

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was lodged with the court electronically with the Nevada Supreme Court on February 17, 2017. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

KATHLEEN BLISS, ESQ.
Counsel for Petitioner

KAREN A. CONNOLLY, ESQ.
Counsel for Real Party in Interest

OFELIA L. MONJE
Deputy District Attorney

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
Eighth Judicial District Court, Dept. III
Regional Justice Center, 16th Floor
200 Lewis Avenue
Las Vegas, NV 89101

BY /s/ Franny A. Forsman

Accordingly, NACJ requests that the court lodge the attached corrected brief pending the ruling on the Motion for Permission to file the brief.

Dated this 19th day of February, 2017.

NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

BY /s/ Franny A. Forsman
FRANNY A. FORSMAN
LAW OFFICES OF FRANNY FORSMAN
Nevada Bar #14
1509 Becke Circle
Las Vegas, NV 89104
(702) 501-8728

IN THE SUPREME COURT OF THE STATE OF NEVADA

DR. SHERA D. BRADLEY)

Petitioner,)

vs.)

EIGHTH JUDICIAL DISTRICT COURT)
of the State of Nevada, in and for Clark)
County; THE HONORABLE DOUGLAS)
W. HERNDON, DISTRICT JUDGE)

Respondents,)

and)

DONTAE HUDSON, AN INDIVIDUAL)
AND THE STATE OF NEVADA)

Real Parties in Interest.)

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Feb 21 2017 09:48 a.m.
CASE NO. 70522 Elizabeth A. Brown
Clerk of Supreme Court

**REQUEST TO SUBSTITUTE AMICUS BRIEF IN SUPPORT OF
REAL PARTY IN INTEREST, DONTAE HUDSON**

On February 17, 2017, Nevada Attorneys for Criminal Justice (NACJ) filed
a Motion for Permission to File an Amicus Brief in Support of Real Party in
Interest, Dontae Hudson. With the motion, NACJ lodged its Amicus Brief.
Following the filing, the undersigned discovered that the Amicus Brief contained
some formatting errors which occurred in the conversion of the document.

Accordingly, NACJ requests that the court lodge the attached corrected brief pending the ruling on the Motion for Permission to file the brief.

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)	
<u>Real Parties in Interest.</u>)	

BRIEF OF AMICUS NEVADA ATTORNEYS FOR CRIMINAL JUSTICE
IN SUPPORT OF REAL PARTY IN INTEREST DONTAE HUDSON

**THE ONLY ISSUE RIPE FOR ADJUDICATION IS THE DECISION
OF THE TRIAL COURT TO REVIEW THE DOCUMENTS *IN CAMERA***

There is only one narrow issue before the court that is justiciable: whether, in a criminal case, a trial court may require production of counseling records of a witness for in camera review prior to determining whether further disclosure to the defense is appropriate. No other issues raised by the Petitioner and the State are ripe for adjudication. Two factors are considered in analyzing the ripeness of an issue: “1) the hardship to the parties of withholding judicial review, and 2) the suitability of issues for review.” Herbst Gaming, Inc. v. Heller, 122 Nev. 877, 888, 141 P.3d 1224, 1231 (quoting Matter of T.R., 119 Nev. 646, 651, 80 P.3d 1276, 1279-80 (2003)). This court focuses on whether the alleged harm is sufficiently concrete. “Alleged harm which is speculative or hypothetical is insufficient. Id. See also Cote H. V. District Court, 124 Nev. 36, 175 P.3d 906 (2008).

Here, all that has been ordered is *in camera* production. Upon review of the materials, the court could determine that nothing should be disclosed, or the court could disclose some material and reserve decision on others until the trial when

the witness takes the stand, or the court could employ other methods such as a protective order, disclosure to attorneys only, or other remedies which would balance the rights of the witness against the rights of a criminal defendant facing life imprisonment. The trial court, with greater knowledge of the case, the evidence and the record, should be permitted to exercise its discretion in fashioning the appropriate remedy after the *in camera* review has been conducted.

**EXTRAORDINARY RELIEF IS NOT WARRANTED AS THE
DECISION OF THE TRIAL COURT TO REVIEW THE MATERIALS
IN CAMERA IS NOT AN ARBITRARY OR CAPRICIOUS
USE OF DISCRETION**

In order to prevail in a request for mandamus, a petitioner must prove that the District Court arbitrarily or capriciously exercised or manifestly abused its discretion. Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603–04, 637 P.2d 534, 536 (1981). “An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law.” State v. Eighth Judicial Court (Armstrong), 127 Nev. 927, 931-32, 267 P.3d 777, 780 (internal quotation marks and citations

omitted). Similarly, “[a] manifest abuse of discretion is ‘[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.’ ” Id. (quoting Steward v. McDonald, 330 Ark. 837, 958 S.W.2d 297, 300 (1997)).

The trial court demonstrated the opposite of arbitrariness or capriciousness by insuring that the rights of the defendant and the privacy concerns of the witness were balanced through utilization of the *in camera* process.

Petitioner’s position that the statutory privilege applicable to psychologists prevents even *in camera* review for a determination of the materiality of the documents to the defendant’s ability to confront and cross-examine and to put forth his defense is simply contrary to law as set forth below.

**THE DEFENDANT DOES NOT HAVE TO SHOW
A “COMPELLING NEED” TO PERMIT IN CAMERA REVIEW
OF THE RECORDS**

Both the Petitioner and the State argue that the defendant must show a “compelling need” for the records before *in camera* review may be conducted.

See Petition, p. 12; Reply in Support of Petition, p. 3; Answer (State) in Support

of Issuance of Writ, p. 15. This description of the burden is drawn from cases in which the defendant seeks a compelled psychological examination of the child witness. While the decision in Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006) provides some guidance in dicta, see infra, compelling a child to undergo a psychological evaluation is far more intrusive than allowing a judge to review already-existing records. Neither Petitioner nor the State have provided this court with authority applying that burden to already-existing records in a criminal case.

**THE STANDARD TO BE APPLIED
IS WHETHER THERE IS A REASONABLE BELIEF THAT THE
RECORDS CONTAIN EXCULPATORY INFORMATION**

In Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed. 2d 40 (1987), the U.S. Supreme Court recognized that sensitive information in a Children and Youth Services (CYS) file should have been reviewed in camera by the trial court to determine whether it contained exculpatory information.¹ The

¹Petitioner argues that because the records in Ritchie were records of a social services agency and not of a psychotherapist, Ritchie does not provide authority on the question. Nevada's statutory privileges do not distinguish between psychotherapists and other professions. The statutory privileges are nearly identical for psychotherapists (NRS 49.209); accountants (NRS 49.185); social workers (NRS 49.252); victim's advocate (NRS 49.2547) and school

court recognized the role of the trial court in balancing the confidentiality protection against the defendant's right to a fair trial,² explaining that the review is ongoing: "information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial." *Id.*, at 107 S.Ct. 1003.

State courts have applied the Ritchie analysis to psychiatric records, even when there is an "absolute" statutory privilege.³ The Kentucky Supreme Court reviewed numerous state court decisions and determined that "[a] majority of the state courts that have addressed this issue have held that a criminal defendant, upon a preliminary showing that the records likely contain exculpatory evidence,

counselors (NRS 49.290).

²The court was presented with arguments based on due process and compulsory process and decided the case based on the Sixth Amendment right to due process, finding that the right to compulsory process did not create greater rights.

³Nevada's statute does not create an absolute privilege, as the Petitioner recognizes, because of the list of exceptions.

is entitled to some form of pretrial discovery of a prosecution witness's mental health treatment records that would otherwise be subject to an 'absolute' privilege." Commonwealth v. Barroso, 122 S.W. 3d 554, 561 (KY 2003). The showing required in Barroso is "in camera review of a witness's psychotherapy records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence." Id. at 564.

The reason for the rules set forth by the Barroso court and the numerous decisions cited therein is articulated as follows: "Criminal defendants are entitled to compulsory process to obtain psychotherapy records of a crucial prosecution witness if those records contain exculpatory evidence, including evidence impacting the witness' credibility such as deficiencies in the ability to observe, comprehend, recall, or express themselves." Ross v. Commonwealth, 455 S.W. 3d 899, 915 (2015).

Here, the trial court determined that the defendant made the requisite showing to permit *in camera* review of the records. The trial court knew that the

therapy was directly related to the case before the court and that the underlying facts of the case were undoubtedly part of the interchange between Petitioner and the witness. The trial court knew that the witness was under the influence of drugs at the time of the events and that the therapy notes would likely reveal her history of drug use which would affect her credibility and ability to accurately perceive and recall. Additionally, the trial court knew that the State intended to call an expert witness on the Pimp-prostitute subculture who would testify to “cultural norms and the nature of the subculture, dynamics of pimp-prostitute relations, terminology and language, and known behaviors from the pimp and prostitution subculture.” State’s Appendix, p. 5. The defense is entitled to any statements by the witness which would contradict or diverge from the State’s expert opinion.⁴

Clearly, this showing constitutes a reasonable belief that the records contain exculpatory evidence and the trial court’s determination that an *in camera* review

⁴This court has recognized that, “where a State’s expert testifies concerning behavioral patterns and responses associated with victims of child sexual abuse, courts have recognized that this type of testimony puts the child’s behavioral and psychological characteristics at issue. Abbott v. State, 122 Nev. 715, 727, 138 P.3d 462, 470 (2006)

was warranted was not an abuse of discretion.

**JAFFE V. REDMOND IS A CIVIL CASE AND
THUS IS COMPLETELY UNHELPFUL**

Petitioner urges this court to apply the holding in Jaffe v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed. 2d 337 (1996) to this case. Petitioner's Reply, p. 5. Jaffe was an excessive force case in which the plaintiff sought therapy records of the police officer. It was not a criminal case and thus, none of the balancing of a criminal defendant's rights to due process and confrontation are at play. At least one court has recognized that Jaffe simply does not assist when the case is a criminal case. See U.S. v. Alperin, 128 F. Supp. 1251 (N.D. CA 2001).

Sex crimes against children are extremely upsetting, and our Legislature placed a very severe punishment to fit the crime. As such, it is vitally important that if this penalty is imposed, it is imposed only on a defendant deserving of the punishment. This can only be assured where the defendant is given a meaningful opportunity to present his defense.

Abbott v. State, Supra at 138 P.3d 470 (2006)

CONCLUSION

This court should not intervene when a trial court has fashioned a method to

balance a witness' privacy interest against the constitutional rights of a criminal defendant facing serious penalties. The psychologist-patient privilege is not absolute as suggested by Petitioner. When, as here, the records contain statements by the State's critical witness about the allegations against the defendant, when there is evidence of drug use and other mental health issues which may impact credibility and ability to recall, and when the State intends to call an expert witness on the typical conduct of persons such as the witness, the only balance which can be struck is to permit the in camera review of the documents so that a determination of materiality can be made by the person most able to make that determination-the trial judge.

Dated this 17th day of February, 2017.

NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

BY /s/ Franny A. Forsman
FRANNY A. FORSMAN
LAW OFFICES OF FRANNY FORSMAN
Nevada Bar #14
1509 Becke Circle
Las Vegas, NV 89104
(702) 501-8728

/s/ Stephanie B. Kice
LAW OFFICE OF STEPHANIE KICE
Nevada Bar #10105
324 S. Third St. #1
Las Vegas, NV 89101
702-401-9115

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