

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
MICHAEL VILLANI, DISTRICT
JUDGE,
Respondents,
and
JEREMIAH SERGIO AYALA,
Real Party in Interest.

No. 60468

FILED

JUL 26 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER GRANTING PETITION

This petition for a writ of mandamus or prohibition challenges an order of the district court granting the real party in interest Jeremiah Sergio Ayala's motion for reconsideration of a discovery order and conditioning the State's access to information subject to that discovery order upon petitioner securing its own expert.

Ayala is awaiting trial on charges related to the death of an 18-month-old child. He employed an expert psychologist to testify at a suppression hearing about his susceptibility to police questioning. The district court ordered Ayala's expert psychologist to turn over to the prosecuting attorneys testing materials she used during Ayala's evaluation. Ayala objected, arguing that doing so would require the expert to violate ethical obligations by disclosing materials protected by copyright and trade secret laws. Recognizing that the information was copyrighted

and that professional guidelines limited the expert's ability to disseminate information, the district court structured its order to require release of the data to only the prosecutors on the case and forbidding them to disclose the information to anyone other than their qualified expert witness. The order also precluded the prosecutors from publishing or distributing the materials in any manner, including attaching it to a court document or entering any information in the public record as an exhibit. Subsequently, Ayala filed a petition for extraordinary relief in this court challenging the district court's order; we denied the petition. Thereafter, during a status check hearing, the district court reaffirmed its order. A few weeks later, the district court reversed course and granted Ayala's motion for reconsideration. In that order, the district court explained that Ayala's motion for reconsideration included new information, namely a declaration from his expert psychologist stating that, pursuant to the Health Insurance Portability and Accountability Act (HIPAA), the testing materials are considered "trade secrets" and protected from disclosure to anyone other than a qualified expert who is similarly licensed to use and possess these testing materials." The district court therefore ordered (1) Ayala's expert to make the testing data available to petitioner's expert psychologist, (2) the testing data shall not be provided to the prosecuting attorneys, and (3) Ayala is not required to produce the testing data used by his expert if petitioner does not retain an expert psychologist. This original writ petition followed.¹

¹The State alternatively seeks a writ of prohibition. Because it has not demonstrated that the district court lacked jurisdiction or acted in
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The State argues that the district court acted arbitrarily and capriciously by granting Ayala's motion for reconsideration because it is entitled to the discovery of the materials without having to secure an expert witness. As evidence of an arbitrary and capricious exercise of discretion, the State points to the district court's denial of access to the materials after twice ordering their disclosure. Ayala counters, in essence, that this court typically refrains from intervening in discovery matters, that requiring the release of the testing materials to prosecutors would subject Ayala's expert to discipline for violating ethical obligations, and HIPAA confers protection against the disclosure of the testing materials as those materials constitute trade secrets. As explained below, we conclude that the district court manifestly abused its discretion by granting Ayala's motion for reconsideration and conditioning the prosecutors' access to the testing materials on the retention of an expert witness. See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

In the context of expert opinion testimony, our jurisprudence recognizes the need for disclosure of facts, data, or other information upon which an expert opinion is based to facilitate meaningful cross-examination. See Blake v. State, 121 Nev. 779, 790, 121 P.3d 567, 574 (2005) ("It is a fundamental principle in our jurisprudence to allow an opposing party to explore and challenge through cross-examination the

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excess of its jurisdiction, see NRS 34.320, prohibition is not available.

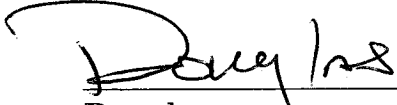
basis of an expert witness's opinion.”). Likewise, our statutes support this principle. In particular, NRS 50.305 provides that an expert may testify as to her opinion on a matter and the reasons for that opinion without prior disclosure of the underlying facts or data, unless the district court requires otherwise; but “[t]he expert may in any event be required to disclose the underlying facts or data on cross-examination.”


Here, we are dealing with the interplay between our discovery rules in the context of expert testimony and competing concerns of disclosing testing materials that implicate a psychologist's ethical obligations and HIPAA. Below, Ayala advanced conclusory arguments that psychological testing materials are unconditionally protected from release to unqualified persons by psychologists' ethical obligations and HIPAA. We conclude that the submissions before us do not support such a fundamental departure from our broad discovery rules or warrant prohibiting release of the testing materials to the prosecutors. As no evidentiary hearing was conducted specifically related to the release of the testing materials, nothing in the record explains why HIPAA applies to those materials, how the testing materials qualify as trade secrets under HIPAA, and who holds the privilege precluding their release. Further, nothing in the record explains why a protective order cannot assuage the concerns related to the release of the testing materials, particularly where the district court had previously fashioned an order that imposed what appear to be adequate protective measures limiting dissemination of the testing materials. Under these circumstances we conclude that the district court did not fully exercise its discretion in granting Ayala's motion for reconsideration and therefore extraordinary relief is warranted. Nothing in this order precludes the district court from revisiting this issue

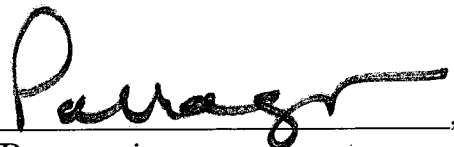
and gathering additional information to assist in resolving this discovery matter.

Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order granting Ayala's motion for reconsideration.²


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Michael Villani, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Eighth District Court Clerk

²We lift the stay of the evidentiary hearing granted by this court on March 22, 2012.