PENNSYLVANIA v. RITCHIE: DEFENDANT'S RIGHT TO THIRD PARTY CONFIDENTIAL RECORDS

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I. The *Ritchie* Decision

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the United States Supreme Court held that the defendant had a due process right to have a judge conduct an in camera review of a child protective services agency file on the victim to determine whether it contained favorable and material evidence, and if so, to turn it over to the defense. *Id.* at 58-60. In that case, defendant Ritchie was charged with rape and other crimes committed against his daughter. During pretrial discovery, Ritchie issued a subpoena seeking access to the agency's file related to the charges against him, as well as certain records that he claimed were compiled a year earlier when the agency investigated a separate report that Ritchie's children were being abused. Ritchie argued that the file "might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence." *Id* at 44. The agency refused to comply with the subpoena, claiming that the records were privileged under state law. The relevant state statute provided that information obtained during an agency investigation was confidential, but could be disclosed pursuant to a court order. Acknowledging that he had not reviewed the entire agency file, the trial court denied Ritchie's request for disclosure. Ritchie was convicted and he appealed. As noted, the Court held that Ritchie had a due process right to have the trial court review the file in camera and disclose to him any favorable, material evidence. Noting that "the public interest in protecting this type of sensitive information is strong," the Court declined to find that "this interest necessarily prevents disclosure in all circumstances." *Id.* at 57. In this respect the Court noted that the state statute did not grant the agency "absolute authority to shield its files from all eyes," *id.*, and it expressly declined to address whether the case would have been decided differently had the state statute "protected the [agency's] files from disclosure to *anyone*, including law-enforcement and judicial personnel." *Id.* at 57 n.14. Though finding that Ritchie had a right to have the trial court conduct an in camera review, the Court expressly rejected his argument that he had a constitutional right to examine all of the confidential information in the file and present arguments in favor of disclosure. *Id.* at 59-60. Recognizing that the "eye of an advocate may be helpful" in identifying favorable and material evidence, *id.* at 59, the Court concluded that full disclosure to defense counsel would "sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child-abuse information." *Id.* at 60. Thus, it endorsed a rule requiring in camera review by the trial court.

II. Application to Third-Party Records Generally

In North Carolina, *Ritchie* issues arise most frequently in child sexual abuses cases where the defendant seeks to obtain the type of agency records at issue in *Ritchie*. *See, e.g.*, State v. Tadeja, 191 N.C. App. 439, 449-50 (2008) (child sex case where the defendant sought Department of Social Services (DSS) records); State v. Johnson, 165 N.C. App. 854, 856-59 (2004) (same); State v. McGill, 141 N.C. App. 98, 101-03 (2000) (same); State v. Bailey, 89 N.C. App. 212, 222 (1988) (same). However, the courts have applied *Ritchie* to a variety of confidential records in possession of third parties, including government agencies and private parties. *See, e.g.*, Love v. Johnson, 57 F.3d 1305, 1313-14 (4th Cir. 1995) (victim's files at a medical center, county mental health department, and county DSS); State v. Johnson, 145 N.C. App. 51, 54 (2001) (public school records); State v. Henderson, 155 N.C. App. 719, 728-29 (2003) (school records); State v. Taylor, 178 N.C. App. 395, 407-08 (2006) (school records); State v. Bradley, 179 N.C. App. 551, 553 (2006) (Duke University Health Systems records); State v. Jarrett, 137 N.C. App. 256, 266 (2000) (hospital records). As the Fourth Circuit stated in one such case, "[t]he '*Brady*' right, as recognized and implemented in *Ritchie*, is not limited to information in the actual possession of the prosecutor and certainly extends to any in the possession of state agencies subject to judicial control." *Love*, 57 F.3d at 1314.

III. How the Issue Gets to the Trial Judge

The case law illustrates the variety of ways that a defendant's request for in camera review of a third party's confidential records may come to the trial judge. In some cases, the issue is brought to the judge's attention because defense counsel has issued a subpoena to the third party, which has declined to provide the requested information. *See, e.g.*, State v. Johnson, 165 N.C. App. 854, 854 (2004) (the defendant filed a subpoena for DSS records and DSS refused to provide the file); Love v. Johnson, 57 F.3d 1305, 1308 (4th Cir. 1995) (the defendant issued subpoenas for the victim's files at a medical center, county mental health department, and county DSS). In other cases, defense counsel may move for a court order requiring the third party to produce the documents for in camera review by the trial court. And in still other cases, the defendant may move for a court order requiring the third-party to turn the records over to defense counsel to review as an officer of the court. In support of such a motion, defense counsel may assert that he or she is in a better position than the judge to determine what evidence is favorable and material to the defense. The trial judge should exercise caution with regard to such a motion. As noted above, *Ritchie* rejected the defendant's argument that he had a constitutional right to full review of the file. *Ritchie,* 480 U.S. at 59-60. If the trial judge grants such a motion, the judge may wish to prohibit counsel from disclosing any evidence in the file without a court order. In any event, such a procedure is not permitted with respect to DSS records; the trial court *must* conduct any in camera review of DSS records. G.S. 7B-302(a1)(4) (trial court must conduct an in camera review before releasing DSS records).

Sometimes the defendant will file a *Ritchie* motion ex parte. No published North Carolina appellate case has addressed whether such a procedure is permissible. The North Carolina Supreme Court has held that ex parte motions are proper with respect to defense requests for experts in non-capital cases. *See* State v. Ballard, 333 N.C. 515, 519 (1993); State v. Bates, 333 N.C. 523, 526-28 (1993). The rationale that applies in that context may lend some support to an ex parte *Ritchie* request, although the situations certainly differ.

IV. Defendant's Burden for In Camera Review: "Some Plausible Showing"

Under *Ritchie,* the defendant "may not require the trial court to search through the . . . file without first establishing a basis for his claim that it contains material evidence." *Ritchie,* 480 U.S. at 58 n.15. The *Ritchie* opinion suggests that the defendant "must at least make some plausible showing of how [the evidence is] both material and favorable to his defense." *Id.* (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)); *see also* Love v. Johnson, 57 F.3d 1305, 1315 (4th Cir. 1995) (*Ritchie* requires a "plausible showing" that the evidence exists and is material and favorable; this standard cannot be "avoided by drawing on state-law requirements of specificity of subpoenas which may be—and undoubtedly are—considerably more stringent"). Although the "some plausible showing" standard repeats in the case law, other terms are used to articulate the relevant standard, including "substantial basis." State v. Johnson, 165 N.C. App. 854, 855 (2004) (the defendant must show that he or she has a "substantial basis for believing such evidence is material" (quotation omitted)). However, because "an accused cannot possibly know, but may only suspect, that particular information exists which meets these requirements, he is not required, in order to invoke the right, to make a particular showing of the exact information sought and how it is material and favorable." *Love*, 57 F.3d at 1313; *see also Johnson*, 165 N.C. App. at 855 ("Although asking defendant to affirmatively establish that a piece of evidence not in his possession is material might be a circular impossibility, [we] at least require[] him to have a substantial basis for believing such evidence is material." (quotation omitted)). And in fact, the standard is not terribly strenuous. In *Ritchie* the defendant made the requisite showing simply by arguing "'that he was entitled to the information because the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence.'" *Love*, 57 F.3d at 1313 (quoting *Ritchie,* 480 U.S. at 44). For a case where the defendant's showing "went considerably beyond the meager showing held sufficient in *Ritchie,*" see *Love*, 57 F.3d 1305 (with respect to mental health records, defendant represented to court that victim was receiving psychiatric care because of incidents of "bizarre behavior"; with respect to DSS records, defendant asserted that victim had been removed from her mother's custody because mother refused to believe her allegations).

A. Favorable

Evidence is "favorable" "when it tends substantively to negate guilt" or when it "tends to impeach the credibility of a key witness for the prosecution." *Love*, 57 F.3d at 1313 (so interpreting the *Ritchie* rule and citing Giglio v. United States, 405 U.S. 150, 154 (1972)); *see also Johnson*, 165 N.C. App. at 858 (the trial court erred by failing to disclose evidence in a DSS record that was favorable; the evidence "provide[d] an alternative explanation for [the victim's] abuse"); State v. McGill, 141 N.C. App. 98, 102-03 (2000) ("'Favorable' evidence includes evidence which tends to exculpate the accused, as well as 'any evidence adversely affecting the credibility of the government's witnesses'"; going on to conclude that the defendant was denied favorable evidence that false accusations were made against him which could have been used to impeach the credibility of the State's key witnesses (quotation omitted)); State v. Henderson, 155 N.C. App. 719, 728 (2003) (quoting same from *McGill*).

B. Material

Evidence is "material" "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"; "[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Ritchie,* 480 U.S. at 57 (quotation omitted); *see also Love*, 57 F.3d at 1313 (quoting *Ritchie*); *McGill*, 141 N.C. App. at 103. *Compare*

McGill, 141 N.C. App. at 103 (2000) (evidence in DSS records that false accusations were made against the defendant and that could have been used to impeach the credibility of the State's key witnesses was material), State v. Martinez, 212 N.C. App. 661, 666 (2011) (trial court erred by failing to disclose material exculpatory evidence that could have been used to impeach the State's witnesses), *and* State v. Johnson, 165 N.C. App. 854, 858-59 (2004) (evidence in DSS record that provided an alternative explanation for the victim's abuse was material), *with* State v. Bradley, 179 N.C. App. 551, 557-58 (2006) (the defendant "failed to satisfy the threshold requirement of materiality" where the defendant argued that he intended to use the records to impeach the credibility of one of the State's 404(b) witnesses; the court concluded that the defendant would not have been able to impeach the witness with extrinsic evidence and noted that the witness was only one of three 404(b) witnesses offered by the State).

V. In Camera Review, Order and Sealing of Evidence

If the defendant makes the required showing, the defendant "does not become entitled to direct access to the information to determine for himself its materiality and favorability." Love v. Johnson, 57 F.3d 1305, 1313 (4th Cir. 1995) (citing *Ritchie*). Rather, the defendant has the right "to have the information he has sufficiently identified submitted to the trial court for in camera inspection and a properly reviewable judicial determination made whether any portions meet the 'material' and 'favorable' requirements for compulsory disclosure. *Id*. (citing *Ritchie*). Once the defendant makes the required showing, the court must engage in an in camera review. State v. Kelly, 118 N.C. App. 589, 594 (1995) (trial court's failure to conduct an in camera review was error).

If the court determines that there is favorable, material evidence in the records, the court should so find by written order and should provide the relevant evidence to the defendant. If the trial court conducts an in camera review but denies the defendant's request, in whole or in part, the trial court should so find by written order, seal the undisclosed evidence, and place it in the record for appellate review. *See, e.g.*, *Johnson*, 165 N.C. App. at 855-56; State v. McGill, 141 N.C. App. 98, 101 (2000). Sample language for the court's order is provided in the Appendix below.

Appendix: Sample Language for Court Orders

Sample Language Granting Defendant's Request for In Camera Review

Defendant has moved for in camera review of [*identify the confidential records at issue*] maintained by [*identify the third party that maintains the records*]. Under *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the defendant has a due process right to have the trial court conduct an in camera review of confidential third party records to determine whether they contain favorable and material evidence. To trigger the right to an in camera review, the defendant need only make some plausible showing of how the evidence in question is both material and favorable to his or her defense. In this case the defendant asserts that the evidence is material and favorable because [*summarize the defendant's argument*]. The court finds that the defendant has made the requisite showing and hereby orders [*identify the third party that maintains the records*] to produce [*identify the confidential records at issue*] to the court under seal for in camera review and further order.

Sample Language for Order after In Camera Review

Pursuant to *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), this court by order dated [*insert date*] ordered [*identify the third party that maintains the records*] to produce under seal [*identify the confidential records at issue*] for an in camera review by the court. Having conducted the required in camera review, the court finds the defendant is entitled to portions of the [*identify the confidential records at issue*] that contain favorable, material evidence. Copies of those portions of the records that contain such evidence are attached to this order. The court finds that the remainder of the records produced by [*identify the third party that maintains the records*] do not contain favorable, material evidence. Copies of those records shall be retained by the Clerk, sealed for appellate review.