NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ANDREW CHARLES HORTON II, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13538 Trial Court No. 3AN-13-05305 CR MEMORANDUM OPINION No. 6997 — March 23, 2022

Appeal from the Superior Court, Third Judicial District, Anchorage, Kevin M. Saxby, Judge.

Appearances: Dan Bair, Attorney at Law, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Terrell, Judges.

Judge ALLARD.

Andrew Charles Horton II was convicted, following a jury trial, of two counts of first-degree sexual abuse of a minor[1] and four counts of second-degree sexual

[1] AS 11.41.434(a)(2).

abuse of a minor[2] for offenses committed against his stepson, C.B., and his daughter, C.H., both of whom were under eighteen years old at the time of the sexual abuse. Horton was also convicted of one count of solicitation to interfere with official proceedings for encouraging one of his other children to intimidate C.B. into recanting.[3]

On appeal, Horton argues that the superior court erred when it denied his request to subpoena the therapeutic counseling records of his wife (the mother of C.B. and C.H.), who had told her therapist about C.B.'s initial allegations against Horton. For the reasons explained in this decision, we find no reversible error.

Horton also challenges a number of his probation conditions. The State concedes that a remand is required so that some of these conditions can be reconsidered or clarified. We agree.

We therefore affirm Horton's convictions but remand his case to the superior court for reconsideration of the probation conditions as discussed in this opinion.

Horton's claim that the superior court erred when it denied his request for in camera review of his wife's counseling records

Shortly before trial, Horton requested that the superior court issue a subpoena for his wife's mental health records to the extent they contained her statements to her therapist about what C.B. had initially disclosed to her regarding the alleged sexual abuse. Horton specifically requested that the superior court review the records *in camera*, and then disclose any relevant records to the parties. Horton asserted that he

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2 AS 11.41.436(a)(3).

3 AS 11.31.110 (defining solicitation) & AS 11.56.510(a)(1)(A) (defining interference with official proceedings with respect to improperly influencing a witness).

was entitled to these records under the discovery rules and the Alaska and United States Constitutions.

The Office of Victims' Rights filed an opposition on behalf of D.H. (Horton's wife), making clear that she was asserting her right to privacy under Alaska Rule of Evidence 504 (the psychotherapist-patient privilege).[4] The State also opposed, arguing that the motion failed to satisfy the requirements of *N.G. v. Superior Court* and *Booth v. State*.[5]

The superior court issued a written order denying Horton's request for *in camera* review of his wife's counseling records. In the order, the superior court distinguished between Horton's request for *in camera* review of C.H.'s counseling records (which the court granted) and Horton's request for *in camera* review of his wife's counseling records. The court noted that C.H. was a complaining witness, but D.H. was neither a complaining witness nor was she conveying first-hand information about the alleged abuse. As the court explained, the information contained in D.H.'s counseling records "would amount to a third person account of the allegations," because it would be the therapist's notes of what D.H. told her therapist about what C.B. told D.H. As such, the records "would not contain any information admissible in Mr. Horton's cross-examination of C.B. as the statements are not C.B.'s statements." The superior court further reasoned, "At most, information provided might suggest possible avenues of impeachment, but impeaching C.B. through information his mother told her psychotherapist would likely be so tenuous as to not pass the relevant test under

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[4] As the parent of a minor child who was alleged to be a victim, D.H. qualified as a victim for purposes of representation by the Office of Victims' Rights. AS 24.65.100(a) (defining jurisdiction of the office); AS 12.55.185(19) (defining "victim").

[5] *N.G. v. Superior Ct.*, 291 P.3d 328 (Alaska App. 2012); *Booth v. State*, 251 P.3d 369 (Alaska App. 2011).

Alaska Rules of Evidence 403." The court therefore concluded that "[t]his tenuous connection between the disclosures made by [D.H.] to her psychotherapist pertaining to the allegations made by C.B. does not meet the threshold necessary to justify an intrusion into her privileged mental health records."

Horton challenges this ruling on appeal. He requests a remand so that the superior court may conduct an *in camera* review of D.H.'s counseling records, disclose any materially relevant information, and allow the parties to litigate whether reversal of the counts involving C.B. is required. The State opposes any remand and argues that the superior court did not abuse its discretion when it denied Horton's request for his wife's counseling records.

On appeal, Horton makes several arguments for why the superior court's ruling was error.

Horton argues first that the records are not privileged because D.H. knew that the therapist was a mandatory reporter when she shared C.B.'s allegations. Indeed, Horton emphasizes that the record suggests that D.H. spoke to her therapist partly *because* she was a mandatory reporter, and D.H. was seeking advice regarding how to report C.B.'s allegations to the appropriate authorities. The record also indicates that D.H. and the therapist made an initial report to the Office of Children's Services together.

Alaska's mandatory reporter obligations are codified in Chapter 17 of Title 47. Under AS 47.17.020(a)(1), mental health counselors "who, in the performance of their occupational duties . . . have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm" to the

authorities.[6] The mandatory reporter obligation is a legislatively created exception to the general confidentiality requirements that apply to mental health counselors.[7]

According to Horton, Alaska's mandatory reporter statutes abrogate any psychotherapist-patient privilege that would otherwise apply to a patient's mental health records — at least with regard to the patient's statements that triggered the mandatory reporting requirement. Horton contends that consequently, his wife "forfeited" this privilege when she told her therapist about C.B.'s allegations knowing that the therapist was a mandatory reporter. Therefore, the superior court erred in assuming that the mental health records that Horton sought were privileged.

But, as the State points out, Horton did not make this argument to the superior court. He must therefore show plain error on appeal.[8] For the reasons we now explain, we conclude that the court did not plainly err in treating D.H.'s mental health records as privileged.

In a 1984 decision, *State v. R.H.*, this Court held that the then-existing mandatory reporting requirements did not abrogate the psychotherapist-patient privilege in criminal proceedings.[9] This Court also stated that "the close nexus between the psychotherapist[-]patient privilege and the state constitutional right to privacy requires us to apply the privilege literally and strictly construe any limitation on the privilege."[10]

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[6] *See* AS 47.17.290(14) (including "mental health counselors" within the definition of "practitioner[s] of the healing arts" who are subject to the mandatory reporter requirement).

[7] AS 08.29.200(b)(1).

[8] *See Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

[9] *State v. R.H.*, 683 P.2d 269, 280 (Alaska App. 1984).

[10] *Id.* at 280 n.12.

R.H. involved a psychotherapist who had been subpoenaed to testify before a grand jury regarding any statements his patient (the accused) had made regarding whether he had sexually abused his daughters.[11] The psychotherapist moved to quash the subpoena, arguing that the patient's communications were confidential.[12] The trial court agreed, ruling that Evidence Rule 504(b), the psychotherapist-patient privilege, protected the communications.[13]

The State appealed, arguing, *inter alia*, that the communications fell within an exception under Evidence Rule 504(d)(5), which provides: "There is no privilege under this rule . . . [a]s to information that the physician or psychotherapist or the patient is required to report to a public employee, or as to information required to be recorded in a public office, if such report or record is open to public inspection."[14] This Court rejected that argument because child abuse reports under the mandatory reporting statutes are considered confidential and "are not subject to public inspection."[15]

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[11] *Id.* at 273.

[12] *Id.*

[13] *Id.* Alaska Rule of Evidence 504(b) provides:

> General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional conditions, including alcohol or drug addiction, between or among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

[14] *R.H.*, 683 P.2d at 274 (quoting Alaska R. Evid. 504(d)(5)).

[15] *Id.* at 275 (quoting AS 47.17.040(b)).

The State also argued that the mandatory reporting statutes had abrogated the psychotherapist-patient privilege in criminal prosecutions for child sexual abuse based on the statutory language which provides, in pertinent part,

> Neither the physician-patient nor the husband-wife privilege is a ground for excluding evidence regarding a child's harm, or its cause, in a judicial proceeding relating to a report made under this chapter.[16]

This Court rejected the State's argument that the mandatory reporting statute had abrogated the psychotherapist-patient privilege in criminal prosecutions for sexual abuse, concluding that the reference to "judicial proceeding" referred only to child protective proceedings.[17] We also noted that this interpretation of the statute avoided the constitutional concerns regarding the right to privacy and the right against self-incrimination that would otherwise be implicated.[18]

In the years following our decision in *R.H.*, the legislature has amended some of the statutes at issue in that case.[19] As this Court later noted in *Walstad v. State*, these statutory amendments "raise questions concerning the continuing validity of our

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[16] *Id.* at 277 (quoting AS 47.17.060).

[17] *Id.* at 277-80.

[18] *Id.* at 280-82.

[19] *See, e.g.*, SLA 1986, ch. 63, § 7. The legislature added section (b) to AS 08.86.200: "Notwithstanding (a) of this section [outlining the psychotherapist-patient privilege], a psychologist or psychological associate shall report to the appropriate authority incidents of child abuse or neglect as required by AS 47.17.020 . . . ."

decision [in *R.H.*]."[20] But we did not resolve that issue in *Walstad* because it was not necessary to our decision.[21]

On appeal, Horton argues that the post-*R.H.* legislative amendments mean that the mandatory reporting statutes now *do* abrogate the psychotherapist-patient privilege in criminal proceedings. But this is clearly an open question under Alaska law.

Moreover, even if we were to conclude that a counselor's mandatory report is now admissible in a criminal proceeding, it would not follow that the underlying mental health records from which the report was generated are no longer protected by the psychotherapist-patient privilege. As the State points out, the mandatory reporting statutes require the therapist to inform the authorities of the child abuse, but they do not require the therapist to turn over the patient's mental health records. Indeed, while the mental health records may contain the patient's disclosure of the abuse, they also likely contain the patient's feelings, thoughts, and reactions to the abuse, as well as the therapist's evaluation of the patient and associated treatment plans. None of this is covered by the mandatory reporting statutes, and all of this is presumptively covered by the psychotherapist-patient privilege.

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[20] *Walstad v. State*, 818 P.2d 695, 699 n.5 (Alaska App. 1991).

[21] *Walstad* involved the denial of a motion to suppress the evidence obtained as a result of a mandatory report by a counselor (who was also a clergyman). Walstad argued that the mandatory report violated the psychotherapist-patient privilege and the communications with clergy privilege. We rejected this claim, holding that neither privilege applied because the counselor/clergyman was not called to testify at trial and his report was not otherwise admitted. *Id.* at 696-99.

In sum, given the constitutional requirement that we strictly construe any exceptions to the psychotherapist-patient privilege, we disagree with Horton that the superior court plainly erred in treating D.H.'s mental health records as privileged.[22]

Horton next argues that, even assuming the mental health records are privileged, that privilege should yield to his constitutional rights as a criminal defendant. In *N.G. v. Superior Court*, we acknowledged that "[t]here are times when a witness's right to keep certain information confidential must yield to a criminal defendant's right to confront the witnesses against them."[23] We also noted that a majority of other jurisdictions that have considered this issue have held that "if the defendant makes a sufficient preliminary showing, the defendant is entitled to have the trial court conduct an *in camera* inspection of a government witness's mental health records."[24] Those jurisdictions have likewise held that a "witness's psychotherapist-patient privilege can be overridden if the trial court concludes that portions of those records are sufficiently relevant to the defendant's guilt or innocence, or are sufficiently relevant to the witness's credibility."[25]

However, we did not adopt a specific standard in *N.G.*, because we concluded that the defendant in *N.G.* had failed to satisfy even the *Booth* test, which is the showing that a defendant must make to obtain *in camera* review of a police officer's

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[22] *See* Alaska Const. art. I, § 22; *cf. Falcon v. Alaska Pub. Offs. Comm'n*, 570 P.2d 469, 480 (Alaska 1977) (holding that, to prevent invasion of the state constitutional right to privacy, a conflict of interest law could not require reporting the names of individual patients of a physician).

[23] *N.G. v. Superior Ct.*, 291 P.3d 328, 336 (Alaska App. 2012).

[24] *Id.*

[25] *Id.* at 337.

confidential personnel file.[26] A defendant is entitled to such an examination if the defendant identifies:

> a type of information that would be relevant to the defendant's guilt or innocence (in light of the facts of the case, the State's theory of prosecution, and the defendant's theory of defense), and if this type of information is the kind of information that would be recorded in a police officer's personnel file[.][27]

Like in *N.G.*, the superior court found that Horton had failed to satisfy even the *Booth* test with regard to his wife's mental health records. Because we agree with that conclusion, we again do not need to resolve the larger question of precisely what type of showing is required in these circumstances.

In the trial court proceedings, Horton argued that the court should review his wife's mental health records *in camera* because they likely included the therapist's record of what his wife told the therapist about what C.B. initially told her about the sexual abuse allegations. According to Horton, this record could be used to attack C.B.'s credibility on cross-examination because, if C.B.'s initial disclosures were different than his later disclosures, this could suggest that he was lying or exaggerating the abuse.

But there is an obvious double-hearsay problem with this claim that Horton never acknowledged or addressed. As the superior court noted, D.H. never personally witnessed any of the abuse, and the therapist's notes of what D.H. told her about what C.B. said to her were essentially a third-person account of what C.B. allegedly said had occurred. We agree with the superior court that it is not clear whether such a third-

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[26] *Id.* at 338 (citing *Booth v. State*, 251 P.3d 369 (Alaska App. 2011)); *see also Standifer v. State*, 2018 WL 3046354, at *3 (Alaska App. June 20, 2018) (unpublished) (concluding that the defendant from *N.G.* failed to satisfy the *Booth* standard on remand).

[27] *Booth*, 251 P.3d at 374.

person account would even be admissible as impeachment against C.B. at trial, particularly because D.H. was available as a witness to testify directly to what C.B. told her.

On appeal, Horton argues that the mental health records could be used to refresh D.H.'s recollection about what C.B. told her.[28] He points out that, at the grand jury proceeding, D.H. testified that she had memory issues related to her fibromyalgia. But although D.H. admitted to general memory issues, she never testified that these memory issues affected her ability to remember C.B.'s initial allegations. Nor is there any indication that Horton ever based his request for D.H.'s mental health records on her alleged memory problems.

In any event, it is difficult to see how Horton was prejudiced by his failure to obtain D.H.'s mental health records — even setting aside the problems with admissibility and double-hearsay. Horton claims that he needed the mental health records in order to establish that C.B.'s allegations changed over time. But, as the State points out, it was undisputed that C.B.'s allegations changed over time and that his initial disclosures to both his mother and the police were incomplete. D.H. testified that C.B. provided relatively few details in his initial report. Additionally, the record is clear that while C.B. testified about the most serious allegation — the anal rape — before the grand jury, he did not report this allegation until after Horton's initial arrest.

It also appears that Horton may have received a copy of the report that D.H. and her therapist made to the Office of Children's Services. The State asserts that Horton received a copy of this report, and Horton does not claim otherwise. If true, this is

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[28] *See* Alaska R. Evid. 612(a) ("Any writing or object may be used by a witness to refresh the memory of the witness while testifying."); *Kenai Chrysler Ctr., Inc. v. Denison*, 167 P.3d 1240, 1253 (Alaska 2007) ("[A] document need not be admissible to be used to refresh a witness's memory.").

another reason to find a lack of prejudice because there is little reason to believe that the notes from the session in which the formal report was made would be materially different from the report itself.

In sum, given the circumstances presented here, we uphold the superior court's refusal to subpoena D.H.'s mental health records for an *in camera* review.

The challenged probation conditions

Horton challenges three probation conditions on appeal.

Horton first disputes General Probation Condition No. 5, which states: "You must submit to any search for prohibited firearms, ammunition, and explosives." Horton objected to this condition at sentencing, arguing that there was no nexus to his crime or his rehabilitation because there was no evidence that he had used or carried weapons during the commission of the underlying offenses.[29] The superior court agreed that there was no nexus and struck other provisions that related to Horton's possession of weapons. But the superior court overruled the objection with regard to the warrantless search condition, and the court imposed the condition based on general concerns about probation officer safety.

On appeal, the State concedes that the record does not support imposition of this warrantless search probation condition. We conclude this concession is well-

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[29] *See State v. Ranstead*, 421 P.3d 15, 20 (Alaska 2018) (recognizing that probation conditions must be reasonably related to the constitutional principles of sentencing, including rehabilitation of the offender and the protection of the public, and must not be unduly restrictive of liberty).

founded and in accord with our case law.[30] We therefore vacate General Probation Condition No. 5.

Horton also challenges Special Probation Condition No. 7. This probation condition prohibits Horton from knowingly having "any contact with a person under sixteen (16) years old" unless Horton is in the "immediate presence" of an adult who knows the circumstances of Horton's crime "including the assault cycle of the crime, if appropriate." Horton does not object to the prohibition against contact with minors, but he argues that the term "assault cycle of the crime" is impermissibly vague. Horton did not raise this objection in the trial court proceedings, and he must therefore show plain error on appeal.[31]

We have previously noted the vagueness of the term "assault cycle of the crime" in an unpublished memorandum opinion, *Gardner v. State*.[32] In that case, we noted that it was unclear what the term "assault cycle" meant, and we directed the trial court "to either clarify this term or remove it from the probation condition."[33]

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[30] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess whether a concession of error is supported by the record and has legal foundation); *see also Dayton v. State*, 120 P.3d 1073, 1084-85 (Alaska App. 2005) (vacating probation condition authorizing warrantless search for weapons when defendant had no history of using or possessing illegal weapons and no weapon was involved in the commission of the underlying crime); *Boles v. State*, 210 P.3d 454, 455 (Alaska App. 2009) (same); *Johnson v. State*, 2018 WL 798422, at *1 (Alaska App. Feb. 7, 2018) (unpublished) (same); *Gardner v. State*, 2018 WL 6418086, at *3 (Alaska App. Dec. 5, 2018) (unpublished) (same).

[31] *See Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

[32] *Gardner*, 2018 WL 6418086, at *4.

[33] *Id.*

On appeal, the State asserts that "assault cycle of the crime" is a term of art that a probationer will become familiar with because he will be required to describe his assault cycle "in a therapeutic document that he creates together with his therapist." According to the State, the "assault cycle" refers to a "pattern of behavior that the defendant engages in prior to committing an assault" and therefore includes behavior (such as controlling, threatening, or grooming) that is not necessarily part of the circumstances of the crime. The State asserts that it is important that an adult supervising any contact that Horton may have with minors has this additional knowledge. The State acknowledges, however, that the probation condition as currently written is too vague, and it concedes that a remand is necessary for the superior court to clarify the meaning of this term. We conclude that this concession is well-founded,[34] and we therefore remand this issue to the superior court for clarification of the term "assault cycle of the crime."

Lastly, Horton challenges Special Probation Condition No. 3, which requires Horton to "actively participate in Alaska Department of Corrections' approved treatment programming as directed by the probation officer. The defendant shall sign and abide by all conditions of the treatment program, which will include regular periodic polygraph examinations, psychological testing, as well as other methods of ongoing assessment."

Horton does not object to engaging in sex offender treatment. However, he asserts that the reference to "psychological testing" should be modified to clarify that the psychological testing must be related to his sex offender treatment and does not refer

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[34] *See Marks*, 496 P.2d at 67-68.

to psychological testing in general.[35] The State emphasizes that psychological testing can be a critical part of sex offender treatment. But the State otherwise has no objection to a remand to clarify that the psychological testing described in this probation condition must be related to Horton's sex offender treatment. Accordingly, the superior court shall clarify this issue on remand.

Conclusion

For the reasons explained above, we AFFIRM Horton's convictions. However, we VACATE General Probation Condition No. 5, and REMAND this case for further clarification of Special Probation Condition Nos. 3 and 7.

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[35] Horton asserts that he objected to the psychological testing in the trial court proceedings. But the State is correct that his objection was to *physiological testing*, such as plethysmograph testing, which was not included in his probation conditions.