IN THE SUPREME COURT OF THE STATE OF NEVADA

DR. SHERA D. BRADLEY,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE DOUGLAS W. HERNDON, DISTRICT JUDGE

Respondents,

and

DONTAE HUDSON, AN INDIVIDUAL; AND THE STATE OF NEVADA, BY AND THROUGH STEVEN B. WOLFSON, IN HIS OFFICAL CAPACITY AS DISTRICT ATTORNEY FOR THE COUNTY OF CLARK,

Real Parties in Interest.

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Tracie K. Lindeman
Clerk of Supreme Court

CASE NO: 70522

ANSWER IN SUPPORT OF ISSUANCE OF WRIT OF PROHIBITION, OR ALTERNATIVELY, MANDAMUS

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy, Ofelia L. Monje, and submits this Answer in Support of Issuance of Writ of Prohibition, or Alternatively, Mandamus Factual and Procedural Background. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 1st day of July, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Ofelia L. Monje*
Ofelia L. Monje
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ANSWER IN SUPPORT OF ISSUANCE OF WRIT OF PROHIBITION, OR ALTERNATIVELY, MANDAMUS

FACTUAL AND PROCEDURAL BACKGROUND

On April 8, 2015, the State charged Real Party in Interest Dontae Hudson ("Hudson") by way Information as follows: Count 1 – First Degree Kidnapping (Category A Felony – NRS 200.310, 200.320); Count 2 – Sex Trafficking of a Child Under 16 Years of Age (Category A Felony – NRS 201.300.2a1); Count 3 – Child Abuse, Neglect, or Endangerment (Category B Felony - NRS 200.508(1)); and Count 4 – Living From the Earnings of a Prostitute (Category D Felony - NRS 201.320). 1 State's Appendix ("SA") 1-3. The Information alleged that Hudson kidnapped the 15 year-old victim, J.A., and forced her to work as a prostitute on his behalf. Id.

On December 4, 2015, Hudson filed a Motion for Discovery, requesting, in part, "[c]ounseling records of the alleged victim for services she received following the incident in question." 1 Petitioner's Appendix ("PA") 14.[1] The State filed an Opposition on December 14, 2015, noting that it was not required under NRS 174.235 and its constitutional obligations to seek out this information and that, in the event it did exist, disclosure would invade the victim's privacy and that statutory authority prevented its release. 1 PA 28. On February 9, 2016, the District

[1] The State notes that Dr. Bradley was never served with a copy of the motion as she is not a party, thus she never had an opportunity to assert the psychologist-patient privilege until after the motion was granted.

Court issued an order mandating that "any and all records for counseling services" provided by Petitioner Dr. Shera M. Bradley ("Bradley") to the victim after her February 2015 arrest be provided to the District Court for an in camera review. 1 PA 34.

On May 6, 2016, Bradley filed a Motion to Vacate Amended Order Requiring Disclosure of Confidential Treatment Records to Court and to Further Seal All Pleadings Related to Child Victim, noting that the requested records were subject to the psychologist-patient privilege and providing an affidavit wherein she stated that (1) she has not performed any investigative work on behalf of the State, (2) she has not shared her treatment records with any entity, and (3) disclosure would impair the psychologist-patient relationship and cause the victim further trauma. 1 PA 36-65. Hudson responded on May 9, 2016 by filing a Motion to Compel and for Shera Bradley to be Held in Contempt. 1 PA 66-79. The District Court denied Bradley's Motion to Vacate on June 2, 2016. 1 SA 12.

On June 9, 2016, Bradley filed the instant Petition for Writ of Prohibition or, Alternatively, Mandamus. This Court directed an answer from Hudson and the State on June 15, 2016. The State's Answer follows and concurs with Bradley's request for extraordinary relief.

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ARGUMENT

I

Extraordinary Relief is Warranted

This Court may issue a writ of mandamus "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." NRS 34.160. Further, a writ may also be appropriate "to control an arbitrary or capricious exercise of discretion." Hickey v. Eighth Jud. Dist. Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989).

Relief is warranted here. Petitioner seeks to protect her patient's right to keep her psychological treatment a private matter, rather than reviewed by the District Court in camera and potentially exposed to the public and put in the hands of a criminal defendant. First, this third-party request for production of documents fell outside the criminal discovery statutes and the State's constitutional obligations. Further, Bradley correctly asserted her privilege, and no exception to the privilege is at issue in this case. Finally, Hudson only made a general request for counseling records and failed to show any compelling need for the records, which forecloses any claim that he is entitled to the records under constitutional protections. Accordingly, this Court should grant the Petition for Writ of Prohibition, or Alternatively, Mandamus and compel the District Court to vacate its orders requiring in camera review of Bradley's records.

/ / /

A
Hudson's Request Was Not Within the Scope of the Discovery Statutes or the State's Constitutional Obligations

"There is no general constitutional right to discovery in a criminal case, and [Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963)] did not create one." Weatherford v. Bursey, 429 U.S. 545, 559, 97 S. Ct. 837, 846 (1977). Yet, the District Court has allowed Hudson to assert a right to discover material not within the State's possession, in issuing an Order mandating Bradley, a non-party to the criminal action at hand, to disclose the counseling records of the victim, another non-party to the litigation.

"Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment.'" State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (quoting Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000)). To adequately allege a Brady violation, the accused must make three showings: (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) prejudice ensued. Id. (quoting Mazzan, 116 Nev. at 67, 993 P.2d at 37).

Brady does not require that the State perform an investigation on behalf of the defense. Instead, the Brady duty only extends to government agencies involved in the investigation or prosecution of the same defendant. Kyles v. Whitley, 514

U.S. 419, 115 S. Ct. 1555 (1995); United States v. Zuno-Arce, 44 F.3d 1420, 1427 (9th Cir. 1995) (the prosecution is deemed to have knowledge of and access to anything in the custody and control of any federal agency participating in the same investigation of the defendant). There is no duty to search "all agencies of the same government." Odle v. Calderon, 65 F. Supp. 2d 1065, 1071-72 (N.D. Cal. 1999); see also United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (declining to impose unlimited duty on prosecutor to inquire of other offices not working with prosecutor's office on the case, because to do so would be to adopt a "monolithic view of the government" that ultimately would lead to prosecutorial paralysis).

The Brady duty to search for favorable information extends only to information in the possession or control of law enforcement. See United States v. Plunk, 153 F.3d 1011, 1027 (9th Cir. 1988), overruled on other grounds by United States v. Hankey, 203 F.3d 1169 (9th Cir. 2000) (no Brady duty to disclose information in federal public defender's files regarding prior inconsistent statements made by a government witness; Brady duty extends only to information in the possession or control of law enforcement personnel); United States v. Friedman, 593 F.2d 109, 120 (9th Cir. 1979) (government had no Brady obligation with regard to co-defendant's diary about which it had no knowledge of the information contained in it, no access to it, and no control over it).

Here, the records at issue are in the custody and control of Bradley, a private citizen, and not the State or an investigatory agency. Bradley attested that she has not shared her records with anyone and has never performed investigative work on behalf of state agencies in connection with the victim. 1 PA 45. Further, Hudson made no showing below that the records were favorable to him. Thus, Brady was simply inapposite.

Nor were the materials discoverable pursuant to NRS 174.235 because they were not within the "possession, custody, or control" of the State. This distinction was noted by this Court in regard to the practice of compelling a child sexual assault victim to undergo a psychological evaluation in State v. Eighth Judicial Dist. Court (Romero), 120 Nev. 613, 619, 97 P.3d 594, 598 (2004), overruled on other grounds by Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006) ("NRS 174.235 codifies discovery powers in criminal cases, the ability to discover reports of mental examinations of an alleged victim is limited to reports within the State's possession. NRS 174.235 does not grant trial courts the authority to require an alleged victim, who is, after all, a witness in the action but not a party to the action, to submit to psychological examination."). Here, the records are even farther outside the purview of NRS 174.235 because the State has no intention of calling Bradley as a witness.

By seeking disclosure from a non-investigatory third party under these authorities, Hudson sought to utilize the discovery power in a way that is neither permissible under statute nor constitutionally mandated. Pennsylvania v. Ritchie, 480 U.S. 39, 57-58, 107 S. Ct. 989, 1001-02 (1987), is entirely inapposite – that case concerned records in the possession of the *government* (the state child protective services agency), where Brady obligations apply. Here, there is simply no Brady obligation at stake because the State's investigative and prosecutorial arm does not have possession of the documents – rather, these documents are in the possession of Bradley.

Thus, if not for any other reason, mandamus is warranted due to the fact the Hudson sought disclosure from Bradley under the discovery statutes and Brady, which simply do not apply to her.

B

These Records are Squarely Protected by the Psychologist-Patient Privilege

Bradley correctly contends that the psychologist-patient privilege protects the disclosure of these documents. NRS 49.209 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.

The privilege may be asserted by psychologist and patient alike. NRS 49.211.

There are nine exceptions to this privilege:

> There is no privilege pursuant to NRS 49.209 or 49.211:
>
> 1. For communications relevant to an issue in a proceeding to hospitalize the patient for mental illness, if the psychologist in the course of diagnosis or treatment has determined that the patient requires hospitalization.
>
> 2. For communications relevant to any determination made pursuant to NRS 202.360.
>
> 3. For communications relevant to an issue of the treatment of the patient in any proceeding in which the treatment is an element of a claim or defense.
>
> 4. If disclosure is otherwise required by state or federal law.
>
> 5. For communications relevant to an issue in a proceeding to determine the validity of a will of the patient.
>
> 6. If there is an immediate threat that the patient will harm himself or herself or other persons.
>
> 7. For communications made in the course of a court-ordered examination of the condition of a patient with respect to the specific purpose of the examination unless the court orders otherwise.
>
> 8. For communications relevant to an issue in an investigation or hearing conducted by the Board of Psychological Examiners if the treatment of the patient is an element of that investigation or hearing.

9. For communications relevant to an issue in a proceeding relating to the abuse or neglect of a person with a disability or a person who is legally incompetent.

The State cannot invoke the privilege on behalf of the victim. However, it notes that Bradley's argument that her communications with the victim were privileged comports with Nevada law. Here, as Bradley noted, her communications with the victim in this case fall within the scope of this privilege and no exception applies. 1 PA 36-45. Accordingly, her exercise of the psychologist-patient privilege and refusal to submit the documents for in camera review was sound.

C

Hudson is Not Entitled to Disclosure of These Records Under the Sixth and Fourteenth Amendments

Finally, the Confrontation and Compulsory Process Clauses of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment do not justify overcoming the psychologist-patient privilege and the strong interest the victim and Bradley have in keeping their communications private.

"[T]he right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. . . . The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial

to question witnesses." Ritchie, 480 U.S. at 52-53, 107 S. Ct. at 999. The United States Supreme Court "has never held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes." Nevada v. Jackson, 569 U.S. ___, ___, 133 S. Ct. 1990, 1994 (2013) (emphasis added).

Applying the Sixth Amendment, the California Supreme Court has spoken on the issue of mandated disclosure of privileged mental health information and held that it is not warranted in the pre-trial context:

> [D]efendant asks us to hold that the Sixth Amendment confers a right to discover privileged psychiatric information before trial. **We do not, however, see an adequate justification for taking such a long step in a direction the United States Supreme Court has not gone. Indeed, a persuasive reason exists not to do so**. When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon, as in [Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1005 (1974)], to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. . . . **Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily.**
>
> The facts of the case before us illustrate the risk inherent in entertaining such pretrial requests. Defendant sought disclosure of Jacqueline's psychotherapy records on the theory that such "records [would] provide evidence of the existence or nonexistence of said molestations . . . . [and would be] necessary to prove the victim's lack of

> credibility, her propensity to fantasize and imagine events that never occurred." In fact, defendant at trial admitted engaging in sexual conduct with his foster daughter, thus largely invalidating the theory on which he had attempted to justify pretrial disclosure of privileged information. Pretrial disclosure under these circumstances, therefore, would have represented not only a serious, but an unnecessary, invasion of the patient's statutory privilege
> . . .
>
> **For the reasons stated, therefore, we decline to extend the defendant's Sixth Amendment rights of confrontation and cross-examination to authorize pretrial disclosure of privileged information.** Of course, nothing we say here is intended to address the application at trial of the principles articulated in Davis . . . Nor do we have an occasion in this case to revisit the question of whether a defendant may generally obtain pretrial discovery of unprivileged information in the hands of private parties. **That the defense may issue subpoenas duces tecum to private persons is implicit in statutory law . . . and has been clearly recognized by the courts for at least two decades. . . . However, this more general right provides no basis for overriding a statutory and constitutional privilege.**

People v. Hammon, 15 Cal. 4th 1117, 1127-28, 938 P.2d 986, 992-93 (1997). This Court should find this authority persuasive – while a defendant surely has a right to present evidence and cross-examine accusers, this right does not and should not extend to pretrial disclosure of privileged information. Doing so presents too significant a risk that unnecessary disclosure will occur. Likewise, this case presents the same risk.

Further, the United States Supreme Court has concluded that "compulsory process provides no greater protections in this area than those afforded by due process." Ritchie, 480 U.S. at 56, 107 S. Ct. at 1001. And due process does not warrant overriding the privilege, especially when the privileged information has not been shown to be material. See United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 1264 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions."); Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973) ("In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."); see also Jaeger v. State, 113 Nev. 1275, 1280, 948 P.2d 1185, 1188 (1997) ("Even in the context of a full criminal trial, a criminal defendant is only entitled to subpoena documents that are shown to be material to his or her defense.").

The line of cases concerning compelled psychological examinations of sexual assault victims most resembles the issues presented in this Petition. Cf. Romero, 120 Nev. at 629, 97 P.3d at 604-05 ("Our past decisions are a clear indication that we have believed that the courts of Nevada have the authority to order psychological examinations when necessary to provide a fair tribunal and to meet due process requirements."). Applying the test utilized by this Court in the

realm of psychological examinations, it is clear that Hudson is not entitled to disclosure of this documentation.

Pursuant to Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000), a defendant seeking a psychological evaluation of an alleged child victim must demonstrate a "compelling need" for the exam, and whether a compelling need exists depends on: (1) whether the State actually calls or obtains some benefit from an expert in psychology or psychiatry; (2) whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim; and (3) whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity. Koerschner, 116 Nev. at 1116-17, 13 P.3d at 455.

Here, Hudson made nothing close to the showing of a "compelling need." Instead, he made only a broad discovery request for "[c]ounseling records of the alleged victim for services she received following the incident in question." 1 PA 14. Nothing more. And none of the Koerschner factors can be met. While the State intends to call an expert witness on pimp and prostitution subculture, a witness only acts as an expert for purposes of the first Koerschner factor "when he does more than merely relate the facts and instead analyzes the facts and/or states whether there was evidence that the victim was coached or biased against the

defendant." Abbott, 122 Nev. at 728, 138 P.3d at 471; 1 SA 5. This is obviously not in the purview of the State's expert.

Further, there is nothing to suggest that the victim's mental or emotional state may have affected her veracity. See Koerschner, 116 Nev. at 1117, 13 P.3d at 456 ("[W]hile the child-victim in this case had experienced a very tragic and stressful childhood, there was no indication in the record that her veracity was affected to any particular degree by her mental or emotional state."); see also Chapman v. State, 117 Nev. 1, 5, 16 P.3d 432, 434 (2001) ("[T]he facts of an ugly divorce between the victim's parents, and animosity between [the victim's] father and Chapman, are insufficient grounds to believe that the victim's mental or emotional state may have affected her veracity.").

Thus, were a "compelling need" test applied here, Hudson clearly would not meet the requirements of such a test.

Further, under current Nevada law, the remedy when a "compelling need" is shown is not to force a non-consenting victim to undergo an invasive physical examination; rather, the remedy is to preclude the State from using psychological testimony to its benefit. The Nevada Legislature recently enacted the following law:

> 1. In any criminal or juvenile delinquency action relating to the commission of a sexual offense, a **court may not order the victim of or a witness to the sexual**

offense to take or submit to a psychological or psychiatric examination.

2. The court may exclude the testimony of a licensed psychologist, psychiatrist or clinical worker who performed a psychological or psychiatric examination on the victim or witness if:

(a) There is a prima facie showing of a compelling need for an additional psychological or psychiatric examination of the victim or witness by a licensed psychologist, psychiatrist or clinical worker; and

(b) The victim or witness refuses to submit to an additional psychological or psychiatric examination by a licensed psychologist, psychiatrist or clinical worker.

3. In determining whether there is a prima facie showing of a compelling need for an additional psychological or psychiatric examination of the victim or witness pursuant to subsection 2, the court must consider whether:

(a) There is a reasonable basis for believing that the mental or emotional state of the victim or witness may have affected his or her ability to perceive and relate events relevant to the criminal prosecution; and

(b) Any corroboration of the offense exists beyond the testimony of the victim or witness.

4. If the court determines there is a prima facie showing of a compelling need for an additional psychological or psychiatric examination of the victim or witness, the court shall issue a factual finding that details with particularity the reasons why an additional

> psychological or psychiatric examination of the victim or witness is warranted.
>
> 5. If the court issues a factual finding pursuant to subsection 4 and the victim or witness consents to an additional psychological or psychiatric examination, the court shall set the parameters for the examination consistent with the purpose of determining the ability of the victim or witness to perceive and relate events relevant to the criminal prosecution.

2015 Nev. Stat., ch. 399, § 24. Testimony given at the hearing on this bill reflects the problematic nature of courts invading the privacy rights of victims of sexual offenses:

> MS. LUZAICH: . . . The children who are victims of sex offenses are the ones who are the most vulnerable in society and need the most protection. The Special Victims Unit is seeing more and more motions by the defense to compel our children to undergo psychological evaluations. We always thought our goal was to protect these children, not to revictimize them by forcing them to undergo a psychological evaluation at the hands of a defense expert.

Hearing on A.B. 49 Before the Assemb. Committee, 2015 Assemb., 78th Sess. 25 (Nev. February 13, 2015) (testimony of Lisa Luzaich, Chief Deputy District Attorney, Special Victims Unit, Clark County District Attorney's Office). Similarly, should the State seek to present psychological testimony where the defendant has identified a compelling need for privileged psychological information, the remedy should not be to violate the victim's right to privileged

communications with his or her psychologist; it should be to prevent the State from presenting psychological testimony.

To do otherwise risks creating a chilling effect. A victim who seeks prosecution of his or her assailant but also requires psychological services will be presented a dilemma – seek essential health care, but risk exposure of the confidences made to her psychologist, or not seek psychological treatment, preserving confidences but depriving her of care most victims desperately need.

Accordingly, the Sixth and Fourteenth Amendments do not warrant invading the privacy of the victim in the case and exposing her confidences to the parties in this criminal action or to the District Court. Hudson produced nothing to support even a threshold finding that the psychological records contained information pertinent to his case, and prohibition, or alternatively, mandamus, should issue.

III
In the Event this Court Denies Bradley's Petition, It Should Give Clear Guidelines as to the District Court's Standard for Disclosure

The State contends that because Hudson failed to establish any basis for receiving the counseling records, the District Court abused its discretion in ordering that the records be produced for in camera review. Essentially, Hudson seeks to mount a fishing expedition through Bradley's records that would destroy the psychologist-patient privilege and relationship. The fact that Hudson is a defendant in a criminal action is insufficient to warrant production of the

documents, as the policy surrounding the psychologist-patient privilege outweighs his broad and speculative request for production of the records, especially considering that this is a pre-trial discovery request.

However, should this Court deny extraordinary relief, the State requests that this Court give the District Court guidelines for its in camera review and establish what must be contained within the records to warrant disclosure to Hudson. It is unclear which standard should be applied and any unguided review may result in an unnecessary violation of psychologist-patient privilege.

For example, the Court should instruct the District Court that it is insufficient that the records contain potentially relevant information within them. This Court should instead instruct the District Court that the records must indicate a "compelling need" as outlined by Koerschner, and that failing to permit disclosure of this material would result in a denial of due process. It is only under this high standard that the psychologist-patient privilege should be pierced, if it must at all.

Further, this Court should instruct the District Court that disclosure must be narrowly tailored in such a manner that privileged information for which there is *not* a compelling need is not disclosed. Only with this guidance can the District Court properly assess the records while preserving the psychologist-patient privilege.

Accordingly, although the State contends that extraordinary relief is warranted to prevent in camera review, in the event the Court finds that this relief is not warranted, it should give the District Court guidelines for its in camera review.

Dated this 1st day of July, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Ofelia L. Monje*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 1, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

JUDGE DOUGLAS W. HERNDON
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BY */s/ j. garcia*
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