ON SUBMISSION ONLY

STATE OF NEW YORK
COUNTY OF [redacted] COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ORDER TO SHOW CAUSE
INDEX NO: [redacted]
Ind. No. 2021 [redacted]

KEVIN [redacted],
Defendant

Upon the annexed affirmation of Brian P. [redacted], Esq., attorney for defendant, Kevin [redacted] dated February 28, 2022, and the Affidavit of Kevin [redacted] dated February 27, 2022, and upon all other papers and proceedings had heretofore, let the [redacted] County District Attorney Show Cause at a term of this Court to be held on the 11th day of March 2022 at 9:15, a.m./p.m. **(on submission only)** at the [redacted] County Courthouse, [redacted], New York [redacted] why an Order should not be made:

Requiring [redacted] Medical Center to deliver to the Clerk of the Court at [redacted] on or before the ____ day of March, 2022 at ____ a.m./p.m.,* certified copies of the complete treatment records, including any and all psychiatric psychological, alcohol and/or substance abuse counseling records, evaluations, tests, and any case notes entered during the course of treatment or counseling with respect to [redacted]

* Court to determine date for production of records if Defendant's relief is granted on March 11, 2022.

in compliance with an order served upon the facility under a separate cover.

Permitting defendant's attorney and the assistant district attorney to examine said records and to have access to the information contained therein for use in connection with the above proceeding.

For such other and further relief as the Court may deem just and proper; and it is further

ORDERED, that sufficient reason appearing therefore, let service of the Order to Show Cause, together with the supporting papers be served personally ~~or by ordinary mail~~, upon [redacted] Medical Center, or upon persons of suitable age and discretion employed at [redacted] Medical Center in the medical records department and upon the [redacted] County District Attorney, ~~and upon the patient~~ on or before the 4 day of March, 2022, be deemed good and sufficient.

ENTER;

Craig P. [redacted] 3/1/2022

Hon. Craig

STATE OF NEW YORK
COUNTY OF [redacted] COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ATTORNEY AFFIRMATION
IN SUPPORT OF
ORDER TO SHOW CAUSE
INDEX NO: [redacted]
[redacted] [redacted] [redacted]1

KEVIN [redacted]

Defendant

BRIAN [redacted] hereby states, pursuant to CPLR 2106, affirms the statement is true under the penalties of perjury under the laws of New York.

1. I am an attorney at law admitted to practice in the State of New, with an office address at [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]. I represent the defendant in this case, and the allegations herein are based on personal knowledge gained through my representation of the defendant.

2. This affirmation is made in support of an application for an Order and Subpoena Duces Tecum for certain mental health records to be produced in court for inspection and use in this action.

3. Upon information and belief, [redacted] Medical Center is located at [redacted] [redacted] [redacted] [redacted], is a facility that provides mental health treatment.

4. The complaining witness, [redacted] d/o/b [redacted] has filed charges against the defendant. On or about 6/25/2020 the complainant accused the

defendant of rape and other alleged associated offenses. No felony complaint was filed at this time. Before this time the complainant never accused the defendant of any criminal activity.

5. On April 29, 2021 the Grand Jury charged the defendant in a 5 count indictment (No. 2021[redacted]). The indictment alleges crimes occurring on June 25, 2020.

6. Upon information and belief in calendar years 2018 and 2019 the complainant was treated for mental health issues involving anxiety and depression in 2018 and a suicide attempt in 2019. The complainant was treated as an inpatient during at this facility and later discharged.

7. Upon information and belief, the complainant has a history that includes paranoia, possible schizophrenia and a suicide attempt.

8. The records requested are material and necessary for this action in that they will provide information relating to the complaining witness's mental health and emotional capacity. The requested material may also disclose whether, in her mental heath treatment, the complaining witness underwent hypnosis or other treatment that would affect her credibility or even her competence and ability to take an oath. Therefore, the need for disclosure of the requested material significantly outweighs any potential injury to the patient, to physician-patient privilege

or other confidential relationships, and to the services provided to the complainant.

9. The patient/complainant has not signed a release of information form to allow the defense to review the records. The information sought is unavailable from other sources.

10. Disclosure is authorized by law pursuant to Mental Hygiene Law §33.13(c)(1), where the interests of justice significantly outweigh the need for confidentiality. This request is made pursuant to *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963)*. Further, the defendant has a right to confront and *meaningfully* cross-examine this witness.

11. No previous application has been made for the relief requested.

WHEREFOERE, I respectfully request that the Court grant the relief requested herein.

Affirmed under the penalty of perjury pursuant to CPLR 2106.

Dated, February 28, 2022

BP[redacted]

Brian P. [redacted]
Attorney for Kevin [redacted]

cc: Matthew [redacted] Esq.
Office of the [redacted] County District Attorney

STATE OF NEW YORK
COUNTY OF [redacted] COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-against-

AFFIDAVIT OF
KEVIN [redacted]
INDEX NO: [redacted]
Ind. No. 2021-[redacted]

KEVIN [redacted],
Defendant

KEVIN [redacted], first being duly sworn deposes and states as follows under the penalties of perjury:

1. On or about early April 2020 I commenced a relationship with a person I knew as [redacted]. This relationship primarily consisted of [redacted] coming to my home to have intercourse approximately two times per week from early April 2020 to and through June 2020.

2. On the second occasion when [redacted] came to my house she told me that she had to take her medications, and she asked if I would get her a glass of water. I then proceeded to get her water and I saw her take pills from two separate pill bottles.

3. While watching [redacted] take these pills I asked her what they were for, and she told me they were for her "anxiety and depression."

4. On next the visit from [redacted] after the occasion I saw her take the pills which would now be about mid to late April 2020, we had intercourse as we always did, and subsequent to having intercourse on this occasion we had a conversation. During this

conversation, again being in mid to late April 2020 [redacted] told me she wanted to change her name. When I asked her why, [redacted] told me she had been "raped by her father" and she did not want his name.

5. I never raped or assaulted [redacted], (or the person claiming to be [redacted]). I would never do that.

Affiant sayeth naught.

Kevin [redacted]

Sworn to before me this 27th
day of February, 2022

Brian [redacted]
Notary Public

Brian [redacted]
Notary Public. State of New York
No. [redacted]
Qualified in [redacted]
Commission Expires July 17, 2022

STATE NEW YORK
COUNTY COURT OF [redacted] COUNTY
----------X
PEOPLE OF THE STATE OF NEW YORK,

-against-

KEVIN [redacted],

Defendant.
----------X

INDEX NO.: [redacted]
IND. NO. 2021-[redacted]

ATTORNEY's AFFIRMATION IN OPPOSITION TO DEFENDANT'S ORDER TO SHOW CAUSE

Hon. [redacted]

DAVID N. HOFFMAN, ESQ., an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following under the penalties of perjury:

1. I am the [redacted] COUNSEL for [redacted] Medical Center, upon whom the Defendant in the above captioned action has served an Order to Show Cause seeking certain business records of the Hospital, specifically treatment records for the complainant in the above captioned action, which Defendant asserts exist. As such, I am fully familiar with the facts and circumstances of surrounding the Order to Show Cause as revealed by the contents of the file maintained in your Affirmant's office. Your Affirmant specifically and explicitly ***does not represent*** the interests of the complainant. In fact, your Affirmant has had no contact with the complainant, and therefore does not have her permission to even represent to this court whether she has or has not ever received treatment at our hospital.

2. This affirmation is respectfully submitted in opposition to defendant's motion by order to show cause seeking an Order:

a) requiring [redacted] Medical Center to deliver to the clerk of the court at [redacted], on or before the blank day of March, 2022 at blank a.m. stroke p.m., certified copies of the complete treatment records including any and all psychiatric, psychological, alcohol and or substance abuse counseling records, evaluation's, tests, and any case notes injured during the course of treatment or counseling with respect to [redacted] a.k.a. [redacted], DOB [redacted]; and

b) Permitting defendant's attorney and the assistant district attorney to examine said records and to have access to the information contained therein for use in connection with the above proceeding; and

c) for such other further and different relief as this Honorable Court may deem just and proper.

INTRODUCTION

3. This affirmation is submitted to protect the interests of all patients treated at [redacted] Medical Center and all patients across the country at other mental health treatment facilities, by ensuring that the ability of mental health providers to assure their patients of the confidentiality of information contained within the treatment record will not be compromised. This is critically important under circumstances such as those presented in the instant order to show cause which constitutes a fishing expedition on the eve of trial seeking to obtain privileged information which the defendant hopes ***may*** provide some basis for attacking the credibility or confidence of the claimant. Though protection of the due process rights of defendant in criminal matters does require full disclosure of all matter material and necessary in the defense of an action," such protection is not without limits. *Liberty Petroleum Realty v Gulf Oil*, 164 AD3d 401, 403–404, 84 NYS3d 82, 85 [NY App Div 2018]; *Kapon v Koch*, 23 NY3d 32, 34, 988 NYS2d 559, 11 NE3d 709 (2014); *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406, 288 NYS2d 449, 235 NE2d 430 (1968). Disclosure is only required where it will "assist preparation for trial by

sharpening the issues and reducing delay and prolixity." *Liberty Petroleum Realty* at 85. The CPLR and related case law specifically protects attorney work product from discovery —and by statutory equivalence, as explained below, affords the same protection to communication between ***psychologists and their patients,*** and allows the court to issue an order "denying, limiting, conditioning or regulating the use of any disclosure device where necessary to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (internal quotations and citations omitted). *Id*.

4. The issue before this court is whether there is any basis for violating the clinical privilege, under state law and federal regulations, which protects psychotherapy communication, records and notes from discovery. Because of the nature of such notes, the sensitive information such notes typically contain, and the purpose the psychotherapist privilege serves, this court should find that they are protected from discovery. *See Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377, 575 NYS2d 809, 581 NE2d 1055 (1991). "[A] party who claims a privilege has the burden of demonstrating his right to withhold the documents or information being sought. In order to discharge this burden and avoid compliance with an otherwise valid subpoena, it is not adequate for the witness merely to make a general or 'blanket' claim of privilege" (internal citations and quotations omitted). *Big Apple Concrete Corp. v Abrams*, 103 AD2d 609, 613, 481 NYS2d 335, 338 (1984). There is no blanket claim in this case because, as your Affirmant sets forth below, there is a specific legal basis for protection of this privilege and its broader public policy implications.

5. Even if the Defendant is putting *at issue* Complainant's mental state, as Defendant's counsel asserted in his order to show cause, it does not follow that the psychotherapist privilege is negated. *See In Re Sims*, 534 F3d 117, 134 [2d Cir 2008] ("a party's psychotherapist-patient

privilege is not overcome when his mental state is put in issue only by [another party]."). *See also Henderson v Rite Aid of New York, Inc.*, No 16-CV-785V(SR), 2018 WL 3023378, at *4 (WDNY June 18, 2018); *Malowsky v Schmidt*, No 3:15-CV-666, 2017 WL 5496068, at *3 (NDNY Jan. 9, 2017); *Silverman v. Silverman,* No. 350023/17, (Supreme Court, New York County, Jan. 25, 2019, unpublished opinion) . Defendant's subpoena is a transparent fishing expedition intended to negate the Complainant's rights in order to improve his position in his criminal trial.

6. Several cases have addressed the circumstances presented here through the regulatory provisions of the Health Insurance Portability and Accountability Act of 1996 (hereafter "HIPAA"), 42 USC § 300gg, 29 USC § 1181 *et seq.* and 42 USC 1320d *et seq.*, as added by Pub L 104–191, 110 US Stat 1936, as amended by the Health Information Technology for Economic and Clinical Health (hereafter "HITECH") Act of 2009, as added by Pub L 111-5, 123 US Stat 226. However, HIPAA regulations dealing with disclosure of psychotherapy notes set only the ***minimum*** national standard, and are not controlling in the matter before this court.

POINT ONE

THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT REGULATIONS WHICH BAR DISCLOSURE OF PSYCHOTHERAPY NOTES, ARE APPLICABLE, BUT ARE NOT CONTROLLING IN THIS MATTER

7. HIPAA regulations establish the national ***minimum*** standard concerning the protection of certain clinical documents. However, New York State afforded a higher level of protection through § 18 of New York State's Public Health Law (PHL) for all mental health practitioners, and CPLR § 4507, which relates to Psychologists; as distinguished from §164.524 of the HIPAA regulations which provide specific protection for psychotherapy notes.

§ 164.524 of the federal HIPAA regulations provides:

> Access of individuals to protected health information.
>
> (a) Standard: Access to protected health information –
>
> (1) Right of access. Except as otherwise provided in paragraph (a)(2) or (a)(3) of this section, an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set, for as long as the protected health information is maintained in the designated record set, **except for**:
>
> (i) **Psychotherapy notes**; and
>
> (ii) Information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding.

See: 45 C.F.R. 164.524 (emphasis added).

8. Further, § 264 (c) (2) of the HIPAA statute states that provisions created under state law ***expand*** the appropriate federal provisions under the HIPAA regulations if "the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation." In this regard, the statutes and regulations cited above, under New York State law, that afford a higher standard of privacy than those under HIPAA regulations, will supersede the federal regulations. Regarding psychotherapy notes taken during the course of communications between a therapist and a patient, New York State has determined that they should be afforded even greater protections than those contained in the HIPAA regulations. Thus, by enacting greater protections, New York State has emphasized that a patient's ability to speak freely to their psychologist far outweighs the need for disclosure (effectively superseding federal law). *Miccoli v W.T.*, 52 Misc3d 411, 418, 31 NYS3d 806, 812 [NY Sup Ct 2016].

9. The New York State Department of Health, in guidance published, on October 15, 2002, provided instruction as to which state provisions would preempt federal regulations after HIPAA came into effect. *See* New York State Department of Health, *HIPAA Preemption Charts*, available at https://www.health.ny.gov/regulations/hipaa/preemption_charts.htm (last accessed Dec. 8, 2018). Moreover, PHL § 18 provides a stricter requirement than HIPAA regulations, effectively expanding the protections of federal law. In other words, HIPAA regulations do not protect psychotherapy records as completely as New York State law. Consequently, this court should abide by the enhanced protections afforded under state law.

10. Under the Health Department guidance cited above, provisions dealing with psychotherapy notes under HIPAA regulations are said to be preempted by PHL § 18. *Id*. PHL § 18 provides, in part, that "patient information" or "information" —that would otherwise be subject to disclosure— ***does not*** include "personal notes and observations of a mental health care practitioner, provided that such personal notes and observations are maintained by the practitioner and not disclosed by the practitioner to any other person." PHL § 18 (1) (e) (ii). Furthermore, "personal notes and observations" includes "a practitioner's speculations, impressions (other than tentative or actual diagnosis) and reminders, provided such data is maintained by a practitioner." PHL § 18 (1) (f).

11. Psychotherapy notes, as defined under federal regulations, fall within this state law definition of personal notes and observations, since they are the psychotherapist's speculations and impressions that help the therapist recall the therapy and remind them of certain aspects of session discussions. In addition, PHL § 18 provides that the psychotherapist can deny access to the personal notes and observations —the *psychotherapy notes*— and *may* grant access to a prepared summary of the information. PHL § 18 (3) (d). This is consequential to the conclusion that the

notes are not owned by the patient or client, and they are not part of the medical record, but are the psychologist's property; and they *are not intended to communicate to, or even be seen by, persons other than the therapist* —they are the therapist's work product. Even if a duly executed authorization would seemingly warrant a disclosure; under this more stringent state law provision, it is clear that it is the psychotherapist's prerogative, not the patient's, to decline to disclose their notes.

PHL § 18 (10) relates back to Chapter 45 of the CPLR regarding disclosure of confidential information. It provides:

> Nothing contained in this section shall restrict, expand or in any way limit the disclosure of any information pursuant to articles twenty-three, thirty-one and forty-five of the civil practice law and rules or section six hundred seventy-seven of the county law.

12. Hence, CPLR § 4507, which establishes the equivalence of Psychologist's records to the attorney work product, provides the foundation to bar disclosure of all psychotherapy records. CPLR § 4507, in conjunction with PHL § 18 (and its preemptive impact on HIPAA regulations in this matter), requires this court to find that ***if any psychotherapy notes exist*** for treatment that may have been provided to the complainant, they should be protected from discovery.

POINT TWO

THE DISCLOSURE OF PSYCHO-THERAPY NOTES IS BARRED BY THE PSYCHOLOGIST-CLIENT PRIVILEGE UNDER CPLR § 4507

13. Because psychotherapy records, including those notes that fit the federal definition of psychotherapy notes and those that fit the definition of ordinary medical records (under PHL § 18 discussed above) cannot be furnished to this court or the litigants in the instant action because

if they exist, they are protected by the psychologist's privilege created by CPLR § 4507. This privilege was enacted by New York State in 1956 to afford an even higher protection to clinical psychologists in the state than that which is afforded to psychiatrists or other mental health practitioners. The statute states, in part, that:

> [t]he confidential relations and communications between a psychologist […] and his client are placed on the same basis as those provided by law between attorney and client, and nothing in such article shall be construed to require any such privileged communications to be disclosed. CPLR § 4507.

14. Thus, to understand how the psychologist-client privilege operates, this court must examine the attorney-client privilege established in CPLR § 4503. CPLR § 4507, which was originally a provision of the state Education Law, is fully applicable to criminal cases.

People v Wilkins, 65 NY2d 172, 178–179, 480 NE2d 373, 376–377 (1985). First, it is imperative that the court understand what psychotherapy notes encompass.

Psychotherapy notes are defined in federal regulation as:

> notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. 45 CFR § 164.501.

The United States Department of Health and Human Services (HHS) clarified that:

> [t]hese notes are often referred to as "process notes," distinguishable from "progress notes," "the medical record," or "official records." These process notes capture the therapist's impressions about the patient, contain details of the psychotherapy conversation considered to be inappropriate for the medical record, and are used by the provider for future sessions. We were told that process notes are often kept separate to limit access, even in an electronic record system, because they contain sensitive information relevant to no one other than the treating provider. Standards for Privacy of Individually Identifiable Health Information, 65 Fed Reg 82,462, 82,622-82,623 (December 28, 2000).

15. As such, under the federal regulations, psychotherapy notes have a particular status and a different definition from the medical record, in that they contain sensitive information, since they are the personal notes of, and observations by, the psychotherapist, intended to help them recall the discussion; and have no value to others not involved in the therapy. That information is not intended to be communicated to, or even be seen by, persons other than the therapist. *Id*.

16. These notes are part of, and created in, *the confidential relations and communications between a psychologist and her client* —and hence, fall under the purview of CPLR § 4507. Referencing the attorney-client privilege, CPLR § 4503 refers to communications between an attorney and her client during the course of legal representation as **broadly and generally protected** under the privilege. CPLR § 4503 (a). In New York State, the psychotherapist's records (as distinguished from psychotherapy notes), under CPLR § 4507, are the equivalent of the attorney's work product under CPLR § 4503 (c), as distinguished from documents prepared in anticipation of litigation that would fall under CPLR § 3101 (d). The work product immunity under subdivision (c) is absolute. *Forman v Henkin*, 30 NY3d 656, 661–662, 93 NE3d 882, 887 (2018) ("The right to disclosure, although broad, is not unlimited. CPLR 3101 itself establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery; **attorney's work product**, also absolutely immune…") (citations omitted, emphasis added). Such work product, though, is limited to "documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." *In Re New York City Asbestos Litig.*, 109 AD3d 7, 12, 966 NYS2d 420, 424 (2013), quoting *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190–191, 803 NYS2d 532 [1st Dept 2005]. *See also Competitive Enter. Inst. v Attorney Gen.*

of New York, 161 AD3d 1283, 1286, 76 NYS3d 640, 643 [NY App Div 2018]. Given these guidelines set forth by the court, psychotherapist's records are equivalent to the attorney's work product; and, thus, completely protected from discovery. *Application of Queen*, 233 NYS2d 798, 800 [Sup Ct 1962] ("That the Legislature intended that a confidential relationship as here, should be protected as is the relationship 'between attorney and client' is indeed clear.").

17. As stated above, psychotherapist's records: are prepared by the psychotherapist "during a private counseling session or a group, joint, or family counseling session" (analogous to *documents prepared by counsel acting as such*); are "recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation" (as with *materials uniquely the product of a lawyer's learning and professional skills*); and "capture the therapist's impressions about the patient [… and] they contain sensitive information relevant to no one other than the treating provider" (*such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy*). Therefore, since they are the equivalent of the attorney's work product, they must be afforded the same protection under New York law. In other words, psychotherapist's records, like lawyer's notes and records, should be shielded from discovery.

POINT THREE

THE COURT SHOULD CONSIDER THE DEVASTATING IMPLICATIONS THAT DISCLOSING CONFIDENTIAL PSYCHOTHERAPY NOTES AND RECORDS WILL HAVE ON THE THERAPEUTIC BOND BETWEEN ALL PSYCHOLOGISTS AND ALL OF THEIR CLIENTS WHICH IS FUNDAMENTAL FOR POSITIVE TREATMENT OUTCOMES

18. This court should consider the broader consequences of its ordering the disclosure of psychotherapy notes and records. Psychotherapy notes serve a fundamental purpose for the

therapist and they contain sensitive information only discernable by her. Disclosing these records would be equivalent to the therapist testifying in court, stating to the public that which should remain hidden and protected —for the sake of the entire profession and all of its work with individual patients' mental health and of all such individuals' openness for guidance in a fragile moment of his or her life. Following the path of disclosure could produce devastating consequences for the practice of clinical psychology in general, and negatively impact the therapeutic outcomes of all patients.

19. As such, the court's quashing of the subpoena at issue in this motion is of critical importance to all patients of all clinical psychologists in New York State.

20. A first unintended consequence of disclosure would be that psychotherapists will be discouraged from creating notes, which will be detrimental to their practice.

21. A second unintended consequence may be that individuals will retract from seeking mental health services, precisely because no trust can ever be established without fostering an effective —confidential— psychotherapist-patient relationship.

22. As the U.S. Supreme Court has noted, "[…] if the purpose of the privilege is to be served, the participants in the confidential conversation must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all" (internal citations omitted). *Jaffee v Redmond*, 518 US 1, 17–18, 116 S Ct 1923, 1932, 135 LEd2d 337 (1996). *See also Liberatore v Liberatore*, 37 Misc3d 1034, 1035–1036, 955 NYS2d 762, 765 [Sup Ct 2012]; *Yaron v Yaron*, 83 Misc2d 276, 277–278, 372 NYS2d 518, 519–520 [Sup Ct 1975].

For psychotherapy to flourish, it

> depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. *Jaffee v Redmond*, 518 US 1, 116 S Ct 1923, 135 LEd2d 337 (1996). *Miccoli v W.T.*, 52 Misc3d 411, 418, 31 NYS3d 806, 811–812 [NY Sup Ct 2016].

"For mental health services to succeed, the patient must establish a high degree of trust and confidence in the therapist —and doing so at the beginning of the therapeutic relationship will be paramount for its success." Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U Miami L Rev 249, 260–261 (1996). Moreover, for some patients, "the specter of their therapist as a weapon in the hands of an adversary in litigation will prevent formation of the *therapeutic alliance*. Concern about disclosure of intimate and personal information confided in a therapist thus can have profoundly anti-therapeutic effects for the individual, producing a distrust of the therapist that can make the therapeutic process impossible." *Id.* at 261-262.

23. These conclusions should not be taken lightly. By virtue of the necessary bond between the psychotherapist and the patient "unauthorized disclosure could seriously harm the psychotherapy relationship. In many instances, the damage is irreparable because the mere possibility that confidential information might be disclosed prevents successful treatment from occurring by interfering with the development of the necessary trusting psychotherapy relationship and open communication with the therapist" (internal quotations and citations omitted). Stephanie O. Corley, *Protection for Psychotherapy Notes under the HIPAA Privacy Rule: As Private as a*

Hospital Gown, 22(2) Health Matrix 489, 501 (2013). Here again, we find equivalence in the attorney-client privilege when it seeks to "foster the open dialogue between lawyer and client that is deemed essential to effective representation. It exists to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment" (internal quotations and citations omitted). *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 623, 57 NE3d 30, 34 (2016). Likewise, stigmas associated with mental health, still alive and prevalent in our society, coupled with the consequences of data breaches, and the further ramifications such information could have on health insurance benefits, and employment, among other circumstances, hurt the therapeutic alliance and prevents effective and meaningful treatment for the patient. Stephanie O. Corley, *Protection for Psychotherapy Notes…* at 503-508.

24. HIPAA regulations alone do not fully protect the therapeutic alliance—and this court should be persuaded to afford that alliance the protection it deserves and needs, in order to develop for the benefit of the patient's mental health. *Lightman v Flaum*, 97 NYS2d 128, 736 NYS2d 300, 761 NE2d 1027 (2001). Amanda M. Hall et al., *The Influence of the Therapist-Patient Relationship on Treatment Outcome in Physical Rehabilitation: A Systematic Review*, 90(8) Physical Therapy 1099 (2010); Adam O. Horvath, *the role of the Therapeutic Alliance in Psychotherapy*, 61(4) J Consult Clin Psychol 561 (1993).

POINT FOUR

THE COURT SHOULD NOT ORDER AN IN-CAMERA INSPECTION OR AFFORD COUNSEL FOR EITHER SIDE THE OPPORTUNITY TO REVIEW COMPLAINANT'S THERAPY NOTES, IF SUCH NOTES EXIST

25. Defendant's counsel may assert that if the court will not order the disclosure of hospital mental health notes to the litigants, the court, should at least direct that the notes be surrendered to the court for inspection by counsel for the parties or by the court itself. Even this half measure will produce the therapeutic harm described above and violate the absolute confidentiality afforded to the records of a clinical psychologist under CPLR § 4507. Furthermore, *even the ordering of such limited in camera inspection by this Court* will force *all* psychologists to disclose to their patients that the content of the patient's records that *may* be subject to inspection (which from a clinical perspective should not be disclosed), due the important therapeutic purpose of reassuring the patient that the notes that a court has ordered to be surrendered do not contain even more inflammatory and prejudicial information about the patient than the note do actually contain.

POINT FIVE

THE DEFENDANT HAS FAILED TO SATISFY THE REQUIREMENTS FOR A COURT ORDERED SUBPOENA DUCES TECUM IN HIS ORDER TO SHOW CAUSE

26. Because [redacted] Medical Center has asserted a specific and substantial confidentiality argument to support its objection to the defendant's motion for a court ordered subpoena, it is incumbent upon the Defendant to demonstrate that he has a legal right to the requested material notwithstanding your Affirmant's asserted grounds for objecting to the issuance of such a subpoena. The United States Supreme Court laid out the criteria to be applied

in balancing the interests of a criminal defendant, against the interests of a non-party petitioner asserting a right of confidentiality, in UNITED STATES v. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., 418 U.S. 683 (1974).

In *Nixon*, the Court held that:

> A subpoena for documents may be quashed if their production would be "unreasonable or oppressive," but not otherwise. The leading case in this Court interpreting this standard is *Bowman Dairy Co.* v. *United States,* 341 U. S. 214 (1951). This case recognized certain fundamental characteristics of the subpoena *duces tecum* in criminal cases: (1) **it was not intended to provide a means of discovery for criminal cases,** *id.,* at 220; (2) its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of subpoenaed materials,[11] *ibid.* As both parties agree, cases decided in the wake of *Bowman* have generally followed Judge Weinfeld's formulation in *United States* v. *Iozia,* 13 F. R. D. 335, 338 (SDNY 1952), as to the required showing. Under this test, in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary[12] and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith ***and is not intended as a general "fishing expedition."*** (Emphasis added).

27. In the instant case the defendant has not, and in fact cannot, establish any of the elements prescribed by the Court in *Izoia.* The court in *Nixon* went on to state:

> Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial, "that `the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, *United States* v. *Bryan,* 339 U. S. [323, 331(1950)]; *Blackmer* v. *United States,* 284 U. S. 421, 438 (1932) ." *Branzburg* v. *Hayes,* 408 U. S. 665, 688 (1972). The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself." **And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence.** These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.[18] (Emphasis added).

28. Defendant's order to show cause meet's only one evidentiary definition, and that is of a ***"fishing expedition."*** As defendants counsel acknowledges in his supporting affirmation all he can assert is that "the requested materials may also disclose whether, in her mental health treatment, the complaining witness underwent hypnosis or other treatment that would affect her credibility or even her competence and ability to take an oath." That statement is itself definitionally self-serving and speculative, and well beyond the clinical competence of a criminal defense lawyer. His assertion that the complainant suffers from depression and anxiety is likewise irrelevant to the courts consideration of her capacity to testify under oath if lawfully subpoenaed to do so, and does not necessitate the destruction of the trust relationship she may have established with a mental health provider.

CONCLUSION

29. For all these reasons, this court should find that the psychotherapist privilege protects any psychotherapy notes and records, *to the extent that they may exist,* from discovery. As stated, because of the nature of these notes, the sensitive information they contain, the enhanced protections they have under New York State law since 1956, and the purpose the psychotherapist privilege serves in supporting the therapeutic alliance, they have an essential function for individuals seeking mental health services and they should be protected as such.

27. Defendant's motion to obtain a subpoena for release of any behavioral treatment records of the Complainant, *if they even exist,* should be denied.

NO PRIOR APPLICATION FOR THE RELIEF SOUGHT HEREIN HAS BEEN MADE.

WHEREFORE, your Affirmant respectfully requests the subject motion by Order to Show Cause be denied in its entirety, and that the Court grant such other and further relief as the court deems just and proper.

Dated: New York, New York
March 15, 2022

/s/ David N. Hoffman

David N. Hoffman

District Attorney

County
Office of the District Attorney

March 10, 2022

Hon.

Re: *People v. Kevin*
Order to Show Cause

Dear Judge C

Enclosed for filing with your Court please find an Attorney Affirmation submitted in response to defendant's Order to Show Cause, dated February 28, 2022.

Respectfully submitted,

Matthew L.
Assistant District Attorney
County

Enclosure

cc: Brian

David N. Hoffman, Counsel to Medical Center

STATE OF NEW YORK
COUNTY COURT

COUNTY OF [redacted]

THE PEOPLE OF THE STATE OF NEW YORK,

-v-

ATTORNEY AFFIRMATION IN RESPONSE TO ORDER TO SHOW CAUSE

KEVIN [redacted]

Defendant.

Indictment No. 2021-[redacted]
Index No. [redacted]

I, Matthew [redacted], state under the penalties of perjury the following:

1. That I am an attorney and counselor at law, duly admitted to practice before the Courts of the State of New York and employed with the [redacted] County District Attorney's Office at [redacted] New York.
2. That I am the Assistant District Attorney assigned to the above-entitled case.
3. That the defendant in this matter has submitted an Order to Show Cause seeking disclosure of treatment records pertaining to the complainant.
4. Upon information and belief, the source of my information and the grounds for my belief being the files maintained by the District Attorney's Office in this matter and defendant's instant motion, the People would oppose defendant's request for relief.
5. Defendant has failed to support his request with any legal citations and has failed to establish an adequate basis for the relief sought.
6. In defendant's instant motion, defense counsel states that, "upon information and belief," the complainant was treated for "anxiety and depression" and "a suicide attempt" in 2018 and 2019, respectively. Defense counsel further states, upon information and belief, that "complainant has a history that includes paranoia,

possible schizophrenia and a suicide attempt." However, there is no reference to the foundation for this "information and belief."

7. Presumably, defense counsel's "information and belief" is based on the attached affidavit of the defendant. However, therein, defendant simply states that the complainant told him she was taking medication for "anxiety and depression" and had been "raped by her father." There is no indication that the complainant ever disclosed that she had been diagnosed with paranoia, schizophrenia, or any other condition that would affect her ability to perceive events or testify credibly.

8. Pursuant to Mental Hygiene Law § 33.13(c)(1), a court may order disclosure of confidential mental health treatment records only upon a finding that the interests of justice "significantly" outweigh the need for confidentiality. *See also, People v. Felong,* 283 AD2d 951, 952 (4th Dept. 2001).

9. "To trigger a defendant's right to disclosure under MHL § 33.13(c), the defendant must make a preliminary, specific, showing that the records sought will reveal a significant condition relevant to the reliability or accuracy of a material prosecution witness's testimony." *People v. Velasquez,* 49 Misc.3d 265, 268-9 (Bronx. Cty. 2015).

10. Absent a showing that the records will contain evidence of such things like fabrication, coaching, exculpatory statements, or a diagnosis that may affect a witness's credibility, courts have consistently found that the interests of justice did not outweigh the patient's need for confidentiality. *See, e.g., Felong, supra; People v. Sakadinksy,* 239 AD2d 443 (2d Dept. 1997); *People v. Woods,* 60 AD3d 1493, 1494 (4th Dept. 2009); *Matter of Dean T., Jr.,* 124 AD3d 548, 549 (1st Dept. 2015);

People v. Telfair, 198 AD3d 678, 683 (2d Dept. 2021); *cf. People v. Knowell,* 127 AD2d 794 (2d Dept. 1987).

11. Similarly, the Court of Appeals has noted that access to such records should be denied where the defendant "failed to demonstrate any theory of relevancy and materiality, but, instead, merely desired the opportunity for an unrestrained foray into confidential records in the hope that the unearthing of some unspecified information would enable him to impeach the witness." *People v. Gissendanner,* 48 NY2d 543, 549 (1979).

12. Even if this Court were to find that the defendant has established a sufficient basis for ordering production of the requested records, the proper procedure dictates that those records only be provided to the Court for *in camera* inspection to allow the Court to make a determination whether they contain any evidence that justifies their release in the interests of justice e.g., information which could possibly bear on the complainant's ability to perceive or recall the event; information possibly demonstrating the complainant's bias or hostility; evidence of a possible motive to fabricate; etc. *See People v. Cesar G.,* 154 Misc.2d 17, 24 (New York Cty. 1991); *People v. Arnold,* 177 AD2d 633, 634 (2d Dept. 1991); *Velasquez, supra.* The parties should not be allowed to review the records until that determination has been made by the Court.

13. Here, defendant has failed to make a *specific* showing that the records sought will reveal a *significant* condition relevant to the complainant's reliability or accuracy. Instead, defendant has made general, unspecified allegations, as to why the records would be relevant and admissible. Based on this, it appears defendant is attempting

to gain an opportunity for an "unrestrained foray" into these confidential records in the hope of finding something useful.

14. As such, this Court should deny defendant's request to produce these records.

WHEREFORE, the People respectfully request an order be entered denying defendant's motion, granting the People's motion, and for such further relief as is deemed just and proper.

Dated: March 10, 2022
[redacted] New York

Respectfully submitted,

Matthew [redacted], Esq.
Assistant District Attorney
[redacted] County

1 THE COURT: Mr. B[redacted]?
2 MR. B[redacted]: Nothing further. Thank
3 you, Your Honor.
4 THE COURT: Thank you. All right, we
5 will now -- and what I will do is I'll leave
6 these up here. I will return to everyone
7 their exhibits. We can return those. That's
8 Mr. B[redacted]'s.
9 COURT OFFICER: Thank you.
10 THE COURT: And that's Mr. P[redacted]'s.
11 COURT ASSISTANT: Thank you.
12 MR. B[redacted]: Thank you.
13 MR. P[redacted]: Thank you.
14 THE COURT: All right, so moving to the
15 next issue, which is the Order to Show Cause
16 filed by Mr. B[redacted] and executed by this
17 Court.
18 An Order to Show Cause was signed on
19 March 1st of 2022 in which the defendant
20 seeks an order requiring [redacted] to
21 deliver to the clerk of the court, the clerk
22 of this court certified copies of the
23 complete medical records, including any and
24 all psychiatric, psychological, alcohol or
25 substance abuse counseling records,

1 evaluations, tests, and any case notes
2 entered during the course of treatment or
3 counseling with respect to [redacted],
4 a/k/a [redacted], date of birth [redacted].
5 Upon executing that Order to Show Cause,
6 the People have filed a response in
7 opposition dated March 10th, 2022. And last
8 night the attorney, [redacted]
9 [redacted] filed an opposition, papers
10 in opposition to Mr. B[redacted]'s request, as
11 well. That's dated March 15th, 2022.
12 So the following constitutes the
13 decision and order of the Court. Pursuant to
14 Mental Hygiene Law 33.13, a court may order
15 the disclosure of confidential medical health
16 records only upon finding that the interests
17 of justice significantly outweighs the need
18 for confidentiality.
19 In this case, there has been no showing
20 made to the Court that would support the
21 disclosure of the complainant's records from
22 [redacted] which are sought by the
23 defendant.
24 Thus, the Court is denying the
25 defendant's motion in its entirety as the

1 Court finds the interests of justice in this
2 case does not outweigh the patient's need for
3 confidentiality of her treatment records from
4 [redacted].
5 In support of the defendant's motion,
6 defendant's attorney alleges in his
7 affirmation that upon information and belief,
8 complainant was treated for
9 anxiety/depression in 2018 and a suicide
10 attempt in 2019, and that the complainant has
11 a history that includes paranoia, possible
12 schizophrenia, and a suicide attempt.
13 The defendant's attorney makes these
14 allegations upon information and belief
15 without mentioning in his motion papers the
16 basis for his information and belief.
17 However, the Court assumes the information
18 and belief stems from the Defense counsel's
19 conversations with defendant.
20 However, the defendant, who also
21 submitted an affidavit in support of the
22 motion, only alleges that he once saw the
23 complainant take two pills. And when the
24 defendant asked the complainant what they
25 were there for, what the pills were for, she

1 replied anxiety and depression.
2 Nowhere in the defendant's own affidavit
3 does he allege the complainant has a history
4 of paranoia, possible schizophrenia, or
5 suicide attempt.
6 Further, the defendant's motion papers
7 as a whole fail to make any specified showing
8 that the records will be will contain
9 evidence of exculpatory statements or of a
10 diagnosis that may affect the complainant's
11 credibility or impair her ability to perceive
12 events. Rather, the defendant's motion
13 papers simply include broad generalizations
14 regarding the complainant's mental health
15 history.
16 Similar to the holding in People v.
17 Gissendanner, the defendant in this case
18 failed to demonstrate any theory or relevancy
19 of materiality, but rather only has shown an
20 attempt to gain an unrestrained invasion into
21 the confidential records of the complainant
22 in the hope of maybe recovering some
23 unspecified information that would help him
24 to impeach the complainant. For these
25 reasons, the motion is denied.