IN THE SUPREME COURT OF THE STATE OF NEVADA

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*,

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*.

REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, MANDAMUS

Supreme Court Case No.: 70522

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

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

Appellee Hudson bases his Answer on two false premises: first, that the psychotherapist/counseling privilege is tantamount to a juvenile records privilege; and second, that Dr. Bradley (or the child victim) waived the privilege. Hudson further argues that this is merely a "discovery dispute," and that this Court should rule that his right to a fair trial outweighs the victim's privilege with her counselor. Hudson's Answer and Supplement to it fail.

1. Supreme Court Decisions Addressing the Confidentiality of Juvenile Records Lacks Relevance to the Psychotherapy/Counseling Privilege Asserted Here

Hudson relies almost entirely on *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), as his authority for production of the privileged treatment records at issue here. *Ritchie* is inapposite and serves as no authority for piercing the victim's treatment privilege with Dr. Bradley. The records in *Ritchie* concerned investigative files held by a social services/child protective services agency, not treatment files of a treating psychologist. Furthermore, the agency in *Ritchie* did not assert a psychotherapist/counseling privilege. Rather, a specific exception applied: Pennsylvania law protected the files as confidential records *subject to* disclosure if ordered by the court. There is no such provision under Nevada law for disclosure of privileged psychotherapist/counseling treatment records. *See* NRS 49.213.

Hudson claims that the exception for "disclosure otherwise required by state or federal law" under NRS 49.213 means that his "right to a fair trial" and for discovery in a criminal case under Nevada causes the psychotherapist privilege to yield in favor of disclosure. But he cites no case requiring disclosure under these circumstances. The trial court relied on no case requiring disclosure under these circumstances. Thus Hudson raises no specific compelling need other than: "The overriding 'public policy' considerations considered by the district court are Hudson's right to fair trial as protected by the United States Constitution." Ans. Br. at p. 10. Hudson does not point to the record for this assertion, because the trial court never made an evaluation of any public policy considerations. Dr. Bradley was ordered to produce the records on a date unknown without ever having an opportunity to assert the privilege in the first instance.

Simply, a ruling adopting Hudson's argument would result in court compelled disclosure of all privileged information, including psychotherapist records, attorney records, and spousal communications, simply because a defendant cites it in need of a fair trial.

Davis v. Alaska, 415 U.S. 308 (1974), similarly lacks meaningful application to the privilege at issue here. In *Davis*, juvenile delinquency records were sought for the purpose of cross examination. But here, Hudson has the victim's juvenile delinquency records. Nowhere does the *Davis* decision suggest that Hudson is now

entitled to receive mental health treatment records. What Hudson and the trial court fail to understand is that mental health treatment records are not juvenile delinquency records and disclosure of these "apples and oranges," so to speak, are covered by different statutes.

This Court rejects broad-net discovery fishing by litigants. *See Hetter v. Eighth Judicial District*, 874 P.2d 762 (2008). Without more than simply arguing generally under the principle that he has a right to a fair trial, which no one disagrees with, Hudson must demonstrate that the privilege must be pierced. He has never done so, and the trial court abused its discretion in ordering production. Notably, Hudson recites a string of alleged mental health problems suffered by the victim, and he then baselessly speculates that she cannot tell the truth. Hudson effectively cross examines this child before this Court. How is he so prejudiced, then, by Dr. Bradley's refusal to produce privileged treatment records? How much more damage to this victim does Hudson need? The victim's treatment depends on trusting her psychologist for the purpose allowing her to heal. The victim's confidential sharing of information with Dr. Bradley and Dr. Bradley's confidential communications with the victim serve one purpose and one purpose alone: to rehabilitate and restore a damaged patient so that she may assume a normal life and become healthy member of society.

2. In Analyzing the Privilege under NRS 49.209 Relative to Disclosure of Treatment Records Here, this Court Should Apply the Analysis of *Jaffe v. Redmond* in Finding that Public Policy Prohibits Disclosure

There is no dispute that Nevada recognizes the psychotherapist privilege under NRS 49.209. Hudson concedes as much. Outside of civil personal injury actions, or where the state may present evidence of an examination or evaluation, there has been no decision by this Court concerning court-compelled waiver of the psychotherapist privilege in a case like this. *See, e.g., Potter v. West Side Transportation*, 188 F.R.D. 362 (D. Nev. 1999) (patient put mental condition into issue); *Koerschner v. State*, 116 Nev. 111 (2000) (mental health examination by defendant of victim where state seeks to admit psychological evaluation in case-in-chief), modified by *State v. Dist. Ct. (Romano)*, 120 Nev. 613 (2004), overruled on other grounds by *Abbott v. State*, 122 Nev. 715 (2006).

The United States Supreme Court's analysis in *Jaffe v. Redmond*, 518 U.S. 1 (1996), is instructive and was notably ignored by Hudson in his Answering Brief. There, survivors of a man shot by a police officer sought the police officer's counseling records in a civil action. The Court determined that there is a significant public policy interest in recognizing the privilege, hence adopting it as a privilege under Fed.R.Evid. 501. The Court explained:

> The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than

> its physical health, is a public good of transcendent importance. In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access – for example, admissions against interest by a party – is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

Id. at 11-12.

Hudson argues that there is no apparent public policy interest here in refusing to release privileged records in a criminal case. He further claims that Dr. Bradley has produced no empirical evidence supporting her opinion that release would harm the victim and interfere with her treatment. Ans. Br. at 10-11. These points have no merit. Nevada passed a law recognizing the privilege, so the policy is recognized by law. There is no exception in Nevada law for disclosure in a criminal case. Moreover, the *Jaffe* Court explained precisely the public policy interest in adopting a federal privilege. As for "empirical data," there should be no need to produce any; but to the extent that this Court deems it necessary or important, submitted herewith as Attachments 1 and 2 are the amicus letter of the

Nevada Psychological Association relative to this case and the Amicus Brief of the American Psychological Association submitted in *Jaffe*.

3. There Has Been No Waiver By The Victim Or Dr. Bradley.

Hudson presents a farcical argument: Dr. Bradley is in cahoots with the State, and, for some unspecified reason, "tampers" with witnesses on behalf of the LVMPD and the State, presumably in an effort to obtain convictions. *See* Ans. Br. at p. 8. He makes the fantastical argument that, "As reflected in her CV, Bradley has a clear agenda and it is not to aid defendants charged with sex trafficking." Ans. Br. at p. 9. While a juicy conspiracy theory, Hudson can point to nothing that would even remotely substantiate these claims. Regardless, Hudson's alleged hidden "agenda" was never properly before the trial court, and therefore cannot be raised now.

In his Supplement, he also suggests that a juvenile court ordered the victim to undergo "treatment"; hence, there somehow is proof of waiver. How so? Mere suggestions mean nothing more, and certainly reveal no waiver here. Indeed, even the trial court never entertained such suggestions. The privilege is the victim's to waive, alone, and Hudson's argument regarding a constructive waiver due to a juvenile court order is implausible.

Hudson also opines that third parties have the records, without any basis or evidence in support of this notion. Ans. Br. At 11. He further remarks that the

victim caused these charges and therefore waived her privilege. *Id.* This argument borders on outrageousness. But again, Hudson provides no legal or factual support, so this Court should pass on it. Hudson also thinks that because Dr. Bradley is paid by the state for treating the victim, her compensation serves as a waiver. Analogously, Hudson's argument means that every court-appointed attorney must disclose all privileged communications with her or his client just because the court paid for those indigent services. Indeed, Hudson's attorney might be court appointed. The Court must pass on this argument as wrong and that it would lead to no privileges whatsoever in criminal cases.

4. Hudson's Constitutional Rights Are Not Jeopardized By The Assertion of the Privilege.

Neither the Confrontation Clause nor Hudson's Due Process rights are implicated here. Dr. Bradley's assertion of the psychologist-patient privilege does not prevent Hudson from cross-examining the victim at his trial. Nor does it prohibit Hudson from testing the victim's credibility. Hudson is free to explore any issues regarding the victim's alleged mental state and/or use of narcotics through other avenues, or he ask the victim directly at trial. Hudson's desire to embark on a fishing expedition disguised as a quest for "Due Process" does not satisfy the compelling need requirement to pierce the privilege.

5. Hudson Attacks Dr. Bradley's Professional Qualifications And Integrity Instead of Demonstrating a Legal Exception Applies.

Hudson contends that "Bradley's opinion should be given no weight in that she "presents absolutely no evidence, empirical or otherwise to back up her opinion." Ans. Br. at p. 14. Again, this Court should wholly disregard Hudson's unsubstantiated and paranoid allegation that Bradley somehow benefits from his conviction. Furthermore, Hudson misunderstands the test. It is not Dr. Bradley's burden to provide evidence to support her opinion in order to assert the privilege. To the contrary, the assertion of the privilege is her statutory right, and the burden rests on Hudson to demonstrate his request falls within one of the exceptions identified in NRS 49.213

Here, there is nothing in the record or in the District Court's decision that reveals 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)).

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 5th day of August 2016.

/s/ Kathleen Bliss
Kathleen Bliss, Esq.
Nevada Bar No. 7606
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Counsel for Petitioner

I. 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 5th day of August 2016.

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

II. 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. 4th St., Suite 500, Las Vegas, Nevada, 89101. On August 5, 2016, I served the within document:

REPLY IN SUPPORT OF 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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/s/ Kathleen Bliss, Esq.
Kathleen Bliss, Esq.
Dated: August 5, 2016

Attachment 1

July 14, 2016

Re: Bradley (*Petitioner*) vs. The Eighth Judicial Court of the State of Nevada and The Honorable Douglas W. Herndon, District Court Judge (*Respondents*) vs. Dontae Hudson and Steven B. Wolfson, District Attorney (*Real Parties in Interest*)

Amicus Curiae Letter in Support of Petition for Writ of Prohibition or, alternatively, Mandamus (District Court Case No.: C-15-307301-1)

To the Chief Justice and the Justices of the Nevada Supreme Court:

The Nevada Psychological Association (hereinafter "Association") urges this Court to grant the petition in the above referenced case. The Association is in agreement with the petitioner's stance that extraordinary relief is warranted in this situation. The petitioner is following her ethical obligations as a psychologist in seeking to protect her patient's right to keep her psychological treatment a private matter, rather than share therapy notes in District Court. Even in camera hearings in District Court have the potential to see private, therapeutic information exposed to the public and out in the hands of a criminal defendant. The defendant is a third-party to this privileged relationship. We concur with the assertions made by the State in their Answer in Support of Issuance of Writ of Prohibition, or Alternatively, Mandamus dated July 01, 2016. The State argues that the third-party request in this case falls outside of the criminal discovery statutes. The third-party request for disclosure also failed to show a compelling need for the records. The protection of this minor victim in a privileged relationship with a psychologist should not be violated spuriously.

Jaffee v. Redmond[1] (hereinafter "*Jaffee*") set important precedence for psychotherapists and their patients. By regarding both reason and experience of the state legislatures, the Supreme Court of the United States noted that psychotherapist-patient privilege was "rooted in the imperative need for confidence and trust."[2] Trust in that confidence is imperative while working as a psychotherapist. During *Jaffee*, the Supreme Court of the United States received numerous amicus briefs from organizations such as the American Psychiatric Association, the American Psychoanalytic Association, the American Counseling Association—among many other organizations—all which were concerned with the damaging consequences which could occur after revealing a patient's psychological records. If a patient is not open and candid with their psychotherapist, the psychotherapist will not be able to fully mitigate a patient's traumatic experiences. This truth is especially applicable to minors. Trust is necessary for minors to receive therapy for their past traumatic experiences.

The American Psychological Association (hereinafter "APA"), as well as the American Psychiatric Association, iterated reasons why confidential communications should be kept between a psychotherapist and a patient. In its amicus brief[3] to the Supreme Court of the United States, the APA strongly supported psychotherapist-patient privilege, stating that the privilege existed to protect the intimate confidences given by the patients to their psychotherapists. Just as confidentiality is essential for an attorney to properly engage with a

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[1] *Jaffee v. Redmond*, 518 U.S. 1 (1996). (The Supreme Court of the United States held that the notes of a psychotherapist who counseled a police officer should be protected under *Rule 501 of the Federal Rules of Evidence*.)

[2] *Jaffee*, 518 U.S. at 10 (*quoting Trammel v. United States*, 445 U.S. 51 (1980)).

[3] Brief for the American Psychological Association et al. as Amici Curiae Supporting Respondents, *Jaffee v. Redmond*, 518 U.S. 1 (1996) (No. 95-266).

client, psychotherapists also need essential confidentiality to fully aid a traumatized patient. Psychotherapists offer their aid to help patients through traumatic events, and many times, these patients will confide within their psychotherapists, disclosing to the psychotherapists sacred thoughts that the patient would not relay to close friends and family members.

The consequences of revealing confidential communications of a minor patient can be detrimental. Trust is an important part in the psychotherapist-patient relationship—so important that some have argued that without trust "psychotherapy is rendered worthless in its absence."[4] As the APA once stated, "Unlike a patient with a broken leg who consults a physician, a client who seeks psychotherapy must expose his most intimate thoughts, feelings, and fantasies."[5] A patient who feels as if her intimate thoughts might be revealed will have a difficult time fully confiding within her psychotherapist. The APA, through its own practical experience and through empirical evidence, noted that a majority of patients reacted negatively when perceiving that their confidential communications would not be adequately protected, thus significantly impairing or destroying that psychotherapeutic relationship.[6] A minor who undergoes the same uncertainty will most likely react negatively, withholding information and suffering a reduction in helpful psychotherapy. By fearing that their psychotherapeutic notes may be released, the minors may decide to forgo mental therapeutic healing until after litigation, thereby rejecting therapy and continuing life without necessary mental relief. Minors which have been subjugated to a myriad of abuses will fear whether their

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[4] Mark B. DeKraai & Bruce D. Sales, *Privileged Communications of Psychologists*, 13 Prof. Psychol. 372, 372 (1982).

[5] Brief for the American Psychological Association et al. as Amici Curiae Supporting Respondents, *supra* note 3, at 13.

[6] Brief for the American Psychological Association et al. as Amici Curiae Supporting Respondents, *supra* note 3, at 14.

subjugators have access to their most intimate thoughts. By maintaining a privileged relationship, this Court may protect a minor victim and the victim's innermost thoughts, especially if the minor is fearful of receiving mental therapy in lieu of another gaining access to the minor's intimate thoughts.

As *Jaffee* noted, a psychiatrist's ability to help her patients depends on the patients' "willingness and ability to talk freely."[7] Victims, no matter the age, must be "willing to make a frank and complete disclosure of facts, emotions, memories, and fears"[8] for a psychotherapist to work effectively. Many of these statements may be embarrassing, traumatic, shocking, and debilitating, and through their introduction into court, these statements would violate a victim's privacy. *Jaffee* stated that protection of a patient's therapeutic notes serves a public benefit the same way spousal privilege "furthers the important public interest in marital harmony."[9] Through effective treatment by fully examining a patient's thoughts and fears, a psychotherapist helps to heal a patient's mind. A person's mental health is just as important as a person's physical health. To encourage public good, psychotherapists aid their patients to assuage the victims of past trauma. A minor victim who has undergone traumatic experiences needs psychotherapeutic aid—especially while at a vulnerable age—and through therapeutic aid, the victim will be able to re-enter society with a better state-of-mind. However, as discussed above, if that psychotherapeutic aid is stifled, a minor will have a more difficult time re-entering society, thus hindering the public good as a whole. By regarding the concerns of the APA, along with other organizations and legislative statutes which affirm these concerns, a

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[7] *Jaffee*, 518 U.S. at 10.
[8] *Id.*
[9] *Jaffee*, 518 U.S. at 11 (*quoting Trammel v. United States*, 445 U.S. 53 (1980)).

minor can be psychologically healed through psychotherapeutic aid, thereby strengthening the public good.

The Nevada Psychology Association urges the Court to consider the detrimental effects of releasing confidential psychological records of a minor to her accused offender. The Association also urges the Court to consider other avenues of proceeding through discovery, especially if there are no compelling needs for the psychological records of the minor. The present case affords this Court an opportunity to protect a minor victim by not breaching a privileged relationship for an unknown benefit to her accused offender.

Respectfully submitted,

Nevada Psychology Association

Attachment 2

No. 95-266

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CAROL HARTSURG, as Special Administrator
for Ricky Allen, Sr., Deceased,
Petitioner,

v.

MARVIN C. RYMOND, Hoffman Estates Police Officer,
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-266

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr., Deceased,
Petitioner,

v.

MARYLU REDMOND, Hoffman Estates Police Officer,
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF *AMICUS CURIAE* OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The American Psychological Association (APA), a scientific and professional organization founded in 1892, is the major association of psychologists in the United States. It has more than 135,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.

The APA is filing this brief to give the Court the benefit of the first-hand experience of its members who provide psychotherapy services on a daily basis. Those members understand that confidentiality is an essential part of

the process of psychotherapy. Maintaining the confidentiality of client communications is thus both an ethical duty and a practical necessity for this profession. Psychologists cannot effectively treat mental and emotional disorders if their clients fear that their innermost thoughts and feelings will not be kept confidential.

Amicus submits that this reality should weigh heavily in the Court's decision about whether to recognize a federal psychotherapist-patient privilege. Compelled testimonial disclosure, like any other breach of confidentiality, disrupts the psychotherapist-client relationship and can fatally impair the therapeutic process. Recognizing this intrusive effect, all fifty states have adopted some form of privilege for confidential communications to psychotherapists. They have concluded that the social benefits of the psychotherapist-patient privilege outweigh its limited costs to the justice system. This Court should weigh the same considerations and reach the same conclusion.

STATEMENT

Respondent Marylu Redmond is a police officer who shot and killed a man while in the line of duty. After the incident, Officer Redmond voluntarily sought counseling from a licensed clinical social worker. The victim's estate then sued Officer Redmond for wrongful death and deprivation of civil rights in federal court. Prior to and during the trial, petitioner sought to elicit testimony from Redmond and the social worker concerning what Redmond said about the circumstances of the shooting during her psychotherapy sessions. Redmond moved to quash this discovery, asserting the psychotherapist-patient privilege. The district court initially ordered disclosure of these communications, holding that a federal psychotherapist-patient privilege exists but that it does not apply to social workers. When Redmond and the social worker resisted the order, the court instructed the jury that it could infer that the information withheld would have supported petitioner's version of the events. The jury

found for petitioner and awarded a total of $545,000 in damages.

On appeal, the Seventh Circuit held (1) that there is a psychotherapist-patient privilege in federal court, and (2) that this privilege covers confidential communications made to social workers, including those at issue here. The court determined that it had the discretion to recognize such a privilege under Rule 501 of the Federal Rules of Evidence, which calls on federal courts to determine privilege issues by applying the "principles of the common law as they may be interpreted . . . in the light of reason and experience." Pet. App. 15-16. It then reasoned that

> recognition of a psychotherapist/patient privilege can only serve to encourage troubled individuals, as well as those who witness, participate in, and are intimately affected by acts of violence in today's stressful, crime ridden, homicidal environment, to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors.

Pet. App. 18. Citing this practical concern and the concomitant privacy interests of psychotherapeutic clients, the court of appeals decided to follow the lead of the fifty states, all of which have recognized some form of psychotherapist-patient privilege. Pet. App. 19-21. It held that the balance of competing interests favored the application of the privilege in this case and therefore shielded from disclosure the communications at issue. Pet. App. 22-23.

SUMMARY OF ARGUMENT

1. Federal Rule of Evidence 501 authorizes the federal courts to establish new evidentiary privileges not recognized at common law, based on "the principles of the common law as they may be interpreted . . . in the light of reason and experience." This rule, which calls on courts to apply the *principles* of the common law rather

than its specific existing rules, was intended by Congress to give the courts the flexibility to recognize new privileges.

2. The common law has long protected from disclosure confidential communications made within a relationship of trust. This principle, interpreted in the light of reason and experience, strongly supports the recognition of a psychotherapist-patient privilege in federal court.

Psychotherapeutic clients have strong expectations of confidentiality, and therapists have an ethical duty to maintain confidentiality. Confidentiality is essential to the psychotherapist-patient relationship because the effectiveness of psychotherapy depends on the client's willingness and ability to talk freely and candidly about his or her most intimate thoughts and feelings. The absence of confidentiality is likely to deter people from seeking therapy and to cause clients already in therapy to withhold information or to terminate the relationship prematurely.

The privilege benefits society as a whole because people who are mentally and emotionally healthy are more likely to be productive members of society and are less likely to pose a danger to the community. All fifty states have enacted some form of psychotherapist-patient privilege, concluding that this public benefit outweighs the interest in assuring that all evidence is available to assist in the administration of justice. There is no reason for the federal courts to strike the balance any differently.

3. If recognized, the privilege should not be applied on an *ad hoc*, case-by-case basis, for an unpredictable privilege is little better than no privilege at all. Rather, the privilege should be broad, and any exceptions to the privilege should be narrow, predictable, and categorical.

ARGUMENT

Congress, in Federal Rule of Evidence 501, expressly authorized the evolution of the federal common law of privileges, including the recognition of new types of privileges. Recognizing this fact, and given the importance of confidentiality to the effective treatment of mental and emotional disorders, the Seventh Circuit correctly decided to adopt and apply a psychotherapist-patient privilege in this case.

I. FEDERAL RULE OF EVIDENCE 501 AUTHORIZES THE FEDERAL COURTS TO RECOGNIZE A PSYCHOTHERAPIST-PATIENT PRIVILEGE.

There is no question that the federal courts have the *authority* to recognize a psychotherapist-patient privilege under Rule 501.[1] Although it is true that such a privilege did not exist "at common law," Congress never intended that the courts be restricted to the application of the privileges that existed at a particular point of common-law evolution. Rather, it intended to give the courts the flexibility to recognize new privileges and, indeed, specifically anticipated that the courts would use their best judgment about the psychotherapist-patient privilege issue.

Rule 501 provides, in relevant part, that in cases governed by federal law, "the privilege of a witness . . . shall be governed by the principles of the common law

[1] We do not understand petitioner to be challenging the Seventh Circuit's authority to recognize the privilege. *See* Pet. Br. at 11 ("Federal courts have the authority under Rule 501 . . . to establish new evidentiary privileges 'in the light of reason and experience.'"); Pet. for Cert. at 7 (Rule 501 "permits the federal courts to look to 'reason and experience' in considering claims of privilege not recognized at common law"). Some courts, however, have seemingly taken this view. *See In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989) (with three Justices dissenting from denial of certiorari); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976).

as they may be interpreted by the courts of the United States in the light of reason and experience." This language, on its face, rebuts the notion that Congress simply wanted to incorporate the common law as it stood on a given date. The rule calls on courts to apply the *principles* of the common law (not just the existing "rules" or "privileges") as they *may be* interpreted (not as they "have been" or "were" interpreted) in the light of reason and experience. Thus, the intent of Congress in enacting this rule was "not to freeze the law of privilege" but to " 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis' . . . and to leave the door open to change." *Trammel v. United States*, 445 U.S. 40, 47 (1980) (quoting 120 Cong. Rec. 40891 (1974) (statement of Rep. Hungate)). *See In re Doe*, 964 F.2d 1325, 1327-28 (2d Cir. 1992); *In re Zuniga*, 714 F.2d 632, 637 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

This conclusion is reinforced by the sequence of events that led to the adoption of Rule 501. The Federal Rules of Evidence, as originally proposed by the Judicial Conference Advisory Committee and adopted by this Court, contained nine specific evidentiary privileges, including a psychotherapist-patient privilege in Proposed Rule 504. *See* Proposed Fed. R. Evid. 502-510, 56 F.R.D. 183, 234-56 (1973). These specific privileges were intended to be the sole privileges available in federal court except as otherwise required by the Constitution or acts of Congress. *See* Proposed Fed. R. Evid. 501, 56 F.R.D. at 230. But Congress declined to adopt the nine fixed privileges in the Proposed Rules, and opted instead for the general, more malleable mandate of Rule 501. It did so in order "to provide the courts with *greater* flexibility in developing rules of privilege on a case-by-case basis." *United States v. Gillock*, 445 U.S. 360, 367 (1980) (emphasis added).

The legislative history confirms that the move from specific privileges to the new Rule 501 should not be interpreted as barring, or even disfavoring, the recognition

of the protections for confidential communications to psychiatrists and psychologists that were provided in the proposed Rule 504:

> The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule[s] submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.[2]

S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059.

To read Rule 501 as precluding judicial recognition of the psychotherapist-patient privilege solely because the privilege did not exist at common law would be particularly unwarranted in light of the actual evolution of the privilege under state law. Psychotherapy itself was relatively rare until after the Second World War. By that time, the majority of the states had already established a doctor-patient privilege by statute.[3] That privilege covered most of the therapeutic relationships then in existence, since they primarily involved physicians (*i.e.*, psychiatrists). Nevertheless, in the 1950s, the courts began

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[2] Although privileges must be recognized on a case-by-case basis, they should not be applied on a case-by-case basis. *See* note 12, *infra*.

[3] *See* Zechariah Chafee, Jr., *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?* 52 Yale L.J. 607, 607 (1943) (New York passed the first physician-patient privilege in 1828 and all but seventeen states recognized a doctor-patient privilege in 1943).

to show an interest in recognizing a separate psychotherapist-patient privilege. *See* Proposed Fed. R. Evid. 504 advisory committee's note, 56 F.R.D. at 242 ("While the common law recognized no general physician-patient privilege, it had indicated a disposition to recognize a psychotherapist-patient privilege . . . when legislatures began moving into the field."); Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 Nw. U.L. Rev. 384 (1952); *Binder v. Ruvell*, Civil Docket No. 52C2535, Circuit Ct., Cook Co., Ill., *reported in* 15 Am. Med. Ass'n. J. 1241 (1952) (refusing to allow the disclosure of a patient's communications during psychiatric treatment in a civil action despite the absence of a statutory privilege). *See also State v. Evans*, 454 P.2d 976 (Ariz. 1969) (holding that a criminal defendant's communications to a court-appointed psychiatrist were subject to a limited privilege despite the absence of an applicable statutory privilege).

By 1975, when Rule 501 was enacted, many states had separate psychotherapist-patient privilege statutes. *See* Proposed Fed. R. Evid. 504 advisory committee's note, 56 F.R.D. at 242 (citing examples).[4] At that time, there was general acceptance of the need for a privilege applicable to the psychotherapeutic relationship, even though the doctor-patient privilege as applied to other branches of medicine was under substantial attack. *See Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955); David W. Louisell & Kent Sinclair, Jr., *Foreword: Reflections on the Law of Privileged Communications—The Psychotherapist-Patient Privilege in Perspective*, 59 Cal. L. Rev. 30, 51-53 (1971); Ralph Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 184 (1960).

[4] In the 1970s, in some of those states where statutes had not yet been enacted, the courts recognized a psychotherapist-patient privilege on their own. *See Allred v. State*, 554 P.2d 411 (Alaska 1976); *In re "B"*, 394 A.2d 419 (Pa. 1978) (recognizing a broad psychotherapist-patient privilege separate and apart from the state's statutory doctor-patient privilege).

Recognizing the widespread support for the protection of the confidentiality of the psychotherapeutic relationship, the Advisory Committee included a psychotherapist-patient privilege among the nine specifically proposed privileges in the original version of the Federal Rules of Evidence approved by this Court, even though a more general physician-patient privilege was *not* included. *See* Proposed Fed. R. Evid. 504 advisory committee's note, 56 F.R.D. at 242; Proposed Fed. R. Evid. 504(a)(1), *id.* at 240 (covering communications to physicians only while they are engaged in "diagnosis or treatment of a mental or emotional condition"). Thus, by the time Rule 501 was enacted, the psychotherapist-patient privilege had already become a well-recognized and accepted feature of American law. It would be inappropriate to conclude that Rule 501, with its open-ended invitation to develop the common law in the light of "reason and experience," somehow precluded the federal courts from bringing federal practice into line with the rule then being applied in the majority of the states.

II. COMMON-LAW PRINCIPLES, APPLIED IN THE LIGHT OF REASON AND EXPERIENCE, STRONGLY SUPPORT RECOGNITION OF A PSYCHOTHERAPIST-PATIENT PRIVILEGE.

At common law, certain communications were protected from disclosure in order to encourage relationships that were considered extremely important to society and that required full and open communication among the participants. The "principles" applied at common law in making this determination have been distilled by Wigmore as follows:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 John H. Wigmore, *Wigmore on Evidence* § 2285, at 527 (McNaughton rev. 1961) (emphasis omitted); *see Allred v. State*, 554 P.2d at 417 (referring to these principles in deciding to recognize a common-law psychotherapist-patient privilege). Applied in the light of reason and experience, these principles strongly support recognition of a psychotherapist-patient privilege in federal court.

A. Psychotherapeutic Clients Have a Strong Expectation of Confidentiality.

There is no doubt that communications made in the course of psychotherapy sessions are made with the expectation that they will be held in confidence. *See* John M. McGuire *et al.*, *The Adult Client's Conception of Confidentiality in the Therapeutic Relationship*, 16 Prof. Psychol.: Res. & Prac. 375, 380 (1985) (survey results demonstrate that mental health "clients not only value confidentiality in the therapy relationship but that they also expect it"); David J. Miller & Mark H. Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 Prof. Psychol.: Res. & Prac. 15, 18 (1986) (noting that the majority of clients view confidentiality "as an all-encompassing, superordinate mandate for the profession of psychology"); Donald Schmid *et al.*, *Confidentiality in Psychiatry: A Study of the Patient's View*, 34 Hosp. & Community Psychiatry 353, 354 (1983) ("The patients in our sample clearly believed that confidentiality was an important concomitant of their care.").

Clients' expectations of confidentiality are based in part on psychologists' ethical duty to maintain confidentiality. *See* Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. Rev. 893, 920 (1982) (patients rely on psychotherapists' ethical duty to maintain confidentiality); *cf. Hammonds v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793, 797 (N.D. Ohio 1965) (patients have a right to rely on physicians' ethical duty to maintain confidentiality). The APA ethical code dictates that psychologists "have a primary obligation and take reasonable precautions to respect the confidentiality rights of those with whom they work or consult." American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, § 5.02 (1992). In addition, psychologists are ethically bound to reveal to their clients the limitations on the confidentiality of their communications and the foreseeable uses of the information generated through their services at the outset of the relationship and as new circumstances may warrant. *See id.* § 5.01.

Clients' expectations of confidentiality are reinforced by the state laws throughout the country that provide a psychotherapist-patient privilege. *See* Anne D. Lamkin, *Should Psychotherapist-Patient Privilege Be Recognized?* 18 Am. J. Trial Advoc. 721, 723-25 (1995) (all fifty states and the District of Columbia have recognized the psychotherapist-patient privilege in some form). State laws that ensure the privacy of medical records, provide causes of action for wrongful disclosure of confidential information, or otherwise protect the privacy of the psychotherapist-client relationship further bolster clients' expectations of confidentiality. *See* Jill S. Talbot, Note, *The Conflict Between a Doctor's Duty to Warn a Patient's Sexual Partner That the Patient Has AIDS and a Doctor's Duty to Maintain Patient Confidentiality*, 45 Wash. & Lee L. Rev. 355, 360-61 (1988) (every state, to some extent, protects the confidentiality of medical records by

statute, and in most jurisdictions, a patient may recover from a physician for wrongful disclosure of confidential information).

B. Confidentiality Is Essential to the Success of Psychotherapy.

It is equally true that "[t]he concept of confidentiality of client-therapist communications is at the core of the psychotherapeutic relationship." Ryan D. Jagim *et al.*, *Mental Health Professionals' Attitudes Toward Confidentiality, Privilege, and Third-Party Disclosure*, 9 Prof. Psychol. 458, 458-59 (1978). The establishment of a relationship of trust between client and therapist "has been deemed so essential by some that it has been argued that psychotherapy is rendered worthless in its absence." Mark B. DeKraai & Bruce D. Sales, *Privileged Communications of Psychologists*, 13 Prof. Psychol. 372, 372 (1982).[5]

The common law, of course, has long recognized that a promise of confidentiality is essential if clients are to be able to confide freely in their attorneys. This Court has also recognized "the imperative need for confidence and trust" in the physician-patient relationship, noting that "the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." *Trammel v. United States*, 445 U.S. at 51. The need for confidentiality is even greater in psychotherapy:

> "Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there

[5] *See also Allred v. State*, 554 P.2d at 417 ("Without the patient's confidence a psychiatrist's efforts are worthless.").

> may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment."

Proposed Fed. R. Evid. 504 advisory committee's note, 56 F.R.D. at 242 (quoting Report No. 45, *Group for the Advancement of Psychiatry* 92 (1960)).

Unlike a patient with a broken leg who consults a physician, a client who seeks psychotherapy must expose his most intimate thoughts, feelings, and fantasies. Because "[t]he very essence of psychotherapy is confidential personal revelations about matters which the patient is and should be normally reluctant to discuss," it is vital that the psychotherapist be able to create an atmosphere in which clients can reveal sensitive and potentially embarrassing confidences without fear that they will be disclosed to others. Slovenko, *supra*, at 184-85. Indeed,

> "[t]he psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand."

Taylor v. United States, 222 F.2d at 401 (quoting Guttmacher and Weihofen, *Psychiatry and the Law* 272 (1952)).

If clients do not perceive that the confidentiality of their communications will be adequately protected, the trust vital to the psychotherapeutic relationship is likely to be significantly impaired or destroyed. This conclusion is based on both the practical experience of APA members and empirical evidence. *See* Miller & Thelen, *supra*, at 18 (majority of subjects would react negatively (*i.e.* finding it difficult to talk to the therapist or discontinuing therapy) to being told before the first session that certain information was not confidential); Schmid *et al.*, *supra*, at 354 (sixty-seven percent of patients would be upset or angry if their confidences were revealed without permission); Paul S. Appelbaum *et al.*, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psychiatry & L. 109, 114 (1984) (fifty-seven percent of patients said therapists' revelation of information without their permission would adversely affect the therapeutic relationship).

Thus, studies show that when clients are told that their therapist might be required to disclose their communications in court, their willingness to discuss sensitive topics declines markedly. *See* Daniel W. Shuman *et al.*, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 Int'l J. of L. and Psychiatry 393, 407, 410, 416, 420 Table I (1986); Shuman & Weiner, *supra*, at 919-20, 926, 929 Appendix Table I; Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226, 1255 (1962) (seventy-one percent of people questioned by the author would be less likely to make full disclosure to a psychotherapist if the therapist had a legal obligation to disclose confidential information if asked to do so by a lawyer or judge). *See also* Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of* Tarasoff, 31 Stan. L. Rev. 165, 183 (1978) (majority of therapists surveyed by the author "thought that patients will withhold information important to treatment if they believe the therapist may breach confidentiality").[6]

Researchers have also found that fear of disclosure may cause some clients to terminate prematurely the psychotherapeutic relationship. *See id.* at 177 n.67 (one quarter of therapists surveyed reported that they had lost a client because he or she feared a breach of confidentiality); Miller & Thelen, *supra*, at 18; Shuman & Weiner, *supra*, at 926; Schmid *et al.*, *supra*, at 354 (seventeen percent of patients would leave treatment if verbal information were disclosed without their consent).

The threat of public disclosure may also deter persons with mental or emotional problems from seeking needed treatment in the first place. *See* Jacob J. Lindenthal & Claudewell S. Thomas, *Psychiatrists, the Public and Confidentiality*, 170 J. Nervous & Mental Disease 319, 321 (1982) (thirty-three percent of nonpatients in survey said that the possibility that a psychiatrist might divulge confidential information would deter them from seeking therapy; twenty-two percent of patients said they had held back from seeking psychotherapy because of a fear of disclosure); Louisell & Sinclair, *supra*, at 52. "Unlike the patient with physical ailments or complaints, who will likely consult a physician regardless of whether confidentiality is guaranteed, a neurotic or psychotic individual may seek help only if he is assured that his confidences will not be divulged, even in a courtroom." Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 504[03] at 504-18; *see also In re Doe*, 964 F.2d at 1328 (recognizing that communications from a patient to a psychotherapist typically involve more personal information than communications to other kinds of doctors); *Lora v. Board of Educ.*, 74 F.R.D. 565, 571 (E.D.N.Y. 1977) (same).

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[6] *See Allred v. State*, 554 P.2d at 417 ("Without foreknowledge that confidentiality will attach, the patient will be extremely reluctant to reveal to his therapist the details of his past life and his introspective thoughts and feelings.").

Petitioner cites a trilogy of studies for the proposition that the existence of a privilege has no effect on communications between clients and therapists. Pet. Br. at 28. The researchers who conducted these studies, however, in fact concluded that some form of psychotherapist-patient privilege *should be recognized*. *See* Shuman *et al.*, *supra*, at 417-18. These studies do demonstrate that clients ordinarily assume that their communications with their psychotherapists will be held in confidence. *See* Appelbaum *et al.*, *supra*, at 113-15; Thomas V. Merluzzi & Cheryl S. Brischetto, *Breach of Confidentiality and Perceived Trustworthiness of Counselors*, 30 J. of Counseling Psychol. 245, 250 (1983).[7] Therefore, it is not surprising that these studies found no effect when clients were told that a statutory privilege does in fact exist. Given the prevalent assumptions made by clients, the relevant inquiry is not whether knowledge of a privilege encourages communications but whether knowledge of its *absence* would deter or impede communications. *See Developments in the Law—Privileged Communications: Part II. Modes of Analysis: The Theories and Justifications of Privileged Communications*, 98 Harv. L. Rev. 1471, 1475 (1985) [hereinafter *Developments—Part II*]. Examining that question, the studies found that when clients were informed that their psychotherapist could be forced to disclose their communications in court, the degree of disclosure by clients about sensitive subjects dropped markedly.[8] *See* Shuman *et al.*, *supra*, at 407,

[7] That clients often erroneously assume confidentiality in the absence of a statutory privilege does not render a privilege unnecessary. A pronouncement by this Court that there is no privilege in federal court would negate this assumption and alert clients and their therapists, who have an ethical duty to inform their clients of the limits of confidentiality, that their communications could be disclosed without their consent.

[8] The argument that the absence of a federal privilege will have little effect on the psychotherapeutic relationship because of the low probability that disclosure will be demanded by a federal court is refuted by these data; clients would have taken into account the probability that disclosure would be sought by a court when reporting that in the absence of a privilege, they would be less likely to communicate freely. *See Developments—Part II*, *supra*, at 1476.

410, 416, 420 Table I; Shuman & Weiner, *supra*, at 919-20, 926, 929 Appendix Table I. *See also* Kathryn M. Woods & J. Regis McNamara, *Confidentiality: Its Effect on Interviewee Behavior*, 11 Prof. Psychol. 714, 719 (1980) (interviewees who were told that their communications might not be strictly confidential were less open in their disclosures than those interviewees who were given either confidential instructions or no special expectations regarding confidentiality).

C. Society Has a Strong Interest in Fostering the Psychotherapeutic Relationship and in Protecting Client Privacy.

There is likewise no dispute that the psychotherapist-patient relationship is "one that society considers worthy of being fostered." *In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983). Countless people seek professional help to cope with daily stress, family turbulence, and severe emotional trauma, and research has shown that psychotherapy can be highly effective in addressing these problems. *See* Mary L. Smith *et al.*, *The Benefits of Psychotherapy* 124 (1980) (the results of a comprehensive statistical analysis "of the research literature as a whole . . . show unequivocally that psychotherapy is effective"). It is surely in the interest of society as a whole to nurture the emotional health of its members, and mentally healthy people are more likely to be productive members of society. *See, e.g.*, Fla. Stat. ch. 490.002 (1993) ("The Legislature finds that as society becomes increasingly complex, emotional survival is equal in importance to physical survival.").

In addition to the benefit reaped by society from its members' emotional well-being, psychotherapy has other benefits. For those mentally ill people who have a

potential to be dangerous, an effective psychotherapeutic relationship can play a key role in minimizing violent or self-destructive behavior. *See In re Zuniga*, 714 F.2d at 639; *In re Grand Jury Subpoena*, 710 F. Supp. 999, 1010 (D.N.J. 1989).

A final consideration, separate and apart from the societal interest in fostering the psychotherapeutic relationship, is the individual client's interest in keeping his intimate thoughts and feelings private. The damage resulting from compelled disclosure is more than the detrimental effect it may have on the therapeutic relationship; the invasion of privacy caused by forced breach of an entrusted confidence and the revelation of a client's confidential communications is a significant harm in and of itself. *See Developments—Part II, supra*, at 1481.

D. The Benefits of the Psychotherapist-Patient Privilege Outweigh Its Costs.

The important considerations underlying the adoption of a psychotherapist-patient privilege must, of course, be weighed against the interest in assuring that relevant evidence is available to assist in the fair and efficient disposition of legal claims. *See Trammel v. United States*, 445 U.S. at 51 (the standard used for determining whether to recognize a privilege is whether it "promotes sufficiently important interests to outweigh the need for probative evidence in the administration of . . . justice"). The balance strongly favors the recognition of the privilege.

This Court has previously "taken note of state privilege laws in determining whether to retain them in the federal system," *United States v. Gillock*, 445 U.S. at 368 n.8. In this case, all fifty states (and the District of Columbia) have adopted the psychotherapist-patient privilege in some form, concluding that the benefits of the privilege in protecting the psychotherapist-patient relationship far outweigh the limited costs to the administration of justice.

See Lamkin, *supra*, at 723-25.[9] There is no reason for the federal courts to strike the balance any differently.[10] Thus, in adopting Proposed Rule 504, the Judicial Conference Advisory Committee similarly concluded that the need to protect the confidentiality of the psychotherapist-patient relationship outweighed the need for relevant evidence in the administration of justice. *See* Proposed Fed. R. Evid. 504 advisory committee's note, 56 F.R.D. at 242. ("The conclusion is reached that Wigmore's four conditions needed to justify the existence of a privilege are amply satisfied."). In addition, the psychotherapist-patient privilege is advocated by many commentators. *See Developments in the Law—Privileged Communications: Part IV. Medical and Counseling Privileges*, 98 Harv. L. Rev. 1530, 1539 (1985) ("the psychotherapist-patient privilege has won consistent approval from courts and commentators").

The adverse effect on the search for truth would likely be minimal. Testimony about a prior communication is not the best evidence of the underlying facts asserted in

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[9] Although the statutes differ in their details, the vast majority of them apply to communications made to a psychotherapist, including a psychologist, for the purpose of diagnosis or treatment. *See* Lamkin, *supra*, at 723-25. The exceptions to the privilege allowed by the majority of the states, although not uniform, are generally narrow. *See id.* (twenty states follow proposed Rule 504, eleven states accord the privilege the same status as the attorney-client privilege, and ten states recognize the privilege subject to no or only minor limitations).

[10] Moreover, the absence of a federal privilege may interfere with the accomplishment of state policies. Despite the existence of a state privilege, it is likely that a psychotherapeutic client who learns that his communications may be disclosed in federal court will believe the confidentiality of his communications to be inadequately protected, and he may consequently withhold information or terminate the relationship. In such a case, the state policy of protecting the confidentiality of the psychotherapeutic relationship is undermined by the absence of a federal privilege. *See* pp. 14-15, *supra*.

that communication. *See Developments—Part II, supra,* at 1479. Communications to psychotherapists are especially suspect because they often represent the way the client subjectively experienced an event—his feelings and interpretations—rather than a detached and objective account of the event. *See* Robert M. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 Wayne L. Rev. 609, 631 (1964). Thus, the evidence to be gained by forced disclosure of such communications often will have little probative weight to offset the great prejudice inflicted upon the psychotherapist-patient relationship. *See id.*; Slovenko, *supra,* at 194 ("By and large, the data is of no value in the realism of the court.").

In sum, although privileges generally "are not lightly created nor expansively construed, for they are in derogation of the search for truth," *United States v. Nixon*, 418 U.S. 683, 710 (1974), reason and experience dictate that the psychotherapist-patient privilege should be recognized under Rule 501. Reason indicates that the privilege is necessary to protect the confidentiality essential to the success of the psychotherapeutic relationship, a relationship of great value to society. *See Allred v. State*, 554 P.2d at 418. And the recognition of the privilege by all fifty states, the adoption of the privilege by the Judicial Conference Advisory Committee, and the support given the privilege by various commentators is evidence that "experience with it has been favorable." *In re Doe*, 964 F.2d at 1328.

III. APPLYING THE PSYCHOTHERAPIST-PATIENT PRIVILEGE USING A CASE-BY-CASE BALANCING APPROACH WOULD SUBSTANTIALLY UNDERMINE THE VALUE OF THE PRIVILEGE.

If the Court decides to recognize a psychotherapist-patient privilege, the next question will be how that privilege should be applied in this and other cases. The Court cannot, of course, establish all of the parameters of the

privilege in a single common-law ruling. *See Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981). But it can establish the *approach* that courts should use.[11]

Petitioner seems to ask the Court to sanction a case-by-case *balancing* of interests, taking into account the importance of the legal claim, the centrality of the evidence at issue, and all of the other particular facts and circumstances of each case. *See* Pet. Br. at 40-42. Such an approach, however, would be inconsistent with the very policies that justify recognition of the privilege in the first place.[12] The purpose of the psychotherapist-patient privilege is to assure clients that they may reveal their most intimate thoughts and feelings without the fear of disclosure. That purpose will not be served if clients know that the confidentiality of their statements may be forfeited if and when some court, applying an *ad hoc* balancing test, decides that these communications should be revealed. As this Court has recognized, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. at 393.

This is not to say that a psychotherapist-patient privilege must be absolute. Rather, it means that any excep-

[11] One issue that will arise in this case is whether the privilege should extend beyond psychiatrists and psychologists to include licensed clinical social workers. While there may be some limits on the types of therapy or counseling warranting legal protection, *amicus* submits that the privilege should at least apply to all professionals licensed or certified by a given state to provide psychotherapy. That standard is met here.

[12] That Rule 501 was intended to "provide the courts with greater flexibility in *developing* rules of privilege on a case-by-case basis," *United States v. Gillock*, 445 U.S. at 367 (emphasis added), does not mean that the rules of privilege must be *applied* on a case-by-case basis. Thus, the courts do not determine the applicability of the attorney-client privilege on an *ad hoc* basis by weighing the need for the evidence in the particular case against the public benefit of protecting confidential communications to attorneys.

tions should be (1) limited, (2) clear and categorical, and (3) in most instances, triggered by the psychotherapeutic client's own conduct. Such exceptions are far preferable to *ad hoc*, case-by-case balancing because they allow clients to anticipate and/or control the extent of any forfeiture of confidentiality. *See id.* (if the purposes of a privilege are to be served, the communicators must be able to predict whether a particular communication will be protected).

The state privilege laws provide some examples of categorical exceptions that are potentially defensible. Typically, they provide that the privilege will not apply where the client *himself* has either testified about the privileged communications or put his psychological condition at issue in litigation. *See, e.g., Bond v. District Court*, 682 P.2d 33 (Colo. 1984); *State v. Cole*, 295 N.W.2d 29, 35-36 (Iowa 1980). Often, the privilege is treated as waived where the client has revealed an immediate intent to harm third parties. *See, e.g.*, Alaska Stat. § 08.86.200(3) (1981 & Supp. 1992); Mass. Gen. Laws Ann. ch. 233 § 20B (Law. Co-op. Supp. 1995). A few states limit the application of the privilege in criminal proceedings involving violent crimes. *See, e.g.*, D.C. Code Ann. § 14-307(b)(1) (1989) (criminal proceedings involving death or physical injury); Ill. Compiled Stat. Ann. ch. 735, § 5/8-802 (Smith-Hurd 1993) (homicide). Other laws exempt commitment or child custody proceedings where a person's psychological condition is a necessary factor at issue. *See, e.g.*, Ill. Compiled Stat. Ann. ch. 740, § 110/10 (Smith-Hurd 1993); *Harbin v. Harbin*, 495 So. 2d 72 (Ala. Civ. App. 1986).

Every such exception will, to a greater or lesser extent, undermine the value of the privilege. A person going through a divorce, for example, might feel constrained to withhold some sensitive material from a therapist in anticipation of an upcoming custody battle. But the impact of such rules will be far less severe than a regime of general balancing, which would create uncertainty in every case.

Here, for example, it would make no sense to adopt petitioner's suggestion that the privilege should not apply because the testimony of the psychotherapist constituted "crucial evidence bearing on respondent Redmond's credibility," Pet. Br. at 21, or because important civil rights were at stake, *id.* at 38. The privilege would have little value if it could be abrogated whenever information from therapy sessions might have a significant impact on the outcome of the case. Moreover, it is hard to see any principled basis for erecting a hierarchy of importance of federal cases in order to limit the application of the privilege to less important matters.

CONCLUSION

The judgment of the Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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