

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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DR. SHERA D. BRADLEY, *Petitioner*,

vs.

THE EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA in  
and for the County of Clark, and THE HONORABLE DOUGLAS W.  
HERNDON, District Court Judge, *Respondents*,

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Tracie K. Lindeman  
Clerk of Supreme Court

vs.

DONTAE HUDSON, an individual; and THE STATE OF NEVADA, by and  
through STEVEN B. WOLFSON in his official capacity as District Attorney for  
the County of Clark, Nevada, *Real Parties in Interest*.

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**PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY,  
MANDAMUS**

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**Supreme Court Case No.:**

District Court Case No.: C-15-307301-1  
The Honorable Douglas W. Herndon  
District Court, Clark County

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DR. SHERA D. BRADLEY

Petitioner,

vs.

THE EIGHT JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA in and for the County of  
Clark, and THE HONORABLE  
DOUGLAS W. HERNDON, District  
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vs.

DONTAE HUDSON, an individual;  
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through STEVEN B. WOLFSON in his  
official capacity as District Attorney for  
the County of Clark, Nevada,

Real Parties in  
Interest.

**NRAP 26.1 Disclosure**

The undersigned certifies that there are no interested entities or persons to list in this statement as defined in the Nevada Rules of Appellate Procedure, Rule 26.1.

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PETITION FOR WRIT OF PROHIBITION OR MANDAMUS**

**I. RELIEF SOUGHT**

Pursuant to NRS 34.150, *et seq.*, NRS 34.320 *et seq.*, and Nevada Rule of Appellate Procedure 21, Petitioner Dr. Shera D. Bradley, Ph.D., by and through her counsel, Kathleen Bliss Law PLLC, hereby petitions this Court for the issuance of a writ of prohibition and for clarification of law regarding the scope and extent of the psychologist-patient privilege. Alternatively, or in addition, Petitioner requests the issuance of a writ of mandamus by this Court compelling the Honorable Douglas W. Herndon to vacate his Order requiring Petitioner, the treating psychologist herein, to produce her treatment records to the court in camera for consideration as to whether said records should be produced to the defense as discoverable documents in a criminal case.

**II. ISSUE PRESENTED**

Whether a trial court has the authority pursuant to the general discovery statute in criminal cases, NRS 174.235, and under the United States Constitution, as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, to compel a treating psychologist to produce, in camera, treatment records, after the psychologist has asserted that the treatment records are privileged, as provided by NRS 49.209 and NRS 49.211(2).

### **III. FACTUAL BACKGROUND**

In the underlying District Court case, defendant/real-party-in-interest Dontae Hudson is charged by the State of Nevada with, inter alia, trafficking a minor for sex, in violation of NRS 201.300. (Register of Actions, Case No. C-15-307301-1, Appendix at 80-81)

On December 4, 2015, Mr. Hudson filed a motion in the District Court requesting an Order directing Petitioner, a psychologist, to release the confidential patient treatment records of her patient, a minor, who is Mr. Hudson's alleged victim. (Motion for Discovery, Appendix at 1). The State opposed the motion, but did not address the psychologist-patient privilege. (Opposition, Appendix at 16).

The Honorable Judge Herndon entered an Order Regarding Juvenile Records on January 1, 2016, which directed Dr. Bradley to produce "the complete juvenile and delinquency file related to [the minor]. (See Order, Appendix at 30).<sup>1</sup> Dr. Bradley did not have an opportunity to be heard or otherwise assert the privilege prior to the District Court's Order. The District Court filed an amended order on February 9, 2016. (Amended Order, Appendix at 33).<sup>2</sup>

After retaining counsel, Dr. Bradley filed a Motion to Vacate the Amended Order Requiring Disclosure of Confidential Treatment Records to the Court and to

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<sup>1</sup> The Order contained the child's full name and date of birth, so these personal identifiers have been redacted as public disclosure violates the privacy of the child.

<sup>2</sup> The child's full name and date of birth are redacted in the Amended Order, too.

Further Seal All Pleadings Related to Child Victim on May 5, 2016. (Motion to Vacate, Appendix at 36).

On May 9, 2016, Defendant Hudson filed a Motion to Compel and for Shera Bradley to be Held in Contempt for her failure to produce the records. (Motion to Compel, Appendix 66). Defendant did not file a response to Dr. Bradley's Motion to Vacate. Dr. Bradley filed an Opposition to the Motion to Compel (Register of Actions, Appendix 81).

The District Court held a hearing on June 2, 2016. At that hearing the District Court denied Dr. Bradley's Motion to Vacate, but stayed its order compelling production of the treatment records for one week, allowing Dr. Bradley to file this Writ of Prohibition or, Alternatively, Mandamus. *Id.*

#### **IV. LEGAL ARGUMENT**

##### **A. Standard for Extraordinary Writs.**

Under NRS 34.320 *et seq.* and Nevada Rule of Appellate Procedure 21, a writ of prohibition may be issued by this Court to prohibit an act by the District Court. A writ of prohibition is an extraordinary remedy within the Court's discretion. *Smith v. District Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). A writ will not issue when a petitioner has a plain, speedy and adequate remedy in the ordinary course of law. *Walters v. Eighth Judicial Dist. Court*, 2011 Nev. LEXIS 82, 7, 263 P.3d 231, 233-34 (2011). The Court may review a writ of prohibition when

statutory interpretation or application is at issue. *Walters* at 8-10. This Court may issue a writ of prohibition “to prevent improper discovery when a district court enters a discovery order in excess of its jurisdiction.” *State v. Second Judicial District Court*, 120 Nev. 254, 259 (Nev. 2004)(citing *Wardleigh v. District Court* 111 Nev. 345, 351 (1995); *Clark v. District Court*, 101 Nev. 58, 64 (1985)).

Where there is no adequate remedy or an important legal issue arises warranting clarification, a writ of prohibition is proper. *Second Judicial District Court*, 120 Nev. at 259.

This Court has also held that it will exercise its discretion to review matters under mandamus where the “issue of law is a matter of first impression and may be dispositive of the case.” *Otak Nev., LLC v. Eighth Judicial District Court*, 312 P.3d 491, 496 (Nev. 2013). This Court has jurisdiction over either remedy pursuant to NRS 34.150 *et seq.* and NRS 34.320 *et seq.*

Here, Dr. Bradley petitions this Court for a writ of prohibition, preventing the District Court from piercing the psychologist-patient privilege to review, albeit in camera, treatment records for “discoverable” information the District Court could then produce to the Defendant. Petitioner is unaware of any applicable case law on this precise issue where the privilege clearly exists and has been asserted; the records solely concern psychological treatment; and Defendant has other means of impeaching his accuser and has wholly failed to establish a compelling need for the

Court to review the records in violation of the victim's (and psychologist's) statutory privilege.

**B. This Court Should Clarify that Privileged Treatment Records of a Psychologist are not Discoverable by a Defendant.**

Psychologist and patient enjoy a privilege encoded by statute in Nevada. That statute provides:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between the patient and the patient's psychologist or any other person who is participating in the diagnosis or treatment under the direction of the psychologist, including a member of the patient's family.

NRS 49.209.

Both the patient *and* the treating psychologist may claim the privilege. *See* NRS 49.211. There should be no dispute that Dr. Bradley is providing psychological treatment. (See Motion to Vacate, Attachment 1 (Dr. Bradley's Affidavit), Appendix at 44-45). As the minor-victim's treating psychologist, Dr. Bradley is entitled by statute to claim the privilege on behalf of her patient. *See* NRS 49.211(2). Dr. Bradley has affirmatively done so before the District Court.

The treatment records concern just that: treatment. Dr. Bradley did not prepare the records for law enforcement purposes. (Affidavit, Appendix at 44-45). It is Dr. Bradley's professional opinion that disclosure – even in camera – would

have a deleterious effect on her patient and create harmful precedent for all children who are alleged victims of human trafficking. *Id.*

Defendant based his request before the District Court primarily on a United States Supreme Court decision, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). *Ritchie* involved social services records, not the more sensitive psychological treatment records that are at issue here. Furthermore, there was a provision under Pennsylvania law that allowed disclosure under certain circumstances. *Ritchie*, 480 U.S. at 43-44. Thus, *Ritchie* is not on point, and to the extent the District Court relied on its holding, it did so in error.

Nevada law provides for eight specific exceptions to this privilege. *See* NRS 49.213. These exceptions involve issues surrounding mandatory hospitalization, the validity of a will, an immediate threat that a patient will harm himself or others, court-ordered examinations, and other similar, entirely irrelevant scenarios. *Id.* None of these exceptions apply here. Finally, while in Nevada, a patient may waive the psychotherapist privilege by putting her mental state into issues, such as in a personal injury case, *see, e.g., Potter v. West Side Transportation*, 188 F.R.D. 362, 364-65 (D. Nev. 1999), the minor here is not a party to any civil action, and has certainly not somehow placed her mental state into issue in the criminal case.

Here, there is nothing in the record or in the District Court's decision that would demonstrate defendant has a compelling need for these records, a showing that is required by Nevada law. *See State v. Eighth Judicial Dist. of State, ex rel. Cty. of Clark*, No. 56761, 2011 WL 1884736, at \*1 (Nev. May 16, 2011)(referring to compelling need test set forth in *Koerschner v. State*, 116 Nev. 1111, 13 P.3d 451 (2000), modified by *State v. Dist. Ct. (Romano)*, 120 Nev. 613 (2004), overruled by *Abbott v. State*, 122 Nev. 715 (2006)).

Certainly, where such a well-established and statutorily recognized privilege exists as the psychologist-patient privilege, and there is no basis for lifting its protections other than a defendant's general discovery request, the District Court must be prohibited from violating the privilege and reviewing the treatment records of a psychologist and her patient.

This sensitive privilege requires a more careful and deliberate analysis before piercing it. As the United States Supreme Court has emphasized in carving out the parallel federal privilege under Fed. R. Evid. 501:

Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust'. . . Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and

fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. . . .

*Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

The United States Supreme Court also observed that protecting the privilege serves an important public policy. *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (attorney-client), and *Trammel v. United States*, 445 U.S. 40, 47 (1980) (spousal)). These concerns are especially prominent here where a child, who is not a party to any civil or criminal proceeding, risks having her closest secrets shared only with her psychologist exposed. To do so would add insult to injury; the minor-victim's confidences would be revealed to an outsider (the Court) through no fault of her own and, potentially, to the very individual accused of victimizing her (the defendant).

Finally, Dr. Bradley, who has treated child victims for years, has the expertise and training to recognize the harmful effects that disclosure could cause to her client. As stated before the District Court, it is her professional opinion that disclosure would jeopardize the open nature of the privately open communication between therapist and patient, which is central to the patient's treatment. Regardless of these policy concerns, defendant has not pointed to any applicable

exception to the privilege identified in NRS 49.213, and has wholly failed to demonstrate why this important privilege should be abrogated in favor of his general request for discovery.

## **V. CONCLUSION**

Based on the foregoing, Petitioner respectfully requests that this Court issue an Order prohibiting the District Court from compelling Petitioner to disclose the treatment records of her minor-patient to the defendant or to the District Court for in camera review.

Dated this 8th day of June 2016.

/s/ Kathleen Bliss  
Kathleen Bliss, Esq.  
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Jason Hicks, Esq.  
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Counsel for Petitioner

## **VI. CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

X This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font size and Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it:

X Does not exceed 30 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of June 2016.

/s/ Kathleen Bliss  
Kathleen Bliss, Esq.  
Counsel for Petitioner

## **VII. CERTIFICATE OF SERVICE**

I am resident of the State of Nevada, over the age of eighteen years, and not a party to this action. My business address is 400 S. 4<sup>th</sup> St., Suite 500, Las Vegas, Nevada, 89101. On June 8, 2016, I served the within document:

### **PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, MANDAMUS**

by electronically filing and serving it upon the parties listed below through the Court's electronic filing system, eFlex. I also mailed a true and correct copy of the same, postage prepaid, for deposit in the United States mail addressed as set forth below:

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The Honorable Douglas W. Herndon  
Eighth Judicial District Court, Dept. 3  
200 Lewis Ave.  
Las Vegas, NV 89155

/s/ Kathleen Bliss, Esq.  
Kathleen Bliss, Esq.  
Dated: June 8, 2016

## VIII. VERIFICATION

STATE OF NEVADA    )  
                                  )  
COUNTY OF CLARK    )

Under penalty of perjury, the undersigned declares that she is the attorney for the Petitioner named in the foregoing petition and knows the contents thereof, that the pleading is true of her knowledge, except as to those matters stated on information and belief, and that as to such matters she believes them to be true. This verification is made by the undersigned attorney pursuant to NRS 15.010, on the ground that the matters stated and relied upon in the foregoing petition are all contained in the prior pleadings and other records of the Court and the District Court, true and correct copies of which have been included in the appendix submitted with the petition.

Dated this 8<sup>th</sup> day of June 2016.

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