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RENDERED: MAY 18, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0682-MR

DATE 6-8-06 ELA GRAYSON D.C.

COMMONWEALTH OF KENTUCKY — APPELLANT

V.

APPEAL FROM ORIGINAL ACTION IN COURT OF APPEALS
2005-CA-332
MONTGOMERY CIRCUIT COURT NO. 04-CR-124

HONORABLE BETH LEWIS MAZE,
JUDGE, MONTGOMERY CIRCUIT
COURT — APPELLEE

AND

TOM SAPP
(REAL PARTY IN INTEREST) — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Montgomery County grand jury indicted Appellee real party in interest, Tom Sapp, for the offense of sexual abuse in the first degree, accusing him of having sexual contact with J.T., a child less than twelve years old. KRS 510.110(1)(b)2. The Commonwealth filed a pre-trial motion asking the trial court to find that there is a compelling need for J.T. to testify at trial outside the presence of Sapp. KRS 421.350(2); Price v. Commonwealth, 31 S.W.3d 885, 894 (Ky. 2000) ("The procedure described in KRS 421.350(2) may not be utilized absent proof and a specific finding of a compelling need therefor.").

> The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-

> way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than "mere nervousness or excitement or some reluctance to testify."

Maryland v. Craig, 497 U.S. 836, 855-56, 110 S.Ct. 3157, 3169, 111 L.Ed.2d 666 (1990) (citations omitted).

In support of its motion, the Commonwealth filed a letter signed by Carmen Rogers, M.A., a licensed psychological associate employed at the Mt. Sterling clinic of Pathways, Inc., a private non-profit mental health organization that services a ten-county area in northeastern Kentucky. Rogers's letter provided:

> The following information is being submitted regarding [J.T.] for consideration prior to the trial of Tom Sapp, who is accused of sexually abusing her. [J.T.] has been seen for outpatient mental health services at our clinic since November, 2003. This treatment has primarily focused on emotional issues pertaining to the alleged abuse.
>
> Through [J.T.]'s treatment, we have had to address the symptom of anxiety that Tom Sapp will try to hurt her. At one point several months ago, [J.T.] became paralyzed with fear when she encountered Mr. Sapp in a public place. [J.T.]'s primary response to the thought of being in Mr. Sapp's presence is that he will try to harm her. She is unable to calm herself and rationalize that she will be kept safe by the others around her.
>
> When asked directly about her emotional preparedness to testify in the presence of Mr. Sapp, [J.T.] does not have confidence that she will be able to do so. Given the ongoing symptom of anxiety and fear for her safety in Mr. Sapp's presence, it is my opinion that [J.T.] would suffer extreme emotional distress if forced to testify in the presence of her alleged perpetrator. It is reasonable to assume that such fear would severely limit her ability to communicate any details of the alleged crime. It is my recommendation that [J.T.] be permitted to give her testimony by

closed circuit television or some other means that will isolate her from Mr. Sapp.

. . . .

Sincerely:
/s/
Carmen Rogers, M.A.
Licensed Psychological Associate
Qualified Mental Health Professional

Sapp responded with a motion to require the Commonwealth to produce the mental health records in Rogers's possession for examination and use during the "compelling need" hearing (and, presumably, the trial, if necessary). The Commonwealth objected to the motion on grounds that J.T.'s psychotherapy records fall within the psychotherapist-patient privilege, KRE 507. The trial court entered an opinion and order requiring that the records be produced for the trial court's in camera review but denying Sapp's request that the records be turned over directly to him. The Commonwealth then filed this petition in the Court of Appeals for a writ to prohibit the trial court's in camera inspection and the release of any privileged information to Sapp. The Court of Appeals denied the petition and the Commonwealth filed this appeal as a matter of right. Ky. Const. § 115; CR 76.36(7).

A writ is an extraordinary remedy, and whether to grant or deny such relief is within the sound discretion of the court in which the petition is filed. Hoskins v. Maricle, 150 S.W.3d 1, 5 (Ky. 2004). Appellate review of that decision is for abuse of discretion, except that issues of law are reviewed de novo. Rehm v. Clayton, 132 S.W.3d 864, 866 (Ky. 2004). The issue presented by this appeal involves interpretation of KRE 507, KRE 509, and our decision in Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003).

KRE 507 provides in pertinent part:

(a) Definitions. As used in this rule:

. . . .

(2) A "psychotherapist" is:

(A) A person licensed by the state of Kentucky, or by the laws of another state, to practice medicine, or reasonably believed by the patient to be licensed to practice medicine, while engaged in the diagnosis or treatment of a mental condition;

(B) A person licensed or certified by the state of Kentucky, or by the laws of another state, as a psychologist, or a person reasonably believed by the patient to be a licensed or certified psychologist;

(C) A licensed clinical social worker . . . ; or

(D) A person licensed as a registered nurse or advanced nurse practitioner . . . .

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are present during the communication at the direction of the psychotherapist, including members of the patient's family.

(4) "Authorized representative" means a person empowered by the patient to assert the privilege granted by this rule and, until given permission by the patient to make disclosure, any person whose communications are made privileged by this rule.

(b) General rule of privilege. A patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Exceptions. There is no privilege under this rule for any relevant communications under this rule:

. . . .

(3) If the patient is asserting that patient's mental condition as an element of a claim or defense . . . .

KRE 509 provides, <u>inter alia</u>:

A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of <u>any significant part of the privilege[d] matter</u>. . . . .

(Emphasis added.)

We held in Barroso that "[i]f the psychotherapy records of a crucial prosecution witness contain evidence probative of the witness's ability to recall, comprehend, and accurately relate the subject matter of the testimony, the defendant's right to compulsory process must prevail over the witness's psychotherapist-patient privilege." Barroso, 122 S.W.3d at 563. We also established procedures applicable to such disclosures. First, the person seeking disclosure must produce "evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence." Id. at 564. If so, then the trial court must review the records in camera (alone) and, only if "satisfied that the records reveal evidence necessary to the defense is the evidence to be supplied to defense counsel." Id. (quoting People v. Stanaway, 521 N.W.2d 557, 575 (Mich. 1994)).

Remembering that the Commonwealth sought the writ only to preclude the trial court's in camera review of these records, we conclude that the Court of Appeals did not abuse its discretion in denying the Commonwealth's petition.

First, the Commonwealth has made no showing that J.T.'s treatment at Pathways was by a psychotherapist. To be a psychotherapist, a psychologist must be a "licensed psychologist," which requires a doctoral degree in psychology. KRS 319.050(2)(b). Rogers is a "licensed psychological associate," which requires only a master's degree in psychology. KRS 319.064(2)(b). Prima facie, she is not a psychotherapist.

Second, in asserting the privilege on J.T.'s behalf, the Commonwealth made no showing that it is J.T.'s "authorized representative" to do so.

Third, Rogers's letter disclosed a "significant part of the privilege[d] matter." If this was done with J.T.'s consent, J.T. has waived the privilege with respect to treatment

for conditions allegedly impairing her ability to testify in this case. KRE 509. Furthermore, J.T. is asserting her own mental condition as an element of her claim that she cannot testify against Sapp while in his presence, thus falling within the exception at KRE 507(c)(3).

Finally, Rogers's letter, itself, "establish[es] a reasonable belief" that the records contain information "probative of the witness's ability to recall, comprehend, and accurately relate the subject matter of the testimony." Barroso, 122 S.W.3d at 563, 564.

Accordingly, we affirm the Court of Appeals' decision to deny the petition for a writ of prohibition.

Lambert, C.J.; Cooper, Graves, Johnstone, Roach, and Wintersheimer, JJ., concur. Scott, J., dissents by separate opinion.

COUNSEL FOR APPELLANT:

George Wm. Moore
126 West Main Street
P.O. Box 476
Mt. Sterling, KY 40353

COUNSEL FOR APPELLEE HONORABLE BETH LEWIS MAZE, JUDGE, MONTGOMERY CIRCUIT COURT:

Beth Lewis Maze
21st Judicial Circuit Judge
P.O. Box 1267
Mt. Sterling, KY 40353

COUNSEL FOR APPELLEE TOM SAPP (REAL PARTY IN INTEREST):

Michael B. Shields
26 Broadway
P.O. Box 950
Mt. Sterling, KY 40353

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COURT, DIV. II — APPELLEE

AND

TOM SAPP
(REAL PARTY IN INTEREST) — APPELLEE

DISSENTING OPINION BY JUSTICE SCOTT

Respectfully, I dissent.

I simply do not believe the "compelling need" test under KRS 421.350 is an equivalent standard for invasion of the psychotherapist-patient privilege under KRE 507. Thus, I believe the trial court is proceeding erroneously in this criminal discovery matter and correction of the error is necessary and appropriate in the interest of orderly judicial administration. I would, therefore, reverse the Court of Appeals and grant the writ of prohibition.

The Appellee, Tom Sapp (Sapp), was indicted for first-degree sexual abuse of J.T., a minor who is just now ten years of age. After the alleged abuse,

J.T. began counseling with Pathways. The record does not establish any prior treatment history. Prior to trial, J.T.'s treating therapist, Ms. Rogers, provided Appellant with her written opinion that (1) J.T. would suffer extreme emotional distress if forced to testify in the presence of the alleged perpetrator, Sapp, and (2) her fear of him would severely limit J.T.'s ability to communicate details of the alleged crime. In her opinion letter of January 5, 2005, Ms. Rogers, a licensed psychological associate for Pathways, noted:

> [T]reatment has primarily focused on emotional issues pertaining to the alleged abuse.
>
> Throughout [J.T's] treatment, we have had to address the symptom of anxiety that Tom Sapp will try to hurt her. At one point several months ago [J.T.] became paralyzed with fear when she encountered Mr. Sapp in a public place. [J.T.'s] primary response to the thought of being in Mr. Sapp's presence is that he will try to harm her. She is unable to calm herself and rationalize that she will be kept safe by the others around her.
>
> When asked directly about her emotional preparedness to testify in the presence of Mr. Sapp, [J.T] does not have confidence that she will be able to do so. Given the ongoing symptom of anxiety and fear for her safety in Mr. Sapp's presence, it is my opinion that [J.T] would suffer extreme emotional distress if forced to testify in the presence of her alleged perpetrator. It is reasonable to assume that such fear would severely limit her ability to communicate any details of the alleged crime.

Upon receipt of the opinion letter, the Commonwealth filed a motion for a hearing pursuant to KRS 421.350 in order to determine whether J.T. could testify outside the presence of Sapp. The opinion letter was provided to the Appellee and the court concurrent with the filing of the motion. Appellee then filed a motion to compel the production of Ms. Rogers' records on J.T.'s treatment.

Following the hearing, the court ordered Pathways to provide the records to the court for an *in camera* inspection. Appellant then filed a motion to reconsider, with the Appellee responding "that the Commonwealth, by virtue of filing its motion pursuant to KRS 421.350, and the attached letter from Carmen Rogers, has placed the mental health of the alleged victim in issue. Therefore, the [psychotherapist - patient] privilege . . . has been waived."

The court thereafter adopted the Appellee's position, finding:

> "[f]irst by alleging the child is not emotionally capable of testifying in the presence of the Defendant, the child's mental health has been placed in issue. Secondly, by providing a letter from the child's treating psychotherapist that the child's treatment pertains to the Defendant . . . there exists mental health records as a result of mental health counseling with a minor complaining witness, and these records do pertain to the Defendant. Therefore, *there has been presented to the court 'articulable evidence that raises a reasonable inquiry of [the] witnesses mental health history' to be entitled to discovery, [as] the 'articulable evidence does not have to establish the relevance and materiality of the records sought."* (Emphasis added).

Following the ruling, the Commonwealth filed a writ of prohibition in the Court of Appeals. On July 26, 2005, the Court of Appeals denied the writ. Because I disagree with the evidentiary standard applied by the trial court to invade the KRE 507 privileged material, I would reverse the Court of Appeals and grant the writ of prohibition.

THE STANDARD OF KRS 421.350

KRS 421.350 allows children, twelve years of age or younger, who were victims of, or witnesses to, illegal sexual activity to testify from a room other than the courtroom, if approved by the trial court, under the guidelines set out in the statute. Once approved, the defendant, the court ,and the jury remain in the

courtroom viewing the testimony, while the attorneys and other necessary personnel are in another room from which the child testifies. In these instances, everyone can see the child, including the defendant, but the child simply cannot see the defendant.

Statutes similar to KRS 421.350 have been approved on Sixth Amendment constitutional grounds by the United States Supreme Court. See Maryland v. Craig, 497 U.S. 836, 852, 110 S.Ct. 3157, 3167, 111 L.Ed.2d 666 (1990). Similarly, this Court has upheld KRS 421.350 in challenges based upon both the Sixth Amendment and Section Eleven of our Constitution. See Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986).

In determining the applicability of KRS 421.350, a court must find a compelling need. KRS 421.350(3). A "compelling need is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress *produced by the defendant's presence.*" KRS 421.350(5) (Emphasis added). "'[S]erious emotional distress such that the child cannot reasonably communicate' clearly suffices to meet constitutional standards." Craig, 497 U.S. at 856. See also Danner v. Commonwealth, 963 S.W.2d 632, 635 (Ky. 1998)("[T] he compelling need is not based upon convenience or comfort level of the witness so much as it is the need to be able to disclose the testimony so that the jury itself can determine whether they want to accept, or reject same, or what weight it should be given.").

PSYCHOTHERAPIST- PATIENT PRIVILEGE

KRE 507(b) provides that

> [a] patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any

> other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, *or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist*, including members of the patients family. (Emphasis added).

KRE 507(c) sets out specific exceptions to this privilege, none of which are applicable here.

However, under specific circumstances, we have held that a criminal defendant is entitled to discover exculpatory evidence contained in psychiatric treatment records of a prosecution witness, and if the records are not in the possession of the Commonwealth, they can be obtained by subpoena duces tecum or by court order. Commonwealth v. Barroso, 122 S.W.3d 554, 561 (Ky. 2003); Eldred v. Commonwealth, 906 S.W.2d 694 (Ky. 1994) overruled in part by Commonwealth v. Barroso, 122 S.W.3d 554, 561 (Ky. 2003); see also Stidham v. Clark, 74 S.W.3d 719 (Ky. 2002). "There does not appear to be any real dispute that Appellant is entitled to discover medical or psychiatric records concerning a witness if certain prerequisites are met. *The fight is over what showing is required to gain such access.*" Eldred at 701 (emphasis added). Eldred went on to establish the standard that, *"if a trial court is '[confronted] with articulable evidence that raises a reasonable inquiry of a witness's mental health history, [the] court should permit [discovery].'"* Id. at 702 (emphasis added). This "articulable evidence" standard, as set out in Eldred, was the standard followed by the trial court in this case. *However, this standard was abrogated in Barroso.*

In Barroso, "we [concluded] that a more restrictive test [than set out in Eldred] [was] required to preclude 'fishing expedition[s] to see what may turn

up.'" Barroso, 122 S.W.3d at 563. "Thus, we [departed] from the less restrictive standard established in *Eldred* and [held] that [an] *in camera* review of a witness's psychotherapy records is *authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence.*" Id. at 564 (emphasis added).

We departed from Eldred because we recognized a need to balance one's privacy interests in maintaining the confidentiality of psychotherapy records with the constitutional right of a defendant to compulsory process under the Sixth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution. This recognition was consistent with our analysis in Commonwealth v. Huber, 711 S.W.2d 490, 491 (Ky. 1986):

> The prior mental treatment of a witness is not relevant as to the credibility of that witness unless it can be demonstrated that there was a mental deficiency on the part of the witness, either at the time of the testimony or at the time of the matter being testified about. The mere fact that a particular witness has been treated for any kind of psychiatric problem in the past is of no significance in the impeachment of that witness *unless it can be shown [,or is commonly known,] that the psychiatric problem relates in some way to the credibility of the witness.*

Id. at 491 (emphasis added).

Here, as is evident from Ms. Rogers's opinion letter, we have a ten year old child, who is so scared of the alleged sexual predator, Sapp, that she would probably not be able to testify in his presence. Outside his presence, there is no evidence she would suffer such debilitating fear. This is precisely the "compelling need" test required for KRS 421.350. It does not however, meet the Barroso standard, i.e., "sufficient to establish a reasonable belief that the records

contain exculpatory evidence" for an invasion of KRE 507. Barroso, 122 S.W.3d at 564. See also United States v. Zolin, 491 U.S. 554, 574-75, 109 S.Ct. 2619, 2632, 105 L.Ed.2d 469 (1989)("before a . . . court may engage in *in camera* review . . . [a] party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability.").

We noted as much in Barroso. Upon such a proper showing, the witness's psychotherapy records are subject to production for an *in camera* inspection to determine whether the records contain [such] exculpatory evidence, including evidence relevant to the witness's credibility. Barroso, 122 S.W.3d at 564. We listed factors to be considered:

> the nature of the psychological problem, the temporal recency or remoteness of the condition, and whether the witness suffered from the condition at the time of the events to which she is to testify. *For example, a mental illness that causes hallucinations or delusions is generally more probative of credibility than a condition causing only depression, irritability, impulsivity, or anxiety.*

Id. at 562-63 (emphasis added).

Here once KRS 421.350 is applied, the debilitating fear is allayed – as the child then testifies outside the presence of the defendant – and there is no inhibiting fear, anxiety, or mental deficiency to interfere with the witness's ability to recall, comprehend, and accurately relate the events. The debilitating condition only arises from the perceived presence of the alleged perpetrator as was noted by Ms. Rogers, and then it is then dealt with to protect the delivery of the evidence and that is the purpose of KRS 421.350.

In Mosley v. Commonwealth, 420 S.W.2d 679 (Ky. 1967), we held that the fact the complaining witness was *previously* diagnosed with schizophrenia, with a tendency towards sexual fantasies, was relevant to her credibility in the rape charge at hand. In Wagner v. Commonwealth, 581 S.W.2d 352 (Ky. 1979), overruled in part by Estep v. Commonwealth, 663 S.W.2d 213 (Ky. 1983), we held that evidence the prosecuting witness had been committed to a psychiatric hospital for attempted suicide, severe depression, and drug abuse, and had received shock treatments which were affecting her memory, *previous* to the events in issue in the case, related to her credibility as a witness. In Eldred, supra, we approved review of otherwise privileged psychotherapy records based on the fact that the witness had *a history of past psychiatric treatment*, including severe depression, drug addiction, and an attempted suicide, along with having suffered total amnesia from sometime in the past, the beginning date of which, she could not remember. In Barroso, supra, the complaining witness had *been previously hospitalized for depression and attempted suicide, and was taking anti-depressant medications.*

However, we have *never recognized* the post event anxiety of a ten year old child, such as exists here, to be a mental deficiency sufficient to authorize a KRE 507 invasion. Even, "[t]he *prior mental treatment* of a witness is not relevant as to the credibility of [a] witness unless it can be demonstrated that there was a mental deficiency on the part of the witness, either at the time of the testimony or at the time of the matter being testified about." Huber at 491 (emphasis added). By this opinion, we have laid the bar on the ground for this jump.

THE INTERSECTION POINT OF KRE 507, BARROSO AND KRS 421.350.

The implicit point of the majority's opinion today is that the evidentiary requirements for meeting KRS 421.350 constitute an "automatic entitlement," or trigger, for an *in camera* review of materials otherwise privileged under KRE 507. Thus hereafter, an invasion of KRE 507 will be triggered by every KRS 421.350 motion. I disagree with such a result, if Barroso is still the law.

KRS 421.350 was designed, not so much as to protect the emotions and psyche of child victims, and in some instances child witnesses, but to protect and insure the admissibility and viability of critical evidence, primarily of criminal sexual events involving children. Thus, the standard of "compelling need" required by such statutes is triggered only by findings of the trial court that there is "a substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the *defendant's presence*." KRS 421.350(5).

KRE 507(b), on the other hand, grants absolute confidentiality to a patient's psychotherapist treatment records, subject to the exceptions set out herein. Barroso, Stidham, and Eldred established that, "[i]f the psychotherapy records of a crucial prosecution witness contain evidence probative of the witness's [inability] to *recall, comprehend, and accurately relate* the subject matter of the testimony, the defendant's right to compulsory process must prevail over the witness's psychotherapist-patient privilege." Barroso, 122 S.W.3d at 563. *But, the priority of a defendant's right to compulsory process is dependant upon the establishment of a preliminary showing "sufficient to establish a*

reasonable belief that the records contain exculpatory evidence." Id. (emphasis added). "No lower a standard should apply when a defendant seeks an *in camera* review of a witness's psychotherapy records for the purpose of determining whether they contain exculpatory evidence." Id. at 564. The same standard also applies to impeachment evidence. "If the *in camera* inspection reveals exculpatory evidence, *i.e.,* evidence favorable to the accused and material to guilt or punishment, *including impeachment evidence*, that evidence must be disclosed to the defendant if unavailable from less intrusive sources." Id.

The "possibility" that a review of privileged material might possibly enable Appellant to impeach the child, or her psychotherapist – the standard applied today by the majority – while a legitimate and worthy aim, is not a sufficient trigger for the right to invade privileged material. Cf. Newsome v. Lowe, 699 S.W.2d 748, 752 (Ky. App. 1985). If the standard was dependant only upon a "possibility of existence," *such possibilities would occur in every case and thus the privilege would be non-existent.* Thus, *we must balance* the two rules in order to give appropriate effect and purpose to each. That was the gist of Barroso.

To protect the existence of the privilege, the person attacking the privilege, once established, must provide evidence sufficient to the court to establish a reasonable belief that the records may contain such matters. We are not unmindful of the needs for discovery. Neither are we unmindful of the needs and reasons for the privilege. The existence of one is grounded on facilitating treatment, by guarantees of privacy; the protection of the other is mandated by

the constitution. And, given our previous interpretation and applications, the objectives of each are not inconsistent with the other.

We stated in Barroso, "thus, we depart from the less restrictive standard as established in Eldred and hold that *in camera* review of a witnesses' psychotherapy records is authorized *only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence."* Barroso, 122 S.W.3d at 564. From Barroso, not only must there be evidence to support a belief the records contain exculpatory or impeachable evidence, but to be such, it necessarily has to be relevant and material; otherwise it could not, in any way, be exculpatory or usable for impeachment.

The Appellee argues, and correctly so, that the trial court is professional, ethical and considerate of all the interests of all the parties, and of course, this is true. Yet, KRE 507 allows no invasion, no matter how qualified, conscientious, and professional the person might be, unless the appropriate standards or exceptions are met. Otherwise, we would "permit opponents of the privilege to engage in groundless fishing expeditions with [trial] courts their unwitting (and perhaps unwilling) agents." Stidham v. Clark, 74 S.W.3d 719, 727 (Ky. 2002). This I am not willing to do.

Neither do I agree that the standard required for the applicability of KRS 421.350 is an equivalent standard for piercing the privilege provided for in KRE 507. The KRS 421.350 standard is centered around the inhibiting effect the defendant will have on the child witness and, thus, on the evidence crucial to the trial through the affect upon the child, victim or witness's emotional state, while the triggering standard for the invasion of the privilege in KRE 507 is a likelihood

that evidence material to the Appellant's defense is likely to exist in this source. "Material" is noted in Barroso to be, "evidence probative of the witness's [inability] to recall, comprehend, and accurately relate the subject matter of the testimony." Barroso, 122 S.W.3d at 563. It would also, of course, include evidence relevant to the witness's credibility." Id. However, "[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.

APPROPRIATENESS OF THE WRIT

> The writ of prohibition is such an "extraordinary remedy" that Kentucky courts "have always been cautious and conservative both in entertaining petitions for and in granting such relief." We have divided writ cases into "two classes," which are distinguished by "whether the inferior court allegedly is (1) acting without jurisdiction (which includes "beyond its jurisdiction"), or (2) acting erroneously within its jurisdiction." We have also delineated a third "class" of writ cases (in essence, a subclass of the "acting erroneously" class): the so-called "certain special cases."

Independent Order of Foresters v. Chauvin, 175 S.W.3d 610, 613 (Ky. 2005)(citations omitted).

The requirement that a petitioner show great and irreparable injury is not an absolute prerequisite to the issuance of a writ in these certain special cases. Cf. Bender v. Eaton, 343 S.W.2d 799, 801 (Ky. 1961).

> [I]n certain special cases this Court will entertain a petition for prohibition in the absence of a showing of specific great and irreparable injury to the petitioner, provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction

> of the error is necessary and appropriate in the interest of orderly judicial administration.

Bender, 343 S.W.2d at 801.

"We have tended to apply this exception only in those limited situations where the action for which the writ is sought would blatantly violate the law, for example, by breaching a tightly guarded privilege or by contradicting the clear requirements of a . . . rule." Independent Order of Foresters, 175 S.W.3d at 616-17 (citing Wal-Mart Stores, Inc. v. Dickinson, 29 S.W.3d 796, 803 (Ky. 2000) (holding that failure to make findings of fact demonstrating a nexus between an inspection of Wal-Mart's operating center and an issue in the action met the exception)); Bender, 343 S.W.2d at 803 (holding a judge's order for production of an expert's report violated the civil rules and thus fell under the exception). This exception, however, only allows a Petitioner to avoid the requirement of great and irreparable injury, not the requirement there be a lack of an adequate remedy by appeal. Bender, 343 S.W.2d at 801.

The privilege under KRE 507 is breached upon the first invasion (the *in camera* review); notwithstanding, upon an *in camera* review there may not be any further invasions by other persons, depending on the court's ruling. But, one invasion is an invasion and this court has adopted and established this privilege so that, "a patient . . . has a privilege to refuse to disclose and to prevent *any other person* from disclosing [these] confidential communications." KRE 507(b). A judge of the court is *another person.* Here, the trial court obviously employed the wrong standard for the invasion of the privileged KRE 507 material. Thus, absent the granting of this writ, the preliminary invasion will occur prior to the availability of any appeal. This is enough. Thus, the trial court's order requires

the disclosure of material in violation of Barroso and, therefore, in violation of KRE 507, a substantial miscarriage of justice would occur, particularly since our pronouncements in Barroso, as well as KRE 507, were designed for the protection of all the rights therein enunciated.

OTHER ISSUES

The majority also asserts that KRE 507 does not apply to a "licensed psychological associate." This argument ignores the fact that a licensed psychological associate is licensed under KRS 319.005. See KRS 319.010(5) and 319.053(1). Furthermore, KRE 507(b) extends the privilege to "persons who are participating in the diagnosis or treatment under the direction of the psychotherapist," which was obviously the case here. Thus, I would not find the privilege was waived in this regard.

The Appellee also alleges waiver through the disclosure of Ms. Rogers' opinion letter. This disclosure, however, is for the benefit of the defendant and was required under RCr 7.24(1)(b). Waivers under KRE 507 are required to be voluntary. "[A] witness whose privileged information is compelled by court order has not disclosed it voluntarily." Barroso, 122 S.W.3d at 565.

CONCLUSION

Therefore, for the reasons stated, I would reverse the Court of Appeals, and grant the writ of prohibition, remanding the matter back to the trial court for such further proceedings as are appropriate, including further reviews under the appropriate standards set out in Barroso.