IN THE

Supreme Court of the State of Oregon

No. S 30798

STATE OF OREGON,

Respondent,

v.

JERRY LEE MILLER,

Petitioner-Defendant.

On Appeal from the Oregon Court of Appeals
(Court of Appeals No. A 27112)
(Van Hoomissen, J.)

BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AND OREGON PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

KIT KINPORTS
DONALD N. BERSOFF
ENNIS, FRIEDMAN, BERSOFF & EWING
Suite 400
1200 - 17th Street, N.W.
Washington, D.C. 20036
(202) 775-8100
Counsel for Amicus
American Psychological Association

JONATHAN A. ATER (OSB #66007)
LINDSAY, HART, NEIL & WEIGLER
111 S.W. Columbia Street
Portland, Oregon 97201
(503) 226-1191
Counsel for Amicus
Oregon Psychological Association

Dated: December 14, 1984
Washington, D.C.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. OREGON'S PSYCHOTHERAPIST-PATIENT PRIVILEGE STATUTE IS BASED ON IMPORTANT POLICY AND CONSTITUTIONAL CONSIDERATIONS	3
A. The Policies Underlying the Privilege	3
B. The Constitutional Basis of the Privilege	8
C. The Oregon Privilege Statute	11
II. THE LANGUAGE OF OREGON'S PSYCHOTHERAPIST-PATIENT PRIVILEGE STATUTE, THE RELEVANT CASELAW, AND THE POLICIES AND CONSTITUTIONAL PRINCIPLES UNDERLYING THE PRIVILEGE REQUIRE RECOGNITION OF THE PRIVILEGE IN THIS CASE	11
A. Defendant's Communications to Dr. Wendy Saville	12
B. Defendant's Communications to Ms. Edith Smith	21
CONCLUSION	26

TABLE OF AUTHORITIES

CASES Page

Allred v. State, 554 P.2d 411 (Alaska 1976) 5, 13, 22
Baum v. Denn, 187 Or. 401, 211 P.2d 478 (1949) 16
Boddie v. Connecticut, 401 U.S. 371 (1971) 9
Booher v. Brown, 173 Or. 464, 146 P.2d 71 (1944) 15
Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977) 5, 6, 9, 11
Carey v. Population Services International, 431 U.S. 678 (1977) 9
Doe v. Bolton, 410 U.S. 179 (1973) 10
Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981) (Unit B) 9
Falcon v. Alaska Public Offices Comm'n, 570 P.2d 469 (Alaska 1977) 11
General Motors Corp. v. Director of Nat'l Inst. for Occupational Safety & Health, 636 F.2d 163 (6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981) 9
Griswold v. Connecticut, 381 U.S. 479 (1965) 9, 10-11
Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028 (D. Haw. 1979) 9-10, 10, 11
Hickox v. Hickox, 64 A.D.2d 412, 410 N.Y.S.2d 81 (1978) 6
In re "B", 482 Pa. 471, 394 A.2d 419 (1978) 5, 10
In re Brenda H., 119 N.H. 382, 402 A.2d 169 (1979) 6, 7
In re Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970) 4, 6, 7, 8
In re Moser, 27 Or. App. 31, 554 P.2d 1022 (1976) 13, 17
In re Subpoena Served upon Zuniga, 714 F.2d 632 (6th Cir.), *cert. denied*, 104 S. Ct. 426 (1983) 3, 4, 5, 7
In the Interest of Hoppe, 289 N.W.2d 613 (Iowa 1980) 17
Katz v. United States, 389 U.S. 347 (1967) 8
Lora v. Board of Education, 74 F.R.D. 565 (E.D.N.Y. 1977) 6, 9, 10, 15, 16, 17
Mapp v. Ohio, 367 U.S. 643 (1961) 9
Massey v. State, 226 Ga. 703, 177 S.E.2d 79 (1970), *cert. denied*, 401 U.S. 964 (1971) 17
Matter of Edward D., 61 Cal. App. 3d 10, 132 Cal. Rptr. 100 (1976) 16, 22-23
McKenna v. Fargo, 451 F. Supp. 1355 (D.N.J. 1978), *aff'd mem.*, 601 F.2d 575 (3d Cir. 1979) 10
McNamee v. First National Bank of Roseburg, 88 Or. 636, 172 P. 801 (1918) 13
Meyer v. Nebraska, 262 U.S. 390 (1923) 9
Miranda v. Arizona, 384 U.S. 436 (1966) 9
Parham v. J.L., 442 U.S. 584 (1979) 9
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 9

TABLE OF AUTHORITIES—Continued

	Page
Paul v. Davis, 424 U.S. 693 (1976)	9
Perry v. Fiumano, 61 A.D.2d 512, 403 N.Y.S.2d 382 (1978)	3, 6
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	9
Planned Parenthood v. Danforth, 428 U.S. 52 (1976)	9
Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979)	9
Post v. State, 580 P.2d 304 (Alaska 1978)	10
Robinson v. Magovern, 83 F.R.D. 79 (W.D. Pa. 1979)	4
Roe v. Wade, 410 U.S. 113 (1973)	8, 9, 10
Sitton v. Peyree, 117 Or. 107, 241 P. 62 (1925)	12
Stanley v. Georgia, 394 U.S. 557 (1969)	8
State ex rel. Juvenile Dep't of Clatsop County v. Martin, 271 Or. 603, 533 P.2d 780 (1975)	7, 13
State ex rel. Juvenile Dep't of Clatsop County v. Martin, 19 Or. App. 28, 526 P.2d 647 (1974), *rev'd*, 271 Or. 603, 533 P.2d 780 (1975)	8
State ex rel. Juvenile Dep't of Multnomah County v. Black, 19 Or. App. 493, 528 P.2d 130 (1974)	17
State ex rel. Juvenile Dep't of Multnomah County v. Wade, 19 Or. App. 314, 527 P.2d 753 (1974), *appeal dismissed*, 423 U.S. 806 (1975)	17
State ex rel. North Pacific Lumber Co. v. Unis, 282 Or. 457, 579 P.2d 1291 (1978)	16, 20
State v. Betts, 235 Or. 127, 384 P.2d 198 (1963)	3, 21
State v. McCoy, 70 Wash. 2d 964, 425 P.2d 874, *cert. denied*, 389 U.S. 873 (1967)	13
State v. Miller, 67 Or. App. 637, 680 P.2d 676 (1984)	18, 21, 24
State v. Naylor, 291 Or. 191, 629 P.2d 1308 (1981)	21
State v. O'Neill, 274 Or. 59, 545 P.2d 97 (1976)	12
Taylor v. United States, 222 F.2d 398 (D.C. Cir. 1955)	5, 13, 17
Terry v. Ohio, 392 U.S. 1 (1968)	8
Trammel v. United States, 445 U.S. 50 (1980)	3
Triplett v. Board of Social Protection, 19 Or. App. 408, 528 P.2d 563 (1974)	17, 23
United States ex rel. Edney v. Smith, 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977)	3, 4, 5, 17, 25
United States v. Layton, 90 F.R.D. 520 (N.D. Cal. 1981)	10
United States v. Osborn, 409 F. Supp. 406 (D. Or. 1975), *aff'd in part, rev'd in part, & vacated & remanded in part*, 561 F.2d 1334 (9th Cir. 1977)	23
United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950)	23

TABLE OF AUTHORITIES—Continued

Page

United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980) 9
Whalen v. Roe, 429 U.S. 589 (1977) 9, 10
Wisconsin v. Yoder, 406 U.S. 205 (1972) 9
Woosley v. Dunning, 268 Or. 233, 520 P.2d 340 (1974) 17
Wray v. Department of Prof. Reg., 410 So. 2d 960 (Fla. Dist. Ct. App. 1982) 15

CONSTITUTIONAL AND STATUTORY MATERIALS

OR. R. EVID. 503 ..... 20, 23-24
OR. R. EVID. 504 ..... 2, 11, 16, 18, 21
Advisory Committee Note to Proposed Fed. R. Evid. 504 8
Commentary to Del. R. Evid. 504 23
Commentary to Or. R. Evid. 503 ..... 13, 23
Commentary to Or. R. Evid. 504 ..... 13, 14, 15

TEXTS, TREATISES, AND OTHER AUTHORITIES

F. ALEXANDER, THE MEDICAL VALUE OF PSYCHOANALYSIS (1936) 4
Bersoff & Jain, *A Practical Guide to Privileged Communications for Psychologists*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST (G. Cooke ed. 1980) 4
R. Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943) 3
DeKraii & Sales, *Privileged Communications of Psychologists*, 13 PROF. PSYCHOLOGY 372 (1982) 4, 5
Epstein, Steingarten, Weinstein & Nashel, *Panel Report: Impact of Law on the Practice of Psychotherapy*, 5 J. PSYCHIATRY & L. 7 (1977) 5
Everstine, Everstine, Heyman, True, Frey, Johnson & Seiden, *Privacy and Confidentiality in Psychotherapy*, 35 AM. PSYCHOLOGIST 828 (1980) 5
S. FERENCZI, FINAL CONTRIBUTIONS TO THE PROBLEMS & METHODS OF PSYCHOANALYSIS (1955) 5
Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609 (1964) 3, 4, 5, 6, 7, 13, 15, 25
Goldstein & Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 118 AM. J. PSYCHIATRY 733 (1962) 4, 6, 7
R. GREENSON, THE TECHNIQUE AND PRACTICE OF PSYCHOANALYSIS (1967) 5

TABLE OF AUTHORITIES—Continued

Page

GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY (Report No. 45, 1960) 6, 7

M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW (1952) 5

Guttmacher & Weihofen, *Privileged Communications Between Psychiatrist and Patient*, 28 IND. L.J. 32 (1952) 7

Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974) 11

Hurley, *Privileged Communications in Oregon*, 36 OR. L. REV. 132 (1957) 6, 13, 15

Jagim, Wittman & Noll, *Mental Health Professionals' Attitudes Toward Confidentiality, Privilege, and Third-Party Disclosure*, 9 PROF. PSYCHOLOGY 458 (1978) 5, 10

Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731 (1957) 5

Louisell & Sinclair, *Reflections on the Law of Privileged Communication: The Psychotherapist-Patient Privilege in Perspective*, 59 CALIF. L. REV. 30 (1971) 8

MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE (E. Cleary 2d ed. 1972) 8, 12, 16

Reubhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184 (1965) 10

Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597 (1980) 6, 25

Shah, *Privileged Communications, Confidentiality and Privacy*, 1 PROF. PSYCHOLOGY 56 (1969) 3

Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. REV. 893 (1982) 4

Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175 (1960) 4, 6, 7, 8, 17, 20, 24-25

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) 8

J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE (1982) 8, 15, 16, 20, 22, 24

J. WIGMORE, EVIDENCE (McNaughton rev. ed. 1961) 3, 23

IN THE

Supreme Court of the State of Oregon

No. S 30798

STATE OF OREGON,

Respondent,

v.

JERRY LEE MILLER,

Petitioner-Defendant.

On Appeal from the Oregon Court of Appeals
(Court of Appeals No. A 27112)
(Van Hoomissen, J.)

BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AND OREGON PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*

The American Psychological Association and Oregon Psychological Association file this brief pursuant to the Court's order of October 17, 1984, granting leave to appear as *amici curiae*. The particular interests *amici* have in this case are specified in their Motion for Leave to Appear as *Amici Curiae* (dated Oct. 5, 1984). Although *amici* in no way condone the nature of the alleged crime involved in this case, they do wish to provide information that they hope will be helpful to the Court in its consideration of the complex issues presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

Shortly before midnight on August 6, 1982, the defendant, Jerry Lee Miller, telephoned his brother in California and told him that he had just "strangled a kid." Defendant's brother advised him to call

a mental hospital or talk to someone who could help him with his problem. Accordingly, defendant telephoned Dammasch State Hospital, identified himself to Ms. Edith Smith, the secretary/receptionist, as "John Johnson," and asked to speak to a psychiatrist. When Ms. Smith asked defendant "what the problem [was]," he replied, "Murder. I just killed a man." Transcript of Edith Smith's Testimony of October 27, 1982, at 10-11. Ms. Smith then promised to let defendant speak to a psychiatrist.

Instead, Ms. Smith immediately dialed the Sheriff's office. She then telephoned Dr. Wendy Saville, the on-duty psychiatrist at the Hospital, and asked Dr. Saville to keep defendant on the line so that the police could trace the call and locate him. Dr. Saville talked to defendant for ten or fifteen minutes until the police arrived and arrested him.

During their conversation, Dr. Saville asked defendant for background information, similar to that she usually obtained from a patient in a psychiatric interview. When she questioned defendant about his name, he asked whether their conversation was confidential. Dr. Saville assured defendant that she would not disclose his confidences; only then did he reveal his true name. During the conversation, defendant made a number of incriminatory statements about his homosexual encounter with the victim and about his role in the victim's death.

Initially, Dr. Saville refused to tell the police what defendant had told her because, in her view, the conversation was protected by the psychotherapist-patient privilege. But later she made a full report of the conversation to the police. Over defendant's objection, both Dr. Saville and Ms. Smith then testified against defendant at trial. Defendant was convicted of manslaughter in the first degree.

In the view of *amici*, both the Trial Court and the Court of Appeals erred in holding that defendant had no right to invoke the psychotherapist-patient privilege to prevent the testimony of Dr. Saville and Ms. Smith. As we will show, the admission of that testimony was inconsistent with: (1) the policies underlying the privilege; (2) the constitutional basis of the privilege; (3) the language of Oregon's therapist-patient privilege statute, Or. R. Evid. 504; and (4) the relevant caselaw. *Amici* therefore urge this Court to reverse defendant's conviction and remand for a new trial.

ARGUMENT

I. OREGON'S PSYCHOTHERAPIST-PATIENT PRIVILEGE STATUTE IS BASED ON IMPORTANT POLICY AND CONSTITUTIONAL CONSIDERATIONS.

A. The Policies Underlying the Privilege.

Courts and legislatures protect certain communications from compelled disclosure for a variety of reasons. The primary purpose relevant to this case is the encouragement of relationships that are deemed extremely important to society and that are dependent for their success on full mutual communication by the participants, unchilled by the fear of revelation. Although the administration of justice and the ascertainment of truth in legal proceedings depend upon the court's ability to consider all material and relevant evidence, that interest is outweighed by society's interest in encouraging these special relationships. As a result, communications in the context of these relationships are protected as a matter of public policy against disclosure in a formal proceeding. The standard for determining whether such communications are protected 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. Psychology 56, 58 (1969).[1]

Many modern statutory privileges, including the physician-patient privilege, have been soundly criticized.[2] But the psycho-

---

[1] *See also In re Subpoena Served upon Zuniga*, 714 F.2d 632, 639-40 (6th Cir.), *cert. denied*, 104 S. Ct. 426 (1983); *Perry v. Fiumano*, 61 A.D.2d 512, 517, 403 N.Y.S.2d 382, 385 (1978) (quoting 8 J. WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. ed. 1961)); Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 611 (1964) ("[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.").

[2] *See, e.g., State v. Betts*, 235 Or. 127, 140, 384 P.2d 198, 205 (1963); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1040-41 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977); R. Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607, 609-10 (1943). *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.").

therapist-patient privilege has been distinguished as one that, like the attorney-client privilege, serves such uniquely important societal interests as to deserve full judicial and legislative support.[3] Adopting this view, the vast majority of States—including Oregon—have created a psychotherapist-patient privilege. *See* DeKraii & Sales, *Privileged Communications of Psychologists*, 13 Prof. Psychology 372 (1982); Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. Rev. 893, 907 & n. 100 (1982) (43 States and the District of Columbia have enacted statutes creating either a psychiatrist-patient privilege, a psychologist-patient privilege, or a psychotherapist-patient privilege).

By definition and practice, the psychotherapeutic relationship is one that depends for its success upon the creation of an atmosphere in which intimate and often embarrassing facts, fantasies, feelings, and thoughts are freed from censorship. "The very essence of psychotherapy is confidential personal revelations about matters which the patient is and should normally be reluctant to discuss. Frequently, a patient in analysis will make statements to his psychiatrist which he would not make even to the closest members of his family. The process involves a prying into the most hidden aspects of personality, a prying which discloses matters theretofore unknown even to the conscious mind of the patient." Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 184-85 (1960). The patient's "willingness for unreserved self-revelation" is therefore universally recognized as necessary to the success of psychotherapy. F. Alexander, *The Medical Value of Psychoanalysis* 41-42 (1936). The person seeking help from a professional therapist

> confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know this is

---

[3] *See, e.g., In re Subpoena Served upon Zuniga*, 714 F.2d at 638; *Robinson v. Magovern*, 83 F.R.D. 79, 91 (W.D. Pa. 1979); *United States ex rel. Edney v. Smith*, 425 F. Supp. at 1043 ("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."); *In re Lifschutz*, 2 Cal. 3d 415, 434 n. 20, 467 P.2d 557, 570 n. 20, 85 Cal. Rptr. 829, 842 n. 20 (1970); Bersoff & Jain, *A Practical Guide to Privileged Communications for Psychologists*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST (G. Cooke ed. 1980); Fisher, *supra* note 1, at 639; Goldstein & Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 118 AM. J. PSYCHIATRY 733 (1962).

> 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), *quoted in Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955).[4]

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. Psychology 458, 458-59 (1978).[5] Perhaps more than any other activity 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). Any doubts that this confidentiality may be violated 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. Psychologist 828, 828 (1980). "This relationship has been deemed so essential by some that it has been argued that psychotherapy is rendered worthless in its absence." DeKraii & Sales, *Privileged Communications of Psychologists*, 13 Prof. Psychology 372, 372 (1982) (citing Epstein, Steingarten, Weinstein & Nashel, *Panel Report: Impact of Law on the Practice of Psychotherapy*, 5 J. Psychiatry & L. 7 (1977)).[6]

---

[4] *See also United States ex rel. Edney v. Smith*, 425 F. Supp. at 1042-43; *In re "B"*, 482 Pa. 471, 394 A.2d 419, 425-26 (1978); S. Ferenczi, Final Contributions to the Problems & Methods of Psychoanalysis 77 (1955); R. Greenson, The Technique and Practice of Psychoanalysis 59-66 (1967); Fisher, *supra* note 1, at 618-21, 628; Louisell, *The Psychologist in Today's Legal World: Part II*, 41 Minn. L. Rev. 731, 744-45 (1957).

[5] This study of psychologists, psychiatrists, social workers, and counselors found that 98% of those surveyed agreed that confidentiality was "essential in maintaining a positive therapeutic relationship." Jagim, Wittman & Noll, *Mental Health Professionals' Attitudes Toward Confidentiality, Privilege, and Third-Party Disclosure*, 9 Prof. Psychology 458, 462 (1978).

[6] *See also, e.g., In re Subpoena Served upon Zuniga*, 714 F.2d at 638; *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955); *Allred v. State*, 554 P.2d 411, 417 (Alaska 1976) ("Without foreknowledge that confidentiality will

In addition to interfering with existing therapeutic relationships, the threat of public disclosure discourages "the psychologically handicapped [from] seek[ing] and fully cooperat[ing] in psychotherapeutic counseling." *Lora v. Board of Education*, 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 at 1071-72 (Hufstedler, J., dissenting).[7] For that reason, persons seeking psychotherapy have "justifiable expectations of confidentiality." *In re Lifschutz*, 2 Cal. 3d 415, 431, 467 P.2d 557, 567, 85 Cal. Rptr. 829, 839 (1970).[8]

As a result of these policies, the psychotherapist-patient privilege has been adopted despite its adverse impact on the ascertainment of truth in judicial proceedings. Recognition of the privilege is the result of a balancing process that has led to the consensual conclu-

---

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."); *In re Brenda H.*, 119 N.H. 382, 402 A.2d 169, 172 (1979); *Perry v. Fiumano*, 61 A.D.2d at 516, 403 N.Y.S.2d at 384; GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY 92 (Report No. 45, 1960) ("[The psychotherapist's] capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. . . . [T]here is widespread agreement that confidentiality is a *sine qua non* for successful . . . treatment" of patients with emotional and behavioral problems.); Goldstein & Katz, *supra* note 3, at 735 ("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."); Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 620 (1980); Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 186 (1960) ("Speaking every thought is a difficult thing for a patient to achieve, and an essential in overcoming the usual resistance and inhibition, is the utmost faith of the patient in the psychiatrist that his confidence will not be revealed, even in a courtroom.").

[7] The majority and the dissent were in agreement on this issue. *See, e.g.*, 542 F.2d at 1072. The point of disagreement concerned only the question whether the psychotherapist-patient privilege was absolute or was waived when the patient put her mental state at issue in litigation.

[8] *See also Lora v. Board of Education*, 74 F.R.D. 565, 575 (E.D.N.Y. 1977); *Hickox v. Hickox*, 64 A.D.2d 412, 415, 410 N.Y.S.2d 81, 83-84 (1978); *Perry v. Fiumano*, 61 A.D.2d at 519, 403 N.Y.S.2d at 386; Fisher, *supra* note 1, at 621, 626; Hurley, *Privileged Communications in Oregon*, 36 OR. L. REV. 132, 155 (1957); Slovenko, *supra* note 6, at 187-88.

sion that "the social value which effective psychiatric treatment has for the community far outweighs the potential loss of evidence." Group for the Advancement of Psychiatry, *Confidentiality and Privileged Communication in the Practice of Psychiatry* 111 (Report No. 45, 1960). Even in criminal cases, the privilege applies because "punishment is not that much more important than therapy." Guttmacher & Weihofen, *Privileged Communications Between Psychiatrist and Patient*, 28 Ind. L.J. 32, 36 (1952). As the Court of Appeals for the Sixth Circuit recently observed, "[t]he interest of the patient in exercising his rights is also society's interest, for society benefits from its members['] active enjoyment of their freedom. . . . [T]hese interests, in general, outweigh the need for evidence in the administration of criminal justice." *In re Subpoena Served upon Zuniga*, 714 F.2d 632, 639 (6th Cir.), *cert. denied*, 104 S. Ct. 426 (1983).[9]

These principles have been recognized and endorsed by the courts and legislature in this State. As this Court noted in *State ex rel. Juvenile Dep't of Clatsop County v. Martin*, 271 Or. 603, 606, 533 P.2d 780, 781 (1975), "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, . . . regardless of whether the psychotherapist is privately employed or is employed by the state." The Court therefore agreed with the discussion of the psychotherapist-patient privilege by the Court of Appeals, which had observed that "'[o]n account of the special therapeutic need for assurance to the patient of protection against disclosures it is cogently argued . . . that even in states not having the physician-patient privilege generally, a privilege

---

[9] *See also In re Lifschutz*, 2 Cal. 3d at 421-22, 467 P.2d at 560, 85 Cal. Rptr. at 832; *In re Brenda H.*, 119 N.H. 382, 402 A.2d 169, 172 (1979); Fisher, *supra* note 1, at 633 ("[T]he psychotherapist, no matter what the proposed asocial behavior with which he comes into contact, will be in a peculiarly influential position for preventing this behavior. The psychotherapist, like the clergyman, may in fact better be able to prevent future crimes or torts by not being forced to disclose confidential communications as to these in legal proceedings. The nature of the relationship being what it is, the fear of disclosing future crimes might not only destroy the effectiveness of the relationship, but, in effect, might destroy the possibility of preventing crime."); Goldstein & Katz, *supra* note 3, at 736; Slovenko, *supra* note 6, at 194.

Another factor that favors the balance struck by the privilege is that "the nature of the evidence to be gained from forcing disclosure of the confidence is of little probative weight" because communications to therapists "are often weird composites of fabrication and fantasy, the significance of which is beyond the appreciation of the trier of facts." Fisher, *supra* note 1, at 631; *see also* Goldstein & Katz, *supra* note 3, at 739.

should be recognized, by statute or decision, for confidential disclosures to psychiatrists, qualified psychologists trained in the treatment of mental disorders, and (in the court's discretion) general practitioners consulted for diagnosis or treatment of mental disease. . . . "A privilege is necessary if the psychiatric profession is to fulfill its medical responsibility to its patients." ' " *State ex rel. Juvenile Dep't of Clatsop County v. Martin*, 19 Or. App. 28, 35, 526 P.2d 647, 650 (1974) (quoting *McCormick's Handbook of the Law of Evidence* § 99, at 213 n. 9 (E. Cleary 2d ed. 1972) (quoting Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 199 (1960))), *rev'd on other grounds*, 271 Or. 603, 533 P.2d 780 (1975).[10]

The privilege against disclosure of confidential communications made by clients in the course of psychotherapy is therefore based on sound policy principles widely accepted by legal scholars, the courts and legislatures of this State and of other jurisdictions, and theoreticians and practitioners in psychology and psychiatry.

B. The Constitutional Basis of the Privilege.

In addition to the psychological, judicial, and legislative support for the psychotherapist-patient privilege, the patient's "interest in . . . retaining this substantial privacy . . . draws sustenance from our constitutional heritage." *In re Lifschutz*, 2 Cal. 3d 415, 431, 467 P.2d 557, 567, 85 Cal. Rptr. 829, 839 (1970).[11] Although the right to privacy is not expressly guaranteed in the Federal Constitution, zones of privacy have been found to be implicit in the more specific provisions of the First Amendment, *see, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969); the Third Amendment, *see, e.g., Katz v. United States*, 389 U.S. 347 (1967); the Fourth Amendment, *see, e.g., Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); the Fifth Amendment, *see, e.g., Roe v. Wade*, 410 U.S. 113

---

[10] The importance of the principles underlying the therapist-patient privilege was also recognized in proposed Federal Rule of Evidence 504, on which Oregon's therapist-patient privilege statute is based, *see* note 25, *infra*. *See* Advisory Committee Note to Fed. R. Evid. 504, *reprinted in* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 504-3 to 504-4 (1982); *id.* ¶ 504[03], at 504-15 to 504-16.

[11] For a discussion of *In re Lifschutz*, including its constitutional dimensions, see 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).

(1973); *Miranda v. Arizona*, 384 U.S. 436 (1966); and the Ninth Amendment, *see, 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 a consensus that this right is grounded primarily in "the Fourteenth Amendment's concept of personal liberty and restrictions on state action . . . ." *Roe v. Wade*, 410 U.S. 113, 115 (1973).

Although the United States Supreme Court has never directly addressed the question whether the constitutional right to privacy applies to the psychotherapist-patient privilege, support for that conclusion is 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). These important decisions concern, *inter alia*, "matters relating to marriage,[12] procreation,[13] contraception,[14] family relationships, and child rearing and education[15]." *Paul v. Davis*, 424 U.S. 693, 713 (1976).[16]

Both of these interests are implicated in the context of the psychotherapist-patient relationship. First, the compelled disclosure of the intimate details disclosed in therapy 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. Board of Education*, 74 F.R.D. 565, 570 (E.D.N.Y. 1977).[17]

---

[12] *See Boddie v. Connecticut*, 401 U.S. 371 (1971).

[13] *See Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

[14] *See Carey v. Population Services International*, 431 U.S. 678 (1977).

[15] *See 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).

[16] *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-66 (1973); *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981) (Unit B); *Plante v. Gonzalez*, 575 F.2d 1119, 1127-28 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

[17] *See also United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980); *General Motors Corp. v. Director of Nat'l Inst. for Occupational Safety & Health*, 636 F.2d 163, 166 (6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981); *Caesar v. Mountanos*, 542 F.2d 1064, 1067-68 & n. 9 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481

> 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 psychotherapist, so essential to successful therapy, is also closely related to the second protected interest identified in *Whalen v. Roe*. Compelled disclosure of confidences related to such intimate matters as family and human sexuality—as is 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. Board of Education*, 74 F.R.D. at 570 (citing *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), and *Whalen v. Roe*, 429 U.S. 589 (1977)).[18] Public disclosure of the most embarrassing particulars of patients' lives not only strips them of their sense of dignity and fails to protect their subjective interest in freedom from humiliation, *see, e.g., Post v. State*, 580 P.2d 304, 307 (Alaska 1978), but also discourages 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 Professionals' Attitudes Toward Confidentiality, Privilege, and Third-Party Disclosure*, 9 Prof. Psychology 458, 459 (1978).

Because of these constitutional dimensions of the therapist-patient privilege, the State bears a heavy burden when it wishes to infringe on the exercise of that privilege. In such situations, the Supreme Court has exercised strict scrutiny and required the State to prove that the violation of the right to privacy is necessary to a compelling state interest and that no less intrusive means are available to accomplish the State's purposes. *See, e.g., Griswold v. Connecticut*, 381

F. Supp. 1028, 1043-45 (D. Haw. 1979); *McKenna v. Fargo*, 451 F. Supp. 1355, 1378-81 (D.N.J. 1978), *aff'd mem.*, 601 F.2d 575 (3d Cir. 1979); *In re "B"*, 482 Pa. 471, 394 A.2d 419, 423-26 (1979).

[18] *See also United States v. Layton*, 90 F.R.D. 520, 526 (N.D. Cal. 1981); *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. at 1038-39.

U.S. at 485; Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410, 1421 (1974).[19]

C. The Oregon Privilege Statute.

Recognizing the policies and constitutional principles underlying the psychotherapist-patient privilege, the Oregon legislature enacted a privilege statute that went into effect on January 1, 1982. Rule 504 of the Oregon Rules of Evidence provides, in pertinent part, that "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis and treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist . . . ." Rule 504(2).

"Patient" is defined as "a person who consults or is examined or interviewed by a psychotherapist." Rule 504(1)(b). "Psychotherapist" is defined as "a person who is licensed, registered, certified or otherwise authorized under the laws of any state to engage in the diagnosis or treatment of a mental or emotional condition, or reasonably believed by the patient so to be, while so engaged." Rule 504(1)(c). And "confidential communication" is defined as "a communication not intended to be disclosed to third persons except: Persons present to further the interest of the patient in the consultation, examination or interview; persons reasonably necessary for the transmission of the communication; or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family." Rule 504(1)(a).

II. THE LANGUAGE OF OREGON'S PSYCHOTHERAPIST-PATIENT PRIVILEGE STATUTE, THE RELEVANT CASELAW, AND THE POLICIES AND CONSTITUTIONAL PRINCIPLES UNDERLYING THE PRIVILEGE REQUIRE RECOGNITION OF THE PRIVILEGE IN THIS CASE.

The Court of Appeals' ruling that the psychotherapist-patient privilege did not protect defendant's communications to Dr. Wendy Saville, the psychiatrist at Dammasch State Hospital, and to Ms.

---

[19] *See also Caesar v. Mountanos*, 542 F.2d at 1072 (Hufstedler, J., dissenting); *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. at 1039; *Falcon v. Alaska Public Offices Comm'n*, 570 P.2d 469, 476 (Alaska 1977).

Edith Smith, the Hospital's secretary/receptionist, cannot be reconciled with the language of Rule 504, the relevant caselaw, or the policies and constitutional principles underlying the privilege.

A. Defendant's Communications to Dr. Wendy Saville.

Apparently, there is no dispute that defendant was a "patient" within the terms of Rule 504. On the evening of August 6, 1982, defendant was extremely agitated, *see* Transcript of Wendy Saville's Testimony of August 31, 1982, at 10; Transcript of Edith Smith's Testimony of October 27, 1982, at 18, and therefore, at his brother's suggestion, he telephoned Dammasch State Hospital in an attempt to seek professional assistance for his disturbed emotional condition. Even the State admits that defendant's purpose in calling the Hospital was to "get medical attention." *See* Respondent's Brief to the Court of Appeals at 9. Thus, he "consulted" Dr. Saville within the meaning of Rule 504. In addition, defendant must be deemed a patient within the terms of the privilege statute because he was "interviewed by" Dr. Saville on the telephone.

The fact that defendant had no previous relationship with Dr. Saville is of no consequence in determining whether defendant was a patient for purposes of the therapist-patient privilege. In *State v. O'Neill*, 274 Or. 59, 72-73, 545 P.2d 97, 104 (1976), for example, this Court reversed the decision of the Court of Appeals and held that the physician-patient privilege was applicable where the appellant was brought for the first time to a hospital crisis unit for medical help.[20] Moreover, the psychotherapist-patient privilege, like the attorney-client privilege, should protect communications made in the course of the initial conference during which the relationship is formed. *See McCormick's Handbook of the Law of Evidence* § 88, at 179 (E. Cleary 2d ed. 1972); *Sitton v. Peyree*, 117 Or. 107, 115, 241 P. 62, 64 (1925) (noting in addition that the fact that the attorney had not been paid at the time of the communication did not remove the privilege).[21]

---

[20] The evidence of a privileged relationship in *State v. O'Neill* was even weaker than is true in this case because in *O'Neill* the appellant was forcibly taken into custody by the police at request of his mother and was brought to the hospital; therefore, he did not voluntarily seek treatment or intend to enter into a confidential relationship, as is the case here.

[21] Likewise, the facts that defendant had not tendered any payment to Dr. Saville and that she was an employee of the State are not relevant in determining whether or not a therapist-patient privilege had been established. *See,*

In fact, the attorney-client privilege protects communications made for the purpose of establishing such a relationship even when the relationship is never actually formed. The Commentary to Rule 503 of the Oregon Rules of Evidence points out, for example, that the attorney-client privilege "extends the status of client to one consulting a lawyer with a view to retaining the lawyer, even though actual employment does not result." *See also McNamee v. First National Bank of Roseburg*, 88 Or. 636, 640, 172 P. 801, 802 (1918). "In light of the policy upon which [the attorney-client] privilege is based, such a result would appear necessary. A person should be encouraged to make a full and frank disclosure to the attorney before the latter accepts the case." Hurley, *Privileged Communications in Oregon*, 36 Or. L. Rev. 132, 147 (1957). The same reasoning applies in the context of the psychotherapist-patient privilege.[22] As the court noted in *Allred v. State*, 554 P.2d 411, 420 (Alaska 1976), the therapist-patient privilege "necessarily includes communications made in the course of diagnostic interviews and examinations which might reasonably lead to psychotherapy . . . ."[23]

Dr. Saville must likewise be deemed a "psychotherapist" for purposes of the privilege statute. There is no question that, as a

---

e.g., State ex rel. Juvenile Dep't of Clatsop County v. Martin, 271 Or. 603, 606, 533 P.2d 780, 781 (1975); *Taylor v. United States*, 222 F.2d 398, 402 (D.C. Cir. 1955).

[22] Cases interpreting the attorney-client privilege are useful by way of analogy in determining the proper scope of the psychotherapist-patient privilege because Rule 504 conforms in many respects to Rule 503 of the Oregon Rules of Evidence, which provides for the attorney-client privilege. *See, e.g.*, Commentary to Or. R. Evid. 504(1)(a) and 504(3). The therapist-patient privilege should therefore be interpreted at least as broadly as the attorney-client privilege; if there is any difference, the scope of the therapist-patient privilege should exceed that of the attorney-client privilege. The Commentary to Rule 504(4) notes, for example, that because of "the basic differences" in the therapist-patient and the attorney-client relationships, "it has been argued convincingly that the nature of the psychotherapist-patient relationship demands complete security against legally coerced disclosure . . . ." *See also, e.g., In re Moser*, 27 Or. App. 31, 33-34, 554 P.2d 1022, 1023 (1976); Fisher, *supra* note 1, at 618.

[23] The case relied on by the State in its brief to the Court of Appeals, *State v. McCoy*, 70 Wash. 2d 964, 425 P.2d 874, *cert. denied*, 389 U.S. 873 (1967), is very different from this one. In that case, the defendant was unconscious when he was brought to the hospital, and he was undressed by two nurses, who found a package of marijuana in one of his socks. Although the court concluded in *McCoy* that the testimony of the two nurses was not protected by the physician-patient privilege statute, the defendant had made no communications to the nurses that would fall within the scope of the privilege. Obviously, that is not the case here.

licensed psychiatrist, she was "authorized to engage in the diagnosis or treatment of a mental or emotional condition" under the laws of Oregon. *See* Trial Court's Order Allowing Defendant's Motion to Suppress in Part and Denial of Defendant's Motion to Suppress in Part, at 3 (Nov. 15, 1982). The sole issue is whether she was "so engaged" when she spoke with defendant over the telephone.

Certainly, Dr. Saville acted precisely as if she were engaged in diagnosis or treatment at that time. The conversation lasted ten or fifteen minutes, and ended only when the police arrived to arrest defendant. *See* Transcript of Wendy Saville's Testimony of August 31, 1982, at 12-13. During the conversation, Dr. Saville asked defendant questions designed to elicit background information about him. She also spoke with him about his reasons for killing, about his feelings at the time, about his "fantasies about a situation in which someone was killed during a homosexual act," about his reading of pornography, and about other issues relevant to defendant's actions and feelings. *See id.* at 9-12. As she admitted, the information Dr. Saville sought from defendant was "similar to what [she would] obtain from [her] training in a psychiatric interview." *Id.* at 17.[24]

The only basis for the Court of Appeals' conclusion that Dr. Saville was not engaged in diagnosis or treatment was its rationale that her intent in speaking with defendant was merely to keep him on the telephone until the police could apprehend him, and not to give him any therapeutic care or treatment. But the application of the therapist-patient privilege has never been determined, nor should it be, by the subjective intent of the therapist. Such a view is contrary to the interests the privilege was designed to protect.

The legislature's requirement that a therapist engage in diagnosis or treatment to trigger the protection of the privilege was not meant to exclude communications in cases like this one, but perhaps may be construed to exclude communications to mental health professionals engaged in nonclinical research. Thus, the Commentary to Rule 504 states that the Rule is consistent with "the current Oregon requirement that a physician be consulted for treatment in order that the physician-patient privilege attach" and therefore "does not include a person submitting to examination for scientific pur-

[24] Moreover, Dr. Saville testified that the Hospital sometimes provided psychiatric counseling by telephone to persons who called because they were upset or had a problem and wanted to talk to someone about it. *See* Transcript of Wendy Saville's Testimony of August 31, 1982, at 5-6.

poses." Similarly, proposed Rule 504 of the Federal Rules of Evidence, on which Rule 504 of the Oregon Rules of Evidence is based,[25] "applies when a clinical psychologist is performing psychodiagnosis or psychotherapy and not when a person consults a psychologist engaged in advertising, market research and the like." 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 504[04], at 504-21 (1982).[26] Thus, there is no support for the Court of Appeals' interpretation of Rule 504's requirement that a psychotherapist be engaged in diagnosis or treatment as limiting the availability of the privilege where both the patient's intent in consulting the therapist and the therapist's apparent purpose are diagnosis and treatment. *Cf.* Hurley, *Privileged Communications in Oregon*, 36 Or. L. Rev. 132, 147 & n. 92 (1957) (noting that in *Booher v. Brown*, 173 Or. 464, 146 P.2d 71 (1944), this Court followed the usual approach taken by the courts and presumed that a lawyer, in performing his duties, was "employ[ing] the knowledge and skill of his profession").

Moreover, the therapist-patient privilege belongs to the patient, not the therapist, and therefore it is the intent of the patient that is considered determinative in questions concerning the scope of the privilege. *See, e.g., Wray v. Department of Prof. Reg.*, 410 So. 2d 960 (Fla. Dist. Ct. App. 1982); 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 504[06], at 504-26 (1982). In fact, Oregon's therapist-patient privilege statute expressly provides that the privilege applies to "confidential communications *made for the purposes*

---

[25] The scope of proposed Rule 504 of the Federal Rules of Evidence is helpful in interpreting Oregon's psychotherapist-patient privilege because "Oregon Rule of Evidence 504 is based on proposed Rule 504 of the Federal Rules of Evidence .... Aside from minor changes made to conform the [Oregon] rule to the form and style of Oregon statutes, the only differences between this and proposed Federal Rule 504 lie in the exceptions." Commentary to Or. R. Evid. 504. In fact, the Oregon privilege provides even greater protection for the patient than the proposed federal rule because in Oregon the privilege applies not only when the psychotherapist is in fact licensed, but also when the patient reasonably but incorrectly believes that the psychotherapist is licensed. This protection was missing in the proposed federal rule.

Proposed Rule 504 of the Federal Rules of Evidence was endorsed by an 8-1 vote of the Supreme Court but was ultimately rejected by Congress in favor of the single, more general privilege provided for in Federal Rule of Evidence 501. *See* 2 J. WEINSTEIN & M. BERGER, *supra* note 10, at 501-2.

[26] *See also Lora v. Board of Education*, 74 F.R.D. 565, 576 (E.D.N.Y. 1977) (communications to psychologist conducting examination for purposes of screening and referral within educational system should not be privileged); Fisher, *supra* note 1, at 641 (communications to industrial psychologists or psychologists polling public opinion should not be privileged).

of diagnosis or treatment . . . ." Rule 504(2) (emphasis added). This language clearly suggests that when a patient discloses a confidence to a therapist with the intent of obtaining diagnosis or treatment, that communication is privileged.[27]

An additional indication that the patient's intent is controlling is that, in determining whether or not a specific communication is confidential, the question asked in this State, as in other jurisdictions, is whether the patient intended that the communication be confidential. *See* Rule 504(1)(a). "[T]he crucial element is intent; if a patient makes a communication expecting it to be disclosed, the privilege ceases." 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 504[05], at 504-21 (1982); *see also State ex rel. North Pacific Lumber Co. v. Unis*, 282 Or. 457, 460-61, 579 P.2d 1291, 1293 (1978) (referring to the attorney-client privilege); *Baum v. Denn*, 187 Or. 401, 407, 211 P.2d 478, 480 (1949) ("communications made to an attorney for the purpose of being conveyed by him to others are . . . not privileged"); *Lora v. Board of Education*, 74 F.R.D. 565, 585 (E.D.N.Y. 1977); *Matter of Edward D.*, 61 Cal. App. 3d 10, 21-22, 132 Cal. Rptr. 100, 106-07 (1976) (Jefferson, J., dissenting).

In addition, the Oregon therapist-patient privilege statute protects communications to persons who are "reasonably believed by the patient" to be psychotherapists licensed in the State of Oregon. *See also McCormick's Handbook of the Law of Evidence* § 88, at 179 (E. Cleary 2d ed. 1972) (same re attorney-client privilege). This provision makes even clearer that the patient's intent and reasonable belief are critical in determining the scope of the privilege. This provision likewise suggests that the privilege applies when, as

---

[27] Moreover, the original draft of proposed Rule 504 of the Federal Rules of Evidence defined "patient" as follows: "'A patient is a person who consults or is examined or interviewed by a psychotherapist *for purposes of* diagnosis or treatment of his mental or emotional condition.'" 2 J. WEINSTEIN & M. BERGER, *supra* note 10, ¶ 504[04], at 504-18 (emphasis added). This provision unequivocally indicates that the patient's purposes in consulting the therapist are controlling in determining whether or not a therapist-patient relationship has been established. Although the phrase commencing "for purposes" was eliminated from subsequent drafts, and thus from Oregon's privilege statute, "*the meaning remains the same* because the definition of psychotherapist has been adjusted by adding 'while engaged in the diagnosis or treatment of a mental or emotional condition . . . .'" (emphasis added). Thus, the subsequent amendments to the wording of proposed Federal Rule 504 were not intended to be substantive, and were not meant to change the fact that the patient's perceptions and purposes are controlling in determining the scope of the privilege.

in this case, patients intend to enter into a confidential therapist-patient relationship and reasonably believe that they have done so.

The cases in which the courts in this jurisdiction have concluded that an evidentiary privilege is not available because the requisite relationship had not been established are cases where the patient knew, or should have known, that a confidential relationship had not been formed. In *State ex rel. Juvenile Dep't of Multnomah County v. Black*, 19 Or. App. 493, 497, 528 P.2d 130, 132 (1974), for example, the court noted that the psychologist-patient privilege did not apply because the appellants were not "the psychologist's 'clients' 'in the course of his professional employment' "; rather, they were aware that the psychologist had examined them at the request of the State solely for the purpose of testifying at a parental termination proceeding. *See also Woosley v. Dunning*, 268 Or. 233, 249, 520 P.2d 340, 347 (1974) (hospital pathologist who performed autopsy on plaintiff's decedent was not one of the decedent's physicians to whom the physician-patient privilege applied).[28] In each of these cases, then, the patient knew, or had every reason to know, that the therapist or physician had not agreed to enter into a confidential relationship. In this case, by contrast, Dr. Saville expressly promised defendant that their conversation would be confidential and acted so as to lead defendant reasonably to believe that she was engaged in the process of diagnosing and treating him.

Amici do not contend that all conversations with a psychotherapist are automatically protected by the privilege. If, for example, a

---

[28] *See also In re Moser*, 27 Or. App. 31, 34-35, 554 P.2d 1022, 1023 (1976) (same as *State ex rel. Juvenile Dep't of Multnomah County v. Black*, 19 Or. App. 493, 528 P.2d 130 (1974)); *Triplett v. Board of Social Protection*, 19 Or. App. 408, 414-15, 528 P.2d 563, 566 (1974) (same); *State ex rel. Juvenile Dep't of Multnomah County v. Wade*, 19 Or. App. 314, 329-30, 527 P.2d 753, 759-60 (1974) (same), *appeal dismissed*, 423 U.S. 806 (1975); *Taylor v. United States*, 222 F.2d 398, 402 (D.C. Cir. 1955); *Lora v. Board of Education*, 74 F.R.D. 565, 583 (E.D.N.Y. 1977) (parents of handicapped students knew that third parties had access to the students' diagnostic and referral files and therefore did not have an expectation of privacy with regard to those files); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1044 (E.D.N.Y. 1976) (patient consulted psychotherapist to obtain expert advice for the purpose of litigation), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977); *Massey v. State*, 226 Ga. 703, 177 S.E.2d 79 (1970), *cert. denied*, 401 U.S. 964 (1971); *In the Interest of Hoppe*, 289 N.W.2d 613, 617 (Iowa 1980) (court-ordered psychiatric examination); Slovenko, *supra* note 6, at 200 (court-ordered examination does not violate the therapeutic privilege because "[t]he patient is aware that he is not in a confidential relationship with the examining physician . . .").

person wishing to seek treatment for an emotional condition inadvertently met a psychotherapist on the street and immediately blurted out an unsolicited confession, a court might reasonably conclude that no therapist-patient relationship had been formed, despite the patient's unexpressed purpose. In such a case, the therapist would have no idea of the reason for the encounter and would not have had the opportunity to inquire as to the patient's intent. But, as noted in Judge Richardson's dissent from the Court of Appeals' opinion, "[t]his was not a situation in which the psychiatrist *told* defendant that she did not understand their conversation to be related to her professional role, or one in which she listened in silence while defendant spoke, or even one in which she simply engaged in polite chatter and offered comforting reassurances. She spoke with defendant in the basic way she would speak with a patient in a diagnostic or treating situation." *State v. Miller*, 67 Or. App. 637, 651, 680 P.2d 676, 685 (1984) (Richardson, J., dissenting) (emphasis in original).

Where, as in this case, the patient intends to seek treatment for an emotional condition, where the therapist expressly informs the patient that their conversations are confidential, and where the therapist then proceeds to conduct a therapeutic interview, thereby leading the patient reasonably to believe that the therapist has agreed to diagnose or treat his emotional condition and that a therapist-patient relationship has in fact been established, the patient should be entitled to presume—and the courts should find—that the patient's confidential communications to the therapist are privileged.

Accordingly, defendant's conversation with Dr. Saville was a "confidential communication[] made for the purposes of diagnosis or treatment of [defendant's] mental or emotional condition . . ." as required by Rule 504(2). As indicated above, a communication is considered confidential when it is the patient's purpose that it not be disclosed to third persons. *See* Rule 504(1)(a). Defendant clearly intended that his communications not be divulged; he asked Dr. Saville whether their conversation was confidential, and he refused to reveal his identity until she assured him that the conversation would in fact be confidential. *See* Transcript of Wendy Saville's Testimony of August 31, 1982, at 8-9. In fact, Dr. Saville herself believed that the conversation was protected by the privilege. *See id.* at 13, 15. Moreover, defendant's purpose in telephoning Dr. Saville was to receive treatment for his emotional condition, and Dr. Saville led defendant reasonably to believe that their conversation did in

fact have that purpose. Under these circumstances, the language of Rule 504 and the relevant caselaw require that defendant's conversation with Dr. Saville be privileged.

The policies underlying the privilege compel the same result. If communications to a psychotherapist are not protected under the circumstances of this case, patients, like defendant, who are in immediate need of treatment will be reluctant to seek emergency help from a therapist with whom they have no prior relationship. Yet these persons are the ones most in need of professional assistance, and they may have nowhere else to turn because presumably they do not have a long-standing relationship with any other therapist. Discouraging persons such as defendant from seeking help—the direct result of the Court of Appeals' opinion—therefore disserves the purposes underlying the psychotherapist-patient privilege and the public interest.

In addition, even patients with long-standing relationships with a therapist will be discouraged from communicating openly during therapy. Under the rationale adopted by the Court of Appeals, a therapist could promise to undertake therapy of a patient, and could conduct what appeared to be therapeutic sessions for an indefinite period of time. But if the therapist's secret purpose in seeing the patient were to elicit a confession to a crime so that the patient could be apprehended by the police, and not to treat the patient, all of the patient's communications to the therapist could be disclosed in open court. The possibility that any therapist might be acting as an undercover agent for the police, or for some ulterior purpose other than providing treatment, will deter patients from cooperating fully in therapy and will hinder development of the critical relationship of trust between patient and therapist.

The courts below rationalized their decision on the ground that society's interest in the public safety and welfare militates against application of the privilege in cases such as this one. Specifically, these courts reasoned, a therapist has an ethical obligation to divulge a patient's confidences where necessary to render aid to a potential victim of the patient's violence. This rationale does not justify the failure to recognize a privilege in this case. First, it would require abrogation of the privilege not only in this case, but also in cases where the therapist and the patient have a long-standing relationship. That is not the law in this State.

Second, the interest in the public safety can be adequately served if the therapist takes only those steps necessary to aid the victim—for example, by informing the police of the identity of the victim or by warning the victim. The public interest identified by the courts below does not require the more extensive and therefore more damaging violation of the therapist-patient privilege caused if the therapist discloses the patient's confidences in open court. *See, e.g.*, Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 197-98 (1960).

Finally, it is not at all clear that the public safety justified any violation of the privilege under the facts of this case. Defendant unequivocally told Dr. Saville and Ms. Smith that he had *murdered* someone. There was no question in the psychiatrist's mind that a murder had occurred, and she did not act with any purpose of rendering aid to the victim. *See* Transcript of Wendy Saville's Testimony of August 31, 1982, at 8. She did not, for example, ask defendant about the status of the victim's health, about how defendant knew the victim was dead, or even about the victim's exact location. Rather, she expressly testified that her only purpose in violating defendant's confidences was "to keep him on the phone so the police could get there." *Id.* at 9.[29] Under these circumstances, there is no need for this Court to decide whether there is an exception to the psychotherapist-patient privilege where a potential victim's life is endangered.[30]

Accordingly, there is no countervailing public policy at issue in this case that could even potentially outweigh the substantial policies favoring recognition of the privilege. Like the language of Rule 504 and the relevant caselaw, those policies require application of the privilege to defendant's communications to Dr. Saville. Otherwise,

---

[29] Similarly, there is no evidence of any doubt in Ms. Smith's mind that defendant had murdered someone, or of any intent on her part to render aid to a potential victim.

[30] Moreover, the legislature's failure to create an exception to the therapist-patient privilege regarding a patient's communications about future crimes—an exception that is applicable to the attorney-client privilege—suggests that the legislature has struck the balance in favor of protecting communications to therapists even when possible harm is threatened, "on the assumption that less harm will ensure [*sic*] if patients feel free to ventilate their intentions." 2 J. WEINSTEIN & M. BERGER, *supra* note 10, ¶ 504[05], at 504-24. *Cf.* OR. R. EVID. 503(4)(a) (recognizing such an exception to the attorney-client privilege); *State ex rel. North Pacific Lumber Co. v. Unis*, 282 Or. 457, 579 P.2d 1291 (1978) (same).

persons in need of therapy will be reluctant to seek treatment, and those who do will not be completely open with their therapists, thereby impeding the success of the therapy.[31]

B. Defendant's Communications to Ms. Edith Smith.

Defendant's communications to Ms. Smith, the secretary/receptionist at Dammasch State Hospital, likewise fall within the scope of Rule 504. The Court of Appeals' conclusion that defendant's conversation with Ms. Smith was not privileged was based primarily on its reasoning that Ms. Smith was not "present to further the interest of the patient in the consultation, examination or interview . . . ." Rule 504(1)(a). But Rule 504's definition of "confidential communication" also includes communications that are disclosed to persons, like Ms. Smith, who are "reasonably necessary for the transmission of the communication . . . ." Rule 504(1)(a). Thus, the Court of Appeals basically ignored the most important provision of the therapist-patient privilege statute in analyzing the applicability of the privilege to defendant's communications to Ms. Smith.

The uncontroverted testimony at defendant's trial indicated that Ms. Smith's job entailed "reception, administration and admission of patients." Transcript of Edith Smith's Testimony of October 27,

---

[31] The Court of Appeals reasoned that, even if the admission of Dr. Saville's testimony was error, it was harmless because her testimony was cumulative of the testimony of Ms. Smith and because Dr. Saville's testimony "may have helped defendant more than it may have hurt him in that it substantially negated the state's contention that he had *intentionally* killed his victim, thus permitting the judge to convict on the lesser included offense." *State v. Miller*, 67 Or. App. 637, 646 n. 8, 680 P.2d 676, 682 n. 8 (1984) (emphasis in original).

Because *amici* believe that the admission of Ms. Smith's testimony was also inconsistent with the therapist-patient privilege, the erroneous admission of Dr. Saville's testimony cannot be deemed harmless on the ground that it was cumulative of the testimony given by Ms. Smith. Moreover, Dr. Saville's telephone conversation with defendant was much longer and more extensive than was Ms. Smith's very brief conversation; as a result, Dr. Saville's testimony was much more detailed and more damaging to defendant than was that of the receptionist.

In addition, the admission of Dr. Saville's testimony cannot be considered harmless error because defendant was convicted of manslaughter rather than murder. The crucial point is that defendant was found guilty of a crime rather than acquitted. Dr. Saville's testimony concerning defendant's confession to the crime was extremely prejudicial and might well have contributed to defendant's conviction. It cannot be said, therefore, that the Trial Court "almost certainly would have, and ought to have, reached the verdict it did . . ." if the privileged testimony had not been admitted. *State v. Betts*, 235 Or. 127, 143, 384 P.2d 198, 206 (1963); *see also State v. Naylor*, 291 Or. 191, 196-98, 629 P.2d 1308, 1310-11 (1981).

1982, at 5. She compiled an extensive, detailed packet of information on each patient seeking or securing mental health services at the Hospital, and she routinely handled confidential information. *See id.* at 7-10, 21-22.[32] Most important, Ms. Smith was responsible for screening calls received by the Hospital's professional staff; one could not telephone the Hospital and speak to a psychotherapist without first speaking to Ms. Smith. *See id.* at 16. And she had been expressly instructed to ascertain the identity of each caller and the nature of each call before transferring the call to a psychotherapist. *See id.* at 10-11.

Thus, it was necessary for defendant to explain to Ms. Smith the reason for his call in order to ensure that he could speak to a therapist and get help. If he had not confided in Ms. Smith, she would not have transferred his call to Dr. Saville. She would probably have been particularly hesitant to transfer the call because defendant had no prior treatment relationship with the Hospital or its staff. Defendant's communications to Ms. Smith were, therefore, "reasonably necessary for the transmission of the communication[s] . . ." to Dr. Saville.

The conclusion that defendant's communications to Ms. Smith were protected by the therapist-patient privilege is consistent with the interpretation given proposed Rule 504 of the Federal Rules of Evidence, on which this State's privilege statute is modeled. Commentators have noted, for example, that "[m]edical secretaries, nurses and hospital personnel will undoubtedly be found to fall within the[] categor[y]" of persons to whom confidences may be disclosed because they are reasonably necessary for the transmission of the communication. 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 504[05], at 504-21 (1982). Even where, as in this case, the therapist is not present when the patient discloses a confidence to one of the therapist's assistants, the confidence is protected by the privilege as long as the paraprofessional "is working under *close* supervision and control of a professional . . ." and is not "left virtually unsupervised . . . ." *Id.* at 504-23 (emphasis in original). *See also Allred v. State*, 554 P.2d 411, 424 (Alaska 1976) (Boochever, C.J., concurring) (similarly interpreting a privilege statute analogous to that in effect in Oregon); *Matter of Edward D.*, 61 Cal. App. 3d 10,

[32] In fact, Ms. Smith had had previous conversations with persons who were "very depressed" and who would call the Hospital and "go on and on" about their intention to commit suicide if they did not get help. *See* Transcript of Edith Smith's Testimony of October 27, 1982, at 24-25.

22-23, 132 Cal. Rptr. 100, 107-08 (1976) (Jefferson, J., dissenting); Commentary to Del. R. Evid. 504 (noting, with respect to a privilege statute similar to that in effect in Oregon, that "[i]t is intended that [the statute] include assistants who work under the direct supervision of a physician or psychotherapist such as nurses, paramedics, etc.").

The conclusion that defendant's communications to Ms. Smith were protected by the therapist-patient privilege is likewise consistent with the law in this State and in other jurisdictions with respect to the attorney-client privilege. The Commentary to Rule 503 of the Oregon Rules of Evidence observed that "present Oregon law" protects a client's communications to an attorney's assistants and "recognizes that in rendering legal service, a lawyer may use advisors and assistants in addition to those employed in the process of communicating." Even communications to "an expert who is hired to assist in rendering legal advice or to help in the planning and conduct of litigation . . ." are therefore privileged. *Id. See also United States v. Osborn*, 409 F. Supp. 406, 409 (D. Or. 1975) (attorney-client privilege protects communications to the attorney's subordinates) (quoting *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950)), *rev'd in part on other grounds, aff'd in part, & vacated & remanded in part*, 561 F.2d 1334 (9th Cir. 1977); 8 J. Wigmore, *Evidence* § 2301, at 583 (McNaughton rev. ed. 1961).

Moreover, in *Triplett v. Board of Social Protection*, 19 Or. App. 408, 528 P.2d 563 (1974), the court noted that the privilege extended to communications to an attorney's subordinates provides a useful analogy in the context of relationships in the medical field. Specifically, the court observed, the conclusion that "the testimony and reports of non-physicians working as members of a team of health professionals under the direction of a medical doctor come within the protection of the physician-patient privilege . . ." "might follow, by analogy, from cases holding that testimony and reports from an appraiser or physician retained by an attorney fall within the protection of the attorney-client privilege." *Id.* at 413 & n. 4, 528 P.2d at 566 & n. 4.[33]

---

[33] Defendant's communications to Ms. Smith fall within the protection of the therapist-patient privilege statute because they were "reasonably necessary for the transmission of the communication" to Dr. Saville. In addition, Oregon's attorney-client privilege expressly protects confidential communications "between the client . . . and the client's lawyer or a representative of the lawyer." OR. R.

Under the circumstances of this case, where Ms. Smith was working under the direct control of the Hospital's medical staff and was not someone who was left virtually unsupervised in her dealings with patients, *see* Transcript of Edith Smith's Testimony of October 27, 1982, at 17, and where Ms. Smith was responsible for screening calls to the medical staff so that defendant was required to explain the nature of his problem to her before he could speak to a psychiatrist, *see id.* at 16, Ms. Smith was a person "reasonably necessary for the transmission of the communication" to Dr. Saville.

The policies underlying the psychotherapist-patient privilege likewise require application of the privilege to defendant's communications to Ms. Smith. According to the Court of Appeals, the only persons who are "reasonably necessary for the transmission of the communication" and to whom a patient may freely disclose confidential information are those "who assist[] a patient in directly communicating with a psychotherapist, for example, a translator." *State v. Miller*, 67 Or. App. 637, 643, 680 P.2d 676, 680 (1984).

But psychotherapists, like doctors and lawyers, cannot operate alone. They need assistants to act not only as translators, but also as intermediaries between the therapist and the patient—to obtain information about the patient's symptoms, medical history, and other relevant matters, and to transmit messages from the patient to the therapist and vice versa. They also need assistants, like Edith Smith, to answer their telephone and to evaluate whether the caller needs to speak to the therapist immediately, can speak to someone else, or can wait until the therapist has an opportunity to return the call. "It goes without saying that the purpose and policy of the privilege is not enhanced by the court when it requires evidence from persons who gather and record information while acting for and in conjunction with a [psychotherapist]." Slovenko, *Psychiatry*

EVID. 503(2)(a). Although the therapist-patient privilege has no such provision relating to representatives of the therapist, there is no indication that the legislature intended any such difference in the scope of the two privileges. With respect to proposed Federal Rules of Evidence 503 and 504, on which the Oregon privilege statutes are based, commentators have observed that the failure to protect communications between the patient and a representative of the therapist is "inconsistent with the purpose of the privilege and seems to be due to a draftsman's error." 2 J. WEINSTEIN & M. BERGER, *supra* note 10, ¶ 504[05], at 504-23.

and a Second Look at the Medical Privilege, 6 Wayne L. Rev. 175, 181 (1960).[34]

If the privilege does not extend to a patient's communications with these assistants, their usefulness to the therapist will be substantially diminished. Patients will no longer be willing to divulge any confidential information to these paraprofessionals, but will instead insist on giving all information directly to the therapist. As a result, these assistants will not be able to alleviate therapists' workload and to free them for only those tasks that require their professional expertise. Rather, therapists will be required to answer personally every telephone call from a patient or potential patient, to maintain sole responsibility for entering information in the patient's confidential file, and to transmit all information to each patient and receive all information from the patient. As therapists are burdened with more of the day-to-day tasks of the office, the availability of therapeutic services to those in need of them will be correspondingly decreased, while the cost of such services is increased.

Thus, the policies underlying the psychotherapist-patient privilege, like the language of Rule 504 and the relevant caselaw, require application of the privilege to exclude the testimony of both Dr. Saville and Ms. Smith. No contrary policies justify the result reached by the Court of Appeals.[35]

---

[34] *See also United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1044 (E.D.N.Y. 1976) ("Given the complexities of modern existence few, if any, lawyers could as a practical matter represent the interests of their clients without the assistance of a variety of trained legal associates not yet admitted to the bar, clerks, typists, messengers, and similar aides."), *aff'd*, 556 F.2d 556 (2d Cir.), *cert denied*, 431 U.S. 958 (1977); Fisher, *supra* note 1, at 649-50; Saltzburg, *supra* note 6, at 625-26.

[35] For the same reasons, the prosecution's desire for evidence incriminating defendant does not justify infringement of defendant's constitutional right to privacy. As argued in text, no countervailing policies are present in this case that outweigh the policies underlying the therapist-patient privilege and that would therefore justify abrogation of the privilege in this case. Accordingly, the State is necessarily unable to satisfy its burden of proving that infringement of defendant's constitutional right to privacy by permitting the testimony of Dr. Saville and Ms. Smith is necessary to a compelling state interest.

CONCLUSION

Because the admission of the testimony of Dr. Wendy Saville and Ms. Edith Smith was inconsistent with Oregon's therapist-patient privilege statute, with the relevant caselaw, with the policies underlying the privilege, and with the constitutional basis of the privilege, *amici* respectfully urge the Court to reverse defendant's conviction and remand for a new trial.

Respectfully submitted,

KIT KINPORTS
DONALD N. BERSOFF
ENNIS, FRIEDMAN, BERSOFF & EWING
Suite 400
1200 - 17th Street, N.W.
Washington, D.C. 20036
(202) 775-8100
Counsel for Amicus
American Psychological Association

JONATHAN A. ATER (OSB #66007)
LINDSAY, HART, NEIL & WEIGLER
111 S.W. Columbia Street
Portland, Oregon 97201
(503) 226-1191
Counsel for Amicus
Oregon Psychological Association

Dated: December 14, 1984
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of December, 1984, I served the foregoing Brief of American Psychological Association and Oregon Psychological Association as *Amici Curiae* in Support of Petitioner by mailing two copies, first-class postage prepaid, to Stephen A. Houze, Esquire, Birkland, Koch & Houze, Suite 1007 Orbanco Building, 1001 S.W. Fifth Avenue, Portland, Oregon 97204, counsel for petitioner-defendant, and to Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, 100 State Office Building, Salem, Oregon 97310, counsel for respondent.

KIT KINPORTS

JONATHAN A. ATER