Colleen Clase (AZ Bar # 029360)
Jessica Gattuso (AZ Bar # 025492)
Robert Swinford (AZ Bar #030651)
Attorneys for Petitioner L[redacted] F[redacted]-E[redacted]
Arizona Voice for Crime Victims
111 East Taylor Street
Phoenix, AZ 85004
480-600-2661
cclase@voiceforvictims.org

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

L[redacted] F[redacted]-E[redacted],

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of PINAL, THE HONORABLE DELIA R. NEAL, a judge thereof,

Respondent Judge,

SHAWN MAIN,

Real Party in Interest.

Court of Appeals
No. 2 CA-SA 2019-0045

Pinal County Superior Court
No. CR201503594

PETITION FOR SPECIAL ACTION

INTRODUCTION

Only in limited circumstances will a victim's constitutional right to refuse a defendant's discovery request, under the Arizona Victims' Bill of Rights (VBR), yield to the due process rights of the accused. Ariz. Const. art. II, § 2.1(A)(5); *State ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232 (Ariz. Ct. App. 1992). "When the defendant's constitutional right to due process conflicts with the Victims' Bill of Rights in a direct manner... then due process is the superior right." *State v. Kellywod,* 246 Ariz. 45, ¶ 8 (Ariz. Ct. App. 2018) citing *Roper*, 172 Ariz. at 236. Thus, a victim may be compelled to produce treatment records for an *in camera* inspection if the defendant shows a "reasonable possibility that the information sought ... include[s] information to which [he or] she [is] entitled as a matter of due process." *State v. Sarullo*, 219 Ariz. 431, 437 (Ariz. Ct. App. 2008) quoting *State v. Connor*, 215 Ariz. 553, ¶ 10 (Ariz. Ct. App. 2007). However, the burden of demonstrating a "reasonable possibility" is not insubstantial, and necessarily requires more than conclusory assertions or speculation on the part of the requesting party. *Kellywood*, 246 Ariz. 45, ¶ 9. Rather, a criminal defendant has to demonstrate a substantial need of a constitutional dimension and that a sufficiently specific basis exists to warrant an exception to a victim's constitutional right to refuse a defendant's discovery request. *Connor*, 215 Ariz. 553, 558, 561.

Real Party, Shawn Main, has sought broad disclosure of privileged and

confidential records belonging to the child-victims. Her initial request was granted but was later vacated by this Court. *See* 2 CA-SA 2018-0084. This Court ordered that Main's request be reconsidered in light of *Kellywood*. *Id*. A number of Main's requests were eventually denied, but Respondent Judge has ordered some of the records for an *in camera* review despite that Main still has not demonstrated a substantial need or a sufficiently specific basis to warrant an exception to the rights of the child-victims. Any infringement this Court has previously authorized has been done in the context of a reasonable possibility, not a mere possibility, that a criminal defendant may be entitled to privileged and confidential records over the objection of the victim.

JURISDICTIONAL STATEMENT

Crime victims have standing to bring a special action seeking to enforce any right or to challenge an order denying any right guaranteed to victims under the VBR, Article II, § 2.1 of the Arizona Constitution, any implementing legislation, or court rules. A.R.S. § 13-4437(A); Ariz. R. P. Spec. Act. 2(a)(2). This Court has jurisdiction to hear and determine petitions for special action. A.R.S. § 12-120.21(A)(4). Additionally, victims have no other remedy by appeal. *State v. Dairman*, 208 Ariz. 484, 486 (Ariz. Ct. App. 2004) (citing *State ex rel. Gonzalez v. Superior Court,* 184 Ariz. 103, 104 (Ariz. Ct. App. 1995) (noting that special action jurisdiction is appropriate if there is no adequate remedy by appeal and the case will

guide the trial court's interpretation of a statute)); *see also State ex rel. Romley v. Sheldon,* 198 Ariz. 109, 110 (Ariz. Ct. App. 2000) (accepting jurisdiction where the legal issue is likely to recur and where the state would have no remedy by appeal of trial court's ruling). The decision to decline or accept special action jurisdiction is discretionary. *State ex rel. Romley v. Fields*, 201 Ariz. 321, 323 (Ariz. Ct. App. 2001) (noting discretionary nature).

The Court should exercise its discretion and accept jurisdiction in this case for either of two reasons. First, the issue presented by the petitioner is one of first impression, involves a purely legal question, is of statewide importance, and is likely to arise again, *Blake v. Schwartz*, 202 Ariz. 120, 122 (App. 2002) (noting when special action jurisdiction is appropriate). Second, Petitioner has no plain, speedy or adequate remedy by appeal and justice cannot be obtained by other means. Ariz. R. P. Spec. Act. 1(a); *State ex rel. Romley v. Fields*, 201 Ariz. 321, 323 (App. 2001).

Petitioner, Ms. F[redacted]-E[redacted], respectfully urges this Court to accept jurisdiction because the issue presented is a purely legal question, one of statewide importance as it involves disclosure of child-victims' privileged and confidential records, and this issue is likely to arise again. Additionally, Ms. F[redacted]-E[redacted] does not have an adequate remedy by appeal. If this Court declines to accept jurisdiction of this petition, the child-victims will be denied their constitutional rights and be forever without remedy once their privileged and confidential records are submitted

for an *in camera* review. This Court's intervention is again necessary to protect the child-victims in this case.

A *de novo* review is appropriate. Generally, a trial court's discovery rulings are reviewed for an abuse of discretion, but constitutional claims in a records request or in an objection to a records request warrant a *de novo* review. *State ex rel. Montgomery v. Stephens/Wilson*, No. 1 CA-SA 15-0128, WL5083972, *1 (Ariz. Ct. App. August 27, 2015 (memorandum decision)) (noting that the constitutional claims in a records request and in the opposition to the records request warrants *de novo* review)[1]; *State v. Connor*, 215 Ariz. 553, 557 (Ariz. Ct. App. 2007) (noting that whether defense is entitled to discovery is within the discretion of the trial court that will usually not be disturbed absent an abuse of discretion, but to the extent that a defendant sets forth a constitutional claim asserting this information is necessary,

[1]Rule 111(c) of the Arizona Rules of the Supreme Court allows to the citation of memorandum decisions:
(1) Memorandum decisions of Arizona state courts are not precedential and such a decision may be cited only:
(A) to establish claim preclusion, issue preclusion, or law of the case;
(B) to assist the appellate court in deciding whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review; or
(C) for persuasive value, but only if it was issued on or after January 1, 2015; no opinion adequately addresses the issue before the court; and the citation is not to a de-published opinion or a de-published portion of an opinion.
(2) A citation must indicate if a decision is a memorandum decision.
(3) A party citing a memorandum decision must provide either a copy of the decision or a hyperlink to the decision where it may be obtained without charge.
(4) A party has no duty to cite a memorandum decision.

the court will review de novo) (internal citations omitted); *see also Emmett McLoughlin Realty, Inc. v. Pima County,* 212 Ariz. 351, 355 (Ariz. Ct. App. 2006) (the appellate court reviews constitutional claims de novo).

FACTS AND PROCEDURAL HISTORY

Before her murder on November 19, 2015, three year old child-victim, T.C., suffered unspeakable physical abuse at the hands of Shawn Main. The abuse documented in law enforcement reports includes a large dark bruise covering her entire forehead, bruising under her eyes, a cut under her chin, and vaginal and anal tearing. Additionally, law enforcement has described the three year old's body as unclean, as having filthy hair, and looking as if she hadn't been bathed in a long time.

Further investigation revealed that T.C.'s biological mother had moved in with Main and her girlfriend after meeting them on Facebook.[2] T.C., and her three brothers I.C., A.C., and D.C. (A.C. and D.C. are also referred to as the "child-victims" throughout this petition.), all children, were also moved into the Main's home. After T.C.'s death, law enforcement discovered T.C.'s three brothers in the home which was described by law enforcement as cluttered with boxes, trash, food containers, and other items piled approximately four feet high. A.C. and D.C.

[2] Shawn Main's wife/girlfriend, Maria Tiglao, and T.C.'s biological mother, Tina Morse, are co-defendants in this case. This petition pertains only to requests for privileged and confidential victim records made by Shawn Main.

appeared to be victims of physical abuse and severe neglect. One of T.C.'s bothers was described by law enforcement as having a broken nose. Law enforcement alerted DCS and the children were eventually placed with Ms. F[redacted]-E[redacted], who is now their legal guardian and petitioner in this second *Petition for Special Action* related to the child-victims' privileged and confidential records.

Shawn Main was arrested on December 24, 2015, and charged with first degree murder and multiple counts of child abuse for T.C.'s death. Exhibit 1. She was also charged with three counts of child abuse against two of T.C.'s brothers, A.C. and D.C.[3] *Id*. Criminal proceedings commenced in the Superior Court of Pinal County. The Pinal County Attorney's Office (PCAO) is seeking the death penalty for T.C.'s murder. Main has sought privileged and confidential records belonging to the child-victims. First, she sought medical, counseling, and school records that exist or may come into existence. Appendix 2. Despite that she had not demonstrated that the limited exception to the child-victims' constitutional right to refuse a defense discovery request is warranted or that privilege had been waived,

[3] All three of T.C.'s brothers are victims in this case. Two are victims because they are named in the indictment. Ariz. Const. art. II, § 2.1(C) (a victim is a person against whom the criminal offense has been committed…). All three of T.C.'s brothers are victims based on the fact their sister was murdered. Ariz. Const. art. II, § 2.1(D) (The legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section…); A.R.S. § 13-4401(19) (A victim is a person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person's spouse, parent, child, grandparent or sibling…); *E.H. v. Hon. Slayton*, 245 Ariz. 331 (Ariz. Ct. App. 2018) (sibling of a homicide victims is a victim under Arizona law; more than one victim may assert rights).

the Honorable Kevin White granted the request for all of the child-victims' records. Appendix 3. Main then requested WIC records that belong to the child-victims. Appendix 4. Judge White granted that request as well. Appendix 5. This Court reversed Judge White's order after Ms. F[redacted]-E[redacted] petitioner for special action review, (2 CA-SA 2018-0084). Appendix 6. This Court ordered that Main's request be reconsidered in light of its ruling in *State v. Kellywood*. *Id*. The underlying criminal case was transferred from Judge White's division to the Respondent Judge in this petition, the Honorable Delia Neal. At a January 25, 2019 status conference, Counsel for Shawn Main requested an evidentiary hearing related to this Court's order. Ms. F[redacted]-E[redacted] objected to an evidentiary hearing and suggested, if anything, that briefing would be appropriate. Respondent Judge ordered simultaneous briefing and oral argument before Judge White's order would be reconsidered. Appendix 7.

Simultaneous briefing was submitted. Appendix 8; Appendix 9. Main's briefing consisted of three renewed motions. The first was for release of T.C.'s medical records. Appendix 8a. Ms. F[redacted]-E[redacted], however, had not ever objected to the release of any records belonging to the murder victim, T.C. The second renewed motion was related to A.C. and D.C.'s medical and counseling records. Appendix 8b. In the renewed motion for medical and counseling records, Main asserts that the medical records of the child-victims, from birth until now, will show

their growth-related measurements. *Id*. Additionally, she suggests that the child-victims were thin because their biological parents were thin. *Id*. She also states: "there are many medical reasons and causes for malnourishment including medical conditions that disrupt the body's ability to digest food, inadequate ingestion or digestions, malabsorption, impaired metabolism, loss of nutrients and/or increased nutritional requirements that can occur with infections and cancers." *Id*. Main additionally asserts that the WIC records are "extremely relevant, even critical" because the weights and growths of the child-victims were measured. *Id*. Main goes on to suggest "there may be statements made by one or both boys related to meal preparation and mealtimes and eating" while living in her home. *Id*. As it relates to physical injuries, Main states that "the medical records are expected to include references to and statements by D.C. related to [injuries to his face]." *Id*. For the first time since undersigned's involvement, Main suggests there is a need to evaluate the medical records of the child-victims for genetic defects in order to determine whether there is an alternative reason for injuries sustained by the murder victim, T.C. *Id*.

As she has done throughout the criminal matter, Main next attacks the credibility and truthfulness of the child-victims and asserts their medical records are necessary to determine whether they have been coached to make false statements. *Id*. Main stated: "medical records may include references" to the abuse and neglect

and "may include" contradictory statements made by the child-victims. *Id*. Main also argues that the biological mother had a concern that D.C. was autistic and such a diagnosis "would have bearing on the child's ability to relate the truth." *Id*.

The third renewed motion was for the release of DCS records. Appendix 8c. Ms. F[redacted]-E[redacted] hasn't posed an objection to the defense teams receiving records they may be entitled to under A.R.S. 8-807(B)(3). But, she has objected to records that DCS may have received that fall under A.R.S. 8-807 (P), records that are confidential by law, unless the defendant can meet her burden before an exception of the child-victims' right to refuse a discovery request is warranted.

Oral argument was held on February 27, 2018, and the matter taken under advisement. Appendix 10; Appendix 11. At oral argument, Main asserted that *Kellwood* was not the controlling law on this issue, but that *Lockett v. Ohio*, 438 U.S. 586 (1978) was controlling. Appendix 10, page 31, lines 2-4. At the end of oral argument, Respondent Judge granted Main's request to file findings of fact and conclusions of law by April 1, 2019. Appendix 11. Both Main and Ms. F[redacted]-E[redacted] filed findings of fact and conclusions of law. Appendix 12; Appendix 13. On May 1, 2019, Main filed a supplement to explain what WIC records are to assist Respondent Judge in ruling on the matter. Appendix 14. Ms. F[redacted]-E[redacted] filed a response (Appendix 15), which Main attempted to strike. Appendix 16.

On June 14, 2019, Respondent Judge issued her ruling. Appendix 17. Main's

request for counseling and school records was denied and deemed to be without merit. *Id.* at *5*. Respondent Judge also noted that Main "has not articulated a reasonable basis" for the production of her expansive request for medical records based on a possible genetic defect. *Id*. Additionally, Respondent Judge noted that Main did not provide a "scintilla of evidence" to support her position that a possible autism diagnosis would inhibit the child-victims' ability to tell the truth. *Id*. However, Respondent Judge did find that Main "is entitled to medical records from medical examinations conducted within a window of time around the dates listed in the indictment, should they exist." *Id*. Respondent Judge also found that "an *in camera* review of the boys' WIC documents for the twelve (12) months prior to their removal from [Main's] home is appropriate" because she has been charged with child abuse and caused the boys to be malnourished. Appendix 17 at 6. Respondent Judge based this ruling on the fact that D.C. had an injury to his face and information provided related to malnutrition. *Id* at 5-6. Thus, WIC and medical records between, November 19, 2014, through November 19, 2015, belonging to the child-victims were ordered to be submitted for an *in camera* review. *Id*. This *Petition for Special Action* follows.

ISSUE FOR REVIEW

Whether Real Party, the defendant in the underlying criminal matter, has met her burden to warrant an exception to the child-victims' constitutional right to refuse

a discovery request, specifically WIC and physician records for the period prescribed by Respondent Judge, under Ariz. Const. art. II, § 2.1(A)(5).

ARGUMENT

I. The child-victims' privileged and confidential records are protected under the Arizona Victims' Bill of Rights and statutory privileges. Real Party, Shawn Main, has not overcome her burden to warrant an exception to the rights of the child-victims.

A. The real party has not shown a reasonable possibility that child-victims' privileged and confidential WIC and physician records contain information she is entitled to as a matter of due process.

To preserve and protect victims' right to justice and due process, a victim of crime has a right to refuse a defendant's request for an interview, deposition, or other discovery request. Ariz. Const. art. II, § 2.1(A)(5). This constitutional provision abrogated a defendant's right under Rule 15 of the Arizona Rules of Criminal Procedure to seek discovery from an unwilling victim. *State v. O'Neil*, 172 Ariz. 180, 182 (Ariz. Ct. App. 1991).

On a number of occasions, this Court has addressed when an exception to the victims' right to refuse a discovery request is warranted, first in *Roper*, later in *Connor*, and more recently in *Kellywood*. While the *Roper* case carved out a narrow exception to a crime victim's constitutional right to refuse a defense discovery request, it is not a general exception to privileged communications. *Conno*r, 215 Ariz. at 557. *Roper's* limited infringement on a victim's right to refuse a discovery request and the physician-patient privilege was in the context of whether there was

a reasonable possibility that the information sought by the defendant included information she was entitled to as a matter of due process. *Connor* at 558.

Roper was charged with aggravated assault after she used a knife to cause physical injury to her husband. *Roper* at 234. She claimed the attack upon the victim, her husband, was justifiable because she had been a victim of "horrendous emotional and physical abuse" during the couple's marriage, the victim was a mental health patient with a multiple personality disorder, and he was manifesting one of his violent personalities on the date of the assault. *Id.* at 237. Furthermore, Roper herself, not the victim, made the 911 call to the police at the time of the incident. *Id.* During the call, Roper requested help from law enforcement because her husband was beating and threatening her with a knife. *Id.* Upon arriving at the couple's home, law enforcement found the victim bleeding from the stomach and Roper with a knife. *Id.* The victim had previously been arrested, three times, for assaulting Roper and was convicted of an assault against her in another state. *Id*. Thus, under the facts present in *Roper*, the victim's mental health records would establish a justification defense. *Id*. at 238. Further, the victim in *Roper* had arguably waived the physician patient privilege. *Connor* at 558.

In *Connor*, the defendant was charged with first degree murder; his victim had been stabbed or cut at least 84 times. *Connor* at 556. Connor attempted to compel disclosure of "any and all medical treatment, counseling, psychological and/or

psychiatric records" of the victim. *Id*. at 557. Connor argued that the records "may be exculpatory and will likely solidify his position that the [homicide victim] was the initial aggressor." *Id.* Unlike the defendant in *Roper*, Connor failed to provide a sufficiently specific basis to require that the victim provide medical records for an *in camera* review, made no showing that the victim's physician-patient privilege had been waived as to him, nor did he make any other adequate showing that the information sought might contain materials necessary for his defense. *Connor* at 558.

Recently, in *Kellywood*, this Court again considered a request by a criminal defendant for a victim's privileged and confidential records. *Kellywood* at ¶ 3. In *Kellywood*, the defendant was charged with sexual conduct with a minor and sought to compel production of the victim's medical and counseling records from the time that she lived in his home for an *in camera* review because they possibly contained exculpatory evidence. *Id*. at ¶ 1. Kellywood argued that the records should be submitted for an in camera review because "[o]ftentimes, professionals directly ask questions concerning whether or not someone has been sexually inappropriate with [the patient]." The trial court rejected Kellywood's arguments and denied the motion. *Id*. at ¶ 4.

On appeal, Kellywood argued that the medical and counseling records might show that the victim denied sexual contact during a certain period of time. *Id.* at ¶

5. This Court recognized that it is possible that Kellywood's victim could have said something exculpatory to a care provider. *Id*. at ¶ 6. However, the possibility that a victim could have said something exculpatory is not, as a matter of law, sufficient to require an *in camera* review of a victim's privileged and confidential records. *Id.* at ¶ 7. A victim's constitutional right to refuse a discovery request is not absolute and, when a criminal defendant shows a reasonable possibility that the information sought is information he or she is entitled to as a matter of due process, may be compelled to produce records for an *in camera* review. *Id*. at ¶ 8.

In determining whether Kellywood actually demonstrated a reasonable possibility, this Court importantly recognized the competing constitutional interests and privileged nature of these kinds of records and concluded that "the burden of demonstrating a 'reasonable possibility' is not insubstantial, and …requires more than conclusory assertions or speculation on the part of the requesting party." *Id* at ¶ 9. In denying Kellywood's request, this Court noted that he had not been able to identify a single medical treatment provider nor any specific condition for which the victim, his daughter, was receiving treatment. *Id*. at 10.

Unlike the defendant in *Roper*, Main has not shown neither a sufficiently specific basis nor a reasonable possibility that the child-victims' WIC and physician records contain information that she is entitled to as a matter of due process. She makes assertions that the boys were very thin when they came to live with her and

speculates on how and why some children are thin. Appendix 8b at 3-5. Like the defendant in *Kellywood* asserting what a counselor or physician might ask a patient, Main addresses what generally occurs during a physician visit by stating the records "will include weight, height, and other growth related measurements" over their life and concludes that the records will show they have always been thin. Appendix 8b at 4. Main then speculates as to possible genetic diseases and of a possible autism diagnosis that she believes will impact the children's truth telling ability, both rejected by Respondent Judge. *Id*. at 5-6; Appendix 17. She also mentions statements by the other defendants indicating that the child-victims were "klutzy and awkward" and "prone to bumping into things and tripping." *Id.* at 5. Thus, she again speculates that the "medical records are expected to include references to and statements by D.C. related to the same." *Id*. as 5. Again, without any specific information, Main explains what happens at a WIC appointment and how often patients are seen, saying the children were seen for a year or maybe two. Main then speculates about possible causes of malnourishment. Appendix 8b at 4; Appendix 14. Main does not have knowledge of any actual nutritional related diagnosis, but instead cites general information from the WIC guidelines as shared in their WIC supplement (Appendix 14, pages 1-9) and not from specific information about what happened at the child-victims' WIC appointments. Respondent Judge found the information provided in Main's WIC Supplement (Appendix 14) to be irrelevant to

her analysis and did not consider it. Appendix 17, page 3.

Main's proposed findings of fact and conclusions of law contain equally questionable assertions that are contrary to law. Appendix 12. Main asserts that DCS is required to turn over medical records of the child-victims', without their consent or the consent of their legal guardian, under A.R.S. § 12-2292(A) and A.R.S. § 12-2294 based solely on an order of the trial court without regard for A.R.S. § 8-0807(P). Further, Main continuously disregards this Court's established authority related to when an exception is warranted to a victims' constitutional right to refuse a discovery request and questions the order of this Court to reconsider the records request in light of *Kellywood*. Appendix 12, page 5. Additionally, Main provides a list of U.S. Supreme Court cases, none of which stand for the proposition that a criminal defendant has a due process right to seek discovery from an unwilling victim. Appendix 12, page 12. Main asserts that her case is distinguishable from *Kellywood* because her motions "not only articulate a specific argument related to the defendant's entitlement of the records she requested, the renewed motions specifically identify providers and the records requested and involve far more specificity" than the records requested in *Kellywood.* Appendix 12, page 17. A list of providers and providing general information that occurs during a visit with a physician is simply not enough to warrant an exception to the child-victims' constitutional right to refuse a discovery request.

Respondent Judge rejected many of Main's arguments. Appendix 17 at 5. Respondent Judge noted that Main's request went from a general and expansive request for records to a more general request for specific documents. Appendix 17. at 2. Respondent Judge did find Main was entitled to have an *in camera* review of records related to "medical examinations conducted within a window of time around the dates listed in the indictment, *should they exist*." Appendix 17, page 5 (emphasis added). The reasoning by Respondent Judge is due to the injuries on D.C.'s face and that Main wanted to "probe" further. *Id*. It appears that neither Main nor Respondent Judge know whether these records even exist. Further, Main has not articulated what the child-victims' records will show. She merely stated what happens during a physician visit and that she "expects" the children would have told their doctors they were "klutzy." Appendix 8b at 5. Respondent Judge also found that Main was entitled to an *in camera* review of the records for a one year period prior to the child-victims' removal from Main's home due to the "information pertaining to malnutrition." Appendix 17, page 6. Yet, Main also failed to articulate with any certainty what may be contained within the child-victims' WIC records.

Not knowing whether records exist and, if they do, wanting to "probe" into them is inconsistent with the rulings of this Court which have consistently required a sufficiently specific basis to warrant an exception to the constitutional rights of a victim. Additionally, allowing Main to "probe" into records "should they exist" is

contrary to the notion of a limited infringement based on a reasonable possibility that the child-victims' records contain information she might be entitled to as a matter of due process. Rather, allowing probing into records that might exist amounts to nothing less than allowing Main to an infringement on the rights of her victims' based on any possibility at all which would "swallow" the child-victims' right to refuse a discovery request. *Kellywood* at ¶ 10.

B. The child-victims' records are protected by state and federal law.

The child-victims have an express right to privacy under the Arizona Constitution. Ariz. Const. art. II, § 8. The provisions of the Arizona Constitution are mandatory, unless by their express word they are declared to be otherwise. Ariz. Const. art. II, § 32. Thus, by virtue of becoming crime victims, the child-victims have not forfeited their state constitutional right to privacy. Additionally, the United States Supreme Court has found an implied right to privacy within the bounds of the Federal Constitution. *See generally Roe v. Wade*, 410 U.S. 113 (1973). It is established that individuals have a privacy interest in avoiding disclosure of personal matters. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). In more recent years, the Court has reiterated that an implied right to privacy exists in the Federal Constitution. *See generally Lawrence v. Texas*, 539 U.S. 558, 123. S.Ct. 2472 (2003).

Beyond general privacy rights, both WIC and physician records are protected

by statutory privileges. Federal regulations prohibit the disclosure of WIC records. 7 C.F.R. §§ 246.26 (d)(i)-(ii) provides for the confidentiality of WIC applicant and participant information:

> (i) Confidential applicant and participant information is any information about an applicant or participant, whether it is obtained from the applicant or participant, another source, or generated as a result of WIC application, certification, or participation, that individually identifies an applicant or participant and/or family member(s). Applicant or participant information is confidential, regardless of the original source and exclusive of previously applicable confidentiality provided in accordance with other Federal, State or local law.
>
> (ii) Except as otherwise permitted by this section, the State agency must restrict the use and disclosure of confidential applicant and participant information to persons directly connected with the administration or enforcement of the WIC Program whom the State agency determine have a need to know the information for WIC Program purposes. These persons may include, but are not limited to: personnel from its local agencies and other WIC State or local agencies; persons under contract with the State agency to perform research regarding the WIC Program, and persons investigating or prosecuting WIC Program violations under Federal, State or local law.

7 C.F.R. §§ 246.26 (d)(i)-(ii)·

Arizona law governing DHS requires the director to "promulgate such rules and regulations as are required by state law or federal law or regulation to protect confidential information. No names or other information of any applicant, claimant, recipient or employer shall be made available for any political, commercial or other unofficial purpose." A.R.S. § 36-107. Clinical records, medical reports and laboratory statements or reports, maintained as a result of services authorized by this

article, and the information contained therein, shall be confidential and shall not be divulged to or open to inspection by any person other than attending physicians and surgeons, and persons authorized by them, the home health agency involved and state or local health officers. A.R.S. § 36-160. WIC records fall under DHS as it is charged with administering medical service programs that include at least the functions of maternal and child health. A.R.S. § 36-104(1)(c)(i).

Privileged and confidential medical records generated during a visit to a physician are protected under Arizona law. A physician-patient privilege exists in Arizona. A.R.S. § 13-4062(4) (without consent of the patient, a physician shall not be required to testify about information "acquired in attending the patient which was necessary to enable the physical…to prescribe or act for the patient."). Further, "a health care provider may only disclose that part or all of a patient's medical records and payment records as authorized by state or federal law or written authorization signed by the patient or the patient's health care decision maker." A.R.S. § 12-2292(A).

The state had already disclosed the medical records relevant to the counts in which A.C. and D.C. are named victims. This has been stated in numerous status hearings, in briefing, and at oral argument. Appendix 8, Appendix 10, page 35, lines 7-9. As for any other records from physician visits or WIC visits, the privilege is owned by Ms. F[redacted]-E[redacted] as she is the legal representative for the child-victims.

Thus, the child-victims' privileged and confidential records are within her control. *Roper* at 239. Ms. F[redacted]-E[redacted] has not waived the privilege, nor will she. Respondent Judge made no finding, nor could she, that Ms. F[redacted]-E[redacted] has waived any statutory privilege on behalf of the child-victims.

Further, Main has demonstrated neither a substantial need nor a sufficiently specific basis to warrant an *in camera* review of the records. Main has not shown a reasonable possibility that the information contained within the records is information she is entitled to as a matter of due process. *Kellywood* at ¶ 9. Like the defendant in *Kellwood*, Main makes general assertions as to where the children might have been treated and what will generally happen at a WIC or physician's office. *See generally* Appendix 8a and 8b. Main continues to speculate on what is contained in the records and as evidenced by Respondent Judge's order, isn't sure whether some exist. Appendix 17 at 5. Main "asserts that these records *may* contain potentially exculpatory information *and/or* mitigating evidence relevant to the[…] above criminal matter." Appendix 8a, page 20, lines 9-10.[4] Main does not provide any indication of the name of the physician or any specific diagnosis that will be in the child-victims' medical records and how that is relevant to her defense. Respondent Judge notes that due to injury, Main wants to "probe further." Appendix

[4] Although Appendix 8a initially appears to be about T.C.'s records, Main incorporated it by reference into the motion related to records belonging to A.C. and D.C., labeled as Appendix 8b to this petition.

17 at 6. Wanting to probe further is not sufficient and amounts to nothing more than investigation or guessing what "may" be in the records. Conclusory assertions and speculation, such as guessing what may be in the records or stating what generally happens during a physician visit or a WIC visit, are not enough to overcome the VBR and the statutory privilege held by the child-victims' legal guardian, Ms. F[redacted] E[redacted]. *Kellywood* at ¶ 9.

C. Shawn Main does not have a federal due process right to receive discovery from an unwilling victim.

The U.S. Supreme Court has not found a constitutional right to discovery in a criminal case and, in fact, the Due Process Clause has little to say regarding the amount of discovery that must be afforded to a criminal defendant. *Weatherford v. Bursey*, 429 U.S. 545 (1977), quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Additionally, the ability to question adverse witnesses who may testify at trial does not include the power to require pretrial disclosure of any and all information that might be helpful. *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987). *Brady v. Maryland*, 373 U.S. 83 (1963), emphasizes the suppression of evidence by the prosecution, but does not require a victim to cooperate with the defense. *Roper* at 239.

Here, Main asserts that *Lockett v. Ohio*, 438 U.S. 586 (1978), is the controlling law in this matter. Her reliance on *Lockett* is misplaced. As an initial matter, Main is asserting that her right to due process and to defend her capital case requires

receiving privileged and confidential records of the victims in counts for which she cannot receive the death penalty. The State is not seeking the death penalty, nor could they under Arizona law, for the counts related to A.C. and D.C. Rather, the state is seeking the death penalty for the murder of their four year old sister, T.C. *Lockett* does not give a criminal defendant a right to receive discovery from an unwilling victim. *Lockett* at 586. Rather, the *Lockett* Court addressed remarks made by the prosecutor in closing arguments, exclusions of jurors who could not follow the law based on their personal feelings about the death penalty, whether the defendant was given notice of and understood the meaning of the statue under which she was convicted, and individualized consideration of mitigating factors. *Id*. In fact, the words "discovery" and "records" do not appear in the text of the *Lockett* decision. *Id*.

Main will not be prejudiced by being required to follow state and federal law, meaning she must demonstrate a substantial need and a sufficiently specific basis before an exception to the VBR and the child-victims' records are submitted for an *in camera* review. Federal law simply does not require an *in camera* review of the child-victims' privileged and confidential records to comport with the defendant's rights under the Due Process Clause.

II. The child-victims in this case have a constitutional right to have the rules of criminal procedure that govern disclosure construed in a way that protects their constitutional right to refuse a defendant's discovery request.

To preserve and protects victims' rights to justice and due process, a victim of a crime has a right to "have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights…" Ariz. Const. art. II, § 2.1(A)(11). Discovery is governed by Rule 15.1(g)(1) of the Arizona Rules of Criminal Procedure. Under this rule-based provision, "[on] the defendant's motion, a court may order any person to make available to the defendant material or information not included in this rule if the court finds: (A) that defendant has a substantial need for the information to prepare the defendant's case; and (B) the defendant cannot obtain the substantial equivalent by other means without undue hardship." Among the victims' rights that the construction of Rule 15.1(g)(1) must protect are the rights to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, and abuse and the right to refuse a discovery request made by a defendant. Ariz. Const. art. II, §§ 2.1(A)(1) and (5). These constitutional provisions are mandatory provisions unlike the application of Rule 15.1(G)(1) to a crime victim. Ariz. Const. art. II § 32; *State v. O'Neil*, 172 Ariz. 180, 182 (Ariz. Ct. App. 1991) (VBR abrogated a defendants rights under Rule 15 to interview or receive discovery from an unwilling victim); *State v. Warner*, 160 Ariz. 261, 263 (Ariz. Ct. App. 1990) (the VBR abrogated discovery rules with respect to victims).

Arizona's Supreme Court instructed lower courts of the importance in following and applying the plain language of the VBR. *Knapp v. Martone*, 170 Ariz. 237, 239 (Ariz. 1992). The plain language of Arizona's Victims' Bill of Rights gives victims a sweeping right to have the rules of criminal procedure protect a victim's right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, and abuse, and to refuse a discovery request made by the defendant. Ariz. Const. art. II, §§ 2.1(A)(1) and (5). Because courts must construe these provisions in a manner that protects victims' rights, Rule 15 of the Arizona Rules of Criminal Procedure must be construed in a way that protects the child-victims' right to refuse a discovery request, especially in the present case where an *in camera* review was ordered of the child-victims' records, despite Main and Respondent Judge's uncertainty whether some of these records even exist or what they actually contain. Appendix 17 at 5 (ordering records for an in camera review "should they exist."). When the existence of records is unknown, a criminal defendant simply cannot demonstrate neither a sufficiently specific basis in the reasonable possibility context as required under *Connor* and *Kellywood*.

Because Main has not overcome her burden, which this Court concluded is substantial and cannot be based on mere speculation, to warrant an exception to the child-victims' right to refuse a defense discovery request, the Respondent Judge should not conduct an *in camera* review of any of the child-victims' records.

Allowing disclosure, even for an *in camera* review, violates the child-victims' right to have the rules of criminal procedure construed in a way that protects the victims' rights guaranteed under our constitution.

CONCLUSION

For these reasons, Ms. F[redacted]-E[redacted] respectfully requests this Court accept jurisdiction and reverse Respondent Judge's order for an *in camera* review of the child-victims' privileged and confidential WIC and physician records.

Respectfully submitted this 27th day of August, 2019.

By: _____/Colleen Clase/_____
Attorney for Petitioner L[redacted] F[redacted]-E[redacted]