24-6358

No. 25-

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES DAVID WATWOOD — PETITIONER

vs.

LARRY T. EDMUNDS, Warden — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a criminal defendant's Sixth Amendment right to Compulsory Process or Fourteenth Amendment right to due process, right to present a defense, and a right to a fair trial violated when what can be loosely defined as a criminal defendant's "constitutionally guaranteed access" to impeaching and exculpatory evidence contained in third party, confidential medical and mental health records about a sole government witness with severe indicia of dysfunction (that implicates the witness's competency), is denied while access to the same records if held by a government entity is granted?

STATEMENT OF RELATED PROCEEDINGS

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED PROCEEDINGS

Watwood v. Edmunds, United States Court of Appeals for the Fourth Circuit No. 24-6307 (October 16, 2024) denying Watwood's Petition for Review En Banc. Attached hereto in Appendix A.

Watwood v. Edmunds, United States Court of Appeals for the Fourth Circuit No. 24-6307 (Aug. 27, 2024) denying Watwood's certificate of appealability and dismissing his appeal. *Unpublished.* Attached hereto in Appendix A.

Watwood v. Edmunds, United States District Court for the Eastern District of Virginia No. 3:22CV381 (March 7, 2024) dismissing Watwood's Petition for Habeas Corpus. *Unpublished.* Attached hereto in Appendix A.

Watwood v. Woodson, Supreme Court of Virginia No. 201308 (February 23, 2022) dismissing Watwood's Petition for Habeas Corpus. Attached hereto in Appendix B – State Court Proceedings.

Watwood v. Commonwealth of Virginia, Court of Appeals of Virginia No. 0298-18-2 (December 28, 2018) dismissing Watwood's Petition for Appeal. Opinion written by Circuit Court of Chesterfield County (per curiam). Attached hereto in Appendix B – State Court Proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioner James David Watwood respectfully petitions for a writ of certiorari to review the judgment below.

OPINIONS BELOW

Watwood v. Edmunds, United States Court of Appeals for the Fourth Circuit No. 24-6307 (Aug. 27, 2024). *Unpublished.* Attached hereto in Appendix A.

Watwood v. Edmunds, United States District Court for the Eastern District of Virginia No. 3:22CV381 (March 7, 2024). *Unpublished.* Attached hereto in Appendix A.

Watwood v. Woodson, Supreme Court of Virginia No. 201308 (February 23, 2022). Attached hereto in Appendix B.

Watwood v. Commonwealth of Virginia No. 0298-18-2 (December 28, 2018). Attached hereto in Appendix B.

JURISDICTION

On 10/16/24 the United States Court of Appeals for the 4th Circuit entered its order and judgment (denying *en banc*) on the Petitioner's Habeas Corpus. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Amendment V provides in relevant part: "**** nor be deprived of life, liberty, or property, without due process of law."

U.S. Constitutional Amendment VI provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor * * * *."

U.S. Constitutional Amendment XIV provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law."

Federal Rule of Evidence 501 - Confidential communications between a patient and psychotherapist, including licensed social workers during psychotherapy, is held privileged.

INTRODUCTION

The question presented is the core element of a complex controversy where an "incredible hodgepodge of conflicting approaches and procedural conundrums" creates a constitutional conflict that encompasses all the federal circuits and 22 of the states. Clifford S. Fishman, *Defense Access to a Prosecution's Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, 4 (2007).

The controversy explodes when a "guarantee of access" of a criminal defendant is pitted against the privilege of a witness with indicia of dysfunction in a one-on-one adversarial proceeding where there is a complete absence of corroborating evidence that should be there but is not.

The primary components of the "guarantee of access" as established in Pennsylvania v. Ritchie, 480 U.S. 39, 43 (1987) which involved **government held**

records, are the Brady v. Maryland, 373 U.S. 83, 87 (1963) duty to disclose, the availability of the subpoena power to obtain potentially exculpatory and impeaching evidence, and the prohibition against governmental actions that interfere with the defendant's utilization of the subpoena power.

If the records were created by and are possessed by a **private entity**, the due process principle on which the Ritchie plurality relied **presumably** would not apply; a defendant would have to rely on the Compulsory Process Clause of the Sixth Amendment. The Ritchie plurality commented in dictum that "compulsory process provides no greater protections in this area than those afforded by due process," but had no cause to "decide ... whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment. Ritchie, 480 U.S. at 56.

Courts that have considered the issue are divided. Some courts have held that a defendant has no Fourteenth Amendment constitutional right to subpoena a witness's mental-health or counseling records in such circumstances. See United States v. Hatch, 162 F.3d 937, 946-47 (7th Cir. 1998). Several State courts, applying state law, have held a defendant ***does*** have the right to attempt to secure an in-camera review of privately held records. Goldsmith v. State, 651 A.2d 866, 874-75 (MD. 1995). It has also been ruled that criminal defendant's rights trump even 'absolute' privileges. United States v. Butt, 955 F.2d 77, 82, 87 & n.16 (1st Cir. 1992).

This Court has never squarely ruled on the issue, but Kentucky's Supreme Court, in Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003) concluded that a careful review of U.S. Supreme Court precedent strongly suggests that the Compulsory Process Clause of the Sixth Amendment may, in an appropriate case, require the third party to provide information to the court for in-camera inspection.

This Court is asked to remedy lower courts consignment of a criminal defendant's core constitutional rights to second-class status, based on the reprehensible nature of an alleged crime, so that they might stand on equal footing with statutes that infringe upon them. To not do so, dismantles the principle of a fair trial and results in innocents getting convicted for a crime they did not commit, as in the instant case.

Given the differences in the states and circuits, not only on which constitutional right should apply, but also the nuances of using the subpoena power, the instant case provides this Court the means to determine which constitutional right applies and how it would allow a criminal defendant to prevail, under very specific conditions, over a witness's psychotherapist-patient privilege in the absence any clear direction.

Government held evidence

The basic constitutional right recognized in Ritchie is the well-established right of an accused to disclosure of **evidence in the prosecuting government's possession** that is "both favorable to the accused and material to guilt or

punishment." Ritchie, 480 U.S. at 57. In Ritchie, the evidence was contained in confidential records of a state's child protection agency.

The Court in Ritchie then determined that a defendant was not required to invoke the right, to make a particular showing of the exact information sought and how it is material and favorable. Instead, a defendant need only at that stage "at least make some **plausible showing**" that it does exists and how it would be "both material and favorable to his/her defense." Ritchie, 480 U.S. at 58 n.15. A defendant becomes entitled, as a basic right, to have the information submitted to the trial court for *in-camera* inspection and a properly reviewable judicial determination made whether any portions meet the "material" and "favorable" requirements for compulsory disclosure. Ritchie, 480 U.S. at 60. However, **this Court in Ritchie did not address a criminal defendant's access to confidential medical and mental health records of a sole witness held by a third party when the case facts were identical.**

In Love v. Johnson, 57 F.3d 1305 (4th Cir. 1995), the court addressed a criminal defendant's access to **medical and mental health records** of a sole witness that were held by a government entity but not in the possession of the prosecution. In Love, the court ruled "Because Love **made a plausible showing** that sufficiently identified state agency records that might contain evidence that was material and favorable to his defense, the state court's refusal to inspect the identified records *in-camera* and to seal any records not disclosed for appellate review violated Love's constitutional right to such a procedure." Id., at 1307.

In Love, the court did not address access to confidential medical and mental health records held by a third party except to acknowledge that the court's attempt to draw on state-law requirements of specificity of subpoenas which may be --- and undoubtedly are --- considerably more stringent than the merely plausible showing which under Ritchie suffices to require in-camera inspection, was not applicable.

Third Party held evidence

Medical and mental health records and the impeaching and exculpatory evidence contained within are subject to psychotherapist-patient privilege whether written into state law or as expressed in Federal Rules of Evidence 501.

This Court has reconciled psychotherapist-patient privilege and a civil defendant's access to confidential medical and mental health records of a witness held by a third party in Jaffee v. Redmond, 518 U.S. 1 (1995). However, this Court's ruling in Jaffee left the lower courts with the challenge of reconciling this "ill-defined" privilege with the constitutional rights of a criminally accused. Specifically, the intersection of Brady, subpoena power, psychotherapists-patient privilege, due process, and a fair trial has not been addressed by this Court. Therefore, subsequent treatment of the privilege in this context has been neither comprehensive nor uniform among the Circuits and the States.

It is the subpoena power that provides access to confidential third-party records of a sole witness by a criminal defendant. It is in the implementation and application of the subpoena power where there is a split of authority between the Federal Courts of Appeal and State Supreme Courts as to how the subpoena power

extends to confidential medical and mental health records in the possession of third persons in a criminal case.

The instant case, Ritchie, and Love, all involve a sole government witness with indicia of dysfunction, a complete absence of evidence that should have been there but was not, and the existence of confidential medical and mental health records of said witness. The only difference in the cases, is who holds the records and yet there is a blatantly different determination as to access to an *in-camera* review.

It must be noted that whether the confidential mental health records are held by a Government Agency or a third party does not change the fact that in Ritchie, Love, and the instant case, the defendant cannot possibly know what is in the confidential records, but only suspects, that particular information exists. After all, the records are confidential. However, the defendant's suspicion is elevated when the sole witness exhibits indicia of dysfunction that implicates the witness's veracity, reliability, moral capacity, cognitive capacity, and the credibility of the allegations. In addition, a motive-to-fabricate, willingness-to-fabricate, and means-to-fabricate are also implicated.

In the absence of federal law and the Circuits and States in disarray, this Court is asked to bring order to the chaos and return the right to a fair trial by allowing a defendant access to impeaching and exculpatory evidence contained in confidential records held by a third party, or at a minimum an *in-camera* review,

when the determination of a sole government's witness' credibility is the difference between liberty and incarceration for a presumably innocent defendant.

STATEMENT OF THE CASE

Petitioner professed his innocence at trial and continues to do so to this day. The physical and testimonial evidence one would expect to be present was not there.

Background

The defendant's first marriage was for 27 years where two children were successfully raised to adulthood. His second marriage was to Ms. Bivins who came to the marriage with 3 foreign born adopted children ages 9, 7, and 5.

The male accuser (age 9), siblings, and mother lived with the defendant for six months before separating because of Ms. Bivins' controlling behavior. The allegations surfaced 18 months after the accuser left the Petitioner's house. Caregivers, teachers, mental health professionals, neighbors, and relatives did not notice anything out of the ordinary during the six months that the Bivins' family lived with the defendant. The divorce was contentious with the adoptive mother (Bivins) stalking and harassing Petitioner, neighbors, and Petitioner's ex-wife, women friends, and his now current wife.

The allegations consisted of only the accuser's testimony and there was a complete absence of corroborating evidence. The accuser exhibited serious indicia of cognitive and behavioral dysfunction, most likely due to Early Life Institutional Deprivation, before, during, and after the alleged abuse. "... the development of children raised in institutions is profoundly compromised." (Page 331), Romania's

Abandoned Children, Deprivation, Brain Development, and the Struggle for Recovery by Charles A. Nelson. Harvard University Press (2014). The accuser was on Zoloft, Concerta, Ritalin, Prazosin which are psychotropic, mind-altering, and mood-altering drugs prescribed to him by a physician who had his medical license taken away when he was treating the accuser.

A. Pretrial

The accuser's adoptive mother reported the alleged abuse to the police. The police as mandatory reporters by statute as well as the other mandatory reporters, including Ms. Bivins (accuser's mother), did not report the alleged abuse to Child Protection Services (CPS) as required by Virginia Statute.

The Petitioner was arrested, but the charges were dropped during a nolle prosequi proceeding based on the prosecution's perjurious proffer of "not ready" which resulted in extrinsic fraud upon the court which the Virginia and Federal courts have refused to address. This proffer did not comport with Virginia statute nor common law. Trial counsel did not find out the real cause of the prosecution's nolle prosequi request until 18 months **after** the hearing. The alleged victim (accuser) was not competent having been hospitalized with "acute conversion" and was having disassociation, pseudo seizures, paralysis, refusal, running away, self-mutilation, passing out and these events occurred frequently, randomly, and unexpectedly. The Petitioner was direct indicted 12 months later with the same charges.

The Commonwealth's Child Protection Service (CPS) did not conduct a statutorily required investigation or produce a determination of "founded" v. "unfounded" and an investigative file was never created. Caregivers, neighbors, school personnel, siblings, other relatives were never interviewed.

Multiple third-party providers created medical and mental health records documenting the accuser's indicia of dysfunction **before**, during, and after the allegations. **The accuser never disclosed any sexual abuse allegation during 18 months of therapy after leaving the defendant's domicile**.

These records were known to the prosecution and the defense through blue/cross billing records. A highly selective extremely limited portion of the therapy records were created, curated, and utilized by a prosecution expert/fact witness who testified pretrial. The therapy records held by the prosecution expert/fact witness documented 36 months of pre- and post-disclosure pretrial therapy conducted with the accuser of which 22 months were based on sexual abuse therapy not recommended, due to concerns of taint, by the creators of the sexual abuse therapy process.

The defense filed motions for the prosecution to produce the confidential records of the accuser as part of discovery which was denied by the trial court (R. 106-115, 590). The prosecution had stated that they refused to acquire, review, and or turn over the records of their expert/fact witness because "those records would be used solely to discredit the child. I chose to not to seek them in order to make them available to him [trial counsel]." (Hearing 4/5/2017, Page 38,39). After the initial

trial judge was recused for misconduct, Defense Counsel moved the court to reconsider, which was again denied. (R.599-606, 664).

During a hearing on 4/5/2017 the prosecution requested that the sole witness be allowed to testify on closed circuit TV. The prosecution placed the mental condition of its sole witness into evidence and solicited the testimony of a fact/expert witness that had treated its sole witness. Defense team expert on attachment disorder Dr. Marvin, was prevented from testifying at this hearing as well as at trial. The court combined what was supposed to be 2 separate hearings, one on CCTV and one on reliability of the witness where they go through all the points as to whether the testimony was reliable. That was not done, the judge came back later and doctored the order (typed in a different font) to act like this was included. A copy of this is in the court record.

The defense submitted a subpoena duces tecum targeting the mental and medical records of the sole witness based on services provided and billed through blue/cross insurance. A plausible showing of materiality and favorability was made during a hearing on 6/5/2017, Page 43-60, only 22 days before the trial. The trial court did not issue findings of fact and law, setting forth whether the records were or were not privileged. The trial court then quashed the subpoena duces tecum.

B. The Trial

The prosecution presented a single witness, the accuser. During the direct of the accuser the court did not allow defense counsel to hear the accuser's answers

saying "if you can't hear the witness you can't hear the witness" (Trial Day 1, Page 216).

During the trial, defense counsel moved for a mistrial on the ground that they needed the victims medical and mental health records, which was denied by the trial court (Jury Trial Day 2, Tr. 17-40, 46-49)

The defense called two prosecution witnesses, one of which was the fact/expert therapist that had treated the accuser and that had testified during pre-trial hearings. The court used a misapplied "voucher" rule to disallow the adverse direct, cross-examination and impeachment of these witnesses even though they had an "adverse interest." The defense put on other witnesses which included the defendant's urologist, and a forensic psychologist.

Finally, counsel filed a written motion to set aside and spoke at great length about these issues during argument on the motion to set aside. (R. 1308-1309; 7/15/17 Tr. at 3-36).

C. Direct Appeal

The Virginia Court of Appeals denied the petition for appeal on December 28, 2018. The opinion was delegated to the Circuit Court where the court opined (without an explanation) that the defendant did not provide a material need for the records. The Court concluded that ... [A] subpoena duces tecum will be issued, only if the defendant has a "substantial basis for claiming materiality exists" Cox v. Commonwealth, 227 Va. 324, 328 (1984) (quoting United States v. Agurs, 427 U.S. 97, 106 (1976)). Thus, "[a] subpoena duces tecum should not be used when it is not

intended to produce evidentiary materials but is intended as a 'fishing expedition' in the hope of uncovering information material to the defendant's case." Farish v. Commonwealth, 2 Va. App. 627, 630 (1986).

Beyond this initial opinion the Virginia Appellate and Supreme courts did NOT offer any further reasoning as to why the records were not available to defense counsel for review nor required to be reviewed by the court in-camera. A panel refused the rehearing on March 11, 2019. The Virginia Supreme Court refused Petitioner's subsequent appeal on August 27, 2019 and the request for rehearing on November 22, 2019.

D. State Habeas Proceedings

December 2, 2019, Mr. Watwood filed his petition for a writ of habeas corpus in the Virginia Supreme Court. Record No. 201308. It was denied. Virginia courts stated and upheld: [A] subpoena duces tecum will be issued, only if the defendant has a "substantial basis for claiming materiality exists" Cox v. Commonwealth, 227 Va. 324, 328 (1984) (quoting United States v. Agurs, 427 U.S. 97, 106 (1976)). Thus, "[a] subpoena duces tecum should not be used when it is not intended to produce evidentiary materials but is intended as a 'fishing expedition' in the hope of uncovering information material to the defendant's case." Farish v. Commonwealth, 2 Va. App. 627, 630 (1986).

E. Federal Habeas Proceedings

Petitioner's Petition for Habeas Corpus was filed In The United States District Court for The Eastern District of Virginia on 7/14/23. It was denied on

??/??/??. The District Court did not address the issue but parroted the finding of the Virginia Appellate Court in their response to the State Habeas. Petitioner's Certificate of Appealability was Denied on ??/??/??.

REASONS FOR GRANTING THE WRIT

I. This case presents important questions of federal law that have not been, but should be, settled by this Court. It is an excellent vehicle for the Court to further define the contours of what can be loosely defined as "constitutionally guaranteed access" to impeaching and exculpatory evidence that a defendant suspects exists in **confidential privately held records**.

The instant case provides this Court the means to determine whether the defendant's constitutional rights must prevail over the witness's psychotherapist-patient privilege constrained by a specific fact pattern.

A. Brady and progeny - Duty to Disclose

Government held records

Brady v. Maryland, 373 U.S. 83, 87 (1963). "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution."

It is well settled that the government has the obligation to turn over **evidence in its possession** that is both favorable to the accused and material to guilt or punishment. United States v. Agurs, 427 US 97 (1976). A majority of this Court has agreed, "[e]vidence is material only if there is a reasonable probability

that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 US 667 (1985).

This Court's development of Brady's holding has destined the doctrine to become less of a pre-trial discovery right and more of a post-trial remedy for prosecutorial and law enforcement misconduct. However, "one of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed." Taylor v. Illinois, 484 U.S. 400, 413 (1988).

In Ritchie and Love this Court established that a criminal defendant does have a limited pre-trial discovery right with the review in-camera of confidential records, when the defense makes a "plausible showing" that the records contain material and relevant evidence. There is not any specific mention of psychotherapist-patient privilege in either of these two cases although it is alluded to using the term "confidential".

What is important to note in these cases and the instant case, was that it was impossible to say whether any information in the confidential records may be relevant to the defendant's claim of innocence, because the prosecution, nor defense counsel, nor the trial judge had reviewed the records.

Psychotherapist-patient privilege

Unlike in Ritchie and Love when a criminal defendant attempts to access confidential records held by a third party, psychotherapist-patient privilege is invoked.

In the absence of clear direction from this Court, the lower courts will generally rule in a way to prevent disclosure. This Court has recognized that the public interest in protecting this type of sensitive information is strong, but this interest does not necessarily prevent disclosure in all circumstances. Again, there is no clearly established federal law that answers whether and when a psychotherapist-patient privilege must yield to a criminal defendant's desire to use such privileged information in his defense. See Batey v. Haas, Case No. 05-73699, 2013 U.S. Dist. LEXIS 61302, 2013 WL 1810762, at *10 (E.D. Mich. Apr. 30, 2013).

Some Circuits have determined that the psychotherapist-patient privilege will yield under very specific conditions. For example: mental health records are relevant for impeachment purposes when they bear on the witness's credibility, either at the time of the events about which he/she testifies or at the time of trial. See United States v. Love, 329 F.3d 981, 984 (8th Cir. 2003) (quoting United States v. Jimenez, 256 F.3d 330, 343 (5th Cir. 2001)); United States v. Soc'y of Indep. Gasoline Marketers of Am., 624 F.2d 461, 467-68 (4th Cir. 1979).

In addition, "To be relevant, the mental health records must evince an 'impairment' of the witness's ability to comprehend, know, and correctly relate the truth.'" Jimenez, 256 F.3d at 343 (quoting United States v. Partin, 493 F.2d 750, 762 (5th Cir. 1974)). At the very least, these standards permits impeachment where a witness's mental illness renders her/him delusional and hallucinatory, with poor judgment and insight. Indep Gasoline Marketers, 624 F.2d at 469; See also United States v. Butt, 955 F.2d 77, 82-83 (1st Cir. 1992) ("[F]federal courts appear to have

found mental instability relevant to credibility only where during the timeframe of the events testified to, the witness exhibited a pronounced disposition to lie or hallucinate, or suffered from a severe illness, such as schizophrenia, that dramatically impaired her/his ability to perceive and tell the truth.

As the records are confidential, a defendant does not know or can prove, but only have a strong suspicion, that the relevant conditions mentioned above exist in the records but still disclosure is prevented and in-camera review denied as in the instant case and in many of the Circuits, including the 4th Circuit and Virginia. The prevention of the disclosure comes about when a criminal defendant utilizes a subpoena duces tecum (SDT) which has a standard of materiality which is much higher than the standard used in Ritchie and Love.

Intertwined with Brady, privilege and subpoena power is the concept of maintaining balance between the parties. This Court has recognized that Due Process "speaks to the balance of forces between the accused and his accuser." Wardius v. Oregon, 412 U.S. 470, 474 (1973). In the instant case the prosecution's refusal to acquire and review the confidential records, the court's refusal to review the records in-camera, no Child Protective Service Investigation, and no police investigation is an example of how these actions provided "nonreciprocal benefits to the state" in regards to the investigation and presentation of its evidentiary case that should be **constitutionally assailable** "when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." Id. 474

This invokes a real concern that the real threat, as in the instant case, to the adversary system is its reduction to a sham by gross inequality of the adversaries and the confirmation bias prevalent in allegations of a reprehensive crime. At the center of the disparity between accessing confidential records whether held by the government or a third party is the use of the subpoena duces tecum.

B. Subpoena Duces Tecum (SDT)

The Subpoena Duces Tecum (SDT) is the mechanism for acquiring third party records. The granting of the SDT is governed by a "materiality" standard and it is the selection and use of this "standard" by the States and Circuits where there is a split of authority, confusion, and disarray. Under federal law to determine materiality for a SDT the hurdles that must be met are (1) relevancy; (2) specificity; (3) and admissibility. Materiality standards in the circuits range from "likely to contain" in the (1st Circuit); "a reasonable ground to believe" (2nd Circuit); "substantial basis for claiming" (Virginia) or "a reasonable likelihood" (Maryland) both states in the 4th Circuit; "a reasonable belief" (Kentucky) or "reasonable probability" (FL) or "good faith belief" (MI) or "reasonable certainty" (MI) in the 6th circuit; "reasonable likelihood" (WI) in the 7th Circuit and (Alaska) in the 9th Circuit. "A reasonable probability" (11th Circuit).

Various standards imposed by state and federal courts demonstrate that there is no clear consensus of what showing the defendant should be required to make in order to trigger in-camera review.

The Sixth Circuit has pointed out that Ritchie did not clearly establish a specific standard for state courts to follow. The 8th Circuit has upheld that there is no clearly established law whether a states psychotherapist-patient privilege must yield to a criminal defendant's desire to use such confidential information in defense of a criminal case.

When a defendant seeks the disclosure of evidence via a SDT in Virginia, the standard to be applied is whether a "substantial basis for claiming materiality exists." Cox v. Commonwealth, 227 Va. 324, 315 S.E. 2d 228 (1984) (quoting United States v. Agurs, 427 U.S. 97, 106 (1976)).

Coupled with the Cox ruling, Virginia typically attaches ... Thus, "[a] subpoena duces tecum should not be used when it is not intended to produce evidentiary materials but is intended as a 'fishing expedition' in the hope of uncovering information material to the defendant's case." Farish v. Commonwealth, 2 Va. App. 627, 630 (1986).

However, this Court urged long ago: "No longer can the time-honor cry of 'fishing expedition' serve to preclude a party from inquiring into facts underlying his opponent's case." Hickman v. Taylor, 329 U.S. 495, 507 (1947).

A SDT's materiality requirement also includes specificity. In Chavis v. North Carolina, 637 F.2d 213, 224-25 (4th Cir. 1980) (request for "psychiatric or other reports which might reflect on the credibility or competence of any .... prospective witnesses " held specific). In US v. Meintzschel, 538 F.Supp 3d (2021) the SDT was

denied as the record request didn't identify the therapist. However, in the instant case, the identity of the therapists was known by the defense.

In the instant case the SDT included a request for psychiatric reports as in Chavis based on blue cross/blue shield billing records, but this factor was ignored by the Virginia Supreme Court and subsequently the Federal courts.

A materiality standard also incorporates the number of witnesses. Undisclosed evidence that would impeach witness's testimony "material" because witness's testimony was only evidence linking defendant to crime. U.S. v. Parker, 790 F.3d 550, 558-59 (4th Cir. 2015).

The instant case only had the testimony of a single witness with severe indicia of dysfunction with no corroborating evidence and yet this factor was ignored.

Another consideration is found in Smith v. Cain, 565 U.S. 73, 75 (2012). (Evidence impeaching witness is material when other evidence is not strong enough to support verdict.) The instant case did not have any evidence present that should have been there given the allegations. When guilt or innocence may well depend upon the reliability of a given witness, non-disclosure of evidence affecting the witness's reliability is very likely to be material. See Giglio, 405 U.S. at 153-54; Ellis, 121 F.3d at 917.

In the instant case, the fact/expert witness admitted, "A lot of things he said were quite startling to me" (TR Day 3 - Pg 55, On 12-14). And yet an in-camera review of the records was not conducted. Evidence relevant to the credibility of a

witness is material in the constitutional sense as evidence which goes directly to the question of guilt where "[t]he jury's estimate of truthfulness and reliability of a given witness may well be determinative of guilt or innocence" Napue v. Illinois, 360 U.S. 264, 269 (1959).

However, the 4th Circuit doesn't consider psychological evidence in the form of witness bizarre statements and actions as probative of credibility. One example in the instant case is that the alleged victim/accuser said he pooped in his underwear, placed the feces in the toilet and spelled "help" with it. But then went on to claim that the defendant said he would kill the alleged victim/accuser and the mother if the alleged abuse was revealed. This does not make sense.

When the records are held by a third party verses the government and the factual elements of representative cases are essentially identical, the materiality standard for issuance of a SDT is much higher leading to disparity in the application of due process. The disparity comes about as the defendant never gets to the point of determining materiality of the evidence contained in the third-party records.

The choice and application of the materiality standard in a criminal case can be and is typically influenced by the circumstances of who, what, and how the subject of the SDT will be used. The instant case has compelling facts that would allow a court to rule that the psychotherapist-patient privilege must yield to the defendant's need for a fair trial.

Facts - Instant Case

- There is a very strong suspicion that the sole witness was brain and cognitively damaged based on exhibited indicia of dysfunction which would put the witness into a class of individuals that calls into question the witness's moral capacity, memory capacity, and vulnerability to coercion. The sole witness is in a class of individuals that suffered early life institutional deprivation that resulted in a malformed brain and maladaptive behavior.

- All the medical and psychotherapist providers were known to the defense through the blue shield / blue cross billing records.

- The sole witness was subject to over 50 therapy sessions after disclosure and before the trial using a process that the creators of said therapy warned against not using pretrial because of a reasonable probability of taint.

- Evidence that should have been available given the allegations never surfaced.

- The only evidence was the accuser's testimony which changed significantly between the disclosure and the trial.

- The prosecution stated "We interviewed him, we believe him, and it stops there" which led to suppression of evidence and fraud upon the court.

- An investigation by Child Protective Service which was required by state statute was purposively **not conducted** by the state.

- The prosecution refused to acquire and review known confidential records affecting the credibility of their sole witness.

- The prosecution delayed the trial for 12 months using a nolle prosequi of the initial charges without disclosing the mental illness of the sole witness instead stating to the court the witness was "not ready".

- The prosecution placed the sole witness's mental condition into issue during a hearing requesting use of closed-circuit TV. The [psychotherapist-patient] privilege may be waived where the patient's [sole witness's] mental condition is placed into issue. Maynard v. City of San Jose, 37 F.3d 1396, 1402 (9th Cir. 1994). However, the court refused to waive the privilege.

The trial court **DID NOT** give a reason as to why the SDT was quashed and the records not reviewed in-camera. The Court of Appeals delegated the opinion writing to the Virginia Circuit Court which made vague assertions that defense counsel did not make a "material" showing and that the SDT was overbroad. The Virginia Supreme Court denied the appeal without reaching the merits. In the habeas corpus the Virginia Supreme Court and Federal Courts did not address the issue and relied totally on the lower courts handling of the issue.

In the absence of clear legal reasoning, it can only be inferred that the Virginia courts and 4th Circuit Federal courts in the instant case required a "substantial materiality" test just to grant the SDT which then precluded the reviewing of the records in-camera. The facts of the instant case provide this Court with an opportunity to standardize the SDT materiality standard for in-camera review across the circuits for third party held mental health records much like Ritchie did for government held records.

The instant case suggests that the standard should be that "information in such records should be disclosed to the defense if it raises significant doubts upon the truthfulness or accuracy of an important government witness's testimony". In the instant case, the alleged victim/accuser asserted during a CAC interview that there were three episodes of abuse even identifying the weeks when the alleged abuse occurred. By trial it was six alleged episodes with no recollection of when or what he said during the CAC interview.

C. National importance - societal implications

This case presents important questions of federal law that have not been, but should be, settled by this Court as this Court has not addressed or provided any guidance nor is there any federal law that addresses how a witness with abnormal brain development should be evaluated for veracity, reliability, and creditably before being allowed to engage the legal system in a criminal matter when there is no evidence that the crime occurred and the trial comes down to a credibility determination.

The instant case has significant ramifications for two groups in society, innocent citizens and post-institutionalized persons. Citizens have always been concerned with the crime rate. History has shown that children raised in institutions in the U.S. had an elevated propensity for sociopathic behavior and were more inclined to violate the law. In the 1940's the orphanages in the U.S. and the U.K. were shut down. The abnormal behavior among orphans was mitigated through foster homes but nobody knew exactly why this worked. Recently, there has

been a huge influx of foreign-born institutionalized children adopted by U.S. citizens. And with the arrival of those children, their abnormal behavior are once again impacting society.

With advances in neuroscience and testing, a group of scientists set out to determine the cause of the abnormal behavior present in institutionalized children. In 1998, a foundation launched a research network entitled "Early Experience and Brain Development" which Charles A. Nelson directed and in which Charles Zeanah and Nathan Fox were core members.

On April 1, 2001 the Bucharest Early Intervention Project (BEIP) project was formally launched and had two primary goals: 1) to examine the effects of institutionalization on brain and behavioral development; and 2) to examine whether the effects of early institutionalization could be reversed by placing children in families. It was found that institutionalized children's brains do not develop normally and the damage to the brain occurs when a child is institutionalized at birth and raised there while not being placed in a foster home or not adopted until after age 2. **The sole witness in this case was abandoned at birth, with a cleft palate deformity, and raised in a Chinese institution until adopted at age 3.**

The BEIP study stated, "With very few exceptions, we demonstrated compromises in virtually every aspect of development among institutionalized children. From the level of molecular structures to the level of complex social interactions, from brain function to brain structure, these children are

unquestionably disadvantaged." *Romania's Abandoned Children: Deprivation, Brain Development,* and the struggle for recovery. Charles A. Nelson (2014), Page 304. Given the magnitude of the deficits, we do not expect this to change even with the kind of neural reorganization that occurs in adolescence. Id. Page 332. A critical behavioral trait of these children is the pathological lying that occurs to garner attention.

This isn't the only study involving this class of individuals. A Diffusion Tensor Imaging Study demonstrates in children who experience socioemotional deprivation a structural change in the left uncinate fasciculus that partly may underlie the cognitive, socioemotional, and behavioral difficulties that commonly are observed in these children. Abnormal Brain Connectivity in Children After Early Severe Socioemotional Deprivation, *Pediatrics* Volume 117, Number 6, June 2006.

-See Appendix C for relevant scientific studies involving this class of individuals that was submitted with the Petition for Habeas Corpus: The results of these studies showing significant effects of institutionalization on young children's physical, social, intellectual, and mental health therefore have raised important scientific, policy, and now legal issues. There is another class of individuals that suffer early life deprivation damage just not in an institution. The children of drug addicted U.S. mothers that neglected their children, had children who also suffered cognitive brain damage. The name for such deprivation and the

resultant cognitive brain damage is "attachment disorder." The two terms, early life institutional deprivation and attachment disorder, describe the same condition.

Prime indicators of early life institutional deprivation is ADHD and PTSD. ADHD is a highly heritable neurodevelopmental disorder that is extraordinarily prevalent in children with history of institutional rearing. Id. page 289.

The amygdala is an almond-shaped structure deep in the middle of the brain that is involved in the detection of threats and unfamiliar events or people. It plays a significant role in many social and cognitive behaviors. MRI's of post institutionalized children reveal significant differences as compared with a control group. Id. 152, 153. A difference that easily accounts for a PTSD diagnosis.

In the instant case the sole accuser was diagnosed with these conditions years before the allegations. The prosecution acting as an expert asserted that "attachment disorder has no bearing on the prosecution", "ADHD has nothing to do with credibility", and "pre-existing PTSD is not relevant" in opposing the acquisition of the records and opposing the SDT It is the abnormal brain development of post-institutional children that are highly suspect in having any sort of competency above and beyond a normal child.

Memory is an element of a competency determination of competency. The CANTAB (Cambridge Automated Neuropsychological Test and Battery) and the NEPSY (Neuropsychological Assessment) tests have shown that international adopted children between the ages of 8 and 10 performed worse on tests of memory,

visual attention, and learning than did early adopted or non-adopted control children. Id. 139.

People with early life institutional deprivation or attachment disorder are highly suspected in having any sort of competency.

In addition, Hartshorne H, May MS. *Studies in the nature of character: Studies in deceit.* New York: Macmillan; 1928, did a study in which eleven thousand normal children ages 11-14 were involved. These children we NOT damaged by early life deprivation. Moral conduct was studied by giving children opportunities to lie, to cheat, and to steal in different sets of circumstances. The most surprising discovery, because it was not expected, is that the moral behavior of children is specific to the situation. There is little support for the concept of some internal entity such as moral disposition or general traits of honesty, truthfulness, or trustworthiness. A normal child witness's competency and whether they have a conscious duty to speak the truth cannot be determined by a judge in a 5-to-10-minute examination of a child's accuracy of observation coupled with a moral homily on truth telling. Wakefield & Underwager, "*Accusations of Child Abuse*" (1988).

On top of this "normal behavior", post institutionalized children are notorious for lying for attention, being entirely self-centered, and are conscience-impaired creating the requirement that an exhaustive investigation through such a child's records be conducted for determining testimony reliability and credibility, as well as the child's veracity. This was not done in the instant case. What is concerning is

that the best witnesses as to the mental and moral capacity of a child are those people that run childcare facilities and teachers and school psychologists. And yet, in the instant case a CPS and police investigation were deliberately NOT conducted and none of the caregivers were interviewed.

The dysfunction that these post institutionalized individuals exhibit as a potential witness call into question their moral capacity, memory capacity, vulnerability to coercion, and points to a witness with a damaged brain. Witness reliability and veracity must not be ignored because of the age of the witness and the nature of the charges. These defects go to the heart of the witness's competency. In the instant case the court did not assess the witness' reliability.

While incompetency due to defects in mental capacity is still recognized in the law, federal law and precedent does not address incompetency as a result of sociopathy. When these individuals decide or are coerced to utilize the courts for nefarious reasons, unchecked by moral capacity, and are enabled by government confirmation bias, ignorance, and refusal to investigate, the judicial system is weaponized, and it is the innocent citizen that suffers the consequences. When something is alleged to have happened, but did not, the accused MUST be allowed to attack the reliability and credibility of such an accuser.

The records documenting these behavior problems made the accuser very likely to fabricate abuse allegations, the denial of them effectively barred the defense from countering the prosecution's narrative that those behavioral problems were caused by the alleged abuse.

The judicial system must allow a defendant access to medical and mental health records when accused by these cognitively damaged, sociopathic individuals, especially preteens, to challenge their veracity, reliability, and credibility in the complete absence of evidence that should have been there given the allegations but wasn't. Otherwise, confirmation bias and urban myth infects the process and an innocent man is convicted, as in the instant case.

The confidentiality privilege must yield, and confidential records must be disclosed or reviewed in-camera for impeaching or exculpatory evidence especially evidence affecting the credibility of the government's witness. U.S. v. Bagley, 473 U.S. 667, 676 (1985). But even when records are reviewed in-camera, an expert must also go through the records as a judge does not have the knowledge and expertise to identify a sociopath or any other conditions that affect a witness' competency. The refusal to grant in-camera review of the alleged victim's/accuser's records affected the entire course of the trial, fatally hindering the defendant's ability to mount a defense and attempt to prove a negative, the abuse did not happen and the allegations were fabricated.

D. Pretrial Therapy - witness tampering

This case presents important questions of federal law that have not been, but should be, settled by this Court as this Court has not addressed or provided any guidance nor is there any federal law that addresses pretrial, third party suggestive confrontations and how they should be considered when a defendant issues a SDT to acquire evidence that would attack the reliability and credibility of a sole

witness. The extensive use of pretrial suggestive therapy without the defendant's ability to review it for taint should be considered witness tampering unless a mitigating process was put into place.

The existence of extensive pretrial therapy of the sole witness was not a factor in Ritchie and Love. However, this was a critical factor in the instant case. There were over 50 post disclosure, pretrial, suggestive confrontations arranged by the third-party actors. None of these confrontations were videotaped so that an analysis for taint could be conducted. The defense was not aware of the mental state of the sole witness as it was kept from the defense.

A number of courts have applied heightened evidentiary scrutiny to suggestive confrontations arranged by non-state actors. State v. Chen, 208 N.J. 307, 27 A.3d 930 (2011); Commonwealth v. Johnson, 473 Mass. 594, 45 N.E. 3d 83 (2016). However, Virginia does not consider this scenario.

This Court stated in Idaho v. Wright, 497 U.S. 805 (1990) that a necessary procedural safeguard for determining reliability when getting statements from the alleged victim is the use of video recording. In the instant case, a prosecution/fact witness utilized TF-CBT therapy that utilized a book titled "Corey Helps Kids with Sexual Abuse." The instructions for use of the book stated on Page 3, " Beware that young children may lie in order to please ..." On page 6, it stated "This book should not be used unless the sexual abuse has been investigated by Child Protective Services and/or law enforcement, and the abuse has been verified. In the instant case, Child Protective Service never investigated nor did law enforcement.

"If trauma history includes allegations of child abuse, these should be reported to the appropriate authorities and investigated before TF-CBT is initiated. This approach to treatment is predicated on **confirmation that the abuse occurred** either through clinical assessment or substantiation by a child protective service agency or law enforcement. www.nctsn.org. Pg 27 "How to implement Trauma-Focused Cognitive Behavioral Therapy"

However, in the instant case this therapy was used without a Child Protection Services investigation, a clinic assessment, nor a law enforcement investigation and the defense was denied access to the therapy notes. This fact/expert witness stated, " A lot of things he said were quite startling to me" (TR Day 3 - Pg 55, On 12-14). In addition, she also stated "I have been taught and believe that you believe what you are told [by the sole witness]. (Trial Day 3; Page 204)

There are several factors present in therapy that would taint any testimony. They are: Post Event Information | Memory Work (Imagination exercises) | Leading questions | Repeated questioning over repeated sessions | Biased, authoritative adult | Extended time between event and disclosure. Such factors will create testimony replete with Source monitoring errors (events in the mind v. external): "Telling more than we know" errors | Imagination inflation | Audience tuning | Confabulation | Induced and implanted false memories | Memory conjunction - blending feature from different memories.

None of these factors in the instant case could be addressed as the prosecution would not acquire and review the records and the court refused to review the records in-camera.

Eyewitness evidence derived from suggestive circumstances is uniquely resistant to the ordinary tests of the adversary process. Eyewitness artificially inflated confidence complicates the jury's task of assessing witness credibility and reliability. All these items in turn jeopardize the defendant's right to prepare for trial and subject his accuser to meaningful cross-examination. The result of suggestion, whether unintentional or intentional, is to fortify testimony bearing directly on guilt that juries find extremely convincing and are hesitant to discredit. U.S. v. Wade, 388 U.S. 218 (1967).

E. Discovery Obligation - Prosecution

This case presents important questions of federal law that have not been, but should be, settled by this Court as this Court has not addressed or provided any guidance nor is there any federal law that addresses when mental health and medical records held by a third-party fact/expert witness that may or may not testify must be turned over to the defense. The prosecution in the instant case stated: " We interviewed him, we believe him, and it stops there". (Motion Hearing 6-5-17, Page 48).

This Court has stated that "There is no general constitutional right to discovery in a criminal case, and Brady did not create one." Weatherford v. Bursey, 429 U.S. 545 (1977). However, in Giglio v. United States, 405 U.S. 150 (1972) this

Court Implicitly imposed a duty on the prosecutor to seek out central facts about his major witnesses and disclose information that could be used to impeach their witness especially where the witness's testimony is an important part of the government's case.

A prosecutor does not meet their ethical and constitutional duty simply by making a pretrial determination that evidence in confidential records, if not acquired, reviewed, and material and relevant evidence disclosed, would not likely change the outcome of the trial. The failure to carry out this duty reduces the fact-finding process to an exercise in brinkmanship.

This duty springs from a public prosecutor's broader obligation to "seek justice, not merely convict." It is well settled that the prosecution must acquire and review evidence in the possession of members of the prosecution team. It is not well settled that when the prosecution knows of records held by third parties about their sole witness that they must acquire and review the records for evidence. In Ritchie, Love, and the instant case the prosecution in each of these cases DID NOT seek out facts about its sole witness that were in records known to them.

In the instant case, the prosecution knew of the existence of records and were requested by the defense in discovery. The prosecution utilized a fact/expert witness who had provided 50+ pretrial therapy sessions and testified at a pretrial hearing for CCTV usage where **the mental state of the sole witness was at issue.** The judge went so far as to state, "I'm not saying the child doesn't have issues. I don't

think anybody in the room disagrees with that point ..." (Motion Hearing 4-15-17, Page 238).

However, the prosecution did not acquire and review the confidential records; they did not turn over the records to the defense, nor did the court order the prosecution to acquire and review the records before the hearing or trial.

Making prosecutors immune from Brady when the material is in the therapist's (fact/expert) files who is summoned to testify creates a perverse incentive for prosecutors **not to know** about information favorable to the defense. A natural step would be for this Court to enlarge the notion of the government's greater access to evidence. Given the government's larger resources, the expansion could well include evidence that the government knew about and could have gathered but did not. This would effectively impose on prosecutors an affirmative duty to accumulate, as well as transmit, evidence favorable to an accused.

This Court has observed that: "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." Dennis v. United States, 384 U.S. 384 U.S. 855, 870 (1966). This Court is requested to rule that if a third-party fact/expert witness, in possession of confidential medical and mental health records, that testifies at any point during a prosecution, that the records must be turned over to the defense before the testimony is solicited.

CONCLUSION

This issue is substantial because of this complexity and confusion in the courts that this Court should address it. The innocent petitioner has been convicted of a serious crime and deprived of his liberty because the judicial system has chosen to not address the issues that deprived him of presenting a complete defense and a fair trial.

This Court has repeatedly recognized that the right to present a complete defense in a criminal proceeding is one of the foundational principles of our adversarial truth finding process: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clause of the Sixth Amendment, the Constitution guarantees criminal defendant's a meaningful opportunity to present a complete defense'." Holmes v. South Carolina, 547 U.S. 319, 324 (2006).

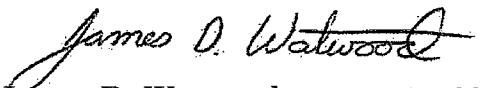
This principle is undermined when a criminal defendant is denied access to third party confidential medical and mental health records of the sole witness when he can only suspect that the records contain impeaching and exculpatory evidence. The need is especially great when there is no corroborating evidence and the sole witness has indicia of dysfunction that implicates the witness's credibility and their ability to comprehend, know and correctly relate the truth

This Court is asked to end the Due Process disparity when a defendant seeks confidential records on the sole witness that occurs when records are held by a third party rather than the government. The purpose here is not to try to transform the adversarial system to one where the prosecutor would instead resemble the neutral

magistrate in the inquisitorial system, but to insure a fair trial of the defendant. "Surely the paramount value our criminal our criminal justice system places in acquitting the innocent, demand close scrutiny of any law preventing the jury from hearing evidence favorable to the defendant." Taylor v. Ill, 484 U.S. 400, 423-424 (1988).

Petitioner James Watwood respectfully requests that this Court grant his petition for writ of certiorari, summarily vacate his conviction, and remand his case to Virginia's Chesterfield County Circuit Court. In the alternative, Petitioner requests that this Court grant the writ, appoint the defendant counsel, and set the Petitioner's case for full briefing and argument before the Court.

Respectfully submitted



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