No. 17-6882

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2017

RICKY LEE BLACKWELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

APPENDIX

Q Okay. In your comments you actually wrote made it unlikely that the ratings by his mother and father were independent of each other.

A If, indeed, the father did fill it out for the mother I would, I would have that concern.

Q Okay. Okay. All right. Now, let's move on to the age of onset.

Give us your impressions as to how that applies in Mr. Blackwell's case.

A Well, as we've discussed from the beginning, the age of onset has to be prior to the age of 18 or in the developmental period, and the difficulty in Mr. Blackwell's case, as with a lot of the Atkins cases we have, is we don't have clear data from that period. Ideally I'd like to have some school psychological evaluation including a test of intelligence, test of adaptive functioning, educational placement in a program for the intellectually disabled. But we, we don't, we don't have records that will give us that.

So, we have to go back and look at what records are available, and for most people, it's going to be school records when we can get them. That's gonna give us the most useful information in that regard.

Q Why importance is all the -- his adaptive functioning throughout the course of his life?

Isn't that some indication as to how he functions?

A Sure.
Q I mean he's held numerous jobs. He's had a family life, raised children.
Isn't that -- can't we extrapolate backwards and say he had no adaptive function disability?
A I think that's one thing we look at, and that's part of what we do, but I don't think this, in itself, is sufficient.
Q Based on the totality of the data that you had in his life history, what is your opinion, doctor, of his mental retardation if he is mentally regarded?
A It is my opinion that he does not meet the criteria.
Q Okay. Thank you. That's all I have.
THE COURT: Mr. McGuire.

CROSS-EXAMINATION

BY MR. MCGUIRE:

Q Morning, Doctor Brown.
A Morning.
Q I hadn't seen you since the Nelson case sometime ago.
How are you doing?
A I'm doing fine.
Q Good to see you again.
Let me talk a little bit about, about -- let's just start with the IQ test, the---
A Okay.

ARGUMENT

I.

The trial judge did not abuse his discretion in limiting a discrete portion of cross-examination of a witness [redacted] Lastly, if error could be found in the limitation, any such error was harmless beyond a reasonable doubt.

Relevant Facts:

During a pre-trial hearing on November 6, 2013, defense counsel moved for an order to show cause why the sheriff's office should not produce its file "on the fire bombing of my client's family member's house, houses." (R. p. 4563, lines 15-23). He referenced a "continuing threat" to appellant's family, and asserted:

> ... Mr. Center belongs to a biker gang or a motorcycle club, whatever you want to call it, that, at the funeral, hundreds of bikers showed up. On the memorial of her death, more bikers showed up for fundraiser to help pay for the funeral from the previous year, and even in some of my motions, I've provided information to the Court that sort of like Harley Davidson type bikers have ridden by my client's family member's houses sort of at a low speed and kind of throwing glances over at the house.

(R. p. 4564, line 15 – p. 4565, line 6).

Defense counsel admitted, "[t]his is a collateral matter," and that it would not be a matter of ordinary discovery. (R. p. 4565, lines 12-19; p. 4570, lines 9-10). The State moved to quash the subpoena as improper (the defense opted out of state discovery rules); the evidence appears to suggest speculative third party guilt; but, critically, the defense "keeps referring to a biker gang in pointing the finger at the victim's father, that somehow this is a biker gang retaliation" when no such link has been established.[7] (R. p.

---

[7] The State also correctly noted that "as victims of what they contend was an arson, they [*i.e.* the Appellant's family members] were entitled to ... request" the reports. (R. p. 4568, lines 11-14). Defense counsel asserted he did not represent the family, and asserted a "right" to use the subpoena process even in light of opting out of discovery – a tactical decision to prevent fair disclosure under established rules. (R. p. 4571, line 10 – p. 4574, line 12). He also contended the State had no standing to seek to quash the subpoena as the solicitor did not represent the sheriff. (R. p. 4574, lines 13-21). Discovery issues were rampant due in large part to the defense opting out of recognized discovery rules only to attempt to force discovery in other ways. (See, for example, FOIA

4566, line 6 – p. 4569, line 3). The State argued "the defense is trying to ... bring this biker element into the trial, at some point, to either get an acquittal or, more importantly, to avoid a death sentence," but the collateral matter was not relevant to the trial and sentencing. (R. p. 4568, lines 3-8). The trial judge found "this is extremely collateral to the issues," and defense counsel again agreed. (R. p. 4570, lines 11-25). Defense counsel also admitted to arguing "both ways," that it was a collateral matter, but he needed it for litigation. (R. p. 4571, lines 2-9).[8]

Objections; Motion for protective or Modifying Order Under SCRCrP 5(d)(1), and For Remedies, R. pp. 3286 - 3385; State's Return to Defendant's Motion to Preserve Notes, Et.Al., p. 3710).

[8] Appellant also inconsistently argued a motion not to sequester the jury for fear "that a hundred bikers might show up the morning we try to pick a jury in some sort of show of solidarity with Mr. Bobby Center," and have "a hundred motorcyclist circling the courthouse," and noted "the most significant amount of retaliatory conduct directed toward the victim's family [in a matter] that I've been involved in." (R. p. 4605, line 19 – p. 4608, line 14).

Appellant also inconsistently argued a motion to "prevent introduction of evidence of attempted murder of defendant's family members," unless it became relevant to "sully the character of Mr. Bobby Center." (R. p. 4610, lines 17-22). It appears appellant argued the post-murder threats and violence against the family members would be admissible to show the impact of appellant's *crimes on his family* (and simply inferentially sully the character of the victim's father) or to attack the sufficiency of the police investigation by proof of collateral acts where the defense perceived the victim's father was given preferential treatment. (R. p. 4610, line 17 – p. 4611, line 18). *But see State v. Dickerson*, 395 S.C. 101, 122, 716 S.E.2d 895, 906 (2011) (Supreme Court precedent "does not limit a court's ability to exclude evidence not bearing on the defendant's character, his prior record, or the circumstances of the crime as being irrelevant"); Rule 608 (b), SCRE ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than a conviction of a crime ... may not be proved by extrinsic evidence."). (See also State's Return to Defendant's Motion in Limine (Defendant's Pleadings #23 &25), R. p. 3390, asserting the defense "request to admit evidence as to a fire of unknown origin is an attempt to attack the family of the victims and should be denied").

A summary of the defense's position is reflected not only in the transcripts, but in pleadings referencing same. (See Motion for Change of Venue Based on the Retaliatory

Again in response, the State argued the eight-year-old child victim had nothing to do with biker gangs, and all the information the defense sought "had nothing to do with this day" of the murder, and was all, in fact, well after the murder. Further, if it could possibly be relevant, "the prejudicial effect is just unbelievable," when the focus should be on the murder of an eight-year-old child. (R. p. 4575, line 5 – p. 4576, line 10). The State also noticed the court and defense counsel it had a *motion in limine* to be heard to prevent such reference at trial. (R. p. 4575, lines 13-15). (See Notice of Motion and Motion in Limine (to Exclude Any Reference to Any Matters Involving Incidents or Investigations in the Neighborhood of the Defendant that Occurred After the Date of the Murder of the Victim Concerning Non-Related Incidents or Crimes, and Any Further Attacks on the Character of the Victim's Father under South Carolina Case Law and Rules 401, 402, 403, 801, 802, and 804 of the South Carolina Rules of Evidence), R. pp. 3387 - 3389).

Later in the same hearing, defense counsel made a pre-trial motion for

---

Attempted Murder of the Defendant's Family Members and the Potential Threats of Violence and Intimidation from Others, Including Local Biker Gangs (R. pp. 3266 - 3274); and Motion for Change of Venue Based on Pre-Trial Publicity and Potential Presence of Biker Gangs Which Will Influence Jurors and Deny the Defendant's Right to a Fair and Impartial Jury, R. pp. 3275 - 3284). Further, though these requests for change of venue were made, the defense could show no issue with selection of a fair and impartial jury and there is no issue raised in this appeal concerning venue.

> In recognition of the civic and moral duty of victims of and witnesses to a crime to cooperate fully and voluntarily with law enforcement and prosecution agencies, and in further recognition of the continuing importance of this citizen cooperation to state and local law enforcement efforts and to the general effectiveness and the well-being of the criminal and juvenile justice systems of this State, and to implement the rights guaranteed to victims in the Constitution of this State, the General Assembly *declares its intent, in this article, to ensure that* ***all victims of and witnesses to a crime are treated with dignity, respect, courtesy, and sensitivity;*** *that the rights and services extended in this article to victims of and witnesses to a crime are honored and protected by law enforcement agencies, prosecutors, and judges* ***in a manner no less vigorous than the protections afforded criminal defendants****...*

S.C. Code Ann. § 16-3-1505 (emphasis added).

10

Ms. Davis testified in the guilt phase that at the time of the murder, she and appellant has been separated "[a]bout a year and nine months or maybe a little longer." (R. p. 2379, lines 16-18). On the day of the murder, she testified she was at her parents' home with Brooke when appellant came by the home and discussed insurance with her. At the conclusion of the discussion, appellant directed her to go to their grandchildren's home. Brooke excitedly told appellant they were going to go swimming. Appellant "looked back" toward Ms. Davis and directed, "you make sure and you go over there and get them boys." He left thereafter. (R. p. 2379, line 19 – p. 2381, line 9). Ms. Davis testified she drove to her daughter's home but did not see a car and attempted to leave. However, appellant "flagged" her to pull over and said to return, that her son-in-law and

grandchildren were there. (R. p. 2382, line 25 – p. 2383, line 9). She returned and exited the car to corral a lively little dog so Brooke would not be bitten. (R. p. 2383, lines 17-19). As she turned, she saw appellant had Brooke. Ms. Davis pleading with him, but appellant stated "you've pushed this too far. You did this. You tell me what Bobby thinks of this," and he shot the child. (R. p. 2386, lines 2-15).

---

[11] The meeting at her parents' home and appellant's direction to Ms. Davis to go to the daughter's home while she had the victim was confirmed in the penalty phase by the witness's mother. (See R. p. 2662, lines 22 – p. 2663, line 14). The defense conceded the testimony was consistent and attempted to prevent Ms. Davis' mother's from testifying to the premeditation and malice, apparently arguing all the State's evidence on same should have been presented in the guilt phase (though he admitted guilt and the sentencing proceeding was separate). (R. p. 2659, line 9 – p. 2662, line 4). The trial judge correctly overruled the attempt to limit the proper evidence for the sentencing phase. (R. p. 2662, lines 5-6). There is no challenge to that ruling on appeal.

THE COURT: Yes, sir.

MR. MCGUIRE: Good afternoon.

You have to be thinking why am I gonna talk to you when I essentially conceded guilt at the very beginning of the case, and I will tell you, you're not gonna pause long in your deliberations with regard to guilt for the crimes of both murder and kidnapping. Go and do your duty. When you do that, you will guarantee that Mr. Blackwell will be sentenced to at least life without parole in prison.

But I want you to think a little bit now about the State's star witness, Angie Davis, formerly Angie Blackwell, and her version of events and there's evidence to indicate -- makes it, I think clear to me, that it didn't happen the way she said.

Remember when she testified and she wanted to even deny her own signature. That's bizarre. And I think she was just trying to say well, that's not my statement so I couldn't ask her about it. That looked like a not very credible witness to me.

She wanted to give you the impression that it was Ricky following her around, that you couldn't talk to her without Ricky being there cause he was always going to her. But their witness, Mark Bryant, told you that Angie was going to Ricky for furniture, take the marital furniture, and she would come back frequently for money. She was going back to

him, not to reconcile, but to take advantage of him, and then think about this.

In her testimony, she gave sort of a heroic speech saying at the moment he pulled out the gun and had Brooke I said Ricky, take me, take me instead, I'm the one you want, take me, and let Heather drive Brooke home. But when you listen to the 9-1-1 tape, you-all knew she's not the kind of woman that would ever make that statement. That heroic statement of trying to exchange her life for Brooke's, that never happened. The way she spoke on the 9-1-1 tape, the way she cried, it was all about her safety.

There's more coming, but, right now, I will tell you it didn't happen the way Angie said. But go do your duty, don't deliberate long, convict Ricky. He'll go to prison for the rest of his life.

Thank you.

THE COURT: Ladies and gentlemen, that completes the closing statements by the attorneys. At this point in time it's my responsibility to charge you concerning the law to be applied in this case.

At this point in time I'm going to go over with you the two indictments in this case.

The first indictment I will talk about is Case Number 2009-GS-42-3609. That indictment is for the offense of kidnapping, and I will give you these indictments. You'll

STATE OF SOUTH CAROLINA
In the Supreme Court

CAPITAL CASE

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

The State of South Carolina, Respondent,

v.

Ricky Lee Blackwell, Petitioner.

Appellate Case No. 2014-000610

RETURN TO MOTION TO UNSEAL THE BRIEFS AND THE RECORD ON APPEAL

Respondent State of South Carolina hereby makes a Return to the motion to unseal the briefs and record. Respondent opposes the motion as the materials referenced remain privileged. In support of its position Respondent would respectfully show the Court:

1. Petitioner Blackwell raised two issues in regard to a witness's mental health records. (Initial and Final Brief of Appellant, Issues I and II). On January 28, 2015, Respondent moved to strike and/or seal in regard to references and designation of the privileged records. On February 9, 2015, Petitioner made his return. By Order dated May 20, 2015, this Court granted the motion to seal the full briefs and record, and ordered redacted copies filed of the briefs and record on appeal for the public record. When hearing oral argument on April 13, 2016, this Court cleared and closed the courtroom to hear argument regarding the privileged records.

2. In Opinion No. 27722 issued on May 31, 2017, this Court affirmed Petitioner's murder and kidnapping convictions, and his sentence of death. In regard to the privilege matter

before the Court, the majority found "the trial court erred in granting defense counsel access to Angela's mental health records prior to an *in camera* review, declining to review the records at trial, and refusing to accept the proffer of the records." The Count found, though, that any error was harmless. The Court also acknowledged that it has "accepted the records under seal," and "reviewed the contents of the records" but resolved Petitioner failed to "establish[] the necessity of these records as they were neither material nor exculpatory, particularly since Blackwell conceded guilt." The Court also "question[ed] how this information was probative and how it would have helped Blackwell's case in mitigation."

3. Petitioner Blackwell did not petition for rehearing, or cite any further challenge to the sealing of the record, or error in the Court's process protecting the privileged information.

4. The State did not have access to the privileged records at the trial level, and has not reviewed the records on appeal consist with the finding of privilege. *See* Rule 407, Rules of Professional Conduct, Rule 4.4 (Respect for Rights of Third Persons).

5. Petitioner Blackwell now moves for reconsideration of the Court's order to seal the publically accessible briefs and record in this matter citing the public's right under the First Amendment, and "infringe[ment] upon Blackwell and his attorneys' First Amendment rights and their ability to discuss the case in public and with interested persons, including attorneys who may ultimately represent Blackwell in post-conviction proceedings." (Motion, pp. 2-3). However, the privilege was not pierced in any way. It would be illogical to strip the privilege from the witness in order to allow Petitioner's counsel to discuss the privileged information in public while discussing this Court's ruling.[1] Rather, when the privilege holds, the records and information from

[1] It does not appear the witness was given notice of this motion to unseal. Though not a party to the litigation, it would seem only fair the witness know the records the defense improperly hold are being considered for public release. Again, this Court found "the trial court erred in granting

those records should be protected. *See, for example, Kinder v. White*, 609 Fed.Appx. 126, 131-32 (4th Cir. 2015) (Fourth Circuit found in similar circumstances the privilege could not be pierced and directed the records be returned or copies destroyed).

Moreover, as a rule, counsel should not discuss specifics of a case in public while still in "adjudicative proceeding[s]." *See generally* Rule 407, Rules of Professional Conduct, Rule 3.6 (limitations on "extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication will have a substantial likelihood of materially prejudicing and adjudicative proceeding in the matter.").

Even so, this Court has found: "Public access to court records may be restricted in certain situations, such as matters involving juveniles, legitimate trade secrets, or information covered by a recognized privilege." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 10, 630 S.E.2d 464, 469 (2006). The one case Petitioner offers in support of his position arguing "public access" should be protected, *Ex parte Greenville News*, (see Motion, p. 2), does not aid his position.[2] In *Ex parte Greenville News*, 326 S.C. 1, 6, 482 S.E.2d 556, 558 (1997), this Court resolved only "[t]he sealed record will be open to the public for inspection *after redaction* by this Court.") (emphasis added). Since that 1997 case, the Court has only heightened its sensitivity to protecting privacy in court filings, noting the advent of ease in obtaining public documents electronically. *See In re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings*, 407 S.C. 607, 609, 757 S.E.2d 421, 422 (2014) ("Parties should also exercise caution in including other sensitive personal data in their filings, such as ... medical records....").

---

defense counsel access to Angela's mental health records prior to an *in camera* review...."

[2] The public access argument was not made in the return to the motion to strike or seal.

Cf. In re S.C. Elec. Filing Policies & Guidelines, 415 S.C. 1, 16–17, 780 S.E.2d 600, 608 (2015) (providing process to file motions to seal sensitive matter).

Petitioner's further argument that he will be prevented from discussing the records in post-conviction relief is not ripe for consideration. But even so, Respondent would again rely on the fact that the privilege was not pierced.[3]

Lastly as to this portion of Petitioner's argument, there is no unequal treatment among the parties to the litigation. The witness was not a party. The State has neither reviewed nor relied upon any specific records or entry in the records. Thus, there is no inequity in access by the parties to the litigation.

6. Petitioner Blackwell also asserts that he "needs to be able to reference and quote the sealed briefs and the sealed record in his petition for certiorari" to the Supreme Court of the United States, and argues the "Court will need access to the sealed materials to review appellant's petition." (Motion, p. 3). Of note, not one quote from the records appears in the Opinion. Rather, the Court carefully set out that it was addressing the process to be followed in future cases to avoid improper disclosure, and the fact that the records where not "material []or exculpatory" because Petitioner conceded guilt. The dipositive facts are other facts of record, not any particular entry in the privileged mental health records. Respondent would also emphasize that the witness was available and testified. She was cross-examined. Moreover, Petitioner has not contested the presence of facts in the record supporting the Court's finding of "strong evidence of malice" and

---

[3] Further, claims, such as this one, which are raised on direct appeal and actually addressed on the merits cannot be raised again in post-conviction relief. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993) ("...errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings"). Even so, this Court has already ruled the records are not available to Petitioner. To the extent Petitioner would alleged ineffective assistance and avoid the bar to being heard, he could not show prejudice given this Court's review and ruling.

the unchallenged testimony of another witness to the event, Petitioner's son-in-law. Again, the dispositive facts are other facts of record, and those facts are not restricted in the record or otherwise unavailable for discussion.

7. Petitioner also asserts that the state court issue was "novel" and may "draw interest from parties wishing to file *amicus curiae* briefs with the United States Supreme Court." (Motion, p. 3). He notes "an *amicus* brief was already filled in the proceedings before this Court." (Motion, p. 3). Petitioner's argument undermines his requested relief in two distinct ways. First, the *amicus* brief filed in this case was filed on the interest and proceed without access to the privileged material. (See Motion for Leave to Appear as Amici Curiae, p. 3, referencing the "significant redactions to the parties' brief"). Second, a proper *amici* brief does not urge a factual resolution but a policy result. "The term 'amicus curiae' means friend of the court, not friend of a party." *See Ryan v. Commodity Futures Trading Comm'n,*, 125 F.3d 1062, 1063 (7th Cir. 1997). And, again, the privilege was not pieced. It is not necessary to discuss individual privileged communications in order to be able to discuss whether the policy and/or structure of review set out in the opinion was fairly evaluated and decided by this Court.

8. In his alternative request for relief, Petitioner Blackwell "urges the Court to unseal these materials for the limited purpose of seeking and obtaining review at the United States Supreme Court." (Motion, p. 3). Respondent submits such appears unnecessary for several reasons. To begin with, the record is not submitted to the Supreme Court unless the Court calls for the record when considering the petition. Moreover, privileged matter may be sealed apart from the record transmitted. See, for example, Docket Sheet, Jaffee v. Redmond, 97-2447, referencing

"2 in camera envelopes" as part of record from District Court).[4] Upon information and belief, Petitioner will, however, need to file a motion for leave to file under seal to submit the sealed record (or portions thereof) with his petition. The Federal Courts, like our Court, are concerned about the protection of sensitive or privileged materials while still allowing proper filings in pending cases. *See* Fed.R.App.P. 25(a)(5); Fed.R.Civ.P. 5.2.

WHEREFORE, for all the foregoing reasons. Respondent State of South Carolina opposes the motion to unseal.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

BY: _____
MELODY J. BROWN
SC Bar No. 14244

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

July 3, 2017.
Columbia, South Carolina.

[4] Undersigned counsel for Respondent reviewed the docket entries from this case as this is a Supreme Court case in which the Court reviewed of disclosure of privileged psychotherapy records under the federal rules in a civil case. *Jaffee v. Redmond*, 518 U.S. 1 (1996). Respondent also notes the docket shows a wealth of amicus briefs underscoring the importance of the privilege.