

**IN THE COURT OF COMMON PLEAS OF CLARK COUNTY, OHIO
CRIMINAL DIVISION**

STATE OF OHIO, : **CASE NO. [REDACTED]**
Plaintiff, :
v. : **JUDGE [REDACTED]**
[REDACTED], :
Defendant. :

VICTIM X.X.'S BRIEF REGARDING MEDICAL RECORDS

Now comes crime victim, X.X., by and through undersigned counsel, who respectfully requests that this Court deny Defendant's Motion requesting access to X.X.'s medical and mental health records. The reasons for this Brief are more fully set forth in a Memorandum in Support, which is attached hereto and incorporated herein.

Respectfully submitted,

Christopher Woeste (0093409)
Bobbie Yeager (0085165)
Ohio Crime Victim Justice Center
3976 North Hampton Drive
Powell, Ohio 43065
P: 614-848-8500
F: 614-848-8501
cwoeste@ocvjc.org
Attorney for Crime Victim

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The instant Brief arises out of Defendant's motion seeking Victim X.X.'s (hereinafter "X.X." or "Victim") privileged, confidential, and constitutionally protected medical and psychiatric records. Defendant has sought these privileged, confidential, and private records and materials via a motion to this Court. Specifically, Defendant requested that this Court issue an order compelling [REDACTED] and/or [REDACTED] of Clark County release all records from August 1, 2019 to September 1, 2019 directly to Defendant's counsel.

Pursuant to the criminal rules, this is an improper route for defendant to seek production of documentary evidence from third parties in a criminal case. The proper mechanism is the Rule 17(C) Subpoena Duces Tecum, which would provide X.X. the ability to file a motion to quash, entitling her to a hearing on the matter of whether the subpoena is enforceable and her records are subject to disclosure. Defendant's motion seeks to circumvent protections put in place to prevent unnecessary and intrusive invasion of witnesses' privacy.

II. ARGUMENT

a. **DEFENDANT'S MOTION ATTEMPTS TO UTILIZE AN IMPROPER AVENUE TO OBTAIN INFORMATION AND DOCUMENTS FROM A THIRD PARTY.**

i. **Criminal Rule 17(C) subpoena is the appropriate mechanism to seek documentary evidence from a third party in a criminal case.**

Criminal Rule 17(C) requires the state or Defendant to subpoena documentary evidence from non-parties and allows the non-party from whom the state or Defendant seeks documentary evidence to file a motion to quash the subpoena, stating, in pertinent part, that: "* * * upon motion made promptly and in any event made at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if compliance would be unreasonable

or oppressive.”

In determining whether compliance with a subpoena issued under Criminal Rule 17(C) is “unreasonable or oppressive,” the Ohio Supreme Court has applied and adopted the four-prong test from *U.S. v. Nixon*. See *In re Subpoena Duces Tecum Served Upon Attorney Potts*, 100 Ohio St. 3d 97, 100 (2003). The *Nixon* test requires that, after the individual from whom documentary evidence is sought files a motion to quash the subpoena, the party seeking to enforce the subpoena must show:

(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general ‘fishing expedition.’ *Id.*, citing *U.S. v. Nixon*, 418 U.S. 683, 699-700 (1974).

The United States Supreme Court has stated that Rule 17(C) is not meant to provide an additional means of discovery to criminal defendants. See *id.*, citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951).

Once the party from whom evidence is sought has filed a motion to quash, “* * * the trial court is required to conduct an evidentiary hearing, at which the party filing the subpoena duces tecum must convince the court that the information sought in the subpoena meets the *Nixon* test.” *Id.* Furthermore, this evidentiary hearing is entirely separate from any other *in camera* inspection of documents which are ultimately ordered to be produced. See *id.* The court should only order documents to be produced after the proponent of the subpoena has satisfied the *Nixon* test in an evidentiary hearing. See *id.* at 101.

Defendant cannot meet the standards of the *Nixon* test in this case. The documents sought by Defendant are neither evidentiary nor relevant. Defendant seeks psychiatric and medical

records from medical providers for X.X. from three weeks after the incident in question. As discussed more fully below, the records are not evidentiary because they are inadmissible pursuant to physician-patient privilege and/or psychologist-patient privilege. None of the documents sought are relevant because they do not tend to make any fact of consequence more or less likely as required by Evidence Rule 401. Defendant is charged with domestic violence, disrupting public service, and assault. The extent to which X.X. sought mental health treatment weeks after the incident in question is wholly irrelevant to these charges.

Defendant does not need—and is not entitled to—these irrelevant and privileged documents prior to trial. If Defendant has questions regarding X.X.’s psychiatric history or treatment, Defendant can inquire at trial, assuming the information sought is admissible. Indeed, in Defendant’s motion he states that the records are intended to attack X.X.’s credibility on cross examination. These matters are appropriate for impeachment at trial, not for the very limited production of documentary evidence defendants may seek from third parties. In light of the lack of relevance of these documents, there is no reason that Defendant should obtain this information.

Defendant’s request is an impermissible fishing expedition. In terms of the psychiatric records, Defendant is not seeking specific documents, rather Defendant has made the broad and sweeping request for all records from two providers for a month long period. Defendant’s request simply lacks the requisite specificity that would suggest this request is anything other than an impermissible fishing expedition.

If the defense meets the *Nixon* test and the non-party from whom records are sought claims that said documents are privileged, the court must conduct an in camera inspection of the documents prior to ruling on the issue of privilege. *See id.*

This Court should deny Defendant's motion because Defendant has used improper channels to seek documentary evidence from a third party, e.g. Victim X.X. The Court should also deny Defendant's motion because Defendant is seeking confidential, privileged, and constitutionally protected materials.

b. DEFENDANT'S MOTION SEEKS PRIVILEGED AND CONFIDENTIAL INFORMATION UNDER STATE AND FEDERAL LAW.

i. Defendant's motion impermissibly seeks privileged information in violation of R.C. 2317.02(B), R.C. 2317.02(G), and R.C. 4732.19.

R.C. 4732.19 makes communications between psychologists and patients privileged. R.C. 2317.02(G) provides that communications between patients and licensed counselors are also privileged. This rule does contain some exceptions, none of which are applicable in the case at bar. In this case, each and every psychiatric record Defendant requested is protected by the privileges listed above.

R.C. § 4732.19 provides licensed psychologists and patients are also entitled to the same privilege as physicians and patients under R.C. § 2317.02(B). Importantly, the Revised Code defines "communication" as

acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient. A 'communication' may include, but is not limited to, any medical or dental office or hospital communication such as a record, chart, letter, memorandum, laboratory test or results, x-ray, photograph, financial statement, diagnosis, or prognosis. *Id.*

This list is not exhaustive. Psychiatric records fall within the scope of privileged communications within the above definition.

Regarding R.C. 2317.02(B), the Ohio Supreme Court has held that this statute has a specific purpose: " 'It is designed to create an atmosphere of confidentiality, which theoretically will encourage the patient to be completely candid with his or her physician, thus enabling more

treatment.’ ” *Ward v. Summa Health System*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, ¶ 24. The privilege exists to alleviate patient concerns that personal information shared with doctors will later be disclosed. *See id.* at ¶ 25.

The privilege listed above is not limited to actual medical records. Some courts have held that medical histories and courses of treatment are also privileged under R.C. 2317.02(B). *See Grove v. Northeast Ohio Nephrology Assocs.*, 164 Ohio App.3d 829, 2005-Ohio-6914, 844 N.E.2d 400, ¶ 16 (9th Dist.). In that case, the appellate court found it to be an “unacceptable end-run around R.C. 2317.02(B)(1)” when the trial court permitted discovery of a patient’s course of treatment. *See id.* at ¶ 17.

The Ohio Supreme Court has acknowledged and expounded upon the importance of confidentiality in medical records. *See Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 188, 2008-Ohio-3343, 893 N.E.2d 153, ¶9. “ ‘It is for the patient—not some medical practitioner, lawyer, or court—to determine what the patient’s interests are with regard to personal confidential *medical information*.’ ” (Emphasis added.) *Id.* at ¶13; citing *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 408, 715 N.E.2d 518 (1999). “If the right to confidentiality is to mean anything, an individual must be able to direct the disclosure of his or her own private information.” *Id.* The Supreme Court found the privacy of medical records so important that it created a separate civil cause of action for wrongful disclosure of medical records. *Id.* at 188.

All of X.X.’s records from psychologists, psychiatrists, and counselors are privileged pursuant to these sections. Therefore, if this Court finds that Defendant’s subpoena meets the *Nixon* test, the records are still not subject to disclosure to Defendant.

ii. Defendant’s motion impermissibly seeks confidential information in violation of the Health Information Portability and Accountability Act

(“HIPAA”), 45 CFR 164.512.

X.X.’s medical records should not be disclosed because these records are subject to the privileges discussed above and are subject to regulation under the Health Insurance Portability and Accountability Act (“HIPAA”). *See* 45 CFR 164.512.

It is also important to note that, by its very terms, HIPAA rights are subordinate to state privilege statutes such as R.C. § 2317.02 which provide more protection to victim records. HIPAA does not preempt these statutes, but rather adds an additional layer of protection to them.

iii. Defendant’s motion seeks confidential information in violation of Victim’s constitutionally protected right to privacy.

The United States Supreme Court has held that all United States citizens have a constitutionally guaranteed right to privacy. *See generally Roe v. Wade*, 410 U.S. 113 (1973); *Whalen v. Roe*, 429 U.S. 589 (1977). The right to privacy is used to prevent disclosure of private information and to prevent government intrusion into private decisions. The Supreme Court has summed up the idea of constitutionally guaranteed privacy in *Griswold v. Connecticut* when the Court stated that various areas of the Bill of Rights cumulatively create zones of privacy. *See generally Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

The Supreme Court of Ohio has also held that all citizens have a right to privacy. *See Housh v. Peth*, 165 Ohio St. 35, 38 (1956). In that case, the Court cited a Georgia case’s recapitulation of a law review article written by Samuel D. Warren and Louis Brandeis, stating: “A right to privacy is derived from natural law, recognized by municipal law, and its existence can be inferred from expressions used by commentators and writers on the law as well as judges in decided cases. The right to privacy is embraced within the absolute rights of personal security and personal liberty.” *Id.*

On November 7, 2017, an overwhelming 83% of Ohio voters passed Marsy's Law, a constitutional amendment for crime victims. Pursuant to Article I, Section 10a(D) of the Ohio Constitution, " 'victim' means a person against whom the criminal offense or delinquent act was committed or who is directly and proximately harmed by the commission of the offense or act." As the person against whom Defendant committed domestic violence, assault, and disrupting public service, X.X. meets the constitutional definition of "victim."

Marsy's Law provides Ohio's victims with concrete, enforceable rights during the criminal justice process. Specifically, Marsy's Law provides victims the right "except as authorized by section 10 of Article 1 of this constitution to refuse an interview, deposition, or other *discovery request* made by the accused or any person acting on behalf of the accused." (Emphasis added.) Ohio Constitution, Article I, Section 10a(A)(6). Marsy's Law also explicitly requires that victims be "treated with fairness and respect for [their] safety, dignity, and *privacy*" throughout the criminal justice process. (Emphasis added.) Ohio Constitution, Article I, Section 10a(A)(1).

By its terms, Marsy's Law "supersede[s] all conflicting state laws," making these new constitutional rights superior to existing statutory laws or court rules controlling discovery. Ohio Constitution, Article I, Section 10a(E). Marsy's Law has changed the legal landscape for crime victims in Ohio and has fundamentally altered the balancing test that courts must utilize when weighing victims' rights against those of defendants.

If the Court does not deny Defendant's motion and allows the release of numerous confidential records of X.X., this would violate X.X.'s constitutional privacy rights. As noted above, a primary purpose of enforcement of these privacy rights is to ensure that private, confidential matters are not publicly disclosed. Psychiatric and medical records are among the

most private records an individual can have. The very efficacy of psychological treatment is dependent upon a patient's confidence that his or her confidential records will not be publicly released. It is for that reason that federal and state legislatures have passed laws providing special protections for these types of records.

c. DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO SEEK OR OBTAIN PRETRIAL DISCOVERY FROM NON-PARTIES.

The United States Supreme Court has stated: "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one * * *" *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). The U.S. Constitution affords defendants no greater discovery rights than those afforded by the states. *See id.* The Supreme Court has held that rights under the confrontation clause apply to trials only, and pretrial discovery is not implicated. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). In light of these U.S. Supreme Court holdings, Defendant does not have any constitutionally protected right that would outweigh X.X.'s constitutional rights.

d. AN ORDER DISCLOSING X.X.'S RECORDS WOULD UNDERMINE OHIO'S PUBLIC POLICY OF PROTECTING CRIME VICTIMS AND ENCOURAGING CRIME REPORTING.

Aside from the damage that X.X.'s constitutional, statutory, and common law rights would suffer from an order such as this and the detrimental effect on victims' rights and privilege generally, this Court should also consider the damage orders such as this will cause to Ohio's public policy of protecting crime victims and encouraging crime reporting.

In 2016 alone, 334,234 Ohio citizens were victimized by crime. Federal Bureau of Investigation, *Crime in the United States*, <https://perma.cc/4E6M-GNJ2> (accessed Sept. 11, 2018). Of those, 34,877 were victims of violent felony crimes. *Id.* These numbers only represent reported crimes. *Id.* Countless victims will never report their victimization. Crime impacts

everyone; it knows no boundaries, crossing all racial, ethnic, gender, and socioeconomic lines.

The refusal to allow victims to exercise constitutional and statutory rights has a chilling effect on crime reporting. See Mary Beth Ricke, *Victims' Right to Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 Wash.U.J.L. & Pol'y 181, 193-94 (2013). A staggeringly small percentage of crime victims will report the crimes. *Id.* "This can be explained by the fear of having to undergo the excruciating, long process before trial and having to face the attacker at trial." *Id.*

The failure to treat victims properly damages the entire criminal justice system. Research shows that victims who believe they have been treated with fairness and provided their rights not only experience less secondary trauma, but also experience more satisfaction with the criminal justice system. Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 Wayne L.Rev. 29, 30 (1987). On the other hand, victims who do not feel they have been treated fairly experience more trauma symptoms and feel harmed by the criminal justice system. See *id.* The failure of the judiciary to treat crime victims fairly increases the anger and resentment towards the criminal justice system generally. Davya Gewurz & Maria A. Mercurio, *The Victims' Bill of Rights: Are Victims All Dressed Up with No Place To Go?*, 8 St. Johns J. C.R. & Econ. Dev. 251, 266 (1992). Ultimately, when crime victims' rights are ignored, the result is dysfunction within the criminal justice system. See generally Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L.Rev. 255 (2005).

X.X. is the survivor of domestic violence, amongst other crimes. Other victims of crime will take note if X.X.'s psychiatric records are forcibly disclosed, which will increase negative attitudes and reduce crime reporting generally. If victims know that Ohio courts will not protect their medical information, it will increase secondary trauma and further damage the reputation of

the criminal justice system. Therefore, this Court should uphold crime victims' constitutional and statutory rights and ensure that Ohio's crime victims are protected.

III. CONCLUSION

Allowing Defendant access to victim X.X.'s confidential psychiatric and medical records is in violation of X.X.'s rights under the constitutions, statutory schemes, and rules of the United States and the State of Ohio and is in derogation of Ohio's public policy to protect crime victims and encourage them to report crimes. Therefore, Victim X.X. respectfully requests that the Court deny Defendant's Motion.

Respectfully submitted,

Christopher Woeste (0093409)
Bobbie Yeager (0085165)
Ohio Crime Victim Justice Center
3976 North Hampton Drive
Powell, Ohio 43065
P: 614-848-8500
F: 614-848-8501
cwoeste@ocvjc.org
Attorney for Crime Victim

CERTIFICATE OF SERVICE

I hereby state that a copy of the foregoing Motion was served upon the following by ordinary US mail, Electronic Mail, and/or facsimile transmission on this 7th day of November, 2019:

[REDACTED]

[REDACTED]

Christopher Woeste (0093409)