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Lingering Questions of a Supreme Court Decision: The Confines of the Psychotherapist-Patient Privilege

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THE LINGERING QUESTIONS OF A SUPREME COURT
DECISION: THE CONFINES OF THE PSYCHOTHERAPIST-
PATIENT PRIVILEGE

JENNIFER L. ODROBINA¹

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I. INTRODUCTION

“It is emphatically the province and duty of the judicial department to say what the law is.”²

For centuries, the Supreme Court has written opinions that have had a substantial impact on the procedural and substantive law of our legal system. Through these opinions, the Court addresses a particular issue in controversy and provides guidance to the lower courts regarding how to dispose of the issue. Sometimes the issue is not thoroughly examined in the Court opinion and lingering questions remain for the lower courts to determine. The lower courts use the guidance provided from the Court opinion, coupled with their own knowledge, to help resolve these lingering questions.

The testimonial privilege between a psychotherapist and a patient is one such issue that the Supreme Court has examined, but the Court has left lingering questions for the lower courts to determine. In the landmark case of *Jaffee v. Redmond*,³ the Supreme Court examined the issue of whether there is a testimonial privilege between a psychotherapist and a patient. The Court held that a privilege exists, but declined to define possible exceptions to the privilege.⁴ The Court did, however, mention that there might be some possible situations where the privilege could be circumscribed.⁵ The opinion has resulted in unanswered questions for the lower courts regarding the possible situations where such an exception exists.

With little guidance from the Supreme Court, the lower courts have begun to determine the situations where an exception to the psychotherapist-patient privilege is permissible. The appellate courts have been inconsistent in deciding whether to acknowledge the various exceptions.⁶ Specifically, one disagreement is whether a dangerous-patient exception is available when a patient has revealed information to a psychotherapist regarding an intention to harm or kill a third party.⁷ The Tenth

²*Marbury v. Madison*, 5 U.S. 137, 177 (1803).

³518 U.S. 1 (1996).

⁴*Id.* at 18.

⁵*Id.* at 18 n.19.

⁶*Compare* *United States v. Chase*, 340 F.3d 978, 992 (9th Cir. 2003) (declining “to recognize a dangerous-patient exception to the federal psychotherapist-patient privilege”) *with* *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998) (stating that there is an exception to the psychotherapist-patient privilege if “the threat was serious when it was uttered . . . [and] its disclosure was the only means of averting harm”).

⁷*Compare Chase*, 340 F.3d 978 *with Glass*, 133 F.3d 1356.

Circuit, in *United States v. Glass*, recognized that “there are situations in which the privilege must give way.”⁸ One situation is “if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”⁹ The Ninth Circuit, however, has recently refused to recognize the existence of a dangerous-patient exception to the psychotherapist-patient privilege.¹⁰ The Ninth Circuit based its decision on four factors: (1) the “States’ Experiences”,¹¹ (2) the “Differing Purposes of State Confidentiality Laws and the Federal Testimonial Privilege”,¹² (3) the 1972 Proposed Rule to the Federal Rules of Evidence,¹³ and (4) Public Policy.¹⁴

II. THE AUTHORITY TO CREATE A PRIVILEGE

The Supreme Court has the authority to create a privilege of a witness “governed by the principles of common law . . . in the light of reason and experience.”¹⁵ In civil cases, when state substantive law applies, the privilege of a witness is determined by state law.¹⁶ Initially, the Supreme Court proposed to Congress specific privileges to become statutory law.¹⁷ A privilege between a psychotherapist and a patient was one of the specific proposed privileges.¹⁸ Congress determined not to establish specific privileges, but to allow the Court to recognize privileges through case law and court opinions.¹⁹

III. RECOGNIZING A PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Supreme Court in *Jaffee* recognized a privilege between a psychotherapist and patient based on Rule 501 of the Federal Rules of Evidence.²⁰ The privilege prevents a psychotherapist from being compelled to testify in court regarding information received from the patient during diagnosis or treatment.²¹ The Court defined a “psychotherapist” to include licensed psychiatrists, psychologists, and social workers.²²

⁸*Glass*, 133 F.3d at 1357.

⁹*Id.*

¹⁰*Chase*, 340 F.3d at 992.

¹¹*Id.* at 985. (emphasis in the original).

¹²*Id.* at 986. (emphasis in the original).

¹³*Id.* at 989.

¹⁴*Id.* at 990.

¹⁵FED. R. EVID. 501.

¹⁶*Id.*

¹⁷See FED. R. EVID. 501 advisory committee’s note.

¹⁸See *id.*

¹⁹See *id.*

²⁰*Jaffee*, 518 U.S. at 15.

²¹*Id.*

²²*Id.*

In *Jaffee*, the petitioner, who was the administrator of the decedent's estate, filed a wrongful death suit in the district court against the respondent, a police officer, contending that the officer used excessive force.²³ The officer used force in response to a police call reporting that a fight had commenced.²⁴ The situation resulted in the officer drawing her gun and fatally shooting an individual.²⁵ The officer and eyewitnesses presented conflicting testimony regarding the events that occurred when the officer arrived at the scene.²⁶ In order to clarify this discrepancy, the petitioner sought to retrieve notes recorded by a social worker who counseled the officer after the incident.²⁷

The officer and the social worker refused to comply with the discovery requests claiming that the information communicated by the officer to the social worker was privileged.²⁸ While instructing the jury, the district court stated that the members of the jury could infer that the social worker's notes contained harmful information because of the refusal to comply with the discovery requests.²⁹ The jury returned a verdict for the petitioner.³⁰ On appeal, the Seventh Circuit reversed the decision of the district court.³¹ The Seventh Circuit held that the district court erred in refusing to exclude the communications because it was privileged under the psychotherapist-patient privilege.³² The circuit court based its decision on the unique relationship between a psychotherapist and a patient requiring open communication for treatment, a person's right to privacy under the constitution, and the recognition of some form of a privilege by all fifty states.³³ The Seventh Circuit followed *In re Zungia*,³⁴ which balanced the interests of disclosing the communication with the interests of nondisclosure.³⁵ The Circuit Court concluded that the interests of encouraging "law enforcement officers who are frequently forced to experience traumatic events by the very nature of their work to seek qualified professional help" outweighed the interest in disclosing the confidential communications in this case.³⁶

²³*Id.* at 5.

²⁴*Id.* at 4.

²⁵*Id.*

²⁶*Id.* at 5.

²⁷*Id.*

²⁸*Id.*

²⁹*Id.* at 5-6.

³⁰*Id.* at 6.

³¹*Id.* at 6.

³²*Id.* at 6-7.

³³*Jaffee v. Redmond*, 51 F.3d 1346, 1355-56 (7th Cir. 1995).

³⁴*In re Zungia*, 714 F.2d 632 (6th Cir. 1983).

³⁵*Jaffee*, 51 F.3d at 1357.

³⁶*Id.*

The Supreme Court granted certiorari³⁷ to determine whether there is a psychotherapist-patient privilege because of the discrepancies among the appellate courts.³⁸ The Court acknowledged that there is a psychotherapist-patient privilege.³⁹ The Court based its reasoning on a number of principles, including the recognition of some form of a psychotherapist-patient privilege by all fifty states;⁴⁰ the necessity of confidence and trust to effective psychotherapy;⁴¹ and the small “evidentiary benefit that would result from the denial of the privilege.”⁴² The Court rejected the court of appeals’ balancing test for determining whether there is an exception to the privilege.⁴³ Declining to establish exceptions to the psychotherapist-patient privilege, the Court anticipated that there would be some situations “in which the privilege must give way”⁴⁴

IV. DEFINING THE CONTOURS OF RECOGNIZED EXCEPTIONS TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Supreme Court clarified the issue of the psychotherapist-patient privilege by declaring that such a privilege exists. The decision of the Court to refrain from defining the perimeters of the privilege, however, provided the lower courts with the opportunity to structure the boundaries of the privilege in light of their own reason and experience. Like any other privilege, the psychotherapist-patient privilege must be construed narrowly in order to ensure a fair trial.⁴⁵ The federal appellate courts and state legislatures have embraced this opportunity and have recognized numerous exceptions to the psychotherapist-patient privilege.⁴⁶

Recognized exceptions to the psychotherapist-patient privilege include situations when the patient’s mental state is at issue in the litigation,⁴⁷ cases of involuntary

³⁷*Jaffee*, 518 U.S. at 17.

³⁸*See id.* (citing *United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994); *In re Doe*, 964 F.2d 1325 (2d Cir. 1992); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989); *United States v. Corona*, 849 F.2d 562 (11th Cir. 1988); *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983) (recognizing a psychotherapist-patient privilege); *United States v. Meagher*, 531 F.2d 752 (5th Cir. 1976) (refusing to recognize a psychotherapist-patient privilege)).

³⁹*Id.* at 15.

⁴⁰*Id.* at 12.

⁴¹*Id.* at 10.

⁴²*Id.* at 11.

⁴³*Id.* at 17.

⁴⁴*Id.*

⁴⁵RALPH SLOVENKO, *PSYCHIATRY IN LAW/LAW IN PSYCHIATRY* 71 (Brunner-Routledge 2002) (stating that “[e]vidence is the basis of justice—the very essence of a fair trial.”). *See, e.g., Glass*, 133 F.3d at 1357 (stating that “testimonial privileges thwarting the search for truth should be narrowly construed”).

⁴⁶*See Ellen W. Grabois, The Liability of Psychotherapists for Breach of Confidentiality*, 12 J.L. & HEALTH 39, 59-60 (1997-98).

⁴⁷*Id.* (citing *In re Lifschutz*, 467 P.2d 557 (Cal. 1970)).

commitment,⁴⁸ homicide cases,⁴⁹ and criminal fraud cases.⁵⁰ The appellate courts have not universally adopted these exceptions to the privilege.

A. When the Mental State of the Patient is at Issue

The patient in the psychotherapist-patient relationship is the holder of the privilege.⁵¹ The patient has the ability to “claim” the privilege in an attempt to prevent confidential communications from being elicited at trial.⁵² The patient also has the ability to waive the privilege, explicitly or implicitly, permitting confidential communications to be revealed.⁵³ “[T]he most common form of waiver of the psychotherapist-patient privilege is . . . when [the patient’s] . . . condition is an element of [a] claim or defense.”⁵⁴

Numerous exceptions have been created in situations when the patient’s mental condition is at “issue.” One exception to the privilege exists when there is a child custody dispute between the parents.⁵⁵ By disputing custody the parents have placed their parental fitness in issue.⁵⁶ In order to determine the best interests for the child the court may have “access to therapy records and to the compelling testimony of the therapist.”⁵⁷ Another exception exists when the patient is a defendant in a criminal case and raises the defense of insanity or mental illness.⁵⁸ “The privilege is also waived in a wrongful death action in which the party relies on the deceased’s condition as an element of his claim or defense.”⁵⁹ For example, an alleged victim’s mental condition may be an issue if a party claims suicide was the cause of death and not a result of the party’s actions.⁶⁰

B. Involuntary Commitment Proceedings and Self Defense

The legislature has created an exception to the psychotherapist-patient privilege when the psychotherapist seeks to have the patient involuntarily hospitalized.⁶¹

⁴⁸*Id.* at 78.

⁴⁹*Id.* at 59-60 (citing D.C. CODE ANN. § 14.307(b)(1) (1995)).

⁵⁰*In re Grand Jury Proceedings* (Gregory P. Violette), 183 F.3d 71 (1st Cir. 1999).

⁵¹SLOVENKO, *supra* note 45, at 71.

⁵²*Id.* at 71-72.

⁵³*Id.*

⁵⁴*Id.* at 72.

⁵⁵*Id.* at 79.

⁵⁶*Id.* at 78-79.

⁵⁷*Id.*

⁵⁸*Id.* at 75.

⁵⁹*Id.* at 74.

⁶⁰*Id.*

⁶¹*Id.* at 78.

The Advisory Committee to the Federal Rules of Evidence commented, “The interests of both patient and public call for a departure from confidentiality in commitment proceedings. Since disclosure is authorized only when the doctor determines that hospitalization is needed, control over disclosure is placed largely in the hands of a person in whom the patient has already manifested confidence.”⁶²

The legislature created an additional exception to the psychotherapist-patient privilege in situations where the patient has brought an action against the psychotherapist.⁶³

As the Advisory Committee to the Federal Rules of Evidence put it: “The exception is required by considerations of fairness and policy when questions arise out of dealings between attorney and client, as in cases of controversy over attorney’s fees, claims of inadequacy of representation, or charges of professional misconduct.”⁶⁴

C. Homicide Cases

An exception to the psychotherapist-patient privilege has been created when the patient is the defendant in a criminal homicide case.⁶⁵ The District of Columbia statute which provides for such an exception, states as follows:

In the Federal courts in the District of Columbia and District of Columbia courts a . . . mental health professional . . . may not be permitted, without the consent of the person afflicted . . . to disclose any information, confidential in its nature, that he has acquired in attending a client in a professional capacity and that was necessary to enable him to act in that capacity, whether the information was obtained from the client or from his family or from the person or persons in charge of him.⁶⁶

The statute provides for an exception in “criminal cases where the accused is charged with causing the death of, or inflicting injuries upon, a human being, and the disclosure is required in the interests of public justice”⁶⁷

D. Criminal Fraud Cases

The First Circuit in *In re Grand Jury Proceedings (Gregory P. Violette)*⁶⁸ held that there is a crime-fraud exception to the psychotherapist-patient privilege. The case involved alleged false statements made to various financial institutions by the

⁶²*Id.* (citing Proposed FED. R. EVID. 504).

⁶³*Id.* at 88.

⁶⁴*Id.* (citing FED. R. EVID. 503 advisory committee’s note).

⁶⁵D.C. CODE ANN. § 14-307(b) (2003).

⁶⁶*Id.* at § 14-307(a).

⁶⁷*Id.* at § 14-307(b).

⁶⁸183 F.3d 71.

appellant regarding disabilities he had in order to obtain disability insurance.⁶⁹ The government sought to obtain testimony from two psychiatrists who had met with the appellant and were used by him to fraudulently induce payments.⁷⁰ The court enforced the government's subpoena despite the psychiatrists' assertions of the psychotherapist-patient privilege.⁷¹ On appeal, the appellant contended that a crime-fraud exception to the psychotherapist-patient privilege did not exist.⁷² The court of appeals rejected the appellant's argument and held that there was an exception.⁷³

Based on reason and experience, the court determined that there should be an exception to the privilege in the case of criminal fraud.⁷⁴ The court stated that the opinion in *Jaffee* did not intend to create an absolute privilege, leaving the substance of the privilege to be decided by future cases.⁷⁵ The court reasoned that without the acknowledgement of a crime-fraud exception, there is a potential for abuse between patients and counselors.⁷⁶ For example, "[p]sychotherapists could use the privilege to deflect investigations into health insurance fraud."⁷⁷ The court also looked at the similarity between the attorney-client privilege and the psychotherapist-patient privilege because both relationships rely on a foundation of trust and confidence.⁷⁸ The court stated that because courts have recognized a crime-fraud exception to the attorney-client privilege to prevent future criminal activity, even though it is based on trust and confidence, the court should also recognize an exception to the psychotherapist-patient privilege to prevent future criminal activity, even though it too is a relationship based on trust and confidence.⁷⁹ The court detailed the elements that must be satisfied in order for the exception to exist: (1) it must be shown "that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity."⁸⁰

⁶⁹*Id.* at 72.

⁷⁰*Id.* at 72-73.

⁷¹*Id.* at 73.

⁷²*Id.*

⁷³*Id.* at 71.

⁷⁴*Id.*

⁷⁵*Id.* at 74.

⁷⁶*Id.* at 77.

⁷⁷*Id.*

⁷⁸*Id.* at 75-76.

⁷⁹*Id.*

⁸⁰*Id.* at 75 (citing *United States v. Jacob*, 117 F.3d 82, 87-89 (2d Cir. 1997)) (emphasis in the original).

V. AN ABRUPT HALT IN THE EXPANSION OF RECOGNIZED EXCEPTIONS:
UNITED STATES V. CHASE

The Ninth Circuit, in *United States v. Chase*,⁸¹ stopped the continuing expansion of exceptions to the psychotherapist-patient privilege. In *Chase*, the court declined to recognize the dangerous-patient exception to the psychotherapist-patient privilege.⁸² The Ninth Circuit, rehearing the case *en banc*, reversed the decisions of the district court and a three-judge panel of the court of appeals and concluded that there is no such privilege.⁸³

In *Chase*, the defendant, during numerous sessions, communicated to his psychotherapist that he was planning to kill two FBI agents.⁸⁴ The psychotherapist warned the defendant of her duty to inform the agents of potential harm if she was informed of the identities of the FBI agents.⁸⁵ The psychotherapist sought the advice of a superior regarding the threats.⁸⁶ The supervisor advised her to learn more information about the plan.⁸⁷ Upon further contact with the defendant, the psychotherapist feared that the defendant might institute his plan.⁸⁸ The psychotherapist once again sought advice from a superior and also sought advice from legal counsel.⁸⁹ As a result of the meeting, the psychotherapist contacted the local authorities and the FBI agents.⁹⁰ When the defendant became aware that he was being investigated, he contacted the clinic where he was seeking treatment.⁹¹ He spoke with two telephone operators and told them that “people are going to die” if the FBI comes to arrest him.⁹² The defendant was arrested and charged with threatening the agents who were en route to execute the search warrant and for threatening to murder the two FBI agents.⁹³ At trial, the defendant challenged the admissibility of the psychotherapist’s testimony claiming the psychotherapist-patient privilege.⁹⁴ The district court admitted the testimony stating that the testimony was not privileged because the defendant’s “threats were serious when uttered, that harm

⁸¹*Chase*, 340 F.3d 978.

⁸²*Id.* at 992.

⁸³*Id.* at 981.

⁸⁴*Id.* at 979-80.

⁸⁵*Id.* at 980.

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹*Id.* at 979.

⁹⁰*Id.* at 980.

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.* at 981.

⁹⁴*Id.*

was imminent, and that disclosure to authorities was the only means of averting the threatened harm.”⁹⁵ The defendant was found guilty and he appealed.⁹⁶

The three-judge panel of the court of appeals affirmed the decision of the district court recognizing the dangerous-patient exception.⁹⁷ The three-judge panel found the arguments recognizing an exception to the privilege more compelling than disallowing the evidence by the psychotherapist altogether.⁹⁸ The court stated that the recognition of an exception is harmonious with the Court in *Jaffee* and policy considerations.⁹⁹ The court held that the dangerous-patient exception applies “when (1) a threat of harm is serious and imminent and (2) the harm can be averted only by means of disclosure by the therapist.”¹⁰⁰

The Ninth Circuit, rehearing the case *en banc*, declined to recognize a dangerous-patient exception to the psychotherapist-patient privilege.¹⁰¹ The court first addressed the decision in *Tarasoff v. Regents of the Univ. of Cal.*,¹⁰² which held that a psychotherapist has a duty to warn a third party or the authorities of potential harm by a patient.¹⁰³ The court distinguished between the rule established in *Tarasoff*, permitting a psychotherapist to disclose confidential information in order to prevent harm, and the dangerous-patient testimonial privilege, permitting a psychotherapist to disclose confidential information in court.¹⁰⁴ The court stated that because the states have declined to adopt a dangerous-patient exception, for the federal courts to recognize such an exception would impede upon the confidentiality laws of the states.¹⁰⁵

The court next considered the purposes of confidentiality laws and testimonial privileges.¹⁰⁶ The court reasoned that the disclosure of the confidences of a patient to a psychotherapist when there is imminent harm to a third party is different than the disclosure of confidences in a court proceeding.¹⁰⁷ When the confidences are disclosed in a trial proceeding the imminent danger no longer exists, therefore obliterating the necessity to disclose confidential information in order to protect third parties from harm.¹⁰⁸

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Id.*; *Chase*, 301 F.3d 1019.

⁹⁸*Chase*, 301 F.3d at 1024.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Chase*, 340 F.3d 978.

¹⁰²551 P.2d 334 (Cal. 1976).

¹⁰³*Chase*, 340 F.3d at 985.

¹⁰⁴*Id.* at 985-86.

¹⁰⁵*Id.* at 986.

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸*Id.* at 987.

The third factor the court considered was the proposed rule to the Federal Rules of Evidence.¹⁰⁹ The proposed rule included nine privileges, including the psychotherapist-patient privilege, and three exceptions, excluding from the rule the dangerous-patient exception.¹¹⁰ The court considered this history as an indication of the Supreme Court's position regarding a dangerous-patient exception to the privilege.¹¹¹ The court's final consideration was public policy.¹¹² The court emphasized the importance of confidence and trust between a psychotherapist and a patient in order to have effective treatment.¹¹³ Based on the aforementioned factors, the court declined to recognize a dangerous-patient exception.

VI. THE RATIONALE IN *UNITED STATES V. CHASE* FAILED TO ACKNOWLEDGE
NUMEROUS FACTORS THAT FAVOR THE RECOGNITION OF
A DANGEROUS-PATIENT EXCEPTION

In *Chase*, the Ninth Circuit considered four paramount reasons for concluding that there should not be a dangerous-patient exception to the psychotherapist-patient privilege: (1) the “*States’ Experiences*”,¹¹⁴ (2) the “*Differing Purposes of State Confidentiality Laws and the Federal Testimonial Privilege*”,¹¹⁵ (3) the 1972 Proposed Rule to the Federal Rules of Evidence,¹¹⁶ and (4) Public Policy.¹¹⁷ The court, however, failed to address other factors that support the recognition of a dangerous-patient exception. The court failed to acknowledge that (1) numerous states have created legislative exceptions to the psychotherapist-patient exception thereby impeding on state confidentiality laws; (2) the anticipated harm from the *Tarasoff* decision regarding the psychotherapist-patient relationship was not realized; (3) the proposed Rule to the Federal Rules of Evidence did not dismiss a dangerous-patient exception; and (4) public policy actually supports an exception.

A. States Have Carved Out Numerous Exceptions to the Privilege

The first factor considered in *Chase* was the experiences states have had creating exceptions to state psychotherapist-patient privileges.¹¹⁸ The court stressed that states’ experiences have opposed the adoption of a dangerous-patient exception and should the courts create such an exception, the courts would impede upon state laws

¹⁰⁹*Id.* at 989.

¹¹⁰*Id.*

¹¹¹*Id.* at 989-90.

¹¹²*Id.* at 990.

¹¹³*Id.*

¹¹⁴*Id.* at 985. (emphasis in the original).

¹¹⁵*Id.* at 986. (emphasis in the original).

¹¹⁶*Id.* at 989.

¹¹⁷*Id.* at 990.

¹¹⁸*Id.* at 985.

of confidentiality.¹¹⁹ The court concluded that the federal courts should not recognize a dangerous-patient privilege because the states have not done so.¹²⁰

Although not creating a specific dangerous-patient exception, state legislatures have impeded the state privilege by creating numerous exceptions to the psychotherapist-patient privilege based on societal needs and public policy. One such exception to the privilege is contained in New York State Social Services Law.¹²¹ The law requires certain individuals, including psychologists and social workers,

to report or cause a report to be made . . . when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child, or . . . the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity . . .¹²²

New York law further provides that “[w]ritten reports from persons or officials required by this title to report shall be admissible in evidence in any proceedings relating to child abuse or maltreatment.”¹²³

The State of Washington allows confidential communications to be divulged if it is “[t]o appropriate law enforcement agencies and to a person, when the identity of the person is known to the public or private agency, whose health and safety has been threatened, or who is known to have been repeatedly harassed, by the patient.”¹²⁴ Here, “a therapist has permission to disclose conversations if the patient has repeatedly harassed someone, even if the psychotherapist does not think that the patient presents a ‘serious danger of violence.’”¹²⁵

An Illinois statute allows a therapist to refuse to reveal confidential information with the following exceptions: (1) when “the recipient introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense . . .”,¹²⁶ (2) “after the recipient’s death when the recipient’s physical or mental condition has been introduced as an element of a claim or defense by any party claiming or defending through or as a beneficiary of the recipient . . .”,¹²⁷ (3) “to determine a recipient’s competency or need for guardianship . . .”,¹²⁸ (4) “when disclosure is necessary to collect sums or receive third party payment

¹¹⁹*Id.* at 985-86.

¹²⁰*Id.* at 986.

¹²¹N.Y. SOC. SERV. LAW § 413(1) (McKinney 2003).

¹²²*Id.*

¹²³*Id.* at § 415.

¹²⁴WASH. REV. CODE ANN. § 71.05.390(10) (West 2004); *see, e.g., Chase*, 340 F.3d at 987.

¹²⁵*Chase*, 340 F.3d at 987; *see also* WASH. REV. CODE ANN. § 71.05.390(10).

¹²⁶740 ILL. COMP. STAT. 110/10(a)(1) (West 2004).

¹²⁷*Id.* at 110/10(a)(2).

¹²⁸*Id.* at 110/10(a)(5).

representing charges for mental health or developmental disabilities services provided by a therapist or agency to a recipient”¹²⁹

Even though state legislatures have not specifically created a dangerous-patient exception to the psychotherapist-patient privilege, the legislatures have demonstrated that the privilege must give way in certain circumstances. These statutes demonstrate that societal interests are of paramount concern and the confidentiality between a psychotherapist and a patient can be curtailed in pursuit of those interests.

B. The Purpose of the Testimonial Privilege Versus State Confidentiality Laws

The court in *Chase* stated that the necessity for the disclosure of confidential information regarding a dangerous patient is no longer present at trial.¹³⁰ This argument is flawed for three reasons. First, there are states that permit a psychotherapist to testify in court even after the potential victim has been warned. Second, there are circumstances in which a patient has to be involuntarily committed to an institution in order to prevent harm to a potential victim. In those situations, the psychotherapist must provide testimony to convince the court that the individual should be committed against his will. Finally, there are circumstances where the only evidence available in order to convict a defendant of harming or attempting to harm an individual is testimony from the psychotherapist.

Focusing on the first point, under Ohio’s state law “[a] school guidance counselor . . . a professional clinical counselor, professional counselor, social worker, independent social worker, marriage and family therapist or independent marriage and family therapist . . . [or] a social work assistant . . .”¹³¹ shall not testify “concerning a confidential communication received from a client in that relation or the person’s advice to a client unless¹³² . . . [t]he communication or advice indicates clear and present danger to the client or other persons.”¹³³ Here, Ohio law permits a psychotherapist to testify in court even after a potential victim has been warned.

Second, the court in *United States v. Hayes*,¹³⁴ stated that “psychotherapists will sometimes need to testify in court proceedings, such as those for the involuntary commitment of a patient, to comply with their ‘duty to protect’ the patient or identifiable third parties.”¹³⁵ The court in *Chase* also conceded that “[s]tates generally allow psychotherapists to testify in civil commitment proceedings”¹³⁶ In addition, *Chase* cited to Proposed Federal Rule of Evidence 504(d)(1) which provides that “[t]here is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the

¹²⁹*Id.* at 110/10(a)(12).

¹³⁰*Chase*, 340 F.3d at 987.

¹³¹OHIO REV. CODE ANN. § 2317.02(G)(1) (West 2004).

¹³²*Id.*

¹³³*Id.* at § 2317.02(G)(1)(a).

¹³⁴227 F.3d 578 (6th Cir. 2000).

¹³⁵*Id.* at 585.

¹³⁶*Chase*, 340 F.3d at 991.

patient is in need of hospitalization.”¹³⁷ South Carolina has enacted a statute which allows a patient to prevent a therapist from disclosing information disclosed in confidence unless it involves “involuntary commitment proceedings, when a patient is diagnosed by a qualified professional as in need of commitment to a mental health facility for care of the patient’s mental illness”¹³⁸ In situations where a therapist institutes involuntary commitment proceedings against an individual, the therapist must provide the respective information to the court by testifying.

Finally, there will be some situations in which the only evidence against the defendant is the testimony offered by the psychotherapist.¹³⁹ There may be some instances where the psychotherapist is the only witness who can testify to the patient’s alleged threats to harm another individual. In those circumstances, courts should be permitted to allow the psychotherapist to testify in order to secure a conviction against the patient.

C. *The Proposed Rule to the Federal Rules of Evidence*

The rule proposed by the Supreme Court to Congress regarding witness privileges was substantially different than the rule Congress actually enacted.¹⁴⁰ The Court proposed nine federal privileges; however, Congress decided not to delineate specific privileges.¹⁴¹ One proposed privilege provided 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 or treatment of his mental or emotional condition”¹⁴² The proposed exceptions to this proposed privilege were as follows:

- (1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness
- (2) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient
- (3) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense¹⁴³

In *Chase*, the majority opinion argues against the adoption of a dangerous-patient exception because the Supreme Court had not recognized a dangerous-patient

¹³⁷*Id.* (citing Proposed Federal Rules of Evidence 504(d)(1)).

¹³⁸S.C. CODE ANN. § 44-22-90(A)(2) (Law. Co-op. 2004); *see, e.g.*, CAL. EVID. CODE § 1004 (West 2004) (stating that there “is no privilege . . . in a proceeding to commit the patient . . . because of his alleged mental or physical condition.”).

¹³⁹*See Chase*, 340 F.3d at 998 (Kleinfeld, J., concurring) (stating in many instances the psychotherapist’s testimony may be the only credible testimony at trial).

¹⁴⁰FED. R. EVID. 501 advisory committee’s note.

¹⁴¹*Id.*

¹⁴²56 F.R.D. 183, 241 (1972).

¹⁴³*Id.*

exception in the proposed rule.¹⁴⁴ Although a dangerous-patient exception was not listed among the proposed exceptions to the privilege, the *Chase* court failed to mention the exceptions that have been adopted by courts, which were not mentioned in the proposed exceptions. For example, the crime-fraud exception to the privilege was not listed in the proposed exceptions; courts have, nonetheless recognized it as an exception. Regardless, Congress declined to adopt the Supreme Court's proposed rules or proposed exceptions.

D. Public Policy

The theory that a patient will refuse to disclose everything to his psychotherapist because of fear that the psychotherapist may later use it against him has not been realized. First, even if the psychotherapist were prohibited from testifying in court, the psychotherapist would still be permitted to reveal the communications to the authorities or to the potential victim. The majority opinion in *Chase* argues that the psychotherapist-patient relationship would be severely tarnished if a psychotherapist were permitted to divulge what the patient had communicated to him in confidence.¹⁴⁵ However, as Judge Kleinfeld so eloquently stated in the concurring opinion “[t]he cat being already out of the bag, trial is no occasion for stuffing it back in.”¹⁴⁶ The majority of courts and legislatures have agreed that a psychotherapist is permitted to divulge confidential communications in order to warn the authorities and/or a potential victim. By warning others, the psychotherapist has already breached the psychotherapist-patient relationship.¹⁴⁷ Therefore, the anticipated harm caused to the psychotherapist-patient relationship has already been realized.

When the decision was published in *Tarasoff*, there was concern that patients would no longer seek the necessary psychiatric treatment because of the possibility that confidential communications may be revealed by the psychotherapist.¹⁴⁸ The mental health profession did not welcome the decision at first, believing that it would “unduly compromise confidentiality and interfere with treatment.”¹⁴⁹ Nonetheless, it is “now clear that the concerns about the potential loss of confidentiality have not had the adverse impact on psychiatric practice that . . . [was] predicted.”¹⁵⁰ “[M]ore than 25 years later . . . such a chilling effect or detrimental impact upon therapy has not occurred.”¹⁵¹ This cause for concern regarding the dissolution of the psychotherapist-patient relationship, providing that a therapist is permitted to testify in court, will also not be realized. A therapist being allowed to testify in court will

¹⁴⁴*Chase*, 340 F.3d at 989.

¹⁴⁵*Id.* at 990.

¹⁴⁶*Id.* at 998 (Kleinfeld, J., concurring).

¹⁴⁷*See id.*

¹⁴⁸*See Tarasoff*, 551 P.2d at 359 (Clark, J., dissenting).

¹⁴⁹Brian Crowley, *Measures to Take After Diagnosis of Violence or Danger*, PSYCHIATRIC TIMES, July 1, 2003, at 15.

¹⁵⁰Fillmore Buckner & Marvin Firestone, “*Where the Public Peril Begins:*” 25 Years after *Tarasoff*, 21 J. LEG. MED. 187, 214 (2000).

¹⁵¹Crowley, *supra* note 149.

not be the determinate factor for a patient when deciding whether or not to seek treatment. Similar to the concern after the *Tarasoff* decision, the concern here will also not be realized.

Another public policy concern is the possibility of a psychotherapist facing civil liability to a patient if the psychotherapist reveals confidential communications. States have anticipated this concern and have created statutes to protect psychotherapists from being sued by their patients when psychotherapists reveal confidential communications. For example, the Utah Legislature has enacted a statute which states that “[a] therapist has no duty to warn or take precautions to provide protection from any violent behavior of his client or patient, except when that client or patient communicated to the therapist an actual threat of physical violence against a clearly identified or reasonably identifiable victim.”¹⁵² The statute continues that “[n]o cause of action arises against a therapist for breach of trust or privilege, or for disclosure of confidential information, based on a therapist’s communication of information to a third party in an effort to discharge his duty in accordance with Subsection (1).”¹⁵³

VI. COURTS HAVE RECOGNIZED A DANGEROUS-PATIENT EXCEPTION

The decision in *Chase* did not resolve the question of whether the courts should recognize a dangerous-patient exception. The question lingers while a number of other courts are addressing the issue. Ultimately, the Supreme Court will determine the issue; until then, the courts can rely on the guidance and wisdom of other courts. One court has specifically recognized a dangerous-patient exception.¹⁵⁴ Other courts have indicated that there are circumstances where such an exception would exist.¹⁵⁵

A. *United States v. Glass*

The Tenth Circuit in *United States v. Glass*¹⁵⁶ recognized the dangerous-patient exception to the psychotherapist-patient privilege. In *Glass*, the defendant was voluntarily seeking treatment for his mental illness at a mental institution.¹⁵⁷ While seeking treatment, the defendant admitted to a psychotherapist that he intended to shoot Bill and Hillary Clinton.¹⁵⁸ Notwithstanding this threat, the defendant was released from the institution on the condition that he remained at his father’s home.¹⁵⁹ Upon discovering that the defendant failed to comply with the condition, the psychotherapist informed the authorities of the defendant’s statement.¹⁶⁰ The

¹⁵²UTAH CODE ANN. § 78-14a-102(1) (2004).

¹⁵³*Id.* at § 78-14a-102(2).

¹⁵⁴*See Glass*, 133 F.3d 1356.

¹⁵⁵*See, e.g., Hayes*, 227 F.3d at 578; *United States v. Bishop*, No. 97-1175, 1998 WL 385898 (6th Cir. July 01, 1998).

¹⁵⁶133 F.3d 1356.

¹⁵⁷*Id.* at 1357.

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰*Id.*

defendant was charged with “knowingly and willfully threatening to kill the President of the United States.”¹⁶¹

The defendant moved to prohibit the use of the psychotherapist’s statement at trial asserting the psychotherapist-patient privilege established in *Jaffee*.¹⁶² The government contended that the evidence should be admitted based on the Supreme Court’s suggestion in *Jaffee* that exceptions exist.¹⁶³ The government premised its argument on a footnote in the *Jaffee* opinion, which stated that that the court does “not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”¹⁶⁴ The *Glass* court interpreted this statement by the Supreme Court to establish an exception to the psychotherapist-patient privilege in situations where there is a “serious threat of harm to the patient or to others [and the harm] can be averted only by means of a disclosure by the therapist.”¹⁶⁵ The court therefore remanded the case to the district court to determine whether “the threat was serious when it was uttered and whether its disclosure was the only means of averting harm to the President when the disclosure was made.”¹⁶⁶

B. *United States v. Hayes*

During psychotherapy sessions, the defendant, Hayes, informed his psychotherapist of his intention to harm his supervisor at work in the U.S. Postal Office.¹⁶⁷ The therapist warned the potential victim.¹⁶⁸ The potential victim requested to obtain all of the therapy records regarding Hayes’ treatment.¹⁶⁹ The therapist provided the records and Hayes was charged with threatening to kill a federal official.¹⁷⁰ At trial, Hayes filed a motion to preclude these therapy records from being entered into evidence and further to prevent his therapist from testifying.¹⁷¹ Citing *Glass*, “the district court held that a psychotherapist may testify as to otherwise privileged statements of threats allegedly made by a patient only where such ‘disclosure was the only means of averting harm to the [federal official] when the disclosure was made.’”¹⁷² The court granted the defendant’s motion finding that the “disclosure was not ‘the only way of averting harm.’”¹⁷³ The court

¹⁶¹*Id.*

¹⁶²*Id.*

¹⁶³*Id.*

¹⁶⁴*Jaffee*, 518 U.S. at 18 n.19.

¹⁶⁵*Glass*, 133 F.3d at 1357.

¹⁶⁶*Id.* at 1360.

¹⁶⁷*Hayes*, 227 F.3d at 579.

¹⁶⁸*Id.* at 580.

¹⁶⁹*Id.*

¹⁷⁰*Id.* at 581.

¹⁷¹*Id.*

¹⁷²*Id.*

¹⁷³*Id.*

based its decision on testimony by the therapist indicating that he did not consider any other avenue besides disclosing the confidential information.¹⁷⁴ The Sixth Circuit affirmed the decision of the district court. In its opinion, the court expressed that it did not support the adoption of a dangerous-patient exception. The court did, however, acknowledge that in some circumstances the privilege may be waived.¹⁷⁵ The court stated that “in order to secure a valid waiver of the protections of the psychotherapist/patient privilege from a patient, a psychotherapist must provide that patient with an explanation of the consequences of that waiver suited to the unique needs of that patient.”¹⁷⁶ A patient can waive the privilege “by disclosing the substance of therapy sessions to unrelated third parties.”¹⁷⁷ The court further stated that it was not creating a test to determine whether the privilege had been waived, but that it would be determined on a case-by-case basis.¹⁷⁸ Nonetheless, the court concluded that the defendant had not waived his privilege in this case.¹⁷⁹

C. *United States v. Bishop*

In *United States v. Bishop*,¹⁸⁰ the defendant, Bishop, was convicted of murdering an individual at the psychiatric hospital.¹⁸¹ During the investigations of the incident, Bishop informed officers that he had committed the crime.¹⁸² At trial, asserting the psychotherapist-patient privilege, Bishop objected to the testimony of a doctor and nurse to whom he had told incriminating statements.¹⁸³ The district court denied the motion because Bishop had waived the privilege by previously disclosing that information to law enforcement officials.¹⁸⁴ The Sixth Circuit agreed with the district court, holding Bishop had waived the psychotherapist-patient privilege by disclosing the information to a third party.¹⁸⁵

VII. CONCLUSION

The United States Supreme Court “in light of [its] reason and experience”¹⁸⁶ has recognized a psychotherapist-patient privilege. The Court has, however, left lingering questions for the lower courts to determine regarding possible exceptions to

¹⁷⁴*Id.*

¹⁷⁵*Id.* at 587.

¹⁷⁶*Id.*

¹⁷⁷*Id.* at 586 (citing *United States v. Snellenberger*, 24 F.3d 799, 802 (6th Cir. 1994)).

¹⁷⁸*Id.* at 587.

¹⁷⁹*Id.* at 586.

¹⁸⁰*Bishop*, 1998 WL 385898.

¹⁸¹*Id.* at *1.

¹⁸²*Id.* at *4.

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵*Id.* at *13.

¹⁸⁶FED. R. EVID. 501.

the privilege. The lower courts have used their own reason and experience to develop exceptions to the privilege. Such exceptions include the crime-fraud exception, waiver exception, and the dangerous-patient exception. “Inevitably other exceptions will follow”¹⁸⁷ The Supreme Court should recognize a dangerous-patient exception to the psychotherapist-patient privilege to allow a psychotherapist to testify in court when there is “a serious threat of harm to the patient or to others” and it can only be averted “by means of disclosure by” the therapist.¹⁸⁸ The Court should recognize the exception because it would not impede on state confidentiality laws, it would not impede on the confidential psychotherapist-patient relationship, Congress did not dismiss this exception, and the exception is supported by public policy.

¹⁸⁷SLOVENKO, *supra* note 45, at 93.

¹⁸⁸*See Glass*, 133 F.3d 1356.