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## Bradley v. Eighth Judicial Dist. Court, 133 Nev. Adv. Op. 92 (Nov. 22, 2017)

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CRIMINAL LAW: DISCOVERY PRIVILEGES

**Summary**

The Court held that the district court erred when it ordered J.A.’s juvenile and delinquency records be turned over to the defense in Hudson’s criminal case. The Court held that Dr. Bradley’s confidential records pertaining to J.A. are privileged, and no exception or waiver applies.

**Background**

J.A., a minor, was arrested while soliciting prostitution and placed on probation by the juvenile court. A condition of J.A.’s probation was to attend and complete counseling with Dr. Bradley, the petitioner. Based on J.A.’s statements to the police, the State charged defendant, Hudson, with first-degree kidnapping, sex-trafficking of a child under the age of 16, living from the earnings of a prostitute, and child abuse, neglect, or endangerment.

In his criminal case, Hudson filed a motion for discovery requesting J.A.’s juvenile and delinquency records. The district court ordered J.A.’s juvenile and delinquency records be provided for *in camera* review. Dr. Bradley filed a motion to vacate the amended order. The district court denied Dr. Bradley’s motion to vacate and ordered J.A.’s counseling records be submitted for *in camera* review. The district court stayed the order, and Dr. Bradley filed the instant petition.

**Discussion**

*Petition for prohibition relief should be entertained*

Dr. Bradley seeks to prevent the disclosure of allegedly privileged materials based on the psychologist-patient privilege. The Court considered Dr. Bradley’s petition for alternative relief under the prohibition standard because it is more appropriate than mandamus for preventing improper discovery.<sup>2</sup> Dr. Bradley is not a party in the criminal case and will not have standing to seek review on appeal. Therefore, the Court elected its discretion to entertain the petition and determine whether the material is privileged, and if so, whether it falls into an exception or has been waived.

*Psychologist-patient privilege*

The Court held that the psychologist-patient privilege applies to the confidential communications and counseling records between J.A. and Dr. Bradley. NRS 49.209 states that the psychologist-patient privilege gives a patient the ability “to refuse to disclose and to prevent any other person from disclosing confidential communications between the patient and the patient’s

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<sup>1</sup> By Brianna Stutz.

<sup>2</sup> *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).

psychologist.”<sup>3</sup> The privilege may be claimed by the patient or by the psychologist on the patient’s behalf.<sup>4</sup>

*The psychologist-patient privilege applies to Dr. Bradley and J.A.’s confidential communications and records*

Dr. Bradley asserted that she was providing psychological treatment to J.A., and claimed the privilege on behalf of J.A. Therefore, the Court held the confidential records are privileged and will only be turned over if an exception or waiver applies.

*No exception to the privilege applies*

There are two exceptions that apply to the psychologist-patient privilege in this matter. The statute declares there is no psychologist-patient privilege: 1) “For communications relevant to an issue of the treatment of the patient in any proceeding in which the treatment is an element of a claim or defense”<sup>5</sup> and 2) “If disclosure is otherwise required by state or federal law.”<sup>6</sup>

*J.A.’s treatment is not an element of a claim or defense under NRS 49.213(3).*

While the Court has never addressed this exact exception, it addressed an almost identical exception to doctor-patient privilege. The Court held that with the doctor-patient privilege, “[r]elevance alone does not make a patient’s condition an element of a claim or defense,” but rather, “the patient’s condition must be a fact to which the substantive law assigns significance.”<sup>7</sup> The Court held that the exception to the psychologist-patient privilege is the same. Hudson has not alleged or demonstrated that the records of J.A.’s treatment, or an issue of her treatment, are a fact to which the substantive law assigns significance. Therefore, the exception does not apply here.

*Disclosure is not required under state law*

Under state law, NRS 174.235 requires the prosecutor to disclose counseling records in her constructive possession because of counseling’s mandatory nature as a probation condition.<sup>8</sup> But, a defendant is not entitled to the records when the information is privileged or protected from disclosure pursuant to state law.<sup>9</sup> Thus, the records are protected by psychologist-patient privilege under state law.

*Disclosure is not required under federal law*

Under federal law, the prosecution is required to provide exculpatory statements to the defense.<sup>10</sup> However, the Court did not apply *Brady* to the instant matter, because the case is yet to

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<sup>3</sup> NEV. REV. STAT. § 49.209 (2017).

<sup>4</sup> NEV. REV. STAT. § 49.211 (2017).

<sup>5</sup> NEV. REV. STAT. § 49.213(3) (2017).

<sup>6</sup> NEV. REV. STAT. § 49.213(4) (2017).

<sup>7</sup> *Mitchell v. Eighth Judicial District Court*, 131 Nev. Adv. Op. 21, 359 P.3d 1096, 1103 (2015).

<sup>8</sup> NEV. REV. STAT. § 174.235(1) (2017).

<sup>9</sup> NEV. REV. STAT. § 49.209 (2017); NEV. REV. STAT. § 174.235(2)(b) (2017).

<sup>10</sup> *Brady v. Maryland*, 373 U.S. 83 (1963)

go to trial, and there is no sufficient record to analyze this claim under *Brady*. Additionally, the Court examined whether withholding the records violated the Confrontation Clause. The Confrontation Clause provides defendants a trial right designed to prevent improper restrictions on types of questions defense counsel may ask during cross-examination.<sup>11</sup> The Court held that the Confrontation Clause does not mandate the disclosure of privileged or confidential communications, and that it does not overcome the psychologist-patient privilege of J.A.’s records. Therefore, the disclosure of J.A.’s counseling records is not required under the state or federal law.

*Privilege was not waived*

The psychologist-patient privilege may be voluntarily waived pursuant to NRS 49.385 by disclosing or by consenting to disclose the confidential information.<sup>12</sup> Although the record indicates that J.A. and Dr. Bradley communicated with J.A.’s mother, her juvenile probation officer, Child Protective Services, and the Department of Child and Family Services, it does not indicate that Dr. Bradley or J.A. relayed any confidential information regarding a significant part of her treatment sessions. Therefore, there was no waiver of the privilege.

**Conclusion**

The psychologist-patient privilege applies to J.A. and Dr. Bradley’s confidential communications, and no exception applies. Additionally, the privilege has not been waived. Therefore, the Court held the district court erroneously ordered that Dr. Bradley provide J.A.’s counseling records for *in camera* review and granted the petition.

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<sup>11</sup> See *California v. Green*, 399 U.S. 149, 157 (1970) (“[I]t is this literal right to ‘confront’ the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause.”); *Barber v. Page*, 390 U.S. 719, 725 (1968) (“The right to confrontation is basically a trial right.”)

<sup>12</sup> NEV. REV. STAT. § 49.385 (2017).