

# April 2020

# Legal Report

## SWAN Legal Services Initiative

*A monthly publication from the SWAN Legal Training Team*

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## SUPREME COURT OF PENNSYLVANIA

**In the Interest of J.J.M.****Date of Order:** April 1, 2020**Cite:** 594 MAL 2019

Petition for Allowance of Appeal GRANTED on the following issue:

Whether the Superior Court misapprehended controlling facts when concluding that the terroristic threats statute, which requires only a conviction based upon recklessness, did not violate Petitioner's First Amendment right to free speech?

\*The Pennsylvania Superior Court decision was featured in the [September 2019 Legal Report](#).

**In the Interest of J.M.G.****Date of Decision:** April 22, 2020**Cite:** 18 MAP 2019

**Holding:** The harmless error doctrine is *per se* not applicable to determinations involving violations of psychotherapist-patient privilege, and expert's consideration of statutorily privileged communication when giving an opinion and providing expert testimony renders the trial court's resulting order of involuntary civil commitment of a juvenile invalid.

**Facts and Procedural Posture:** Appellant J.M.G., a juvenile, had a history of mental health issues and a series of voluntary hospitalizations as a result. During one hospitalization, J.M.G. admitted to his Mother that he had been sexually inappropriate with his adoptive sister. Mother reported the information to ChildLine. J.M.G. was subsequently adjudicated delinquent and placed in a secure residential treatment facility.

J.M.G. underwent evaluation by the Sexual Offender Assessment Board (SOAB) pursuant to the adjudication of delinquency on the basis of the disclosed sexual offense. The information that was submitted to the SOAB by the Juvenile Probation Department contained confidential information, communications, and evaluations by J.M.G.'s psychiatrist related to J.M.G.'s mental health treatment. The Trial Court overruled J.M.G.'s attorney's objection to its inclusion and requests for further redaction. Evidence submitted on behalf of the Commonwealth at J.M.G.'s civil commitment hearing included expert testimony and opinion relying upon said confidential information and communications. As a result of the expert testimony, the Trial Court issued an order of civil commitment for J.M.G. J.M.G. appealed. The question on appeal was whether the harmless error doctrine applies to determinations involving violations of 42 Pa.C.S.A. §5944 (psychotherapist-patient privilege) regarding the involuntary civil commitment of a juvenile following a Sexual Offender Assessment Board (SOAB) evaluation pursuant to 42 Pa.C.S.A. §6358.

***Did you know?***

**Harmless error:** A "harmless error" is one made by a trial court judge that while a mistake of law or fact, is not sufficient for an appellate court to reverse or modify the lower court's judgment at trial.

**"per se":** Latin for "by itself" or "in itself," typically used to define something that is intrinsically or inherently so, without referring to anything else.

The Superior Court held that while the Trial Court had erred in failing to redact the confidential communications from the materials submitted to the SOAB, such evidence admitted in contravention to the psychotherapist-patient privilege was subject to harmless error analysis, and affirmed the trial court. J.M.G. filed Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was granted. This opinion was issued as the result.

**Rationale:** The Supreme Court first looked at Act 21 of the Juvenile Act, which provides for the assessment of juveniles who have been adjudicated delinquent for an act of sexual violence and have been subject to institutional placement. While protection of the public constitutes one motivation for its enactment, at its core Act 21 is about assuring continued, needed mental health treatment.

For effective mental health treatment, a patient must be open to treatment, be able to provide candid disclosure to the treatment provider, and trust in the recommendations of the treatment offered. The psychotherapist-patient privilege set forth in §5944 is an essential protection, without which the success of mental health treatment would be undermined. As such, scrupulous adherence to the privilege is necessary, and harmless error analysis is not appropriate.

The decision is reversed and remanded with instruction for reconsideration of properly redacted materials by individuals within the SOAB *not previously involved in this matter* and any further proceedings necessary.

**Concurring Opinion:** Justice Baer wrote separately to dissent from the Majority's decision that harmless error analysis is *per se* not applicable to cases involving violations under §5944. Justice Baer concurred, however, in the reversal of the Superior Court's decision and remand for a new commitment hearing, as the application of such analysis *in this case* would result in a determination that this error was not harmless and therefore necessitate this result.

**Concurring Opinion:** Justice Todd concurred with Justice Baer that harmless error analysis should be applied to cases involving violations of the privilege found in §5944. Justice Todd further concurred with Justice Baer that the application of this analysis in this case would support that the error was not harmless and remand was necessary.

\*The unpublished Pennsylvania Superior Court opinion was issued July 12, 2016. See In the Interest of J.M.G., 1547 MDA 2015 (Pa. Super. 2016).

## SPOTLIGHT

### **PA: SUPREME COURT ORDERS CONTINUING DECLARATION OF STATEWIDE JUDICIAL EMERGENCY**

On April 1, 2020, the Pennsylvania Supreme Court issued its [second supplemental Order](#) pursuant to Rule of Judicial Administration 1952(A) and extended the general, statewide judicial emergency due to COVID 19 through April 30, 2020.

On April 28, 2020, the Pennsylvania Supreme Court issued an extension of the statewide judicial emergency through June 1, 2020. This [Order](#) noted that beginning May 4, 2020, unless otherwise provided by a local emergency order, Pennsylvania courts generally shall be open to conduct all court business, with strict limitation on all in-person access and proceedings.

*Cont'd.*