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NO. 62263-3-I

COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION I

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CITY OF KIRKLAND

Respondent,

v.

HANIF JAFFER,

Petitioner,

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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BRIEF OF RESPONDENT

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**MOBERLY & ROBERTS, P.L.L.C.**  
**ATTORNEYS FOR RESPONDENT**  
12040 98th Ave NE Ste 103  
Kirkland, WA 98034-4217  
425 284 2362 425 284 1205 (fax)

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## **A. INTRODUCTION**

Appellant Hanif Jaffer had shared a home in Kirkland with his parents, his brother Riyaz, and his sister in law Hamida. The Jaffer family was hostile to Hamida, and during her marriage to Jaffer's brother.

Hamida was regularly beaten, threatened with death, and subjected to bizarre exorcisms. At trial, she elaborated on Jaffer's conduct:

To teach me discipline, he would grab me by my hair and drag me and grab the knife, bringing it to my throat for a few seconds and say (unintelligible) your throat and leave you here to bleed to death (unintelligible) back me up. And then he would smile and throw the knife on the kitchen counter and walk away.

The abuse from her husband and Jaffer ultimately resulted in Hamida and Riyaz divorcing.

Hamida was granted a protection order in King County District Court which barred Jaffer from any direct contact with Hamida. On September 1, 2006, Jaffer came to the line dividing the men and women at their mosque, stared at Hamida, and used his hand to make a cutting motion across his neck. On May 22, 2007 the Appellant pulled his car up next to Hamida's while both were waiting in traffic. Jaffer again made a cutting motion across his neck. A jury found Jaffer guilty of two counts of violating a court order.

Pretrial, Jaffer moved the trial court for in camera review of victim Hamida's confidential counseling records. The trial court found Jaffer

made no showing of specific reasons why he needed the records, and denied the motion. The trial court's ruling was affirmed by the King County Superior Court, and his appeal follows.

**B. STATEMENT OF ISSUE**

Whether the trial court abused its discretion in denying his motion for in camera review of privileged counseling records when Jaffer, (1) misconstrued the type of counseling Hamida may have received; (2) alleged no specific facts which may have been contained in the records; (3) filed no written motion or affidavits setting forth specific reasons why the records were needed; (4) proffered no evidence demonstrating a connection to his theory of the case and what might be in the records.

**C. STATEMENT OF THE CASE**

The city relies on Jaffer's statement of facts adding only the transcript of the oral motion for in camera review of Hamida's counseling records in its entirety.

Judge: What relevant, well, Mr. Roe you don't know what's in those reports, correct? You know that she has been treated?

ATD: She advised in the interview that she's been treated for cognitive therapy, uh, and having talked to Miss Weaver indirectly, directly, not about her though, it has to do with cognitive dissidence [sic] Now cognitive dissidence [sic] is that a person who observes a fact or an event sees it different than you or I or normal people. They take it, they think the flag is green and white, not red and white or something. It doesn't mean they're lying, but it means that they have a problem with perception and there is a cognitive therapy to

teach them that their perception has to be, they have to look at things differently. She has on multiple occasions claimed, even though there is no other evidence that supports it, that my client is looking at her in, and doing a cutting motion over his, his throat which is the 5-22 of this year and last year's complaint. In the interview she denied that all those, there was just one, not the others she had claimed to the police, so I have some issues there, but why, what is causing her to do this? Is she making it up? Is it just, my client claims no and there is no other witness that says, that sees this. So is there something that suggests that she is suffering from the cognitive dissidence [sic]? More important, that, that's one. The other thing is that in the recent case, she, she claims she goes to the hospital, although in the interview to the police, on prior occasions, she never goes to the hospital. Um, so she claims she goes to the hospital and tells the nurse about the beatings that had occurred and exorcisms and the torture. And, and, so I'd like to know the name of that nurse, because I don't think it exists. Uh, but that nurse would be an important witness in this case for the prosecution if there is an contemporaneous complaint, but I suspect there is no nurse and no hospital. Uh, but it's the type of thing that the officer relied upon to, for credibility. So what I'd like is for the court to exam and see if there is some evidence of a mental delusion (unintelligible) thinking, one. And two, if fact there is some reference to hospitalization, that would give us witnesses, effective witnesses to. I mean she describes being beaten and tortured. We should see, and bruises, having to cover her bruises and, if somebody saw that I think that would be great. Not great for my client, but I'd like to see that. I don't think that's true. And nobody has ever been able to point to anything like that. RP 16-17.

Judge: Alright. I'm going to deny the motion at this point. I'm not going to sign a subpoena duces tecum, um, to look at the witness's private therapy notes in this case. Um, I believe that's a little bit too far reaching without some concrete evidence uh, for the court to see. This appears to be a bit of a fishing expedition. You certainly are entitled to interview the witness, ask the name of the nurses she talked to, the name of the witnesses who may have witnesses these bruises. But I think to um, sign a subpoena authorizing examination of her very private and intimate psychiatric evaluations or uh, treatment, mental health treatments

without something more is a little far reaching, based on the evidence I have in front of me. Uh, so I'm not going to sign a subpoena at this time Mr. Roe.

CP 67-69.

#### **D. AUTHORITY AND ARGUMENT**

The decision whether to conduct an in camera review of privileged records is subject to abuse of discretion review. *State v. Gregory*, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006). Discretion is abused only where it can be said no reasonable man would take the view adopted by the trial court. *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977). The trial court did not abuse discretion in denying Jaffer's motion because Jaffer did not make a particularized or plausible showing that any information in the counseling records would have been both material and favorable to defense.

- I. THE COURT SHOULD AFFIRM BECAUSE JAFFER DID NOT DEMONSTRATE THAT THE RECORDS WERE LIKELY TO CONTAIN MATERIAL EVIDENCE, FAILED TO COMPLY WITH STATUTORY REQUIREMENTS, AND FAILED MAKE A CONCRETE CONNECTION BETWEEN HIS THEORY OF THE CASE AND THE RECORDS.

For due process to justify in camera review of a record that is otherwise deemed privileged or confidential, the defendant must establish "a basis for his claim that it contains material evidence." *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

There must be a “plausible showing” that the information will be both material and favorable to the defense. *Id.* (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982)). Mere speculation is not enough to justify in camera review and a defendant must establish a basis for his or her claim that the records in question contain material evidence. *Ritchie*, 480 U.S. at 58. Evidence is material only if there is a reasonable probability that it would impact the outcome of the trial. *Id.* at 57.

1. In camera review in Washington- *Kalakosky*, *Diemel* and *Gregory*

The Supreme Court’s reasoning in *Ritchie* has been applied in several Washington cases. In *State v. Kalakosky*, 121 Wn.2d 525, 852 P.2d 1064 (1993), the Court evaluated whether the trial court should have conducted an in camera review of a sexual assault victim’s counseling file. The Court concluded, “before a rape victim’s privacy should be invaded by a review of crisis center counseling notes . . . the defendant must make a *particularized showing* that such records are likely to contain material relevant to the defense.” *Id.* at 550 (emphasis added). The *Kalakosky* court concluded that a motion which states only that requested records, “may contain details which may exculpate the accused or otherwise be helpful to the defense” does not make the required particularized showing. *Id.* Thus,

the trial court did not err in denying Kalakosky's motion for in camera review.

A similar result was reached in *State v. Diemel*, 81 Wn. App 464, 914 P.2d 779 (1996). The *Diemel* court held that “[a] claim that privileged files might lead to other evidence or may contain information critical to the defense is not sufficient to compel a court to make an in camera inspection.” *Id.* at 469. The court stated, “[C]onsiderable speculation,” and “little factual basis or foundation” were all that supported Diemel's assertion that the requested records might contain relevant to his defense. *Id.* Again, speculation is simply not enough.

In *State v. Gregory*, the defendant requested that the trial court review in camera two separate sets of records: rape crisis records and dependency files. 158 Wn.2d at 793. In addressing the request for rape crisis records the Court recognized these records are statutorily privileged. Because Gregory did not meet the statutory requirements for in camera review of statutorily privileged records, the trial court did not err in denying in camera review of the crisis center records.

With regard to the dependency files, the *Gregory* court stated that to justify in camera review Gregory had to make a *plausible showing* that the dependency file would likely contain evidence of recent prostitution activities which was consistent with his theory of the case. *Id.* at 794. The

Court found that Gregory made a concrete connection between his theory of the case and what he expected to find in the dependency files, justifying in camera review. “Because Gregory's version of events was that the victim had consensual sex with him for money, admissible evidence of recent, factually similar prostitution would have been reasonably likely to impact the outcome of the trial.” *Id.* Further, “it was reasonable to conclude that if the Department of Social and Health Services were aware of any recent prostitution activity, it would have been addressed in the dependency files, and could reveal potential witnesses” *Id.* Because Gregory made a *concrete connection*, in camera review of the dependency files was appropriate.

2. The trial court did not abuse its discretion because Jaffer failed to make the required showing under *Kalakosk*, *Diemel* or *Gregory*

Jaffer failed to demonstrate that material evidence would be found in Hamida’s confidential counseling files. In ruling on his oral motion, the trial court found Jaffer’s request “too far reaching without some concrete evidence for the court to see,” and that “this appears to be a bit of a fishing expedition.” CP 69. The trial court did not abuse its discretion because Jaffer failed to make any showing that the records were likely to contain material evidence, he failed to comply with statutory

prerequisites, and he failed make a concrete connection between his theory of the case and the records.

**a. Cognitive dissonance defined**

Cognitive dissonance is psychological conflict resulting from simultaneously held incongruous beliefs and attitudes (i.e. as a fondness for smoking and a belief that it is harmful). *Stedman's Medical Dictionary* (27th ed. 2000). This is to be distinguished a cognitive disorder. American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)* (4th Ed. 2009). The most direct cognitive disorders are amnesia, dementia and delirium. Others include anxiety disorders such as phobias, panic disorders, obsessive-compulsive disorder, generalized anxiety disorder and post-traumatic stress disorder. *Id.* In other words, cognitive dissonance is a model utilized by social psychologists to assist individuals in reducing negative emotional states that they may be experiencing, not a diagnosis of a mental health disorder.

**b. As in *Kalakosky*, Jaffer failed to make a “particularized showing”**

Jaffer made no showing of specific reasons why he needed the counseling records. Counsel for Jaffer misstated the term as “cognitive dissidence.” Counsel incorrectly defined the term stating, “cognitive dissidence is that a person who observes a fact or an event sees it different

than you or I or normal people. They take it, they think the flag is green and white, not red and white or something.” CP 68. On the basis of these misstatements, counsel then argues Hamida may have a “problem with perception,” implying that she may be making up several reported incidents. However, counsel never specifically or accurately states if or what Hamida has been diagnosed with. Nor does he ever specifically state how such a diagnosis may lead to material evidence.

Further, Jaffer proffered no expert opinions regarding the evidence that might exist. No affidavits in support of the motion were filed. No written motion was filed. Jaffer’s speculation regarding what might be in Hamida’s counseling records appears loosely based on a conversation defense counsel had with a Ms. Weaver. Other than stating she is a social worker, the record is absolutely devoid of any reference to Ms. Weaver’s qualifications or expertise with respect to mental health conditions.

Nothing in the above record demonstrates a specific reason why Jaffer needed the counseling records. *Kalakosky*, 121 Wn.2d at 550. Nothing in the record indicates specific material facts which may have been found in the records. This is precisely why the *Kalakosky* court upheld the trial court’s denial of in camera record review. Thus, the trial court here did not abuse its discretion in denying Jaffer’s motion.

**c. As in *Deimel*, “considerable speculation” is all that supports Jaffer’s request for in camera review**

A review of Jaffer’s motion reveals considerable speculation and little factual basis or foundation. As in *Diemel*, Jaffer’s oral motion merely stated the counseling notes may contain details which might be helpful to the defense. Jaffer implies that Hamida either misperceived or made up various incidents, and argues, “but why, what is causing her to do this? Is she making it up? . . . . So is there something that suggests that she is suffering from the cognitive dissidence [sic]?” CP 68. Jaffer’s motion is not specific, nor does it contain fact-based allegations.

Speculation that the privileged records contain information useful to the defendant in his case is all that was offered to the trial court. A claim that privileged files might lead to other evidence or may contain information critical to the defense is not sufficient to compel a court to make an in camera inspection. *Diemel*, 81 Wn. App at 469. As such, the trial court did not abuse its discretion in the present case.

**d. As in *Gregory*, Jaffer failed to meet statutory prerequisites for privileged records**

Counseling records are statutorily privileged. RCW 18.19.180; 70.02.060; 70.125.065. Victim Hamida stated in her letter to prosecutors that she sought treatment at Harborview Trauma and Sexual Assault Center. Supp. C.P. 364-68. Pursuant to RCW 70.125.030 (5), Harborview

is a “rape crisis center.” Rape crisis center notes are subject to heightened protections in a criminal case under Washington Law. RCW 70.125.065. While rape is not an allegation in the present case, the statute is applicable in the present case because the records are held by a rape crisis center.

RCW 70.125.065 provides that rape crisis center records are not available to defense counsel unless (1) a pretrial motion is made; (2) “[t]he *written* motion is accompanied by an *affidavit or affidavits* setting forth *specifically* the reasons why the defendant is requesting discovery of the rape crisis center’s records” (emphasis added); (3) the court reviews the records in camera; and (4) the court orders discovery. *Gregory*, 158 Wn.2d at 793; *Kalakosky*, 121 Wn.2d at 549. In this case there is no affidavit or written motion. The oral motion merely indicates the victim spoke to rape crisis workers about the incidents with Jaffer. Specific reasons were not presented to the trial court, written or otherwise.

The court may not ignore the statute’s requirement for “reasons” why a defendant is seeking in camera review of the rape crisis center’s records. *Kalakosky*, 121 Wn.2d at 549. The statute requires both a motion and supporting affidavits giving specific reasons why the presumptively privileged records should be revealed. RCW 70.125.065(2). Nothing was filed in the present case. The defense may not circumvent the statutory requirements for in camera review of a rape crisis center file. *Gregory*,

158 Wn.2d at 793. The trial court did not abuse its discretion in declining an in camera review as the statutory requirements were not met.

e. **Unlike *Gregory*, Jaffer fails to make a “concrete connection” between the counseling records and his theory of the case**

In finding that Gregory had made a particularized showing with regard to the dependency files, the Court stated that evidence of recent prostitution activity would be material in because Gregory’s defense was that the victim had consensual sex with him for money. *Gregory*, 158 Wn.2d at 794.

Gregory made a more *concrete connection* between his theory of the case and what he expected to find in the dependency files, i.e., it was reasonable to believe that if R.S. was still engaging in prostitution in 1998, evidence of that would be reflected in the dependency files, and if so, the reports contained therein could reveal potential witnesses.

*Id.* at 795. Jaffer did not make the required concrete connection.

Jaffer’s theory of the case was that Hamida misperceived or made up the incidents that were the basis of the city’s case. However in his motion to the trial court, Jaffer misconstrued Hamida’s condition, alleged no specific facts which might be found in the records, offered no expert testimony or affidavits connecting his case theory to the records, and speculated about Hamida’s treatment and diagnosis. On the other hand, Gregory concretely connected his defense (prostitution activity) to specific

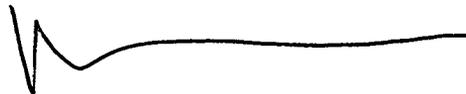
facts that reasonably would be contained in the dependency files (prostitution activity). Jaffer failed to do so. As such, the trial court did not abuse its discretion.

**E. CONCLUSION**

Mere speculation is not enough to justify in camera review, and a defendant must establish a basis for his or her claim that the records in question contain material evidence. *Ritchie* , 480 U.S. at 58 n.15. As no specific evidence or reason was offered in support of the defense position at the motion hearing, the trial court properly exercised its discretion in ruling that Jaffer failed to make any showing that the records were likely to contain material evidence. Further, Jaffer failed to comply with statutory requirements. Additionally, Jaffer failed make a concrete connection between his theory of the case and the privileged records, as required by state and federal caselaw. The court should affirm the trial court.

RESPECTFULLY SUBMITTED this 25 day of June, 2009

CITY OF KIRKLAND



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MARK D. NELSON WSBA 37833  
ATTORNEY FOR RESPONDENT

AFFIDAVIT OF MAILING

I, Vanessa Ahrstrom, certify and declare under penalty of perjury under the laws of the State of Washington, that on the 25<sup>th</sup> day of June, 2009, I placed one true and correct copy of the Brief of Respondent in the First Class United States Mail, addressed to Suzanne Lee Elliott, 705 2<sup>nd</sup> Ave Ste 1300, 601 Union St, Seattle, WA 98104.

Dated: June 25, 2009

Place: Seattle, Washington

By: *Vanessa Ahrstrom*

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