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*.

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

Supreme Court Case No.: 70522

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

Kathleen Bliss, Esq.
Nevada Bar No. 7606
Jason Hicks, Esq.
Nevada Bar No. 13149
KATHLEEN BLISS LAW PLLC
400 S. 4th St., Suite 500
Las Vegas, Nevada 89101
Tele: (702) 793-4202
Fax: (702) 793-4001
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal cases

State cases

Statutes and Rules

MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO BRIEF BY AMICUS NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

Petitioner Shera Bradley, PhD (Dr. Bradley) respectfully submits this Response to Amicus Nevada Attorneys for Criminal Justice, showing this Court that:

(1) the records at issue here are not investigative records or state controlled records; rather, the records are privileged therapeutic records by a psychologist used in treating a juvenile patient;

(2) the reasoning of *Jaffee*, not *Ritchie*, thus applies, in protecting privileged records as required by Nevada law under NRS 49.213;

(3) the district court abused its discretion in ordering *in camera* review -- a piercing of the privilege -- without requiring defendant to demonstrate a compelling need or to identify an exception for release, necessary to unshield the protections of the privilege secured by Nevada law.

Dr. Bradley incorporates the points and authorities that she raised and discussed in her Petition and Reply Memoranda, as well as those arguments and submissions of the State, addressing here only those arguments of Amicus Attorneys.

/ / /

/ / /

A. The records here are therapeutic, not investigative, and therefore the reasoning of *Jaffee* dictates the outcome.

Amicus Attorneys misapprehend the issue before this Court, which is whether privileged information between a psychologist and her patient can be disclosed upon demand by a defendant, even if the disclosure is *in camera*. Amicus Attorneys, like Real Party in Interest Defendant Dontae Hudson, assert that a trial court must examine the records, at least *in camera*, upon the blanket demand of defendant, pursuant to the general discovery statute in criminal cases, NRS 174.235, and under the United States Constitution, as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. Amicus Attorneys do not appear to dispute that the records here are privileged under Nevada law, and that a psychologist may properly assert that the treatment records are privileged, as provided by NRS 49.209 and NRS 49.211(2). Rather, Amicus Attorneys submit that "all that has been ordered is *in camera* production," Brief at 2, suggesting that such practice would not affect or undermine the privilege.

This Court should apply the reasoning of the United States Supreme Court's decision in *Jaffe v. Redmond*, 518 U.S. 1 (1996), as it specifically and clearly addressed the scope of the psychotherapist privilege in adopting it under the Federal Rules of Evidence. It is of no consequence that *Jaffe* involved a civil case because the privilege stands no matter the forum in which it is asserted. Indeed, there is no law, precedent or constitutional amendment that allows generalized

discovery or fishing by a criminal defendant. *See, e.g. Sonner v. State*, 117 Nev. 609, 627 (1996).

In *Jaffee*, Administrator Carrie Jaffee brought claims under state law and 42 U.S.C. § 1983 for constitutional violations by a police officer, Mary Lu Redmond, with resulted in the death of Ricky Allen. Ms. Redmond had been treated by a social worker, whose counseling records were sought by Ms. Jaffee to impeach the testimony of Ms. Redmond. In holding that the records were privileged under Federal Rule of Evidence 501, the Court looked to the policies driving the privilege, which had been enacted or recognized by all 50 states. Importantly, the *Jaffee* Court relied on a regulatory case and criminal court decisions, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (attorney-client privilege asserted in tax investigation), and *Trammel v. United States*, 445 U.S. 40, 47 (1980) (spousal testimonial privilege asserted in drug trafficking case), in holding that the societal and policy interests which contour the privilege must be recognized and protected for the public good.

The *Jaffee* Court found, "Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.'" *Jaffee*, 518 U.S. at 10 (quoting *Trammel*, 445 U.S. at 51). The Court distinguished treatment by a physician, which relies on objective testing and observation, and treatment by a psychologist, which "depends upon an atmosphere

of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears." *Id.* The Court further observed that disclosure "may cause embarrassment or disgrace." Citing the Judicial Conference Advisory Committee that recommended adoption of the psychotherapist privilege, the Court noted that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id*. As a society, we want a mentally healthy citizenry, which "is a public good of transcendent importance." *Id*. at 11.

B. *In camera* review is a disclosure in violation of privilege.

The act of disclosure itself, whether *in camera* or not, unshields the privilege, and Amicus Attorneys and defendant cannot argue otherwise. While the Confrontation Clause mandates the disclosure of exculpatory evidence in possession of the state, a defendant must at least establish a compelling need for breach of the privilege. Hudson has not done so. There is nothing in the record establishing, or even suggesting, that Dr. Bradley will testify for the state or that anything that she used in treatment will be used by the state. Amicus Attorneys argument that the alleged victim is receiving treatment pursuant to court order is not a basis for *in camera* review. Nor is Amicus Attorneys contention that the alleged victim abused drugs a basis to surrender the alleged victim's psychotherapy records. Hudson provided to the district court and this Court a litany of

impeachment evidence regarding the alleged victim and her statements about him. The district court never considered the alleged victim's privilege when it ordered Dr. Bradley to produce the records for *in camera* inspection. The district court simply ordered Dr. Bradley to produce the records because the district court thought that it had to.

A cautionary peek by the district court without more would irreparably undermine the relationship between Dr. Bradley and her patient. The Nevada legislature necessarily understood contours of this relationship when it recognized the privilege as a matter of law. While there are exceptions under NRS 49.209 and 49.211, none fit here. Again, turning to the reasoning of *Jaffee*, the Court rejected a balancing test by the Court of Appeals similar to that which is implicitly proffered by Respondent here. The Court observed that

> [m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in Upjohn, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is a little better than no privilege at all."

Jaffee, 518 U.S. at 17-18 (quoting *Upjohn*, 449 U.S. at 393).

Dr. Bradley recognizes that in a hypothetical case there may exist an extraordinary or compelling reason that would allow breach of the privilege by *in*

camera review. Such a situation has already been contemplated by the Nevada legislature, which has delineated specific exceptions to the privilege, and this Court may provide clear instruction to trial courts regarding *in camera* review under extraordinary or compelling circumstances as it did in *Koerschner v. State*, 116 Nev. 1111, 13 P.3d 451 (2000), in which this Court held that a defendant seeking a psychological evaluation of an alleged child victim must demonstrate a "compelling need" for the exam, and whether a compelling need exists depends on: (1) whether the State actually calls or obtains some benefit from an expert in psychology or psychiatry; (2) whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim; and (3) whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity. *Koerschner*, 116 Nev. at 1116-17, 13 P.3d at 455. But this is not the case, and dismantling this privilege, even if slightly, under these circumstances could lead to the dismantling of other privileges, like attorney-client and spousal.

C. The cases cited by Amicus are inapposite.

Amicus Attorneys, like Hudson, incorrectly assert that *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) controls the issue here. *Ritchie* addressed the release of social services investigative records, not psychotherapeutic treatment records. *See Ritchie*, 480 U.S. at 43 – 44. Furthermore, the state possessed the records.

Here, defendant admittedly obtained investigative records of the alleged juvenile victim. *See* Answer at 5-6. He described numerous bases for impeachment of her. *See* Records submitted by defendant under seal.

Amicus Attorneys cite *United States v. Alperin*, 128 F.Supp.2d 1251 (N.D. 2001), as authority that *Jaffee* does not apply to criminal cases. This is not the holding. Rather, the federal district court found that the *Jaffee* court, in rejecting the balancing test used by some courts, did not anticipate disclosure of privileged records "such as when disclosure would prevent harm to the patient or to others." *Id*. at 1253 (citing *Jaffee*, 445 U.S. at 18, n. 18). Importantly, the government disclosed a letter from a psychiatrist regarding the government's key witness, a U.S. Customs Inspector who got into a physical altercation with the defendant, who claimed self-defense. In the letter, the psychiatrist discussed the "marked worsening" in the inspector's depression since the altercation. In essence, then, the government's key witness waived the privilege.

Here, the state has never represented that it will present Dr. Bradley or her treatment records in its case in its prosecution of defendant. *See* Ans. Br. 5, Docket 70522, Document 2016-20629. If so, of course those records could be disclosed. The situation here is thus different, and neither defendant nor Amicus Attorneys have shown otherwise.

Two Kentucky cases cited by Amicus Attorneys fail to further Amicus Attorneys' point that the principles discussed in *Jaffee* does not apply to criminal cases. In *Ross v. Commonwealth*, 455 S.W.3d 899 (Ky. 2015), the trial court had reviewed *in camera* treatment records of a witness, disclosing some, but not all of the records. The Kentucky court found that *in camera* review was authorized by *Commonwealth v. Barroso*, 122 S.W. 3d 554 (Ky. 2003), where there was a basis for believing that the records may contain evidence of a witness's credibility to recall, comprehend or express herself. The *Barroso* court analyzed cases including *Ritchie* and *Davis v. Alaska*, 415 U.S. 308 (1974) and *Jaffee* in trying to balance the Sixth and Fourteenth Amendment guarantees of a fair trial and opportunity to cross-examine witnesses with that of confidential and privileged communications.

Following, but tightening prior precedence in *Eldred v. Commonwealth*, 906 S.W. 2d 694, 701-03 (Ky. 1994), the Kentucky Supreme Court held that *in camera* review by a trial court in a criminal case is allowed only when the trial court receives "evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence." *Barroso*, 12 S.W. 3d at 564. The *Barroso* court, rejecting the *Eldred* standard of "articulable evidence that raises a reasonable inquiry, did so to prevent 'unrestrained forays' into confidential records in the hope that the unearthing of some unspecified information would enable the defendant to

impeach the witness.'" *Id*. at 563 (quoting *Commonwealth v. Bishop*, 416 Mass. 169 (1993)).

Quoting a California appellate court, the *Barroso* Court recognized that:

> A person's credibility is not in question merely because he or she is receiving treatment for a mental health problem. To subject every witness in a criminal prosecution to an *in camera* review of their psychotherapist's records would be the invasion of privacy which the psychotherapist-patient privilege is intended to prevent.

Id. (quoting *People v. Pack* 201 Cal.App.3d 679, 248 Cal.Rptr. 240, 244 (1988)) (overruled on other grounds by *People v. Hammon*, 15 Cal. 4th 1117, 1127-28, 938 P.2d 986, 992-93 (1997)).

Notably, the California Supreme Court in *Hammon* took a contrary view to allowing the pretrial discovery of privileged information. *See Hammon*, 938 P.2d at 993. Rather, the *Hammon* Court held that the risk was too great, and that if impeachment during trial need occur, the Court could rely on *Davis*. *But see Nevada v. Jackson*, 569 U.S. __, __, 133 S.Ct 1990, 1992 - 94 (2013) (per curiam) holding that defendant's right to confrontation was not violated by the trial court's refusal to allow extrinsic evidence to impeach a witness. The *Jackson* Court explained:

> "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,' " *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)), but we have also recognized that " 'state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials,' " *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503

> (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)). Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence. *See* 547 U.S., at 331, 126 S.Ct. 1727 (rule did not rationally serve any discernible purpose); *Rock v. Arkansas*, 483 U.S. 44, 61, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (rule arbitrary); *Chambers v. Mississippi*, 410 U.S. 284, 302–303, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (State did not even attempt to explain the reason for its rule); *Washington v. Texas*, 388 U.S. 14, 22, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (rule could not be rationally defended).

Id. at 1992.

Here, Dr. Bradley has never contended that the psychotherapist-patient privilege is absolute; no privilege is. But the Sixth Amendment disallows general discovery for the purpose of seeing if something just might be there. Simply, defendant has failed to demonstrate that his demand for *in camera* review is anything more than an unrestrained foray into private records. The district court erred by failing to require him to make that showing prior to issuing its ruling. Defendant cannot even articulate a compelling basis for *in camera* review of these psychiatric records, as he has already asserted numerous grounds on which he can impeach his alleged accuser with the records that he does have. State does not have the records or intend to use them, and there is no exception under Nevada law that fits here.

This is indeed a case of first impression for this Court, and the issue presented is critical to review. Dr. Bradley respectfully requests that this Court

fashion clear and exacting guidance regarding *in camera* review, recognizing the societal and public purpose in the psychotherapist privilege in doing so.

Dated this 17th day of April 2017.

*/s/ Kathleen Bliss*__
Kathleen Bliss, Esq.
Nevada Bar No. 7606
Jason Hicks, Esq.
Nevada Bar No. 13149
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

1. 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 2013 in 14-point Times New Roman font; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. 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 is either:

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[X] Does not exceed 15 pages.

3. 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 17th day of April 2017.

/s/ Kathleen Bliss_____

Kathleen Bliss, Esq.
Bar No. 7606
Kathleen Bliss Law PLLC
400 S. 4th St., Suite 500
Las Vegas, NV 89101
Tel.: 702-463-9074

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 April 17, 2017, I served the within document:

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

by electronically filing and serving it upon the parties of record 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:

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

/s/ Kathleen Bliss, Esq.
Kathleen Bliss, Esq.