Colleen Clase (AZ Bar # 029360)
Robert Swinford (AZ Bar # 030651)
Attorneys for Petitioner Lynn Fox-Embrey
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

LYNN FOX-EMBREY,

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

RESPONSE TO CROSS-PETITION FOR SPECIAL ACTION

INTRODUCTION

Legal guardian to the child-victims, Crime Victims' Representative, Lynn Fox-Embrey, respectfully submits this response to Real Party Shawn Main's *Cross-Petition for Special Action* (hereinafter *Main's Cross-Petition for Special Action*). In this response, Ms. Fox-Embrey does not dispute that *Maryland v. Brady*, 373 U.S. 83, 83 S.Ct. 1194 (1963) requires prosecutors to disclose evidence favorable to an accused that is material either to guilt or to punishment. Nor does she dispute that *Pennsylvania v. Ritchie*, 480 U.S. 30, 107 S.Ct. 2954 (1987) may allow for a criminal defendant to receive some records from the Department of Child Safety (DCS). However, Main failed to demonstrate a substantial need or a sufficiently specific basis, to warrant an exception to the child-victims' right to refuse a defense discovery request.

FACTS AND PROCEDURE

The facts of this case have been briefed in prior pleadings. Out of respect for the Court's time, Ms. Fox-Embrey would adopt the statement of facts in Ms. Fox-Embrey's Petition for Special Action, CA-SA 2019-0045, filed on August 27, 2019.

ISSUE PRESENTED

Main asserts the issues before the Court are whether there is a "federal due process right to discovery and use any relevant evidence that is favorable or material to the issues of guilty or punishment" and whether the "children's confidential

medical and therapeutic records possessed by the state's child abuse investigative agency are Brady materials under Ritchie" and lastly "whether Respondent Judge abused her discretion when she arbitrarily limited the scope and time frame and type of records." However, Main is unable to cite any case law which creates a federal due process right to discovery, and she similarly fails to accurately describe the rule which creates a limited exception to the Arizona Victims' Bill of Rights protections offered against a defendant's discovery request.

Ms. Fox-Embrey believes the issues before the court are 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, and Respondent Judge erred in ordering an *in camera* review of the privileged and confidential records because Main failed to meet her burden.

ARGUMENT

I. THE DECISION TO PERFORM AN *IN CAMERA* REVIEW SHOULD BE REVIEWED *DE NOVO*.

Ms. Fox-Embrey already addressed jurisdiction in her petition for special action. Ms. Fox-Embrey acknowledges this Courts authority to accept jurisdiction for Main's Cross-Petition because the issue presented is a purely legal question. However, Ms. Fox-Embrey would note that many of Main's arguments have already been presented to and rejected by this Court in its January 24, 2019, order in 2 CA-SA 2018-0084.

Main argues in the third section of her *Cross-Petition* that the trial judge abused her discretion when arbitrarily limited the scope, content, and time span of the discovery, 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 v. Connor*, 215 Ariz. 553, 557, 161 P.3d 596 (Ariz. App. 2007) (noting that to the extent that a defendant sets forth a constitutional claim asserting this information is necessary, the court will review de novo).

II. THE DEFENDANT DID NOT MEET HER BURDEN TO WARRANT AN EXCEPTION TO THE CHILD-VICTIMS' CONSTITUTIONAL RIGHT TO REFUSE THE DEFENDANT'S DISCOVERY REQUEST.

A. THE DEFENDANT MUST DEMONSTRATE A SUBSTANTIAL NEED AND SUFFICIENTLY SPECIFIC BASIS BEFORE A REASONABLE POSSIBILITY THAT THE INFORMATION SOUGHT IS INFORMATION HE OR 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 "[t]o refuse 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, 836 P.2d 393, 395 (Ariz. Ct. App. 1991). A crime victim possesses a constitutional right "[t]o refuse an interview, deposition, or other discovery request…". Ariz. Const. art. II,

§ 2.1 (A)(5); *see also* Ariz. R. Crim. P. 39(b)(12).

"A victim's right to refuse discovery is not absolute, however." *State v. Sarullo*, 219 Ariz. 431, ¶ 20, 199 P.3d 686 (Ariz. App. 2008). When "the defendant's constitutional right to due process conflicts with the Victim's Bill of Rights in a direct manner […], then due process is the superior right." *State ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232, 237, 836 P.2d 445 (Ariz. App. 1992).

This statement from *Roper* is not a bright line rule perpetually allowing a violation of the Victims' Bill of Rights. The limited infringement that occurred did not create a wholesale exception to privileged communications between a victim and a physician. In *Roper*, the defendant claimed self-defense after she was charged with aggravated assault for using a knife to injure her husband. *Roper*, 172 Ariz. at 234. After setting forth the factors that govern such balancing, and the unique facts of *Roper*, the Court permitted a limited infringement on the victim's right to be free from discovery. *Id*. at 239-40.

A proper understanding of Roper's decision shows that it was based on the scope and limitation of that case. As noted in *State v. Conner*, *Roper's* decision in requiring disclose of the victim's records was based the scope and limitation of that case:

> "a reasonable possibility that the information sought by the defendant included information to which she was entitled as a matter of due process, and to which her victim husband had arguably waived his physician-patient privilege as to her by including her in some of his treatment sessions. … We,

> thus, merely recognized the possibility that due process could override other rights, that some privilege might have been waived, and then authorized the trial court to weigh these competing rights after considering the evidence and the defendant's need for it in presenting her defense"

215 Ariz. 553 ¶ 10. Therefore, a defendant is required to show either a sufficiently specific basis or a reasonable possibility of entitlement to the information as a matter of due process to overcome a victim's right to refuse to disclose medical records. *State v. Connor*, 215 Ariz. 553, ¶ 10-11, 161 P.3d 596, (Ariz. App., 2007).

Kellywood further clarified the burden required to overcome the protections of the Victims' Bill of Rights. "[N]either *Roper* nor *Connor* supports the view that the Victims' Bill of Rights must give way in every case in which a defendant merely articulates some plausible reason why treatment records might contain something exculpatory." 246 Ariz. 45, ¶ 11, 433 P.3d 1205 (Ariz. App., 2018). As such, conclusory statements are insufficient to show a reasonable possibility. *State v. Kellywood*, 246 Ariz. 45, ¶ 6 (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).

Main's analysis of the relationship between a defendant's due process rights and the rights of a crime victim fails to acknowledge the relevant cases in Arizona and their holdings. The Court of Appeals has consistently addressed this issue and has affirmed trial court decisions denying requests for confidential records absent the requisite findings. *See Connor*, 215 Ariz. 553, at ¶ 11 ("[i]n the absence of either

showing, the trial court did not err by declining to order production of the documents to the defense or infringing on the victim's constitutional and statutory rights"); S*arullo*, 219 Ariz. 431, at ¶ 21 ("[b]ecause Sarullo provided the court no reason to believe [the victim's] medical records would contain exculpatory evidence, we cannot say the court erred by declining to order their production"); and *Kellywood,* 246 Ariz. 45, at ¶ 15 ("we conclude the trial court did not abuse its discretion by refusing Kellywood's motion to compel production […] for *in camera* review").

In the present case, Main has not met her burden. Main is unable to show a specifically sufficient basis for why she would be entitled to get the confidential information or a reasonable possibility that the child-victims' records contain information that she is entitled to as a matter of due process. Similar to the defendant in *Kellywood*, Main's guesses what may be in the records or stating what generally happens during a medical appointment or a WIC visit, are not enough to overcome the VBR and the statutory privilege. Main makes the same arguments that were made to the trial court—that conclusion can be drawn from the forensic interviews and a review of the confidential records is necessary to discover prior inconsistent statements and other relevant material, rebuttal, and mitigation evidence. *Main's Cross-Petition* at 17-19. However, Main's conclusory statements are simply conjecture and fails to demonstrate a reasonable possibility that she would be entitled to those records.

B. MERELY CLAIMING THE REQUESTED DOCMENTS COULD PROVIDE MITIGATION EVIDENCE DOES NOT COMPEL DISCLOSURE.

As an initial matter, Main asserts that her right to due process 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. Ms. Fox-Embrey has no objection to the requested disclosures related to victim T.C.

Main's remaining arguments that she is entitled to the confidential records under the guise of mitigation evidence is a misreading of the disclosure guidelines for mitigation evidence during sentencing of a capital case. Main primarily relies on *Lockett* and its progeny for the proposition that a sentencing jury "may not be precluded from considering any relevant mitigating evidence." *Main Cross-Petition* at 13. Main correctly cites *Lockett* for the statement that the jury in a capital case should "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-2965, (1978) (emphasis original). However, the footnote attached to this very quote brings this statement into perspective: "[n]othing in this

opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."

This distinction is key—the evidence provided to the jury for sentencing must be relevant to show how, not whether, the defendant committed the crime. In fact, legislatures often place limits on what can and cannot be used as a mitigating factor in death penalty cases. "[T]he Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted." *Oregon v. Guzek*, 546 U.S. 517, 523, 126 S.Ct. 1226, (2006) (holding defendant not permitted to present residual doubt evidence during penalty phase of death penalty case).

Similarly, in Arizona courts deem certain proposed mitigation evidence irrelevant during sentencing or the penalty phase of a capital case. *See State v. Martinez*, 230 Ariz. 208, 219, ¶ 58, 282 P.3d 409, 420 (2012) (finding that testimony involving the burglary, third party involvement, or inconsistent statements would not have constituted mitigating circumstances and were not relevant to determining whether to impose a sentence less than death.); *State v. Harrod*, 218 Ariz. 268, 281, ¶ 46, 183 P.3d 519, 532 (2008) (precluding residual doubt evidence as irrelevant during the penalty phase of a death penalty case); *State v. Sharp*, 193 Ariz. 414, 425-426, ¶45, 973 P.2d 1171, 1182-1183 (1999) (finding police delay in entering

the room of the victim not relevant, either to a circumstance of the offense or to any aspect of appellant's character and record).

Main's attempt to compel disclosure of the confidential information of the victims as mitigation evidence fails as the information sought is irrelevant at sentencing. Main's claims that the requested evidence may show supposed contradictions in the statements by the children, and that they were malnourished prior to being placed in Main's care. *See generally Main Cross-Petition* at 17-19. Such arguments related to guilt and whether or not the offense was committed—not how the offense was committed. Again, as previously mentioned, these victim statements are not related to the victim of the death penalty offense. Likewise, the evidence requested by Main would and should not be discoverable during the guilt phase of the trial. As mentioned above, Main is still unable to show either a sufficiently specific basis or a reasonable possibility of entitlement to the information as a matter of due process to overcome victims' right to refuse disclosure of confidential medical records. Permitting them to come in as mitigation evidence would lead to an absurd result as a backdoor to avoid the Victims' Bill of Rights.

III. *BRADY* AND *PENNSYLVAINA V. RITCHIE* DID NOT CREATE OR EXPAND DISCOVERY RIGHTS OF A DEFENDANT.

In *Maryland v. Brady*, the Supreme Court determined that prosecutors are constitutionally obligated to disclose "evidence favorable to an accused . . . [that] is material either to guilt or to punishment." 373 U.S. 83, 83 S.Ct. 1194 (1963). The

Brady rule imposes an affirmative "duty to disclose such evidence . . . even [when] there has been no request [for the evidence] by the accused, and . . . the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, (1999). The prosecutor's duty extends to all material exculpatory and impeachment evidence known by the prosecutor and "'others acting on the government's behalf in th[e] case.'" *Id.* at 280-81 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

Whether the prosecution has possession or control over another government agency's file for *Brady* purposes is case and fact-specific. *See, e.g., United States v. Cano,* 934 F.3d 1002, 1023 (9th Cir. 2019) (quoting *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995))(emphasis in original) ("*Brady* and Rule 16 obligations are case specific. . . . [T]he test for 'possession' turns on the prosecutor's 'knowledge of and access to the documents sought by the defendant *in each case*.'"); *United States v. Reyeros*, 537 F.3d 270, 281–82 (3d Cir. 2008) ("We held that a case-by-case analysis was appropriate when considering a federal prosecutor's constructive knowledge [for *Brady* purposes]"); *compare Cano,* 934 F.3d at 1026 (concluding the prosecution cannot be held to have knowledge of or control over FBI and DEA files relating to a government witness), *with United States v. Blanco,* 392 F.3d 382, 395 (9th Cir. 2004) (concluding the prosecution's *Brady* obligation extends to the DEA files on a government witness).

Main's reliance on *Brady* is misplaced. Ms. Fox-Embrey does not question the requirement for the prosecution to turn over material evidence under *Brady*. However, *Brady* did not create a general constitutional right to discovery. *State ex rel. Thomas v. Foreman*, 211 Ariz. 153, 157, ¶ 16, 118 P.3d 1117, 1121 (App. 2005) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)). The purpose of the *Brady* rule is to prevent a miscarriage of justice; it is not intended "to displace the adversary system as the primary means by which truth is uncovered." *United States v. Bagley*, 473 U.S. 667, 675 (1985).

Defendant's second enumerated argument cites *Ritchie* for the proposition that "the disclosure requirements under Brady are extended to confidential records possessed by state agencies" and imposes "a review obligation on the trial court to conduct in camera review of the records to determine the extent of the material information and evidence." *Cross-Petition for Special Action* page 14. However, *Ritchie* did not decide the issue of whether information in other state agencies was therefore under the control of the prosecutor.

In *Pennsylvania v. Ritchie*, the Supreme Court analyzed whether and to what extent the Confrontation Clause and the Due Process Clause applied to a convicted criminal's pretrial request for access to the Pennsylvania's Child Welfare Services (CWS) case file pertaining to the child-victim. The Court affirmed the state court's decision to order remand on *Brady* grounds without addressing the issue of

possession or control. *Ritchie*, 480 U.S. 39, at 57-59, 107 S.Ct. 989, at 1001-1003. Instead, the Court focused on the Pennsylvania statute contemplating some disclosure and that a lower court already deemed some of the information material. *Id*. at 57-58, 1001-1002 ("In the absence of any apparent state police to the contrary, we therefore have no reason to believe that relevant information would not be disclosed when a court of competent jurisdiction determines the information is "material" to the defense of the accused.").

The *Ritchie* majority decision on due process can be understood as a case where the court implicitly assumed *Brady* applied. For this reason, *Ritchie* has not resolved the issue of whether all state child welfare services agencies, including the Arizona DCS, fall within the prosecution's *Brady* obligation as a matter of law. Moreover, the state law in *Ritchie* is distinguishable in that Pennsylvania law did not appear to impose any constraints on the state courts' ability to order disclosure. Pennsylvania, then and now, does not have a constitutional amendment that affords explicit crime victims' rights, and *Ritchie* did not address the child-victim's rights.

In contrast, Arizona affords victims numerous rights, including the constitutional rights to be treated with fairness and respect; to refuse defense-initiated discovery requests; to privacy; and "[t]o 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)(1), (5), (11); Ariz. Const. art. II, § 8

(recognizing right to privacy for all persons). Because *Ritchie* does not address crime victims' rights, *Ritchie* would not be helpful and should not apply in any analysis that addresses A.R.S. § 8-807 under Arizona law. Additionally, A.R.S. § 8-807(P) maintains that any privileged and confidential records are not subject to automatic disclosure and is different from the Pennsylvania statute in *Ritchie*.

A. *RITCHIE* DOES NOT COMPEL DISCLOSURE UNDER THE CONFRONTATION CLAUSE.

Main's Cross-Petition cites *United States v. Inadi*, 475 U.S. 387, 296, 106 S.Ct. 1121, 1126 (1986) for the proposition that "failure to disclose information that might have made cross-examination more effective undermines the purpose of the confrontation clause to increase the accuracy of the truth-finding process at trial." *Main's Cross-Petition* at 14. Main's citation appears to be a quotation from the text of *Ritchie*—text that actually references the argument made by the defendant to the Pennsylvania Supreme Court.

In *Ritchie*, the defendant's argument was that he could not effectively question the victim without the confidential information and had the files been disclosed, he might have been able to show the victim made statements to the counselor that were inconsistent with her trial statements. 480 U.S. 29, 51, 107 S.Ct. 989, 998. However, the Court in *Ritchie* expressly rejected this argument and the rationale of the Pennsylvania Supreme Court in relying upon *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974). In finding no violation of the Confrontation Clause, the Court in

Ritchie rejected this argument finding:

> "[i]f we were to accept this interpretation of *Davis*, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule or pretrial discovery. Nothing in the case law supports such a view. […] The lower court's reliance on *Davis v. Alaska* therefore is misplaced. […] We find that the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS file violated the Confrontation Clause."

See Ritchie, 480 U.S. 39, at 52-54, 107 S.Ct. 989, at 998-1000. Furthermore, "[t]he ability to question adverse witnesses [...] does not include the power to require pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Id*. at 53.

Main's reliance on the Confrontation Clause to compel disclosure of confidential information is flawed. Main's arguments at the trial court, and her Cross-Petition, want the confidential records to check for inconsistencies and to improve her ability to cross-examination of the child witnesses. However, just like the defendant in *Ritchie*, there is no confrontation Clause violation unless the Respondent Judge prevents Main from cross-examining the victims.

B. MAIN FAILED TO SHOW THE CONFIDENTIAL RECORDS CONTAIN MATERIAL INFORMATION.

The majority of Main's argument relies on *Ritchie*, and *Brady*, for the proposition that an "*in camera* review of the records is needed to determine the extent of the material information and evidence." *Main's Cross Petition* at 14. This conclusion is an inaccurate reading of what constitutes material information and

when an *in camera* review is necessary. *Ritchie's* reference as to what constitutes material information is actually citing the standard provided under *United States v. Bagley*, 473 U.S. 667, 682, 105, S.Ct. 3375 which provides:

> "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed, to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

Bagley, 473 U.S. at 682.

Ritchie does not stand for the proposition that an *in camera* review is necessary every time a defendant claims there is material information in undisclosed documents. 480 U.S. at 58, fn. 15 ("Ritchie, of course, may not require that the trial court to search through the CYS file without first establishing a basis for his claim that it contains material evidence."). Without a preliminary showing that identifies information a defendant is seeking in the confidential and privileged records and that the records contain material evidence, trial courts are not obligated to conduct an *in camera* review. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (defendant claimed deportation of his witness deprived him of compulsory process, the Court held that he must make a plausible showing of how their testimony would have been material and favorable to his defense).

Furthermore, the Court in *Ritchie* specifically disagreed with the Pennsylvania Supreme Court's holding which permitted defense counsel to examine all of the confidential information and then argue in favor of disclosure. *Id*. at 59-60. Citing

Bagely and *Agurs*, the Court stated "[a] defendant's right to discover exculpatory evidence does not include the unsupervised authority to search" through the prosecutor's files. *Id*. at 59 (internal citations omitted). Likewise, the Court reiterated "this Court has never held—even in the absence of a statute restricting disclosure—that a defendant alone may make the determination as to the materiality of the information. Settled practice is to the contrary." *Id*.

Similar to the reasonable possibility standard discussed in *Connor*, and *Kellywood*, for confidential information to be deemed material and thus should be disclosed requires more than speculation by defense. Main fails to make this preliminary showing to even trigger an *in camera* review of materiality. The third section of Main's response makes reference to the interviews of the victims as proof of prior exculpatory statements. *See generally Main's Cross-Petition*, pages 15-21. However, these conclusory statements are purely speculative and thus there is no showing the information is material. *See United States v. Agurs,* 427 U.S. 97, 109-110, 96 S.Ct. 2392, 2400-2401, 49 L.Ed.2d 342 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish 'materiality' in the constitutional sense"). Because Main cannot identify the specific information she seeks in the child-victims' confidential records and that the records indeed contain material evidence, Respondent Judge is not required to conduct an *in camera* review.

C. INTERPRETING A.R.S. § 8-807 AND RITCHIE IN A MANNER THAT PROHIBITS DCS OR A COURT FROM CONSIDER CHILD-VICTIMS' RIGHTS WOULD LEAD TO AN ABSURD RESULT.

When interpreting a statute, courts must "also strive to avoid an 'interpretation [that] would lead to an absurd result.'" *Arizona Dep't of Econ. Sec. v. Lee ex rel. Cty. of Maricopa*, 228 Ariz. at 152, ¶ 7. Interpreting A.R.S. § 8-807(B) or *Ritche* to mean Arizona prosecutors have possession and control over all DCS information for *Brady* purposes would lead to the absurd result of the creation of two classes of child- victims: child-victims who never came to the attention of DCS before the criminal prosecution; and those who had been under the care of DCS. The child-victims in the first class would have the ability to litigate and protect their private, confidential and privileged records from disclosure to defendants in a criminal case; and the child-victims in the second class would have all of their confidential DCS information, including otherwise private and privileged records, automatically subject to disclosure for *Brady* review. A reading of A.R.S. § 8-807(B) that would render the most vulnerable of children to a class of victims entitled to less protection against the invasions of their rights cannot co-exist with a state policy of making child welfare a top priority and DCS's stated "primary purpose . . . to protect children." A.R.S. § 8-451.

Furthermore, the child-victims in this case have a constitutional right to be treated with fairness, respect, and dignity and to be free from intimidation,

harassment, and abuse throughout the criminal justice process. Ariz. Const. art. II, § 2.1(A)(1). A.R.S. § 8-807 does not provide a vehicle for disclosure of the child-victims' privileged and confidential information that includes counseling, medical, and school records, especially those that are not in DCS' possession or that do not even exist yet.

Allowing an *in camera* review, despite the fact that the defendant did not demonstrate a substantial need or a specifically sufficient basis, is unfair to the child-victims and is a form of abuse throughout the criminal justice process. The details of the abuse and murder that the defendant is accused of committing that are contained within DCS reports that the defendant is already entitled to are details that are already known by the public via law enforcement reports. However, the disclosure of current and future privileged and confidential counseling, medical, and school records that contain communications with a counselor after the crime will likely address emotions and issues that the child-victims are dealing with in the aftermath. These records should not be subject to an *in camera* review.

CONCLUSION

For the reasons set forth above, Ms. Fox-Embrey respectfully requests this Court deny Main's request for further disclosure of privileged and confidential information for an *in camera* review.

Respectfully submitted this 10th day of October, 2019.

By: _____/Colleen Clase/_____
Attorney for Petitioner Lynn Fox-Embrey