IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CRIMINAL DIVISON—FIRST MUNICIPAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff	)	
v.	)	18 CR 13 629
XXXX Defendant/ Respondent	)	

VICTIM'S MOTION IN OPPOSITION TO DEFENDANT'S MOTION TO DISCLOSE AND FOR IN CAMERA REVIEW OF MENTAL HEALTH RECORDS

NOW COMES A.D., by and through her attorney, Mallory Littlejohn of the Chicago Alliance Against Sexual Exploitation (CAASE), and respectfully files this motion in opposition to Defendant's motion to disclose mental health records.

I. Factual Background

On June 14, 2018, A.D. reported to the police that she had been the victim of a sexual assault. In September of 2018, defendant was indicted for Criminal Sexual Assault. CAASE entered an appearance in the criminal case on September 14, 2018 in order to assert A.D.'s rights as necessary. After the assault, A.D. began counseling at Mujeres Latinas in Acción; a rape crisis center. On August 6, 2019, Defendant filed a motion in his criminal case to disclose all of A.D.'s mental health records relating to sexual abuse.

II. Standing to File a Motion in Opposition

Under the Illinois Rights of Crime Victims and Witnesses Act (RCVWA), a victim of a violent crime "has standing to assert the rights" enumerated in the Article I, Section 8.1 of the Illinois Constitution and Section 4 of the RCVWA "in any court exercising jurisdiction over the criminal case." 725 ILCS § 120/4.5 (b)(c-5)(3).

As relevant here, one of the rights provided by both the Illinois Constitution and the RCVWA is the right to privacy. 725 ILCS § 120/4 (a)(1) ("The right to be treated with fairness and respect for their dignity and privacy and to be free from harassment, intimidation, and abuse throughout the criminal justice process."); Ill. Const. 1970, art. I, § 8.1. The RCVWA also provides procedures for the assertion of rights. 725 ILCS § 120/4.5 (b)(c-5)(4)(A). Where a prosecuting attorney "decides not to assert or enforce a victim's right, the prosecuting attorney shall notify the victim or the victim's attorney in sufficient time to allow the victim or the victim's attorney to assert the right or to seek the enforcement of a right." *Id.* Here, the prosecuting attorney has decided not to assert the victim's right. Accordingly, as counsel for the victim, CAASE hereby asserts, on behalf of A.D., and in opposition to Defendant's motion to disclose, the right to privacy as protected by the Illinois Constitution and the RCVWA.

III. Argument

Defendant's motion must fail for two reasons. First, Illinois law provides an absolute privilege to mental health records connected to rape crisis centers. 735 ILCS 5/8-802.1. This privilege alone would be sufficient to block defendant's discovery demand. There is, however, a second reason to deny the motion: Illinois law provides explicit protections to victims under the Rights of Crime Victims and Witnesses Act. 725 ILCS § 120/4 (a)(1). Permitting discovery as requested by defendant would accordingly both breach an absolute privilege and violate a clear public policy in the State of Illinois.

A. **Victim's Mental Health Records Are Absolutely Privileged**

Mujeres Latinas in Acción ("Mujeres") is an organization with a domestic violence and sexual assault program that provides comprehensive services to survivors and victims of domestic violence and sexual abuse—including information, referrals, and individual or group

counseling. After she was sexually assaulted, A.D. sought the services of Mujeres. Mujeres provided her with information, support, and counseling. On August 6, 2019, Defendant filed a motion to disclose any and all counseling and mental health records pursuant Illinois Supreme Court Rule 412(h).

Defendant seeks disclosure of "any and all mental health records in regards to any statements, diagnosis and treatment of a mental health issue related to sexual abuse or trauma." *See* Defendant's Motion to Disclose. This request would include information regarding the services A.D. received at Mujeres. In order for the court to review "records of or concerning the victim that are confidential or privileged by law," the court must find by a preponderance of the evidence that "the records are not protected by an absolute privilege." 725 ILCS § 120/4.5 (b)(c-5)(9). The mental health records requested by Defendant, however, are so privileged.

Illinois provides "absolute privilege for information provided to rape crisis personnel by victims of sexual offenses." *People v. Harlacher*, 634 N.E.2d 366, 372 (Ill. App. Ct. 1994). This privilege is codified under a statute entitled "Confidentiality of Statements Made to Rape Crisis Personnel." 735 ILCS 5/8-802.1. Section 8-801.1 defines "rape crisis organization" broadly. A rape crisis organization "means any organization or association the major purpose of which is providing information, counseling, and psychological support to victims of any or all of the crimes of aggravated sexual assault, predatory criminal sexual assault of a child, criminal sexual assault, sexual relations between siblings, criminal sexual abuse and aggravated criminal sexual abuse." 735 ILCS 5/8-802.1 (b)(1).

A.D. received counseling from Mujeres. Because Mujeres provides information, resources, and counseling to victims of sexual assault and sexual abuse of all kinds, Mujeres qualifies as a rape crisis organization under the statute. Section 8-801.1 also defines "rape crisis counselor"

broadly. A rape crisis counselor is "a person who is a psychologist, social worker, employee, or volunteer in any organization or association defined as a rape crisis organization." 735 ILCS 5/8-802.1 (b)(2). The Mujeres employees who provided A.D. with services at Mujeres—a rape crisis organization—are counselors protected by the privilege of the statute. The statute states that "no rape crisis counselor shall disclose any confidential communication or be examined as a witness in any civil or criminal proceeding as to any confidential communication without the written consent of the victim or a representative of the victim." 735 ILCS 5/8-802.1(d). The purpose of this privilege is "to protect victims of rape from public disclosure of statements they make in confidence to counselors of organizations established to help them." 735 ILCS § 5/8-802.1(a).

In this case, A.D. has not provided the written consent required by the statute prior to disclosure of the confidential communications demanded by the subpoena for records. Section 8-802 also provides that "a rape crisis counselor may disclose a confidential communication without consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person." 735 ILCS § 5/8-802.1(e). A.D. is not aware of any allegation that failure to disclose the confidential communications between A.D. and her counselor will pose any clear, imminent risk of seriously physical injury or death. Moreover, § 5/8-802 does not prohibit disclosure without imposing punishment. Indeed, a counselor who knowingly discloses confidential information in violation of the statute commits a Class C misdemeanor. 735 ILCS § 5/8-802.1(f). As the Illinois Supreme Court put it, "[i]n sum, section 8-802 of the Code of Civil Procedure evinces a strong public policy in favor of the confidentiality of communications between sexual assault victims and counselors." *Foggy,* 521 N.E.2d at 92. There, the Supreme Court held that subpoenas for counseling records of rape crisis counselors are properly quashed under this confidentiality statute. *Id.* The refusal to

disclose such statutorily-protected confidential communications does not deny the defendant his Sixth Amendment right to confrontation. *Id.* Similarly, denial of Defendant's motion to disclose is appropriate here under the statute.

B. <u>Defendant's Motion Also Fails Under the Illinois Crime Victims and Witnesses Act</u>

The Illinois Rights of Crime Victims and Witnesses Act provides both procedural and substantive rights. One such procedural right of the RCVWA is the right to notice and hearing before disclosure of confidential or privileged information or records. 725 ILCS 120/4.5. The law requires that "[a] defendant who seeks to subpoena records of or concerning the victim that are confidential or privileged by law must seek permission of the court before the subpoena is issued." *Id*. Once the defendant has filed the requisite written motion, the court must find that "the records are not protected by an absolute privilege and the records contain relevant, admissible, material evidence that is not available through other witnesses or evidence." *Id*. The court must then only review the records *in camera* to determine whether due process requires disclosure of any portion of the records. *Id.* Even then, where the court thinks that due process demands disclosure, the prosecutor and victim have time to seek appellate review in advance of disclosure to defendant. *Id*.

The United States Supreme Court has long emphasized the importance substantive rights for victims. *Morris v. Slappy*, 461 U.S. 1, 14 (1983) ("But in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities."). In Illinois, the spirit of the Supreme Court's admonishment to respect victims is represented in the substantive provisions of the RCVWA. The RCVWA provides a right to privacy. *See* 725 ILCS 120/4(a)(1) ("Crime victims shall have . . .[t]he right to be treated with fairness and respect for their dignity

and privacy.").

Illinois courts have confirmed the broad scope of this right to privacy. In *People v. Lopez,* the court noted that a person has "an interest in privacy . . . even when she is not an alleged perpetrator but an alleged victim of crime." 766 N.E.2d 329, 339 (Ill. App. Ct. 2002). There, the court held that under the RCVWA, "[w]hen entertaining a motion by the defense for an independent physical examination of the complaining witness in a sex offense case, the trial court must give due consideration to the rights of the alleged victim as well as the rights of the defendant." *Id.* The Illinois Supreme Court subsequently held that the rights of the victim weighed more, and that the motion for the examination must be denied. *People v. Lopez,* 800 N.E.2d 1211, 1221 (Ill. 2003) ("[W]e hold that a trial court cannot order a complaining witness in a sex offense case to submit to a physical examination.").

Like the motion for examination in *Lopez,* the court must similarly account for the victim's right to privacy under the RCVWA when entertaining a motion to disclose mental health records. To permit the disclosure of the victim's personal mental health records would contravene the Supreme Court's desire to motivate victims "to report violations." *Morris,* 461 U.S. Moreover, just as the Illinois Supreme Court held that a trial court cannot order a complaining witness in a sex offense case to submit to a physical examination due to the right to privacy under the RCVWA, this court should hold that it cannot order the disclosure of a victim's mental health records relating to sexual assault. Failure to protect the victim from such disclosure would be dismissive of the right to privacy embodied in the RCVWA. Because disclosure would violate the victim's right to privacy under the RCVWA, this court should deny defendant's motion to disclose.

C. In Camera Review of the Privileged Records is not Permitted Under Illinois Law

As noted above, the Illinois privilege for mental health records protects against not only defendant disclosure but also against in camera review. The RCVWA, Rape Crisis Privilege and the court's interpretation supports that rape crisis records are not viewable by anyone without permission of the victim. The privilege applies across the board—neither the parties nor the judge may see the privileged information. Each procedural protection demonstrates the legislature's desire to make nondisclosure of confidential records the default. The uphill procedural battle the statute imposes on a defendant requesting discovery was designed with purpose and informed by the desire to protect the rights of victims in Illinois.

It was the intent of the legislature to keep Rape Crisis records completely privileged. The statutory canons of construction shed light on the intent of the legislature. The codified text of the mental health records statute does not include permitting in camera review, despite the presence of other exceptions within the statute as well as in camera review in related statues. The presence of an exception in one area of the Illinois code dealing with sexual abuse demonstrates an intention to affirmatively reject such an exception in another area.

The RCVWA plainly and explicitly allows for in camera review in cases where privilege does not apply. Despite the fact, however, that the RCVWA and the mental health record statute share the same goal of protecting victims, there is no exception to the privilege provided to victims under the mental health records statute for in camera review. This indicates that the legislature decided that due process would not and could not warrant permitting such review for mental health records privileged under the statute. This omission was intentional and should be respected by this court. In camera review is unavailable under the statute.

The legislator was clear in its intent to maintain an absolute privilege for these records. There is no doubt that the privilege provided by Illinois law under § 8-802 is without qualification. People v. Foggy, 521 N.E.2d 86, 91 (Ill. 1988) ("The privilege contained in section 8-802 is unqualified."). This reality is made all the more evident by the fact that the statutory predecessor to § 8-802 provided only a qualified privilege—a gap that the legislature intended to fill with the passage of § 8-802. Foggy, 521 N.E.2d at 91 ("[T]he legislature originally allowed only a qualified privilege for communications between sexual assault counselors and victims but later decided to strengthen the privilege and make it absolute.").

Furthermore, in Foggy, the court rejected even in camera review noting that in camera review would allow that "in every case a trial judge could become privy to all counseling records of a sexual assault victim, regardless of what was discussed in the counseling sessions and in the absence of any demonstrated need that would justify such an intrusion." *Id.* The court held that in camera review would "seriously undermine the valuable, beneficial services of those programs that are within the protection of the statute." *Id.*; see also People v. Graham, 947 N.E.2d 294, 301 (Ill. App. Ct. 2011). Because the requested discovery is privileged by law, this court should deny Defendant's motion to disclose and for in camera review.

CONCLUSION

WHEREFORE, A.D. respectfully requests that this court deny the motion to disclose issued by counsel for the Defendant seeking the counseling records of A.D under § 8-802.1. In the alternative, A.D. respectfully requests that this court deny the motion to disclose issued by counsel for the Defendant seeking the counseling records of A.D. under the RCVWA.

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