Circuit Court for Baltimore City
Case No.: 24-C-15-002028

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 001011

September Term, 2016

DANIEL SMITHPETER

v.

MARYLAND BOARD OF PHYSICIANS

Meredith,
Arthur,
Leahy,

JJ.

Opinion by Meredith, J.

Filed: August 31, 2018

Dr. Daniel Smithpeter, appellant, was the subject of disciplinary proceedings initiated by the Maryland Board of Physicians ("the Board"), appellee, regarding his license to practice psychiatry. A complaint was filed by a former patient ("the Patient"), alleging that Dr. Smithpeter had engaged in an inappropriate sexual relationship with the Patient. The Board investigated, and ultimately filed charges against Dr. Smithpeter pursuant to the Maryland Medical Practice Act, Maryland Code (2000, 2005 and 2009 Repl. Vols.), Health Occupations Article ("HO"), §§ 14-404(a)(3)(i) and (ii). Following a two-day hearing, conducted by the Office of Administrative Hearings pursuant to the contested-case provisions of the Maryland Administrative Procedure Act, the Administrative Law Judge ("ALJ") issued a proposed decision finding that Dr. Smithpeter had committed the alleged violations. Dr. Smithpeter filed exceptions, but, after a hearing, the Board adopted the ALJ's proposed findings and conclusions of law. The Board ordered that Dr. Smithpeter's medical license be suspended for three years.

Dr. Smithpeter filed a petition for judicial review in the Circuit Court for Baltimore City, which affirmed the ruling of the Board. Dr. Smithpeter then appealed to this Court. In *Smithpeter v. Maryland Board of Physicians*, No. 819, Sept. Term, 2012 (filed July 25, 2013) *(Smithpeter I)*, this Court ruled that substantial evidence supported the Board's decision to suspend Dr. Smithpeter's license, but we also concluded that the Board had committed a procedural error when it adopted the ALJ's decision that quashed certain requests for subpoenas for the Patient's mental health records before the subpoenas had even issued. Accordingly, this Court remanded the matter to the Board pursuant to

Maryland Rule 8-604(d) for limited further proceedings, namely, "for re-issuance of the requested subpoenas, and any proceedings that might flow therefrom." *Smithpeter I*, slip op. at 23. On remand, six subpoenas were issued, notice was given, and motions to quash the subpoenas were filed by both the Patient and the administrative prosecutor. The ALJ quashed the subpoenas and recommended that the Board rule that "there is no need to re-open the record in this matter." The Board thereafter issued its final decision and order, finding that "the subpoenas issued on remand for the [P]atient's mental health records were appropriately quashed," and therefore, the Board's decision that had been issued on December 15, 2011, was reinstated. Dr. Smithpeter again sought judicial review in the Circuit Court for Baltimore City, which affirmed the Board's decision.

Dr. Smithpeter now seeks review in this Court. Dr. Smithpeter frames the issue before us as follows:

> Did the Board commit legal error, engage in an unlawful procedure, or act in an arbitrary and capricious manner when it entered into evidence only the medical records authorized by the Patient, but denied Dr. Smithpeter the right to subpoena any medical records to prove his innocence?

Because we perceive no error, we will affirm.

FACTS AND PROCEDURAL HISTORY

As noted, this appeal focuses on rulings made after we vacated and remanded this case to the Board in *Smithpeter I*. Our unreported opinion in that case provides context for the issue now before us.

In *Smithpeter I*, we recognized that this was "a classic 'he said-she said' controversy," in which "the credibility of the witnesses was critical to the outcome of the

case." *Smithpeter I*, slip op. at 3. The only witnesses at the hearing before the ALJ had been the Patient and Dr. Smithpeter. The Patient testified that sexual misconduct occurred. Dr. Smithpeter denied the misconduct. In *Smithpeter I*, we concluded that "there was substantial evidence in the record upon which the Board could have based its finding that appellant violated HO § 14-404(a)(3)(i) & (ii)."

We then turned our attention to the subpoena issue, noting that this "final issue is a purely legal one, and revolves around the provisions of Md. Code (2000, 2009 Repl. Vol.), Health-General Article ("HG") §§ 4-301 *et seq.*, the Confidentiality of Medical Records Act." The administrative prosecutor and Board had obtained the Patient's mental health records from three mental health providers pursuant to authorizations signed by the Patient. All records obtained by the administrative prosecutor and Board were provided to Dr. Smithpeter during discovery. Dr. Smithpeter, however, sought additional mental health records, beyond the Patient's mental health records produced during discovery, via requests for subpoenas addressed to six other providers of mental health care. We observed:

> [Dr. Smithpeter] requested the OAH issue six subpoenas "in accordance with §§ 4-306 and 4-307 of the Health-General Article of the Annotated Code of Maryland." The State, in its motion to quash, opposed [Dr. Smithpeter's] request and asked that the **request itself** be quashed, arguing that **the request** violated HG §§ 4-306 and 4-307, and the statutory patient-psychiatrist privilege found in [Maryland Code (1973, 2009 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP")] § 9-109(b). [Dr. Smithpeter's] motion in opposition to the State's motion to quash argued that he was entitled to the subpoenaed records, without providing advance notice to the patient, pursuant to HG § 4-307(k)[(1)](v). He also argued that his "right to the records under § 4-307(k)[(1)](v) of the Health-General Article trumps any right of the Patient's right [sic] to assert the [CJP] § 9-109 privilege." [Dr. Smithpeter] relied on two cases in support of his opposition: *Doe v. Maryland Board of Social Workers*, 154 Md. App. 520 (2004) and *Dr. K. v. State Board*

> *of Quality Assurance*, 98 Md. App. 103 (1993). [Dr. Smithpeter] asserted that the latter case was "comparable" to and supportive of the request for subpoenas in the instant case.[1] We note that, at no time is HG § 4-306 addressed or even mentioned in [Dr. Smithpeter's] opposition to the motion to quash.

Our opinion in *Smithpeter I* expressly rejected Dr. Smithpeter's argument that he was entitled, under HG § 4-307(k)(1)(v), to receive the records *without* giving any prior notice to the Patient. We held that, by its plain language, HG § 4-307(k)(1)(v) addresses only disclosures that may be made without patient authorization to "health professional licensing and disciplinary boards" or "grand juries, prosecution agencies, and law enforcement agencies under the supervision of prosecution agencies." Because Dr. Smithpeter is none of those entities, "HG § 4-307(k)(1)(v) does not authorize disclosure of records *to him* without notice to the patient." *Id*. at 21. (Emphasis in original.)

Our holding in *Smithpeter I* then explained why the case nevertheless was remanded for a limited purpose:

> The ALJ erred, however, in relying upon HG § 4-306(b)(6) to grant the State's motion to quash the requests for subpoenas. The ALJ explained that she was granting the State's motion to quash based on her finding that [Dr. Smithpeter]
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> > failed to comply with [HG §§ 4-306(b)(6) and 4-307] concerning the disclosure of confidential medical records. These statutes require a party or a party's attorney to verify in writing that the subject of the medical records is aware of the subpoena **request** and has not objected to their disclosure or has had any objection resolved. There is no indication that [Dr. Smithpeter's] attorney attempted to comply with the statutory

[1] In footnote 5 in *Smithpeter I*, omitted here, we distinguished both cases as inapplicable to Dr. Smithpeter's situation, because both *Doe* and *Dr. K.* address the subpoena power of *the Board*, not a *licensee* under investigation.

> notice requirement; without such verification, the OAH improperly issued the subpoenas in this case. [Footnote omitted.]

(Emphasis added in [*Smithpeter I*]).

In its final decision and order, the Board expressed a similarly erroneous view of the statute governing subpoenas of medical records:

> [Dr. Smithpeter's] subpoenas for certain medical records were appropriately quashed because he failed to comply with the provisions of the Confidentiality of Medical Records Act, Md. Code Ann., Health Gen. §§ 4-306 & 4-307 and because the patient's mental health records were otherwise privileged. Md. Cts. & Jud. Proc. § 9-109(a) & (b).
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> It would have been especially egregious in this case, where [Dr. Smithpeter] admitted on cross-examination that in his three years of psychiatric treatment of this patient that he did not find her to be subject to delusions or hallucinations or a borderline personality disorder, and where this case directly implicated neither [Dr. Smithpeter's] medical treatment nor the patient's medical condition, to permit [Dr. Smithpeter] to obtain the patient's confidential psychiatric records. That issue was never reached, however, because [Dr. Smithpeter] did not give the notice to the patient required by the statutes **prior to subpoenaing** her medical records. *See* Md. Health Gen. Code Ann. § 4-306(b)(6). The ALJ's authority to subpoena records is set out in COMAR 28.02.01.11.B(2) and is derived from the statutory authority set out in Md. State Gov't Code Ann. § 10-206. Nothing in that authority permits the overriding of the safeguards set out in Md. Health Gen. Code Ann. § 4-306(b)(6).

(Emphasis added [in *Smithpeter I*].) (Internal citation omitted.)

The ALJ erred in prohibiting the issuance of the subpoenas for lack of advance notice. Nothing in HG § 4-306(b)(6) requires that notice be provided to the patient *prior to subpoenaing* medical records otherwise protected by the statute. Rather, HG § 4-306(b)(6) addresses disclosures of medical records by health care providers, without the authorization of a person in interest, upon the receipt of both a proper subpoena **and** written

> assurance that the person in interest, having been provided notice of the subpoena and thirty days in which to object, has either not objected or that any objections have been resolved. Nothing in the statute contemplates the quashing of a mere **request** for a subpoena, nor does the statute appear to embrace a situation like the one involved here, where subpoenas had been received [by requesting counsel] but not served. At a minimum, the ALJ's grant of the State's motion to quash was premature (because no objection had been asserted by the patient), and the Board's affirmance of the ALJ's action was an erroneous conclusion of law.
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> Although, as outlined earlier in this opinion, we detected no other reversible errors on this record and [we] would have affirmed absent the subpoena error, we cannot conclude that the grant of the motion to quash was harmless error because we have no way of knowing whether the subpoenaed records would have contained information relevant to the credibility of the patient. But it is also possible that the records contain no relevant information, in which case the error will prove harmless, and there would be no need to conduct any further evidentiary hearings in this case.
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> We will therefore direct the circuit court to remand this case to the Board for re-issuance of the requested subpoenas, and any proceedings that might flow therefrom. Any party aggrieved by the subpoenas may seek any available relief. We take no position on what those proceedings might entail, and our remand will enable the State, and/or the patient, to file any motions it, or she, deem appropriate. We express no opinion in that regard.

Smithpeter I, slip op. at 22-23.

Upon remand, Dr. Smithpeter again requested issuance of subpoenas addressed to six mental health providers, whose records regarding treatment of the Patient had not been requested and obtained by the administrative prosecutor and Board during the investigation of the complaint. On September 22, 2014, OAH issued the requested subpoenas, which directed the recipients to "send patient file of [the Patient] to be delivered to [Dr. Smithpeter's counsel] on or before November 25, 2014." No proceedings had been scheduled at the time the subpoenas were issued; in other words, November 25, 2014 was

not the date of a deposition, hearing, or trial, and the subpoenas issued by OAH at Dr. Smithpeter's request were not trial subpoenas.

Once the subpoenas were issued, Dr. Smithpeter's counsel paired each subpoena with a "Notice of Subpoena of Medical Records to [the individual or entity subpoenaed]," which advised the recipient that his, or its, patient file regarding the Patient had been subpoenaed for delivery to counsel's office by November 25, 2014; and that, "[a]s shown by the enclosed Notice, the patient . . . was sent the Notice required under Section 4-306 of the Health-General Article by certified mail on September 25, 2014. We will provide written notice to you after 30 days of whether the patient has objected to the disclosure of the patient records." The Notice of Subpoena advised the custodian of records that the subpoena was "intended to obtain medical records" and that the custodian need not appear or testify as long as the records were produced to Dr. Smithpeter's counsel on or before November 25, 2014. A copy of the "Notice to [the Patient] In Compliance with § 4-306 of the Health-General Article Annotated Code of Maryland" was included, as referenced in the "Notice of Subpoena of Medical Records" to Dr. Slatkin and the five entities. The "Notice to [the Patient]" advised the Patient that her medical records, including mental health records, had been subpoenaed from each of the six providers, and that she should

> examine these papers carefully. IF YOU HAVE ANY OBJECTION TO THE PRODUCTION OF THESE DOCUMENTS, YOU MUST FILE A MOTION FOR PROTECTIVE ORDER OR A MOTION TO QUASH THE SUBPOENA ISSUED FOR THESE DOCUMENTS UNDER MARYLAND RULES 2-403 AND 2-510 NO LATER THAN THIRTY (30) DAYS FROM THE DATE THIS NOTICE IS MAILED.

The Notice also advised the Patient to consult her attorney if she "believe[d] she need[ed] further legal advice about this matter." A copy of HG § 4-306 was included, along with a "Certificate for Records of Regularly Conducted Business Activity," to be filled out by the records custodian and returned with the records responsive to the subpoena. A packet containing each of the foregoing documents --- the subpoena, Notice of Subpoena, Notice to [the Patient], HG § 4-306, and certificate to be completed by the records custodian --- was sent to Dr. Slatkin and the five subpoenaed entities on September 25, 2014.

On October 1, 2014, the State filed a motion to quash, arguing: (1) that Dr. Smithpeter's request for the subpoenaed records was not superior to the Patient's privilege in her mental health records, which she had invoked, pursuant to CJP § 9-109; (2) that no applicable statutes or regulations permitted Dr. Smithpeter to acquire the Patient's privileged mental-health records; (3) that Dr. Smithpeter was not entitled to pre-hearing discovery; and (4) that Dr. Smithpeter's effort to acquire the Patient's mental-health records was nothing more than a fishing expedition. Attached to the State's motion to quash was an affidavit from the Patient, objecting "pursuant to all applicable laws" to Dr. Smithpeter acquiring or using her mental-health or medical records, and specifically invoking her privilege pursuant to CJP § 9-109(b).

On or about October 6, 2014, the Patient filed, *pro se*, her own motion to quash the subpoenas, in which she submitted that the subpoenas were a "violation of my privacy in those records under [CJP § 9-109] and all other applicable Laws and Statutes," and that

"the attempt to access these records [is] an invasion of my privacy as well as an attempt to harass me."

Dr. Smithpeter filed a motion to strike the State's motion to quash, an opposition to the State's motion to quash, and an opposition to the Patient's motion to quash. The State filed an opposition to Dr. Smithpeter's motion to strike the State's motion to quash, and a reply to Dr. Smithpeter's opposition to the State's motion to quash.

In a proposed decision issued on December 12, 2014, the ALJ ordered that the subpoenas be quashed. The ALJ noted that Dr. Smithpeter had no right to pre- (or post-) hearing discovery, and that Dr. Smithpeter's contention that the *Smithpeter I* Court "had already ruled that the Patient's privilege in her mental health records is inapplicable in this matter" was "disingenuous" and erroneous. Further, the ALJ observed that the Patient had invoked her absolute privilege pursuant to CJP § 9-109, and had not waived the privilege either by executing authorizations allowing disclosure of records to the Board, or because the prosecutor introduced some mental health records at trial.

In addition to finding that Dr. Smithpeter was "not entitled to directly access the Patient's mental health records" via subpoena, the ALJ also found that he was not entitled to an *in camera* review of the Patient's records, noting that Dr. Smithpeter had failed to generate any evidence that the Patient suffered from a mental disability bearing on her ability to accurately recall events, or that the Patient had made prior inconsistent statements of such gravity that her credibility could reasonably be questioned. The ALJ concluded that Dr. Smithpeter "has not made the case that he should have access to the Patient's

privileged mental health records or that I should conduct an *in camera* review of those records." Finding that no need to re-open the record for further proceedings existed in the case, the ALJ quashed all six subpoenas.

Dr. Smithpeter filed exceptions, which were heard by the Board on February 25, 2015. In a final decision filed on March 27, 2015, the Board overruled Dr. Smithpeter's exceptions, and reinstated its finding of "immoral and unprofessional conduct in the practice of medicine, in violation of § 14-404(a)(3)(i) and (ii) of the Health Occupations Article[.]"

The Board expressly rejected Dr. Smithpeter's argument, which he repeats in this appeal, that we decided in *Smithpeter I* "by necessary implication" that the Patient's privilege in her mental-health records, codified at CJP § 9-109(b), did not apply. The Board also ruled that the Patient had not waived the privilege when she authorized the Board to obtain her records, and when the Board introduced some mental health records at trial. And the Board ruled that Dr. Smithpeter was not entitled to have the ALJ conduct an *in camera* review of the Patient's privileged records. In sum, the Board concluded "that the subpoenas were appropriately quashed based upon the [CJP] § 9-109 privilege, the confidentiality of the mental health records, and the patient's privacy rights."

Dr. Smithpeter filed a petition for judicial review in the Circuit Court of Baltimore City. After a hearing, the circuit court affirmed. This appeal followed.

STANDARD OF REVIEW

The Court of Appeals provided this overview of the standard of appellate review of a ruling of an administrative agency such as the Board in *In re J.C.N.*, ___ Md. ___, 2018 WL 3640988, *7, No. 73, September Term 2017, slip op. at 14-15 (filed July 31, 2018):

> When this Court has before it the decision of an administrative agency, we review directly the agency's decision and not that of the lower courts. *Sturdivant v. Md. Dep't of Health & Mental Hygiene*, 436 Md. 584, 587, 84 A.3d 83 (2014). "When this or any appellate court reviews the final decision of an administrative agency . . ., the court looks through the circuit court's and intermediate appellate court's decisions, although applying the same standards of review, and evaluates the decision of the agency." *Kor-Ko Ltd. v. Md. Dep't of the Env't*, 451 Md. 401, 409, 152 A.3d 841 (2017) (quoting *People's Counsel for Balt. Cty. v. Surina*, 400 Md. 662, 681, 929 A.2d 899 (2007)).
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> "A court's role in reviewing an administrative agency adjudicatory decision is narrow." *Cosby v. Dep't of Human Res.*, 425 Md. 629, 638, 42 A.3d 596 (2012) (quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67–68, 729 A.2d 376 (1999)). It is "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Id*. (quoting *Banks*, 354 Md. at 67–68, 729 A.2d 376). In applying the substantial evidence test, we decide whether the ALJ's determination was "supported by evidence which a reasonable person could accept as adequately supporting [the] conclusion." *Kenwood Gardens Condos., Inc. v. Whalen Props., LLC*, 449 Md. 313, 325, 144 A.3d 647 (2016). We "must review the agency's decision in the light most favorable to it" and recognize that "the agency's decision is prima facie correct and presumed valid." *Critical Area Comm'n for the Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111, 123, 12 A.3d 1223 (2011) (quoting *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571, 873 A.2d 1145 (2005)). "[I]t is the agency's province to resolve conflicting evidence and to draw inferences from that evidence." *Banks*, 354 Md. at 68, 729 A.2d 376 (internal quotation marks omitted).
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> We further accord deferential review to an administrative agency's interpretation of its statute and regulations. *Adventist Health Care Inc. v. Md. Health Care Comm'n*, 392 Md. 103, 119, 896 A.2d 320 (2006). Because the

> General Assembly has delegated to the Secretary legislative authority to adopt regulations, the Department's regulations have the "force and effect of law." *See State v. Roshchin*, 446 Md. 128, 148 n.20, 130 A.3d 453 (2016).

Accord Geier v. Maryland State Board of Physicians, 223 Md. App. 404, 430-31 (2015), noting that, when a court reviews a decision of the Maryland Board of Physicians:

> A reviewing court "'may not substitute its judgment for the administrative agency's in matters where purely discretionary decisions are involved.'" *Mueller v. People's Counsel for Baltimore Cnty.*, 177 Md. App. 43, 82-83, 934 A.2d 974 (2007) (quoting *People's Counsel for Baltimore Cnty. v. Surina*, 400 Md. 662, 681, 929 A.2d 899 (2007)), *cert. denied*, 403 Md. 307, 941 A.2d 1106 (2008). With respect to the Board's conclusions of law, "a certain amount of deference may be afforded when the agency is interpreting or applying the statute the agency itself administers." *Employees' Ret. Sys. of Balt. v. Dorsey*, 430 Md. 100, 111, 59 A.3d 990 (2013). "We are under no constraint, however, 'to affirm an agency decision premised solely upon an erroneous conclusion of law.'" *Id.* (quoting *Thomas v. State Ret. & Pension Sys.*, 420 Md. 45, 54-55, 21 A.3d 1042 (2011)).

DISCUSSION

This appeal is concerned only with whether the Board erred in ruling, upon remand, that the ALJ properly quashed the subpoenas seeking the Patient's mental-health records. Dr. Smithpeter advances three theories in support of his claim that the subpoenas were improperly quashed. We reject each of these theories.

A. "*Sub silentio*"

Dr. Smithpeter argues, initially, that this Court, in *Smithpeter I*, determined "by necessary implication, or *sub silentio* . . . that the Patient's mental health records were not" protected from disclosure by privilege. This argument is totally at odds with our holding in *Smithpeter I.* In *Smithpeter I*, we remanded this case to allow for issuance and service of subpoenas conditioned upon the express opportunity for "any party aggrieved by the

subpoenas" to file appropriate motions seeking "any available relief," including quashal. We expressly declined to decide, in *Smithpeter I*, whether the Patient's mental health records were protected by the privilege, and whether there had been any waiver of that privilege. We remanded to allow the subpoenas to be issued and served. That was all we could decide because, at that point in time, the statutory procedures had not been followed, and we were unwilling to speculate about what would happen if and when the subpoenas were issued and served. The Board did not err in rejecting Dr. Smithpeter's argument that the scope of protection provided to the Patient had been resolved in *Smithpeter I*.

B. Waiver

Next, Dr. Smithpeter argues that the Patient's privilege in her mental-health records, codified in CJP § 9-109, "had, in fact, been waived due to the nature of her participation in the Board's prosecution of charges against Dr. Smithpeter." That statute provides, at § 9-109(b):

> Unless otherwise provided, in all judicial, legislative, or administrative proceedings, a patient or the patient's authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing:
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> (1) Communications relating to diagnosis or treatment of the patient; or
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> (2) Any information that by its nature would show the existence of a medical record of diagnosis or treatment.
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> Section 9-109(d) provides the following exceptions to the privilege:
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> There is no privilege if:
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> (1) A disclosure is necessary for the purposes of placing the patient in a facility for mental illness;

(2) A judge finds that the patient, after being informed there will be no privilege, makes communications in the course of an examination ordered by the court and the issue at trial involves his mental or emotional disorder;

(3) In a civil or criminal proceeding:
(i) The patient introduces his mental condition as an element of his claim or defense; or
(ii) After the patient's death, his mental condition is introduced by any party claiming or defending through or as a beneficiary of the patient;

(4) The patient, an authorized representative of the patient, or the personal representative of the patient makes a claim against the psychiatrist or licensed psychologist for malpractice;

(5) Related to civil or criminal proceedings under defective delinquency proceedings; or

(6) The patient expressly consents to waive the privilege, or in the case of death or disability, his personal or authorized representative waives the privilege for purpose of making claim or bringing suit on a policy of insurance on life, health, or physical condition.

None of the exceptions in § 9-109(d) is applicable in this case, and Dr. Smithpeter does not claim otherwise. Rather, Dr. Smithpeter asserts that the Patient implicitly waived the statutory privilege applicable to all of her mental health records "due to the nature of her participation in the Board's prosecution of charges against Dr. Smithpeter," particularly, by executing an "unlimited authorization" granting the Board access to her mental health records, and by permitting the administrative prosecutor to introduce certain of her mental health records into evidence. Dr. Smithpeter asserts that the Patient's waiver applies to all of her mental health records, regardless of whether those mental health

records were obtained and reviewed by the Board during its investigation, and regardless of whether the records were admitted in evidence.

Dr. Smithpeter relies primarily on our decision in *Reynolds v. State*, 98 Md. App. 348 (1993), which he describes as "indistinguishable" from the instant case. *Reynolds* was a criminal case in which the defendant was accused of sexual abuse of his daughter. Reynolds made a pretrial request to inspect the alleged victim's mental health records. We held that the Reynolds's initial pretrial request for the mental health records was properly denied because a criminal defendant "is not entitled to a patient's [privileged] records merely because the patient takes the witness stand." *Id.* at 361. We also rejected his argument that the victim of the alleged abuse had waived her statutory privilege when she signed an authorization permitting the prosecutor to obtain and review her mental health records. We stated that a defendant "does not gain access to a patient's records merely because the patient has executed a limited waiver that allows the prosecutor to review the records." *Id.* at 363. But we also held that, when the State introduced some, but less than all, of the victim's mental health records into evidence, the victim's statutory privilege with respect to the remainder of her mental health information was effectively waived. We therefore held that the trial court erred in refusing to permit one of the alleged victim's treating mental health care providers to testify for the defense. We stated that, "if, during the next trial, the State introduces any portion of the patient's mental health records that contain information about privileged communications, appellant must be given the

opportunity to inspect the remainder of these records and cannot be prohibited on the basis of privilege from introducing any evidence derived therefrom." *Id.* at 364.

As noted above, we rejected the claim of waiver in *Reynolds* that was based on the mere fact that the patient had signed an authorization permitting the prosecutor to obtain her records. To the extent Dr. Smithpeter bases his claim of waiver in this case on the authorization the Patient signed at the request of the administrative prosecutor, we similarly reject his claim.

We also note that *Reynolds* was a criminal case involving the Sixth Amendment right to confrontation, a right that does not apply to civil and administrative cases like the present case. *Bennett v. National Transp. Safety Bd.*, 66 F. 3d 1130 (10th Cir. 1995). And, most important to our analysis in this case, we note, as we did in *In Re Matthew R.*, 113 Md. App. 701 (1997), that a subsequent decision by the Court of Appeals --- namely, *Goldsmith v. State*, 337 Md. 112 (1995) --- "appears to some degree to conflict with some of our determinations in *Reynolds*." 113 Md. App. at 718.

In *Goldsmith*, the defendant sought access to his alleged victim's mental health records through pre-trial discovery, asserting, as Dr. Smithpeter asserts here, that the alleged victim's credibility was a "make or break issue" in the case. Nevertheless, the Court of Appeals affirmed the trial court's denial of the defendant's motion, filed pursuant to Maryland Rule 4-264, for pre-trial issuance of a subpoena compelling production of the alleged victim's mental health records. The *Goldsmith* Court held:

> Neither due process, compulsory process nor the right to confront adverse witnesses establishes a pre-trial right of a defendant to discovery

> review of a potential witness's privileged psychotherapy records. Thus, we find no common law, court rule, statutory or constitutional requirement that a defendant be permitted pre-trial discovery of privileged records held by a third party.

Id. at 127. The Court further explained:

> [Goldsmith] did not establish a need for the records. Goldsmith asserted only that [the witness's] credibility would be an issue at trial. He did not establish that discovery of the records would likely lead to relevant information. Rather, he sought "some latitude in obtaining information that may enable him to confront his accuser in some meaningful way." There was *no* showing of any likelihood of obtaining information relevant to the defense in the records.

Id. at 128. (Emphasis in original.)

Even though *Goldsmith* dealt with an attempt to obtain mental health records at the pre-trial stage of a criminal case, the Court also indicated that, at the trial stage, a time when a criminal defendant's constitutional right to obtain and present exculpatory evidence is implicated, the production of mental health records of a complaining witness will be required only upon a "proper showing." The Court of Appeals explained:

> As we previously indicated, there was an insufficient showing by Goldsmith of the likelihood that the records contained exculpatory information. **The mere assertion that the records in question *may* contain evidence useful for impeachment is insufficient to override an absolute statutory privilege, even at the trial stage.** We agree with the Supreme Court of Michigan that in assessing a defendant's right to privileged records, **the required showing must be more than the fact that the records "may contain evidence useful for impeachment on cross-examination**. This need might exist in every case involving an accusation of criminal sexual conduct." *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557, 576 (1994) (footnotes omitted). **We cannot permit a privilege to be abrogated even at the trial stage by the mere assertion that privileged records *may* contain information relevant to credibility.** To do so would virtually destroy the psychotherapist-patient privilege of crime victims. It has long been recognized that privileges, by their very nature, restrict access to information

> which would otherwise be disclosed. *See* 1 *McCormick on Evidence* § 72, at 269 (John W. Strong ed., 4th ed. 1992). The rationale for this restriction has been our recognition of the social importance of protecting the privacy encompassed by specified relationships. **Such privacy interests cannot be negated by the mere assertion of the possibility of impeachment evidence. A defendant's constitutional rights to a fair trial simply do not stretch that far.**
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> **We therefore hold that in order to abrogate a privilege such as to require disclosure at trial of privileged records, *a defendant must establish a reasonable likelihood that the privileged records contain exculpatory information* necessary for a proper defense**. In the present case, the defendant did not establish the likelihood that the records sought would provide exculpatory information. At most, **Goldsmith made only a speculative assertion that the records might be relevant for impeachment**. He had no right to pre-trial discovery review of the privileged records and he failed to establish the requisite need to warrant a judge ordering disclosure of the privileged information at trial.

Id. at 133-35 (emphasis added) (footnotes omitted).

In his reply brief, Dr. Smithpeter attempts to avoid the threshold standard established in *Goldsmith,* pointing out that the State in *Goldsmith* did not seek to use the alleged victim's mental health records to support its case, and that *Goldsmith* therefore did not present the waiver argument advanced here. Although Dr. Smithpeter is correct that no waiver argument was squarely advanced or decided in *Goldsmith*, the *Goldsmith* Court left no doubt that broad protection must be afforded to a patient whose records are covered by the statutory mental health privilege, and waivers of the privilege will not be easily or lightly implied.

See also In Re Matthew R., supra, 113 Md. App. at 727 ("[I]n cases in which a litigant's medical condition is *introduced* by the opposing party and the litigant responds with a denial supported by a limited medical record asserting a present condition . . . the

waiver of privilege is limited to the record offered by the litigant and the testimony of the person producing the record. . . . Under these circumstances, there is no *carte blanche* waiver of the privilege as to past records, communications, and treatment predating that evidence proffered to defend against the opposing party's claim.").

In this case, as in *Matthew R*, the party seeking to circumvent the privilege, Dr. Smithpeter, was the one who called into question the privilege holder's mental health. Dr. Smithpeter's central defense to the charges against him was that the Patient lacked credibility because of a mental disorder. Dr. Smithpeter filed prehearing testimony in which he suggested that the Patient's diagnoses resulted in "impaired memory and reality testing, and confabulation," and Dr. Smithpeter testified similarly on direct examination. The mental health records introduced by the administrative prosecutor, including those generated by Dr. Smithpeter, were offered to respond to and disprove Dr. Smithpeter's more recent accusations of "confabulation." Under these circumstances, we do not find a *carte blanche* waiver by the Patient of the Patient's right to keep her mental health records confidential. Were we to hold otherwise, any person committing sexual (or other) misconduct could cast aspersions on the mental health of his or her victim, and thereby force the victim to make the unpleasant choice of either permitting the alleged tormentor to have access to his or her sensitive mental health records or abandoning the complaint of abuse. Such a view of waiver fails to recognize the important societal interest in protecting the privacy of the patient/psychotherapist relationship.

Accordingly, we conclude that, even if a patient provides the prosecutor a limited waiver of the privilege, and the prosecutor introduces some mental health records, the defendant must meet the threshold showing established in *Goldsmith* before the court or agency will require further production of mental health records for an *in camera* review.

C. No entitlement to *in camera* review

Dr. Smithpeter argues that, even if the Patient did not waive her mental health privilege, his important due process rights entitled him, at a minimum, to have the ALJ perform an *in camera* review of the subpoenaed records "to determine: (1) whether the records were, in fact, privileged; and (2) if privileged, whether the records contained information that might affect the outcome." He cites *Reynolds* for its discussion of "a precise process for determining whether a particular document is within the privilege and the circumstances in which a particular non-privileged document might be used in the proceeding," and, citing a recent unreported case of the United States District Court for the District of Maryland, Dr. Smithpeter urges this Court to hold that the "*in camera* process outlined in *Reynolds* should apply in Board disciplinary cases." But, once again, *Reynolds* does not assist him.

State v. Johnson, 440 Md. 228 (2014), provides the Court of Appeals's most recent discussion of the preliminary showing that must be made before a court determines that a criminal defendant is entitled to an *in camera* review of privileged mental health records of an accusing witness. In *Johnson*, the Court observed:

> In *Reynolds*, which was decided prior to *Goldsmith*, the Court of Special Appeals considered precisely when a trial judge should conduct an

in camera review of privileged records. There, the court stated "[t]he trial judge . . . should not make an *in camera* review of each and every document that contains privileged information. The patient's claim of privilege shall be honored unless the need for inspection has been established." *Reynolds,* 98 Md. App. at 369, 633 A.2d at 464. To show the "need for inspection" (*i.e.*, to cross the threshold), the intermediate appellate court continued, "[t]he burden is on the defendant to persuade the trial judge that there is a substantial possibility that . . . although privileged, the records contain information that might influence the determination of guilt." *Id.* We note that the Court of Special Appeals in *Fisher* [*v. State*, 128 Md. App. 79 (1999)] cited both the *Reynolds* iteration of the threshold as well as the standard we enunciated in *Goldsmith,* holding that defense counsel's proffer failed either way. *See Fisher,* 128 Md. App. at 128, 736 A.2d at 1151. Although a reasonable mind would conclude that "information that might influence the determination of guilt" (*Reynolds*) is practically equivalent to "exculpatory information necessary for a proper defense" (*Goldsmith*), **we take this opportunity to clarify that Maryland courts should utilize the *Goldsmith* standard in analyzing a defendant's proffer for access to privileged mental health records**.

In neither *Goldsmith* nor *Fisher* did the defendant present a sufficient proffer. In *Goldsmith,* defense counsel asserted that "there [was] a question about the complainant's emotional state, and I think that's tied into the credibility. I mean, I simply don't know what her emotional state is." *Goldsmith,* 337 Md. at 118, 651 A.2d at 869. Similarly, in *Fisher,* defense counsel stated "[w]e have no way of knowing, without having access to those records, whether there is exculpatory material or not." *Fisher,*128 Md. App. at 128, 736 A.2d at 1151. In the words of the Court of Special Appeals, these proffers "do[ ] not do it." *Id.*

In the instant case, defense counsel proffered that: "I'd like to see the records, one, to know what is this young man's mental health diagnosis. Is he, is he bipolar? Is he paranoid schizophrenic? **Is he delusional? Does he have hallucinations . . . . if he's delusional, and if [he] has hallucinations, I believe . . . that's exculpatory for [Respondent's] case." The trial judge concluded that this "fishing expedition" was not enough to pierce the victim's privilege.** In reversing, the Court of Special Appeals held that the suggestion regarding the apparent need to know the victim's propensity for veracity was enough to at least warrant an *in camera* review.

We disagree. **A "fishing expedition," without more, does not satisfy the *Goldsmith* standard. The mere generalized suggestion "that it**

would be appropriate to know of [J.C.'s] propensity for veracity" is not enough to overcome the victim's privilege in his mental health records. As stated in *Goldsmith,* **a "speculative assertion that the records might be relevant for impeachment" will not cut it**. 337 Md. at 135, 651 A.2d at 877. Moreover, under the intermediate appellate court's rationale in this case, it is arguable that *any* defendant would be able to pierce the victim's privilege, because it would always be "appropriate to know [the victim's] propensity for veracity." We stated as much in *Goldsmith:* "**We cannot permit a privilege to be abrogated even at the trial stage by the mere assertion that privileged records *may* contain information relevant to credibility. To do so would virtually destroy the psychotherapist-patient privilege of crime victims.**" 337 Md. at 133, 651 A.2d at 876 ([italicized] emphasis in original).

We recognize how unlikely it may be that a defendant or defense counsel will *know* in advance what information is in a patient's privileged mental health or psychotherapy records. Nonetheless, in order to gain access to any information in those records, the defendant may (and must) be able to point to *some fact* outside those records that makes it *reasonably likely* that the records contain exculpatory information. We look to our sister states for examples of facts that could reveal a likelihood that the privileged records contain exculpatory evidence. One such example is evidence of prior inconsistent statements. . . . Another example is strange behavior by the victim surrounding the counseling sessions . . . . In [another case, in] support of a request to review the claimant's mental health records, the defendant pointed to prior abuse of claimant by her biological father and factual support for sexually aggressive behavior by the victim. Although the trial court denied the defendant's request, the Supreme Court of Michigan held, based on defendant's proffer, that *in camera* review "may have been proper" and remanded for further proceedings, including to further develop the record. 521 N.W.2d at 576–77.

Respondent in this case offered no such factual predicate to show a likelihood that the victim's psychotherapy records contained exculpatory information. On the contrary, defense counsel merely proffered that "if he's delusional, and if [he] has hallucinations, I believe . . . that's exculpatory for [Respondent's] case." **In effect, all defense counsel proposed were hypotheticals—in other words, too many "if's."** The Court of Special Appeals concluded that the "suggest[ion] that it would be appropriate to know of [J.C.' s] propensity for veracity . . . . [was] sufficient, at the very least, to call for an *in camera* review of the records to determine their relevance, *vis a vis* [Respondent's] constitutional rights, before ruling

> on [National Pike's motion]." **Although we do not disagree that it would be "appropriate to know of [J.C.'s] propensity for veracity," that alone is not enough to outweigh a victim's right to assert the privilege in the victim's mental health records**. *See Goldsmith*, 337 Md. at 128 n. 5, 651 A.2d at 874 n. 5 ("Merely stating *'suppose'* the victim did this or said that is not a proffer sufficient to establish a need for the records."). As we have repeated, we must weigh the defendant's need for the evidence with the victim's privacy right in privileged records. Based on this record, Respondent's proffer did not meet the required threshold and he is therefore not entitled to review J.C.'s counseling records for evidence regarding J.C.'s propensity for veracity.

Id. at 249-54 (bold emphasis added; footnotes omitted).

Dr. Smithpeter fell far short of meeting the *Goldsmith* threshold for an *in camera* review. The ALJ found that Dr. Smithpeter had failed to generate any evidence that the Patient suffered from a mental disability bearing on her ability to accurately recall events, or that the Patient had made prior inconsistent statements of such gravity that her credibility could reasonably be questioned. As in *Johnson*, because Dr. Smithpeter proffered no "factual predicate to show a likelihood that the [Patient's mental health records] contain exculpatory information," *id*. at 253, the ALJ properly determined that Dr. Smithpeter was not entitled to have the ALJ conduct an *in camera* review. We agree with the Board's conclusion that Dr. Smithpeter was not entitled to an *in camera* review of the Patient's mental health records based only on speculation about what the privileged records might contain.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.