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.	)	CASE NO. 70522

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

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IDENTITY AND INTEREST OF AMICUS

Nevada Attorneys for Criminal Justice (NACJ) is a voluntary organization of Nevada attorneys who practice criminal defense. NACJ represents approximately 200 members throughout the state of Nevada. The Board of Directors of NACJ has authorized undersigned counsel to prepare and submit the following brief in support of defendant and Real Party in Interest Dontae Hudson.

NACJ has determined that this case presents an issue of vital interest to criminal defense attorneys and their clients in that Petitioner is claiming that an absolute privilege applies tot he mental health records of a critical witness for the prosecution in the underlying case. The privilege which Petitioner seeks to impose would prevent a trial court from reviewing records of a psychologist who is treating the witness (pursuant to an order of the Juvenile court), to determine whether exculpatory evidence is present in those records. If the court were to adopt the rule proposed by Petitioner, defendants will be deprived of their rights to due process, compulsory process and cross-examination. These issues are central to the concerns of NACJ.

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ARGUMENT

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 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

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[1]Petitioner 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 counselors (NRS 49.290).

[2]The court was presented with arguments based on due process and compulsory process and decided the case based on the Sixth Amendment right to

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, 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

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due process, finding that the right to compulsory process did not create greater rights.

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

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 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.

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[4]This 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)

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 31st day of March, 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

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Brief of Amicus Nevada Attorneys for Criminal Justice in Support of Real Party in Interest Dontae Hudson complies with the formatting requirements of NRAP 32(a)(4)-(6) because:

[XX] This Brief of Amicus Nevada Attorneys for Criminal Justice in Support

of Real Party in Interest Dontae Hudson has been prepared in a proportionally spaced typeface using WordPerfect X8 in 14 point-Times New Roman, double-spaced, on 8 ½ by 11-inch paper with 1 inch margins on all sides and consecutively numbered at the bottom.

2. I further certify that this Appellant's Opening 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 is:

[XX] Proportionately spaced, has a typeface of 14 points or more, and contains 2,769 words.

3. Finally, I hereby certify that I have read this amicus 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 31st day of March, 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

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was lodged with the court electronically with the Nevada Supreme Court on March 31, 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