to privacy there is now consensus that this right is primarily grounded "in the Fourteenth Amendment's concept of personal liberty and restrictions on state action. . . ." Roe v. Wade, 410 U.S. 113, 115 (1973).

¹⁹ For discussion of Lifschutz, including its constitutional dimensions, see generally Louisell & Sinclair, Reflections on the Law of Privileged Communication: The Psychotherapist-Patient Privilege in Perspective, 59 Calif. L. Rev. 30, 52-55 (1971); Suarez & Hunt, The Patient-Litigant Exception in Psychotherapist-Patient Privilege Cases: New Considerations for Alaska and California Since In re Lifschutz, 1 U.C.L.A.-Alas. L. Rev. 2 (1971).

²⁰ "The inability to obtain effective psychiatric treatment may preclude the enjoyment and exercise of many fundamental freedoms, particularly those protected by the First Amendment." In re Subpoena Served Upon Zuniga, 52 U.S.L.W. 2107 (6th Cir. August 23, 1983).

Privacy has also been placed "among the specifically enumerated rights in Alaska's Constitution." Ravin v. State, 537 P.2d 494, 501 (Alaska 1975). "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." Alaska Const. art I, § 22. See Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 476 (Alaska 1977).

Although the United States Supreme Court has never directly addressed the question of whether the constitutional right to privacy applies to the psychotherapist-patient privilege, support for such application can be found in several of its decisions. Since the constitutional right to privacy was first articulated in Griswold v. Connecticut, 381 U.S. 479 (1965) the Court has indicated that the right encompasses at least two different kinds of interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977).²¹ These decisions concern, inter alia, "matters relating to marriage,"²² procreation,²³ contraception,²⁴ family relationships, and child rearing

²¹ This concept has been interpreted in Alaska as "a right of personal autonomy in relation to choices affecting an individual's personal life." Ravin v. State, 527 P.2d 494, 500 (Alaska 1975).

²² Boddie v. Connecticut, 401 U.S. 371 (1971).

²³ Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

²⁴ Carey v. Population Servs. Int'l., 431 U.S. 678 (1977).

and education²⁵." Paul v. Davis, 424 U.S. 693, 713 (1976);²⁶ accord, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).²⁷

Both of these interests are implicated in the psychotherapist-patient privilege. First, the compelled disclosure of the private details of a person's marital, family, and sexual conduct directly interferes with the individual's interest in avoiding public revelation of personal matters -- "the right to have intimate biographical details protected from exposure by the government," Lora v. Bd. of Educ., 74 F.R.D. 565, 570 (E.D. N.Y. 1977);²⁸ see also McKenna v. Fargo, 451 F. Supp. 1355, 1378-1381 (D. N.J. 1978), aff'd, 601 F.2d 573 (3d Cir. 1979) (disclosure of personal information gleaned from required personality testing to government employees burdens constitutional right to privacy.)²⁹

²⁵ Parham v. J. L., 442 U.S. 584 (1979); Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

²⁶ See also Lora v. Bd. of Educ., 74 F.R.D. 565, 570 (E.D. N.Y. 1977); Caesar v. Mountanos, 542 F.2d 1064, 1072 (9th Cir. 1976) (Hufstedler, J., dissenting); In re B. 394 A.2d 419, 424 (Pa. 1979).

²⁷ In addition, the privacy right has been extended to freedom from governmental surveillance and intrusion. Katz v. United States, 389 U.S. 347 (1967).

²⁸ Pound called it a "demand which the individual may make that his private personal affairs shall not be laid bare to the world." Pound, Interests of Personality, 28 Harv. L. Rev. 343, 362 (1915).

²⁹ "Some examples would include the patients of a . . . psychologist . . . who specialized in treating sexual problems. . . ." Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 409, 480 (Alaska 1977); cf. In re Pebsworth, 705 F.2d 261, 263 (7th Cir. 1983) (information involving detailed psychological profiles or substantive accounts of therapy sessions arguably infringes on psychotherapist-patient privilege).

The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others. The right to privacy is, therefore, a positive claim to a status of personal dignity -- a claim for freedom, if you will, but freedom of a very special kind.

Reubhausen & Brim, Privacy and Behavioral Research, 65 Colum. L. Rev. 1184, 1189 (1965).

The freedom to confide in one's treating psychologist, so essential to successful psychotherapy, is also closely related to the second protected interest delineated in Whalen. Compelled disclosures of utterances related to family, parenthood, and human sexuality -- all directly involved in this case -- would be a serious disincentive to the decision to exercise "the right to be free to seek benefit from psychotherapeutic counseling. Lora v. Bd. of Educ., 74 F.R.D. 565, 570 (E.D. N.Y. 1977) citing Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Whalen v. Roe, 429 U.S. 589 (1977). Public disclosure of the most embarrassing particulars of clients' lives not only strips them of their sense of human dignity and fails to protect their subjective interest in freedom from humiliation, see Post v. State, 580 P.2d 304, 307 (Alaska 1978),³⁰ but would discourage those needing help from deciding to obtain it. Without the protective privilege, "clients will be . . . reluctant to seek needed therapeutic services." Jagim, Wittman, Noll, Mental Health Professional's Attitudes toward Confidentiality, Privilege and Third-Party Disclosure, 9 Prof. Psychol. 458, 459 (1978). "The interest

³⁰ One court has indicated that "the whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments." City and County of San Francisco v. Superior Court, 37 Cal.2d 277, 282, 231 P.2d 26, 28 (1951).

of the patient in exercising his rights is also society's interest, for society benefits from its members' active enjoyment of this freedom." In re Subpoena Served Upon Zuniga, 52 U.S.L.W. 2107 (6th Cir. August 23, 1983).

C. Statutes Which Protect Individual Rights And Which Have Their Underpinnings In Federal And State Constitutions Can Only Be Defeated By An Extremely Strong Competing State Interest.

In two ways, through a confidentiality statute, Alaska Stat. § 8.86.200, and a judicially-adopted rule of evidence creating a psychotherapist-patient privilege, Alaska R. Evid. 504, Alaska has decided to protect the private disclosures of clients to their treating mental health professionals.

"Protective statutes are to be read broadly where necessary to preserve the public policy they reflect. In re B., 394 A.2d 419, 429 (Pa. 1979) (Roberts, J., concurring). Where a privilege has been created by a coequal branch of government, courts must exercise restraint in carving out exceptions. Similarly, where a rule of evidence has been adopted by the state's highest court, lower courts must exercise restraint. This principle applies with full force to reconsideration of a decision already made by the legislative and judicial branches of the government that the importance of successful psychotherapy outweighs "the need for evidence in the administration of criminal justice."³¹ In re Subpoena Served Upon Zuniga, 52 U.S.L.W. 2107 (6th Cir. August 23, 1983).

³¹ Testimonial privileges are permitted when the exclusion of relevant evidence "has a public good transcending the normally predominant principles of utilizing all rational means for ascertaining truth". Trammel v. United States, 445 U.S. 40, 50 (1980).

Because of the constitutional dimensions of the psychotherapist-patient privilege, the state bears a heavy burden when it wishes to infringe on the exercise of that privilege. The information the government seeks in this case from Dr. Wetherhorn would abrogate the protective privileges created by this state. As amici have shown, the psychotherapist-patient privilege has its roots in the fundamental right to privacy recognized by both the federal and Alaska constitutions. As a result, any incursions must be strongly justified. In such situations the United States Supreme Court requires a state to meet the compelling interest test, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) requiring strict scrutiny and a showing that there are no less intrusive means to accomplish the state's legitimate purpose, id.; see Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410, 1421 (1974). Alaska uses a complementary test: "If governmental restrictions interfere with the individual's right to privacy, we will require that the relationship between means and ends be not merely reasonably but close and substantial." Ravin v. State, 537 P.2d 494, 498 (1975); accord Allred v. State, 554 P.2d 411, 421 (1976); see also Breese v. Smith, 501 P.2d 159 (Alaska 1972) (fundamental right protected by Alaska constitution can only be abridged by compelling governmental interest). "Interference with . . . the doctor-patient relationship ordinarily mandates a very high level of justification." Falcon v. Alaska Pub. Offices Comm'n., 570 P.2d 469, 476 (1977).

D. No Substantial State Interest Exists Which Justifies
The Creation Of A Judicial Exception To The Alaska
Psychotherapist-Patient Privilege Provisions.

Alaska has already done the necessary weighing and balancing and has determined that if clients and psychologists fall within the ambit of the statutes, as they do here, they have the privilege of nondisclosure. Thus, all doubts should be resolved in favor of sustaining the privilege. Where the claims for subpoenaed materials and testimony implicate privileged interests and the privilege invoked has been judged of singular importance, as it has in Alaska, a court should resist the prosecution's request to abrogate such a privilege. Cf. United States v. Nixon, 418 U.S. 683, 697-702 (1974).

Under either the federal or the Alaska test, the prosecution's desire for information related to Dr. Wetherhorn's treatment of R.H. cannot be justified.³² The government seeks to compel the testimony of the treating psychologist so that it may criminally prosecute his client. However, criminal prosecution and incarceration would be in clear conflict with the basic purposes of Alaska's child abuse statute. First, the information requested is not needed to protect the safety of R.H.'s daughter. See Alaska Stat. § 47.17.010 ("It is the intent of the legislature . . . to prevent further harm to the child."). Allegations of sexual abuse have already been reported to the state and the child is under the care and supervision of the Department of Family and Youth Services. Brief for Petitioner at 4. At the subsequent probable cause hearing, Dr. Wetherhorn was designated as a

³² This is also and perhaps more especially true with regard to revelations which would confirm the allegations of incest. These disclosures when gleaned during court-ordered therapy are also protected on fifth amendment grounds. See Point II.

treatment agency approved by the Department so that he could conduct the therapy for R.H. and his family ordered by the court. There have been no additional incidents of sexual misconduct between R.H. and his daughter reported or observed since that time.

Second, the primary purpose of psychotherapy in this case is to understand the nature of R.H.'s sexual conflicts, to resolve those conflicts, and, if treatment is successful, to reunite the family in an atmosphere of safety. This purpose fully supports the rationale underlying the psychologist-patient privilege which

is rooted in the belief that individuals and society at large may be greatly benefited by fostering a sound therapeutic relationship in the interest of preserving families, enhancing individual development and growth, and allowing persons to deal with problems which might otherwise erupt into serious individual and societal difficulties, at least some of which would likely end up in the court system. . . .

State v. Gotfrey, 598 P.2d 1325, 1329 (Utah 1979) (Stewart, J., concurring in part and dissenting in part) (emphasis added);³³ accord In re Subpoena Served Upon Zuniga, 52 U.S.L.W. 2107 (6th Cir. August 23, 1983).³⁴

In fact, the Alaska legislature has expressly stated that the intent of the child abuse reporting statute is "to preserve family life whenever possible."

Alaska Stat. § 47.17.010.

³³ About this basic point the majority and Justice Stewart were in agreement. The issue dividing the court was whether the privilege should extend to nonlicensed practitioners. The majority restricted the privilege only to licensed psychologists. In the instant case, this is not an issue as there is no question that Dr. Wetherhorn is a psychologist licensed in Alaska.

³⁴ See also In re Brenda H., 402 A.2d 169, 172 (N.H. 1979): Effective therapy "is crucial to the preservation of family unity, which is the goal" of child abuse reporting statutes like Alaska's.

Accordingly, in ruling on the prosecution's request for violation of the applicable privileges this court "must cautiously balance the probative value of the evidence against the possible damage to the therapeutic relationship. . . ." Id. at 172-173. When he ordered R.H. and his family to keep their therapy appointments, Master Hitchcock stressed "that the emphasis . . . is one of getting to the root of whatever problems exist and dealing with them in a treatment sense, trying to . . . get the family back together, if at all possible." Requested Excerpts of Transcript of Child in Need of Aid Hearing at 5, lines 5-8.³⁵

As can be seen, the explicit purposes for which R.H. was ordered to receive treatment would be seriously endangered if the Petitioner's position were supported by this court. As amici have shown, see Point I(A) supra, strict confidentiality is essential to successful treatment. See also Meyer &

³⁵ The purposes explicated by Master Hitchcock have been specifically recognized as preeminent when the disposition of child abusers is considered. Sen. (now ex-Vice President) Mondale responded to a witness during hearings to develop a National Center on Child Abuse and Neglect:

This is a very difficult problem for many reasons. No. 1, everybody is afraid of getting in trouble with the law, going to jail, and having a criminal record. Some of them certainly deserve it. But if we want to emphasize care and treatment and prevention, they have to feel free to come in and get it. Right now . . . they do not know whether they are going to get help or whether they are going to go to jail.

To Establish a National Center on Child Abuse and Neglect, to Provide Financial Assistance for A Demonstration Program for the Prevention, Identification, and Treatment of Child Abuse and Neglect and for Other Purposes, 1973: Hearings on S. 1191 Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare, 93rd Cong., 1st Sess. 150 (1977) [hereinafter Child Abuse Hearings]. To the same effect, Sen. Mondale also said, "[F]or a whole host of reasons, and parents when they know they have a problem . . . are afraid to come in for fear that they are going to be indicted for a crime. . . ." Id. at 137.

Willage, Confidentiality and Privileged Communication in Psychotherapy in New Directions in Psycholegal Research (P. Lipsett & B. Sales eds. 1980); Woods & McNamara, Confidentiality: Its Effect on Interviewee Behavior, 11 Prof. Psychol. 714 (1980). This is particularly the case with regard to the treatment of sexual difficulties. In a recent survey, for example, it was found that in patients aware of the absence of a protection privilege in those jurisdictions in which they were receiving treatment, "by far the most prominent categories of information withheld were sexual thoughts . . . and sexual acts." Shuman & Weiner, The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege, 60 N.C. L. Rev. 893, 926 (1982).³⁶ Obviously, without the revelation of such material the possibility of successful treatment of parents who engage in incestuous acts is doomed.

If child abuse could not be treated, then the state's position would have more merit. But, the reality is that, "90% of abusive parents are readily treatable by reconstituting their sense of trust and by giving them considerable minute-to-minute support. . . ." Child Abuse Hearings at 193 (Position Paper of C. Henry Kempe, M.D., Professor & Chairman, Dep't. of Pediatrics, Univ. of Colorado Medical Center and Director, National Center for Prevention of Child Abuse and Neglect). The experience of a typical psychological program reported in the literature has been that no incidences of child abuse were found one year after the conclusion of treatment. Wolfe, Sandler & Kaufman, A Competency-Based Parent Training Program for Child

³⁶ Privacy should be particularly protected in the cases of patients who are being treated for sexual problems by psychologists. See Falcon v. Pub. Offices Comm'n, 570 P.2d 469, 480 (Alaska 1977).

Abusers, 49 J. Consulting & Clinical Psychol. 633 (1981); see also Denicola & Sandler, Training Abusive Parents in Cognitive-Behavioral Techniques, 11 Behav. Therapy 263 (1980); Starr, Child Abuse, 34 Am. Psychol. 872 (1979).

Thus, the Petitioner's position in this case is very shortsighted and antagonistic to the purposes for which child abuse laws were created. Disclosure of R.H.'s admissions to Dr. Wetherhorn would fail to further protect his daughters. It would interfere with the attempt to preserve family unity. It would endanger the therapeutic attempt to change R.H.'s behavior toward his children. And, perhaps more importantly, it would also endanger the safety of other children in this state who find themselves living with abusing parents.

The Petitioner, in attempting to justify abrogation of the psychotherapist-patient privilege is having difficulty in distinguishing two questions (1) What information would exist if no privilege were recognized? and (2) Once information is created in a particular case, would disclosure harm the abused child and his or her family more than nondisclosure would harm the abused child and the state? By focusing only on the second question, it could be argued that the state would be harmed in attempting to exercise its prosecutorial and law enforcement functions. But it is important to recognize that the prosecution is not precluded from prosecuting R.H. in this case. It can indict and seek to convict him from the testimony of witnesses other than Dr. Wetherhorn, particularly the victims of the alleged abuse. The public policy interest exemplified by Alaska's child abuse reporting statute and the constitutional rights underlying the privacy of psychotherapist-client communications do not justify abrogation of a duly created privilege when there is clearly available an alternative, less intrusive means of vindicating

the state's purported interest in securing the conviction of child abusers. Cf. In re B., 394 A.2d 419, 426, 427 (Pa. 1978) (similar reasoning applied to physician-patient privilege); Matter of Farber, 78 N.J. 259, 394 A.2d 330, 338, cert. denied, 439 U.S. 997 (1978) (applied to newspaper reporter privilege). Moreover, the child abuse statutes are not designed to prosecute abusers but to protect children from future harm. That purpose has already been fulfilled in this case.

The more proper focus, amici believe, is on the first question. If there were no privilege or if the existing privilege were rendered ineffective by exceptions such as the one proposed by Petitioner, would parents troubled by sexually deviant thoughts or behavior feel free to seek help from a therapist? In addressing attempts to attenuate protections against disclosure of confidential communications, the court should concentrate on this question and ask itself to what extent will the privilege promote the creation of information that would otherwise not exist in its absence. The privilege, as we have shown, establishes a zone of privacy encouraging information sharing between clients and therapists. This sanctuary would no longer be available and the beneficial results it achieves would no longer occur if the psychotherapist-patient privilege were weakened. If the state prevails in this case, future clients will conclude, when they are asked to disclose crucial information necessary for the successful treatment of their abusive behavior, that it is safer not to disclose. See generally Saltzburg, Privileges and Professionals, 66 Va. L. Rev. 597 (1980).

The possible, though not inevitable, loss of a conviction in this particular case is a small price to pay in exchange for the significantly enhanced potential that parents who abuse their children will be successfully

treated and thus precluded from abusing their children in the future.³⁷ "It is submitted that if there were to be a choice between prevention of future criminal behavior and conviction for past criminal behavior, there can be no question that the former, not the latter, is to be preferred." Fisher, The Psychotherapeutic Professions and the Law of Privileged Communications, 10 Wayne L. Rev. 609, 633 (1964). "Often the purpose of the psychotherapist-patient privilege is the prevention and curing of antisocial behavior, such as the therapy in the instant case. If this type of activity is successful, then many potential crimes will not be committed. The prevention of a number of similar defendants being prosecuted in future cases is more than an adequate balance for the hampering of the truth-finding function in an individual case." Allred v. State, 554 P.2d 411, 429 (Alaska 1976) (Diamond, J., concurring).

Amici do not perceive Alaska as desiring to create an exception to the psychotherapist-patient privilege that would motivate parents "to forego needed treatment . . . out of fear that confidences will later be unfairly and unnecessarily revealed. . . . To avoid such potentially chilling effects, it is apparent that these privileges may not cavalierly be ignored or lightly cast aside." Perry v. Fiumano, 61 A.D.2d 512, 519, 403 N.Y.S.2d 383, 386 (1978). Moreover, although the search for truth in the judicial process is the first predicate of justice,

³⁷ "[S]ociety has an interest in successful treatment of mental illness because of the possibility that a mentally ill person will pose a danger to the community." In re Subpoena Served Upon Zuniga, 52 U.S.L.W. 2107 (6th Cir. August 23, 1983) (justifying the creation of a psychotherapist-patient privilege).

generally there is more than one source of evidence for any given fact. Certainly, our society has not accepted the proposition that the judicial search for truth should override all instances where confidentiality and privacy support basic values of human life. . . . [F]ew privileges are supported by such weighty considerations as those that underlie the psychologist-patient privilege.

State v. Gotfrey, 598 P.2d 1325, 1329 (Utah, 1979) (Stewart, J., concurring in part and dissenting in part).³⁸

In sum, there must be a substantial, if not compelling need, beyond mere conclusory assertions, to cast aside the privilege here. The crucial questions in this case are whether the requested disclosures are necessary (and not merely desirable to Petitioner, see Lora v. Bd. of Educ., 74 F.R.D. 565, 579 (E.D. N.Y. 1977)), and whether the requested disclosures will genuinely effectuate the purposes of the child protection laws of this state. Amici respectfully assert that the disclosures sought by the state are not necessary and failure to protect them would be antagonistic to the very purposes of Alaska's child abuse statutes.

³⁸ See Guernsey, The Psychotherapist-Patient Privilege in Child Placement: A Relevancy Analysis, 26 Vill. L. Rev. 955, 961 (1981):

The likelihood of discouraging people from consulting a psychotherapist is even greater in child custody disputes, where the party who needs help may fear that confidences revealed during therapy will be used against them in later court appearances. In this regard, therefore, the psychotherapist patient privilege is different, and perhaps more necessary, than the physician-patient privilege. . . .

See also Saltzburg, Privileges and Professionals, 66 Va. L. Rev. 597, 650 (1980):

Courts must recognize not only the legitimate needs of litigants, but also their private out-of-court relationships must be fostered and protected despite some burdens on the judicial process. Competing values must be harmonized; each must yield something to the other. Courts enmeshed in litigation must understand that there is more to life than litigation, and must strike a balance with that in mind.

**II. COMPELLED DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS
RELATED TO ALLEGED CRIMES DURING COURT-ORDERED
PSYCHOTHERAPY VIOLATES THE PRIVILEGE AGAINST SELF-
INCRIMINATION.³⁹**

The prosecution in this case wishes to compel disclosures of admissions that R.H. might have made during court-compelled psychotherapy that would directly establish that he is guilty of certain sexual offenses. The district attorney asserts that "the grand jury and the trial jury would be greatly aided by knowing if the defendant has admitted the crime to the therapist." State's Petition for Review at 4.⁴⁰ But disclosures would violate R.H.'s constitutional rights.

"The Fifth Amendment, made applicable to the states through the Fourteenth Amendment,⁴¹ commands that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.' The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him

³⁹ The privilege against self-incrimination should be more correctly referred to as a right; it has the same status as other constitutional rights and is more than a mere concession that the government can evoke. L. Levy, Origins of the Fifth Amendment at vii (1968). However, conforming to convention, it will be referred to as a privilege in this Brief.

⁴⁰ See also Brief for Petitioner at 16: "Obtaining incriminating evidence from those who have to report the crime anyway is the only way to completely fulfill [the child protection purposes of the child abuse reporting law];" Brief for State on Psychotherapist Privilege, Superior Court at 2; "The general areas about which the district attorney and the grand jury will question Dr. Weatherhorn (sic) are: (1) Whether . . . [RH] has admitted to him that he molested his daughters, SH and DH. (2) A meeting approximately two weeks ago at which Dr. Weatherhorn (sic), Dr. Johnstone, SH, and Mrs. . . . [H] were present in which Mrs. . . . [H] made statements to SH about the incest allegations SH was making against her father."

⁴¹ See Malloy v. Hogan, 378 U.S. 1 (1964).

by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips'." Estelle v. Smith, 451 U.S. 454, 462 (1981) (citations omitted). A similar provision against self-incrimination is found in the Alaska Constitution: "No person shall be compelled in any criminal proceeding to be a witness against himself." Alaska Const. art. I, § 9; see Loveless v. State, 592 P.2d 1206, 1209 n.5, on remand, (Alaska 1979), 634 P.2d 941 (Alaska App. 1981). The availability of this privilege clearly applies to grand jury proceedings as well as criminal trials. United States v. Washington, 431 U.S. 181, 186 (1977); United States v. Calandra, 414 U.S. 338, 346 (1974); Counselman v. Hitchcock, 142 U.S. 547 (1892).

The Supreme Court of Alaska has developed a three part test for deciding whether the constitutions of the United States and Alaska regarding the privilege against self-incrimination have been violated: "Is the evidence testimonial; is it incriminating; and is it compelled?" Scott v. State, 519 P.2d 774, 785 (Alaska 1974). All three elements are satisfied here, as is shown directly below.

Whether the privilege should be applied "does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." In re Gault, 387 U.S. 1, 49 (1967). Although the fifth amendment and Art. 1, § 9 of the Alaska Constitution do not apply to nontestimonial communications such as voice exemplars and blood samples, see, e.g., Fisher v. United States, 425 U.S. 391 (1976); United States v. Dionosio, 410 U.S. 1 (1973); Schmerber v. California, 384 U.S. 757 (1966); Loveless v. State, 592 P.2d 1206 (Alaska 1979), they are applicable when the evidence obtained from the accused is communicative and used for its testimonial content. Estelle v. Smith, 451 U.S. 454, 463

(1981). Here, as prosecution unabashedly admits, it seeks to compel R.H. to "speak his guilt," United States v. Wade, 388 U.S. 218, 222-223 (1967), through his therapist's revelations. This is not a case, as in Loveless, where the mental health professional's testimony would be carefully limited to a description of the defendant's conduct or to his conclusions regarding R.H.'s mental state. See 592 P.2d at 1209. The prosecution seeks explicit confirmation that R.H. admitted to sexual contacts with his daughters, admissions that would establish his criminal culpability for those acts.

The privilege against self-incrimination extends not only to answers that would in themselves support a conviction but "likewise embraces those which would furnish a link in the chain of evidence needed to prosecute" a defendant. Hoffman v. United States, 341 U.S. 479, 486 (1951); accord McConkey v. State, 504 P.2d 823, 826 (Alaska 1972). It also applies to the expression of a person's innermost thoughts and feelings. See United States v. Nobles, 422 U.S. 225, 233 (1975); Couch v. United States, 409 U.S. 322, 327 (1973). When court-ordered therapy is "used to determine a defendant's culpability or responsibility for the crimes charged against him the fifth amendment privilege is involved because the use of psychiatric or psychologist [treatment] in this context may assist the state in establishing the basis for imposition of a criminal punishment." Battie v. Estelle, 655 F.2d 692, 701 (5th Cir. 1981). Thus, the requested admissions are both testimonial and incriminating.

The privilege against self-incrimination is not limited to questioning by the police. It applies with equal force to court-ordered intervention conducted by mental health professionals. Although it has traditionally been a bulwark against improperly conducted police

interrogations, "the Fifth Amendment privilege is available outside of criminal proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way." Estelle v. Smith, 451 U.S. 454, 456 (1981) quoting Miranda v. Arizona, 385 U.S. 436, 467 (1966).⁴² It is uncontroverted that the latter part of the treatment R.H. received was court compelled, Brief for Petitioner at 4, and performed by a psychologist, Dr. Wetherhorn, who when appointed to conduct therapy became a "treatment agency approved" by the state. Id. The fact that R.H. was "questioned by a therapist designated by the . . . court . . . rather than by a police officer is immaterial." Estelle v. Smith, 451 U.S. at 467. When treatment is performed by a court-appointed therapist under conditions which can lead to sanctions if the accused fails to attend or cooperate, the professional is neither serving in a neutral or purely therapeutic capacity, but as part "of the adversary system" no longer "acting solely in his [client's] interest." Id. quoting Miranda v. Arizona, 384 U.S. 436, 469 (1966).⁴³ Thus, the requested admissions are compelled.

⁴² "The fundamental right not to incriminate oneself should apply at every stage of criminal inquiry or proceedings regardless of judge-made exclusionary or evidentiary rules." Scott v. State, 519 P.2d 774, 786 (Alaska 1974).

⁴³ The fifth amendment "was designed to protect a putative defendant against the compulsion to incriminate himself arising from an official custodial interrogation. The compulsion can occur . . . from an interrogation conducted by a court-appointed psychiatrist as well as a police officer." Battle v. Estelle, 655 F.2d 692, 699 (5th Cir. 1981). In fact, the evaluation at issue in Battle was performed by a psychologist engaged by the state, not a psychiatrist. The court concluded that the psychologist "had been appointed by the state trial court to conduct the examination and therefore the custodial interrogation was conduct by an agent of the state." Id. at 699-700.

Because all three of Scott's criteria are met, the only remaining question is whether R.H. waived his right to protection against self-incrimination. This is not a case where the accused has placed his own mental status in issue as a defense, an action that arguably waives the fifth amendment privilege. See Estelle v. Smith at 465. "Where a defendant has injected no psychiatric issue into the case, an order compelling him to submit to therapy including discussion of the alleged criminal event, would violate his Fifth Amendment privilege against self-incrimination." Schade v. State, 512 P.2d 907, 919 (Alaska 1973). Even in those cases where mental status is a part of the defense the government may not place in evidence against the defendant any statement uttered during compelled mental health intervention on the issue of guilt. See Wade v. United States, 426 F.2d 64, 74 (9th Cir. 1970); see also 18 U.S.C. § 4244.⁴⁴

R.H. does not seek to introduce the testimony of Dr. Wetherhorn on either the issue of mens rea relevant to the offense or mental status relevant to any defense he might raise with regard to the alleged crime. Accordingly, R. H. "can invoke the protection of the privilege when he does not introduce mental health expert testimony. Submitting to a psychiatric or psychological examination does not itself constitute a waiver of the fifth amendment's protection." Battie v. Estelle, 655 F.2d 692, 702 (5th Cir. 1981). The force of the fifth amendment privilege is even stronger where, as here, the accused is obligated to undergo therapy by the court and the prosecution seeks to

⁴⁴ "To allow a psychiatrist to testify as to guilt or innocence of the defendant by relating admissions obtained in a psychiatric study would be a gross subterfuge." United States v. Julian, 469 F.2d 371, 376 (10th Cir. 1972).

compel the state's treatment agent to expose to a jury his client's secrets that go directly to the crime charged.⁴⁵

Further, there is no evidence that waiver of the self-incrimination privilege occurred as a result of the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). When the requested testimony is testimonial in nature and compelled, "the prosecution may not use statements, whether exculpatory or inculpatory . . . unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Estelle v. Smith, 451 U.S. at 466 quoting Miranda v. Arizona, 384 U.S. at 444. Before such statements can be admitted in this case, Petitioner must show that R.H. was advised, prior to the initiation of court-ordered therapy, that those statements could be used against him in a criminal proceeding, that he had the right to remain silent, and that he had a right to an attorney. Miranda v. Arizona, 384 U.S. at 467-469. As amici read the record, R.H. did not voluntarily consent to court-compelled treatment by Dr. Wetherhorn nor were the required warnings given. Under those conditions, the state may not compel Dr. Wetherhorn to disclose potentially incriminating statements made by his client. See Miranda v. Arizona, 384 U.S. at 468-469.

The unavailability of any incriminating statements made by R.H. will make it somewhat more difficult for the state to prove its case against him but the privilege against self-incrimination must "be accorded liberal

⁴⁵ "It is one thing to conclude that no confidential relationship arises as between an interviewing psychiatrist . . . and a court referred patient, and quite another to decide that a patient . . . who has been committed for treatment rather than an evaluation is not entitled to that confidentiality the relationship requires if it is to be meaningful and therapeutic." Foster, Pretrial Psychiatric Disclosures, 51 N.Y.U. L. Rev. 1090, 1091 (1976).

construction in favor of the right it was intended to secure." Hoffman v. United States, 341 U.S. 479, 486 (1951). Furthermore, Alaska has been one of the more forceful guardians of this privilege. As it has said on a similar occasion, "we are not prepared to exchange a fundamental constitutional right for expediency." Scott v. State, 519 P.2d 774, 787 (1974). "The use in a state criminal trial of a defendant's confession obtained by coercion -- whether by physical or mental -- is forbidden. . . ." Leyra v. Denno, 347 U.S. 556, 558 (1954). Permitting the use of statements touching on guilt under the facts of this case not only would invade R.H.'s constitutional rights but would place him in the intolerable position of choosing between getting better on the one hand or providing evidence against himself on the other. The prosecution is forbidden from imposing this Hobson's choice.

III. THE PROPER APPLICATION OF ALASKA'S PRIVILEGED
COMMUNICATION PROVISIONS AND THE FAIR ADMINISTRATION
OF COURT-ORDERED PSYCHOTHERAPY REQUIRE SENSITIVITY TO
THE ETHICAL AND PROFESSIONAL STANDARDS OF PSYCHOLOGY

In resolving the conflicts raised by this case, amici urge this Court to engage in a flexible mode of analysis which sensitively balances the fundamental values inherent in Alaska's privileged communication statute and in the fifth amendment, as well as art. I, § 9 of the Alaska Constitution, against the government's prerogative to prosecute those who violate its laws.

In offering our perspective on this conflict, amici wish to apprise this court of considerations beyond those controlled by legal precedent. Those considerations concern the necessity of adherence by mental health practitioners to the standards of their professions. Based upon their review of the record in this case, amici believe that Dr. Wetherhorn's refusal to divulge the information sought by the prosecution was not only proper under

the Alaska provision but was also consistent with the highest ethical and professional standards of psychology.

All psychologists who work in the criminal justice system, especially those who are members of the APA, are held to the highest ethical and professional standards of the Association. While "many of the ethical issues facing psychologists in the criminal justice system are shared with psychologists in any other organizational setting," those who function in forensic settings often find themselves in role conflicts and ethical dilemmas concerning "whether to help the client, to further the 'system,' or to serve what they perceive to be the interests of society." APA, Report of the Task Force on the Role of Psychology in the Criminal Justice System, 33 Am. Psychol. 1099, 1100 (1978) reprinted in Who Is the Client (J. Monahan, ed. 1980) [hereinafter Task Force].

In resolving such conflicts psychologists are guided by the Association's Ethical Principles of Psychologists,⁴⁶ [hereinafter Ethical Principles]; Standards for Providers of Psychological Services⁴⁷ [hereinafter Standards]; and Specialty Guidelines for the Delivery of Services by Clinical Psychologists⁴⁸ [hereinafter Guidelines]. Since 1953 the APA has maintained a set of ethical principles to guide the behavior of all psychologists. The failure of members to abide by the principles subjects

⁴⁶ APA, Ethical Principles of Psychologists, 36 Am. Psychol. 633 (1981) [hereinafter Ethical Principles].

⁴⁷ APA, Standards for Providers of Psychological Services, 32 Am. Psychol. 495 (1977) [hereinafter Standards].

⁴⁸ APA, Specialty Guidelines for the Delivery of Services by Clinical Psychologists, 36 Am. Psychol. 640 (1981) [hereinafter Guidelines].

them to disciplinary measures, including expulsion from the Association. The Preamble reminds psychologists that their major goals are "to respect the dignity and worth of the individual and [to] strive for the preservation and protection of fundamental human rights." Ethical Principles at 633.

The purpose of the Standards is to serve the needs of users, providers, third party purchasers, and others with a legitimate concern with the accessibility, timeliness, efficacy, and standards of quality attending the provision of psychological services. "Any persons representing themselves as psychologists, when providing any of the covered psychological service functions at any time and in any setting, whether public or private, profit or nonprofit, are required to observe these standards of practice in order to promote the best interests in and welfare of the users of such services." Standards at 495. The APA has developed guidelines for the four recognized specialties in professional psychology -- clinical, counseling, industrial-organizational, and school psychology -- implementing the generic Standards. The intent of the Clinical Psychology Guidelines is to improve the quality of psychological services and to establish a uniformly acceptable level of such services. Because they represent a consensus of university faculty, private practitioners, and public institution employees the Guidelines "represent the profession's best judgment of the conditions . . . that contribute to competent professional practice." Guidelines at 640.

Mental health practitioners "bear a heavy social responsibility" because "their recommendations and professional actions may alter the lives of others," Ethical Principles at 633. Given the consequences that flow from the sensitive nature of their work, the APA requires that psychologists refuse to "engage in or condone practices that . . . result in illegal or unjustifiable

actions" on that "violate or diminish the legal and civil rights of clients. . . ." Id. at 634; accord Standards at 499; Guidelines at 648.

Should conflicts of interest arise between these ethical demands and those of the institution they serve, psychologists' initial responsibility is to "clarify the nature and direction of their loyalties . . . and keep all parties informed of their commitments." Ethical Principles at 636. Further, they have the duty "to prevent distortion, misuse, or suppression of psychological findings by the institution or agency of which they are employees." Id. at 633. In carefully selected instances when "psychologists . . . find that psychological services are being provided in a manner that is . . . exploitative to users" they are required to "take corrective action, which may include the refusal to provide services." Standards at 501. While clinical psychologists are urged to "work with other professionals in a cooperative manner" such cooperation must be for "the good of the users and the benefit of the general public." Guidelines at 648.⁴⁹

The nature of the therapeutic relationship is of crucial import in this case. The concern about this relationship and attendant ethical problems is heightened when the psychologist is acting as an agent of the government and not as a professional voluntarily retained by the defendant. In these instances, the APA specifically requires psychologists in the context of clinical assessment and treatment to be aware of "problems of self-incrimination in judicial proceedings." Standards at 499; Guidelines at

⁴⁹ "Psychologists have the responsibility to make clear and explicit the nature of their role. . . ." APA, Guidelines for Conditions of Employment of Psychologists, 27 Am. Psychol. 331, 332 (1972).

645. "The defendant must be aware that the [therapist] is employed by his adversary and is not primarily his healer." State v. Corbin, 15 Or. App. 536, 516 P.2d 1314, 1319 (1973); see also Shah, Privileged Communications, Confidentiality, and Privacy. 1 Prof. Psychol. 56, 66 (1969).

Although amici recognize that, generally, a profession's ethical principles cannot override legal mandates, Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 473-474 (Alaska 1977) Alaska has been especially concerned about the ethical considerations that guide the work of psychotherapists. As Alaska's Supreme Court has remarked in the landmark case establishing the privilege at issue here:

Because of the special nature of a patient's confidences, the psychotherapist is subject to an even more stringent honorable obligation not to disclose, under any circumstances, than are other professionals. We do not wish psychotherapists to be faced with the dilemma of either violating this extraordinary trust or being incarcerated.

Allred v. State, 554 P.2d 411, 418 (Alaska 1976).

The same concern applies in this case.

CONCLUSION

The government's request for information from Dr. Wetherhorn concerning statements made by R.H. that could be used to determine guilt is indefensible. The statements made during voluntarily-obtained therapy are protected by the state's privileged communication statutes. The statements made during court-compelled psychotherapy are also protected by the privilege against self-incrimination established under the federal constitution and even more zealously protected by Alaska's constitution. Dr. Wetherhorn, like the

vast majority of mental health professionals, has practiced competently and with great sensitivity to the ethical and legal issues his work involves. Requiring that Dr. Wetherhorn disclose his client's confidences would place all psychologists practicing in Alaska in untenable legal and ethical jeopardy. The very nature of psychotherapy and, most especially, court-compelled treatment, creates significant dangers that fundamental constitutional values and statutory privileges will be infringed. The public has the right to every person's evidence, but such evidence must not be obtained in situations where there is risk of abuse without concomitant imposition of appropriate safeguards. Amici believe that the analysis they have offered may assist this court in justly resolving the complex issues raised in this case.

For the reasons presented, amici urge this court to affirm the decision below. If the court desires, amici would be honored to present their views in oral argument on any issues discussed herein.

Respectfully submitted,

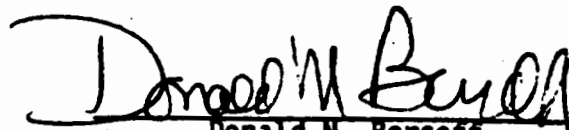
DONALD N. BERSOFF
Ennis, Friedman, Bersoff & Ewing
1200 Seventeenth Street, N.W.
Suite 511
Washington, D.C. 20036
(202/775-8100)

Counsel for Amici Curiae

October 17, 1983

CERTIFICATE OF SERVICE

I, Donald N. Bersoff, Counsel for Amici Curiae certify that on October 12, 1983, I served by mail three copies of the Brief of Amici Curiae on Elizabeth H. Sheley, Suite 520, 1031 W. 4th Avenue, Anchorage, Alaska 99501, Counsel for Petitioner, and Linda Kunc and Phillip Weidener, 444 H. Street, Anchorage, Alaska 99501 and Gregory J. Grebe, 1015 W. 7th Street, Anchorage, Alaska 99501, Counsel for Respondents.


Donald N. Bersoff