



Pennsylvania v. Ritchie: Setting Limits on Defendants' Right to Discovery of Victims' Records*

The difference between a defendant's constitutional right to discover information from the prosecutor and a defendant's right to production of personal records from a non-party – including victims, rape crisis centers or other providers of medical or mental health services – is not insignificant. The United States Supreme Court has not, however, fully outlined the contours of this difference.

This article is the second in a series to address a defendant's ability to obtain disclosure of a victim's records and the devices a victim may use to prevent such disclosure. The 2006 Spring/Summer edition of *NCVLI News* explored the differences between discovery – the process of disclosing information between the defendant and the prosecutor, and production – the defendant's right to receive information from a non-party.¹

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the United States Supreme Court concluded that in addition to a defendant's due process right to have the prosecutor disclose certain evidence in his or her possession, a defendant has a due process right to have other state agencies disclose similar evidence, even if that evidence is not in the possession or control of the prosecutor. Though this case is often cited to support defendant's request for disclosure of victims' privileged records, the *Ritchie* decision is narrow in scope and contains important principles that may be critical to a victim and his or her attorney in preventing or limiting disclosure of the victim's records.

Expanding Discovery Beyond the Prosecutor

In 1979, George Ritchie was charged with rape and other crimes against his 13-year-old daughter. *Id.* at 43. Defendant's daughter had reported the sexual abuse to the police, and the matter was referred to Children and Youth Services (CYS), the state agency charged with investigating cases of mistreatment. *Id.* Prior to trial, the defendant subpoenaed certain CYS records, including records that were not in the possession of the prosecution but were related to the events underlying the criminal charge. *Id.* CYS refused to disclose the records, claiming they were protected by a qualified statutory privilege. *Id.* Although CYS provided the records to the trial court, the court did not review them and declined to order

pretrial disclosure. *Id.* at 44. At trial, defense counsel was not limited in cross-examining the victim, and the defendant was convicted of the charges against him. *Id.* at 44-45.

On appeal, the Pennsylvania Supreme Court concluded that denying the defendant access to the full CYS file violated his Sixth Amendment rights to confrontation and compulsory process. *Id.* at 45. On *certiorari* to the United States Supreme Court, the defendant made two claims. First, the defendant asserted that because he did not have access to the CYS records, he could not effectively question his daughter and expose the weaknesses in her testimony, which violated his Sixth Amendment right to confrontation. *Id.* at 51. Second, the defendant claimed that the refusal to disclose CYS records violated his Sixth Amendment right to compulsory process. *Id.* at 54. On review, the Court framed the issue as “whether and to what extent a State’s interest in the confidentiality of its investigative files concerning child abuse must yield to a criminal defendant’s Sixth and Fourteenth Amendment right to discover favorable evidence.” *Id.* at 42-43.

Confrontation Clause

In addressing the defendant’s Confrontation Clause claim, the Court could not agree upon the parameters of the Sixth Amendment’s right to confrontation. A plurality of the Court rejected defendant’s claim, first explaining that the right to confrontation is a trial right “designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross examination.” *Id.* at 52 (plurality opinion). The plurality concluded that because the trial court did not limit the defendant’s cross-examination of the witnesses, including the victim, the defendant was afforded his right of confrontation. *Id.* at 54 (plurality opinion).

In a concurring opinion, Justice Blackmun disagreed that the Confrontation Clause protects only a defendant’s rights at trial. *Id.* at 61-62 (Blackmun, J., concurring). Importantly, however, Justice Blackmun did conclude that because the trial court was ordered to conduct an *in camera* review of the CYS records to search for “material” evidence on remand, including impeachment evidence, that procedure was sufficient to protect the defendant’s right to confrontation. *Id.* at 65.

Compulsory Process/Due Process

The defendant also claimed that the refusal to disclose CYS records violated his Sixth Amendment right to compulsory process. *Id.* at 54. The Court declined to analyze the defendant’s compulsory process claim, explaining that “the applicability of the [Sixth Amendment’s Compulsory Process Clause] to this type of case is unsettled . . .” *Id.* at 56. Instead, because the Court’s prior due process precedent established a clear framework for review, the Court explained it would analyze defendant’s claims under the Due Process Clause of the Fourteenth Amendment. *Id.*

In resolving this issue, the Court cited *Brady v. Maryland*, 373 U.S. 83, 86 (1963), the seminal case which provided that a defendant has a due process right to have the prosecutor disclose evidence in his or her possession “that is both favorable to the accused and material to guilt or punishment.” *Ritchie*, 480 U.S.

at 57. Without discussion, or even an acknowledgement that it was doing so, the Court then imported the *Brady* standard to circumstances where evidence is held by a governmental entity other than the prosecutor, and it imposed a review obligation on the trial court that is generally reserved for the prosecutor. *Compare Brady*, 373 U.S. at 86 (setting out prosecutor's obligation to disclose evidence that is material to guilt or punishment, and explaining that evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different") *with Ritchie*, 480 U.S. at 57-58 (concluding that the trial court must conduct an *in camera* review of CYS records to determine whether they "contain[] information that probably would have changed the outcome of [defendant's] trial"). While the Court's ruling may result in the disclosure of victims' privileged records that are held by a state agency other than the prosecutor, the *Ritchie* decision contains four important principles that may assist practitioners in maintaining the maximum allowable protection for privileged records.

First, the Court declared that "compulsory process provides no *greater* protections in this area than that afforded by due process . . ." *Id.* at 56 (emphasis in original). Because, under the Due Process Clause, a defendant is only entitled to evidence that is material to guilt or punishment, he is entitled to no greater information under the Compulsory Process Clause. Thus, the Court's holding in *Ritchie* does not entitle a defendant to engage in a broad-based search of privileged material with the hope of uncovering something useful.

Second, a statutory privilege that does not contain an explicit exception under which disclosure is allowed may be sufficient to absolutely shield records from disclosure, even when held by a government agency. *See id.* at 57. In *Ritchie*, the Court explained that though the public interest in protecting CYS records was "strong," *id.* at 57, and "compelling," *id.* at 60, the trial court's determination of whether the CYS records contained material evidence fit squarely within a statutory exception to the privilege which provided for disclosure of CYS records pursuant to a court order. *Id.* at 57. In *dicta*, the Court explicitly left open the question of whether a defendant would be constitutionally entitled to records that were protected by an absolute statutory privilege. *Id.* at 58 n.14. Distinguishing *Ritchie*, other courts have refused to order disclosure of records protected by an absolute privilege. *See, e.g., State v. Spath*, 581 N.W.2d 123, 126 (N.D. 1998) (rejecting defendant's confrontation clause claim and noting that although the evidentiary privilege at issue contained some limited exceptions, it did not contain a general exception for disclosure of records pursuant to court order); *Commonwealth v. Aultman*, 602 A.2d 1290, 1297 (Pa. 1992) (holding that defendant was not entitled to disclosure of victim's records held by a rape crisis center where those records were protected by an absolute statutory privilege); *Commonwealth v. Kyle*, 533 A.2d 120, 131 (Pa. Super. 1987) (refusing to compromise the absolute nature of the privilege at issue, and declining to require the trial court to conduct an *in camera* inspection of the records at issue).

Third, according to the Court's decision in *Ritchie*, a defendant must make a preliminary showing that he is entitled to an *in camera* review of any identified records. *See Ritchie*, 480 U.S. at 58 n. 15. Without a particularized showing identifying the information the defendant is seeking and that the desired records contain material evidence, a trial court is under no obligation to conduct even an *in camera* review of those records. *See Ritchie*, 480 U.S. at 58 n.15. *See also State v. Berube*, 775 A.2d 966, 976 (Conn.

2001) (rejecting defendant’s claim that he was entitled to disclosure of confidential government records because, in part, he failed to meet “the requisite threshold that would require a court to undertake such a review”); *Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003) (explaining that in order to warrant an *in camera* review of a witness’s psychotherapy records, a defendant must provide “evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence”).

Finally, in *Ritchie*, the Court analyzed only whether investigative files held by a state must yield to a defendant’s constitutional rights; nothing in the Court’s analysis or holding entitles a defendant to an *in camera* review of records held by private parties. *See, e.g., State v. Spath*, 581 N.W.2d 123, 126-27 (N.D. 1998) (concluding that defendant was not entitled to privileged records held by a private party); *People v. Hammon*, 938 P.2d 986, 987 (Cal. 1997) (concluding that a trial court need not allow pretrial “review or grant discovery of privileged information in the hands of third party psychotherapy providers”).

Conclusion

The Court’s holding in *Ritchie* did not broaden the type of information to which a defendant is constitutionally entitled; instead, the Court merely imposed an ongoing duty on the trial court to determine whether privileged records held by a state investigative agency² other than the prosecutor contain *Brady*-type information. The Court’s narrow holding in *Ritchie* does not entitle a defendant to an *in camera* review of records that are protected by an absolute privilege or held by a private agency. Finally, under *Ritchie*, a defendant is not relieved of the burden to demonstrate that the desired records are both evidentiary and material to the issue of guilt or punishment.

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1 *See Discovery v. Production: There Is a Difference*, NCVLI News, Spring/Summer 2006, at 2.

2 In *Ritchie*, CYS was an agency charged with investigating suspected mistreatment and neglect and, in this case, that investigation addressed allegations of criminal behavior. Not presented in *Ritchie*, and unclear from the Court’s holding, is whether and the extent to which a defendant’s right to *Brady* information extends to other governmental agencies not involved in the investigation and prosecution of criminal behavior.