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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 2019-0054

Pinal County Superior Court
No. CR201503594

REPLY TO RESPONSE TO PETITION FOR SPECIAL ACTION

INTRODUCTION

Petitioner and legal guardian to the child-victims, Crime Victims' Representative, Lynn Fox-Embrey, respectfully submits this reply to Real Party Main's *Response to Petition for Special Action* (hereinafter "Main's Response"). In this reply, Ms. Fox-Embrey does not dispute that there are limited circumstances that may warrant an exception to the child-victims' constitutional right to refuse a defendant's discovery request under the Arizona Victims' Bill of Rights (VBR), Ariz. Const. art II, § 2.1(A)(5). Nor does she dispute that *Pennsylvania v. Ritchie*, 480 U.S. 30 (1987) may allow for a criminal defendant to receive records from the Department of Child Safety (DCS) and the Department of Health Services (DHS). Despite the limited assertions made in Main's response, Ms. Fox-Embrey objects to the disclosure of the WIC and physician records of the victims for an *in camera* review by Respondent Judge as Main failed to meet the burden of showing a reasonable possibility that she would be entitled to the information under due process.

ISSUE PRESENTED

The issue presented by Petitioner is "[w]hether 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)." Petitioner believes Respondent Judge erred in ordering an *in camera* review of the medical and WIC records because Main failed to meet her burden.

ARGUMENT

I. The Arizona Victims' Bill of Rights Protects Privileged and Confidential Records.

A victim's constitutional right to refuse a defendant's discovery request will only yield when it conflicts with the due process rights of the accused. Main argues her due process rights in this capital case supersede the rights of the victims' representative under the VBR to refuse a discovery request. *See Main's Response to Petition for Special Action*, page 13-14. Similarly, Main contends "the VBR is not to be used by victims to thwart a defendant's ability to effectively present a legitimate defense." *Main's Response to Petition for Special Action*, page 19. However, the suggestion that a defendant's due process rights will always supersede the Victims' Bill of Rights is a misunderstanding of Arizona case law.

In Arizona, 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).

Roper's result did not create a bright line rule perpetually allowing a violation of the Victims' Bill of Rights—the decision was more nuanced. In *Roper*, the defendant claimed self-defense after she was charged with aggravated assault for using a knife to attack her husband. *Roper*, 172 Ariz. at 234. After balancing the unique facts of *Roper*, the Court permitted a limited infringement on the victim's right to be free from pretrial discovery so the defendant could present a self -defense claim. *Id*. at 239-40.

In Arizona, in order to overcome a victim's right to refuse to disclose medical records for an *in camera* review, a defendant is required to show either a sufficiently specific basis or a reasonable possibility that she is entitled to the information as a matter of due process. *State v. Connor*, 215 Ariz. 553, ¶ 10-11, 161 P.3d 596, (Ariz. App., 2007); *see also State v. Kellywood*, 246 Ariz. 45, ¶ 7-10, 433 P.3d 1205 (Ariz. App., 2018). As noted in *State v. Conner*, *Roper's* decision in requiring disclose of the victim's records was based on 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"

State v. Connor, 215 Ariz. 553 ¶ 10. *Kellywood* clarified any apparent contradiction from earlier precedent stating: "[f]urther, neither *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).

In contrast to what Main states, Petitioner does not "think that the VBR under the Arizona Constitution takes precedence over all other state and federal law." *Main's Response to Petition for Special Action*, page 14. Main's contention that the "rights of the victim under the VBR do not diminish or eliminate the federal and state due process rights of the accused" fails to fully comprehend the facts and holding of *Roper*. Main's reliance on *Roper* is misplaced—*Connor* and *Kellywood* more accurately reflect the balancing of a defendant's state and federal due process rights with the victim's constitutional right to be free from pretrial discovery initiated by the defendant. In ordering the disclosure of medical records in *Roper*, the Court only ordered the disclosure of the medical records upon considering the unique facts of the case. *Roper* did not find the VBR unconstitutional or authorize a wholesale production of the victim's medical records to the defendant in every circumstance. *See Connor*, 215 Ariz. 553, ¶ 7-8 ("*Roper,* however, did not authorize a wholesale production of the victim's medical records to the defendant.").

Similarly, 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 medical records when a defendant fails to make the requisite showing of a reasonable possibility of entitlement to the requested information under due process. *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 [defendant's] motion to compel production […] for *in camera* review").

II. Defendant Main Failed to Demonstrate a Reasonable Possibility She Would be Entitled to the Requested Information Under Due Process.

The second enumerated argument in Main's Response includes a block citation from *Kellywood* with a reference to the "reasonable possibility" language, but this section of the response fails to address the rationale encompassed by *Kellywood* and its application to the facts of that case. Main's written response fails to show either a sufficiently specific basis or a reasonable possibility that the child-

victims' records contain information that she is entitled to as a matter of due process. Main's conclusory statements are simply conjecture.

A. Speculative and Conclusory Statements are Insufficient to Prove a Reasonable Possibility.

A reasonable possibility requires more than just speculation. In *Kellywood*, this Court 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. On appeal, Kellywood argued that the medical and counseling records might show that the victim denied sexual contact during a certain period of time. *Kellywood*, 246 Ariz. 45, at ¶ 5. 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. 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.

Main's written response, as well as prior oral argument on February 27, 2019, offers only speculation and fails to provide actual evidence sufficient to prove a reasonable possibility that she would be entitled to the information. After including a block citation from *Kellywood*, Main's response makes the following conclusory

statement:

> "Under the facts and circumstances of the underlying death penalty case there is reasonable possibility, there is reasonable probability to believe that the records sought includes information to which she is entitled as a matter of due process."

Main's Response to Petition for Special Action, at 16. Main's written response provides no further proof for the foundation of her assertion except for the exhibit of her prior motion and oral argument transcript. Main's statements at the oral argument on February 27, 2019, similarly fail to provide any proof other than speculative statements. At the oral argument, Main stated:

> "Mr. Lockwood: […] it's well known that not only adult witnesses, but children witnesses often times change, elaborate or embellish stories that they have told to investigating officers. We need to know whether there are things of that nature in counseling records or in school records as to what statements they're making.

Petition for Special Action, Ex. 10, p. 29-30.

The arguments put forth by Main are similar to the defendant in *Kellywood*. While Main's response only briefly reiterates the arguments made in the motions filed at trial court and at oral argument, Main essentially restates that the therapy or counseling records from the victims will show some evidence of conflicting statements. *Main's Response to Petition for Special Action*, at 17. Again, without any specific information relating to these victims, mere speculation that a statement may differ is insufficient to meet the required burden of reasonable possibility. This failure by Main is similar to the Defendant in *Kellywood* who also made vague

statements about possible conflicting statements to medical providers. 246 Ariz. 45, at ¶ 6 ("the mere possibility [the victim] could have said something exculpatory is not, as a matter of law, sufficient by itself to require her to [production of records].").

B. Main's Uncertainty About the Content or Existence of Records Fails to Prove a Reasonable Possibility of Entitlement Under Due Process.

The June 14, 2019, ruling by respondent Judge rejected many of Main's arguments. *Petition for Special Action*, Appendix 17, pages 5 ("[d]efendant has not articulated a basis for the production of these records and […] has based her request on mere conjecture without specificity"). However, 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*." *Petition for Special Action*, Appendix 17, page 5 (emphasis added).

As noted in the *Petition for Special Action*, 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." *Petition for Special Action*, 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." *Petition for Special Action*, Appendix 17, page 6. Yet, Main also failed to articulate with any certainty what may be contained within the child-victims' WIC records.

Respondent Judge's ruling contrasts *Kellywood* with Main's case. *Kellywood's* dicta indicates that there, the Defendant failed to provide any specific names of a physician or medical provider. 246 Ariz. 45, ¶ 10. In the present case, similar to *Kellywood*, Main does not provide any indication of the name of any of the physicians who treated the victims. With regards to medical providers, Main response fails to clarify what was written in her prior motion to compel. Main's prior motion merely states "there are known to be additional relevant medical records in the possession of Banner Casa Grande Medical Center, Health Connect, WIC, and possibly the OME. It is also believed there may be additional records maintained by other providers not known to the defense." *Main's Response to Petition for Special Action*, Appendix One, p. 7. ln. 20-23. The little information provided to the Respondent Judge is insufficient to show a reasonable possibility Main was entitled to the information under due process.

Main's response also fails to lay any further foundation for her speculation about the remaining contents for any of the requested records. Like the Defendant in *Kellywood*, Main only speculates on what is contained in the records. Main "asserts that these records *may* contain potentially exculpatory information *and/or*

mitigating evidence relevant to the [...] above criminal matter." *Petition for Special Action*, Appendix 8a, page 20, lines 9-10. Again, 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. *Kellywood* anticipated this dilemma noting:

> "[i]ndeed, were we to conclude that [the defendant] had demonstrated a "reasonable possibility" on the basis of such speculation, the effect would be to compel production of medical and counseling records in virtually any case in which a defendant accused of sexual offenses claims fabrication; the exception would swallow § 2.1(A)(5) of the Victims' Bill of Rights."

Kellywood, 246 Ariz. 45, at ¶ 10. Permitting Main to probe into WIC or medical records should they exist is contrary to the notion of a limited infringement of the victims' privacy right she might be entitled to as a matter of due process.

Similarly, Main's discussion of D.C.'s facial injury and as to malnourishment on the victims is insufficient to show a reasonable possibility she would be entitled to the information. Main fails to address the concerns raised in *Petitioner's Special Action* and Main's response only briefly mentions the issues, again making conclusory statements:

> "[t]he statements of the children in the state forensic interviews provide reasonable probability that the therapeutic records include information directly related to the malnourishment charges and disproving all suggestion that the children were not being fed properly. […] A.C. began his second interview with allegations related to the injury D.C. sustained to his nose while showering."

Main's Response to Petition for Special Action, page 16-17. Like the Defendant in *Kellywood*, here, 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 held by the child-victims' legal guardian. Respondent Judge's ruling permitting review of the WIC records and D.C.'s medical record for the year prior to the incident was made without Main providing reasonable possibility that she would be entitled to the information Main's statements that she is charged with neglect and abuse is not a sufficient rationale. Even though the defendant in *Kellywood* was charged with sexual assault, he was not able to have the court review medical records related to possible sexual assault of the victim. 246 Ariz. 45, ¶ 9-10.

III. Main is Unable to Make a Preliminary Showing that the Requested Records Contain Material Information.

Main claims she met the "reasonable probability" standard under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, (1963), and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) to require disclosure of this requested information. However, Main is unable to make the threshold requirement for an *in camera* review of the material.

Main's reliance on *Brady* is misplaced. *Brady v. Maryland* stands for the proposition that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment.

373 U.S. 83, 87, 83 S.Ct. 1194, (1963). Petitioner does not question the requirement for the prosecution to turn over material evidence under *Brady*. The materiality and reasonable probability discussion is more applicable to *Ritchie* and *United States v. Bagley*, 473 U.S. 667, 682, 105, S.Ct. 3375.

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the United States Supreme Court concluded that criminal defendants have a due process right to disclosure from state agencies other than the prosecuting agency. "The 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. The Court recognized the public interest in protecting this type of sensitive information is strong, but this interest does not necessarily prevent disclosure in all circumstances.

Main's response is unclear but it appears that Main cites *Ritchie* for the "reasonable probability" standard for materiality and disclosure. *See generally Main's Response to Petition for Special Action*, pages 16-19. *Ritchie's* reference as to what constitutes "materiality" cites *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. However, before this analysis occurs, a criminal defendant

must make a preliminary showing that they are entitled to an *in camera* review of privileged and confidential records. *Ritchie* 480 U.S. at 58, fn. 15. 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).

Despite any suggestions throughout Main's response that she has made a preliminary showing, she has not. Main contends in her response that the statements in the forensic interviews indicate possible prior exculpatory statements by the victims. *Main's Response to Petition for Special Action*, page 17. However, this is 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"). Main asserts in her initial filing "that these records may contain potentially exculpatory information and/or mitigating evidence relevant to the [...] above criminal matter." *Petition for Special Action*, Appendix 8a, page 20, lines 9-10.

Because Main cannot identify the information she seeks in the child-victims confidential and privileged records, or that the records actually contain material evidence, Respondent Judge is not required to conduct an *in camera* review under *Ritchie*.

IV. Main Does Not Have a Federal Due Process Right to Discovery From an Unwilling Victim.

Main claims that under federal law, she is able to receive information for any purpose, and most notably impeachment and sentencing mitigation. However, Main's reliance on federal law is misplaced. 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).

Main asserts that *Lockett v. Ohio*, 438 U.S. 586 (1978), is the controlling law in this matter. However, 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. Again, Main fails to explain how the facts relating to child abuse charges of separate victims implicate the sentencing on a separate victim.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court to reverse Respondent Judge's order for an *in camera* review of the child-victims' privileged and confidential WIC and physician records.

Respectfully submitted this 3rd day of October, 2019.

By: ____/Colleen Clase & Robert Swinford/____
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