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 MOTION TO QUASH DEFENDANT'S SUBPOENAS DUCES TECUM

Now comes crime victim, X.X., through undersigned counsel, who respectfully requests that this Court quash Defendant's subpoenas filed December 18, 2019, seeking access to X.X.'s medical and mental health records. The reasons for this Motion are more fully set forth in a Memorandum in Support, which is attached hereto and incorporated herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The instant Motion arises out of Defendant's subpoenas to **[REDACTED]** and **[REDACTED]**, filed December 18, 2019, seeking Victim X.X.'s (hereinafter "X.X." or "Victim") privileged, confidential, and constitutionally protected medical and psychiatric records. Specifically, Defendant has subpoenaed **[REDACTED]** and **[REDACTED]** to produce "any and all records" regarding X.X., and additionally, under "Specific Document Request", records from August 1, 2019, to September 1, 2019, directly to Defendant's counsel.

II. LAW AND ARGUMENT

a. DEFENDANT'S SUBPOENAS ARE UNREASONABLE AND OPPRESSIVE.

When parties submit subpoenas duces tecum to non-parties for production of information or documents, Criminal Rule 17(C) applies. Criminal Rule 17(C) allows the non-party from whom the documentary evidence is sought to file a motion to quash the subpoena, stating, in pertinent part, that a court "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 Potts*, 100 Ohio St.3d 97, 2003-Ohio-5234, 796 N.E.2d 915, ¶ 12. 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, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

The United States Supreme Court has stated that Criminal 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, 71 S.Ct. 675, 95 L.Ed. 879 (1951).

Once the non-party from whom documents or information is sought, or to whom the documents or information sought pertains, 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.* The court should only order documents to be produced in camera after the proponent of the subpoena has satisfied the *Nixon* test in an evidentiary hearing. *See id.* at 101. If the documents meet the *Nixon* test and there is a claim that the documents are privileged, as is the case here, the court must conduct an in camera inspection of the documents prior to ruling on the issue of privilege. *See id.*

In short, Defendant bears the burden to demonstrate that the information sought is relevant, admissible, and specific. In the case at bar, the subpoenas are unreasonable and oppressive, and cannot meet the *Nixon* test. The subpoenas are overbroad, vague, unduly burdensome, and request irrelevant, immaterial, and inadmissible information, and information protected by privacy laws and privilege.

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

medical records from medical providers for X.X. and, specifically, records from three weeks after the incident in question. The information sought is neither evidentiary, nor necessary for Defendant to obtain evidentiary information because the information is inadmissible pursuant to X.X.'s constitutional privacy rights and statutory privileges. In light of this, in addition to X.X.'s constitutional privacy rights in her psychiatric and medical records, the records sought are not evidentiary.

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 original motion seeking these records, 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 nonparties. 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 "any and all" records from two providers, and all records 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 quash Defendant's subpoenas because Defendant is seeking confidential, privileged, and constitutionally protected materials.

b. DEFENDANT'S SUBPOENAS SEEK PRIVILEGED AND CONFIDENTIAL INFORMATION UNDER STATE AND FEDERAL LAW.

i. Defendant's subpoenas impermissibly seek privileged information in violation of Revised Code Section 2317.02(B), Revised Code Section 2317.02(G), and Revised Code Section 4732.19.

Revised Code Section 4732.19 makes communications between psychologists and patients privileged. Revised Code Section 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 here. In this case, each and every psychiatric record Defendant requested is protected by the privileges listed above.

Revised Code Section 4732.19 provides licensed psychologists and patients are also entitled to the same privilege as physicians and patients under Revised Code Section 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 Revised Code Section 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 Revised Code Section 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 physicians, psychologists, psychiatrists, and counselors are privileged pursuant to Ohio law. 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 subpoenas impermissibly seek confidential information in violation of the Health Information Portability and Accountability Act ("HIPAA"), pursuant to 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 Revised Code Section 2317.02 which provide more protection to victims' records. HIPAA does not preempt these statutes, but rather adds an additional layer of protection to them.

iii. Defendant's subpoenas seek confidential information in violation of X.X.'s constitutionally protected right to privacy.

Marsy's Law provides Ohio's victims with concrete, enforceable rights during the criminal justice process. Specifically, Marsy's Law requires that victims be "treated with fairness and respect for [their] safety, dignity, and privacy" throughout the criminal justice process. Ohio Constitution, Article I, Section 10a(A)(1).

By its terms, Marsy's Law "supersede[s] all conflicting state laws," making these constitutional rights superior to pre-existing statutory laws or court rules. Ohio Constitution, Article I, Section 10a(E). It is the role of the courts to give life and meaning to constitutional provisions granting rights to Ohio citizens. Therefore, " 'courts must interpret the Constitution broadly in order to accomplish the manifest purpose of an amendment.' " *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 19, quoting *State ex rel. Swetland v.*

Kinney, 69 Ohio St.2d 567, 570, 433 N.E.2d 217 (1982). " '[T]he object of the people in adopting it should be given effect.' " *State v. Smith*, 80 Ohio St.3d 89, 103, 1997-Ohio-355, 684 N.E.2d 668, quoting *Castleberry v. Evatt*, 147 Ohio St. 30, 33 Ohio Opp. 197, 67 N.E.2d 861 (1946), syllabus.

When a constitutional provision is clear and unambiguous, the plain meaning controls. *See Toledo City School Dist. Bd. Of Edn. v. State Bd. of Edn*., 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 16 (explaining that "in construing the Constitution, we apply the same rules of construction that we apply in construing statutes"; "[w]ords used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning"; and " '[w]here the meaning of a provision is clear on its face, we will not look beyond the provision in an attempt to divine what the drafters intended it to mean' "), *reconsideration denied*, 146 Ohio St.3d 1473, 2016-Ohio-5108, 54 N.E.3d 1271. "Courts must give effect to the words * * * and may not modify an unambiguous [provision] by deleting words used or inserting words not used." *State v. Waddell*, 71 Ohio St.3d 630, 631, 646 N.E.2d 821 (1995).

Here, both the intent and the language are clear. The voters' intent is manifest in the provision itself: crime victims are to be afforded the rights to ensure they receive "justice and due process throughout the criminal and juvenile justice systems." Ohio Constitution, Article I, Section 10a(A). The rights that follow, including the constitutional right to privacy contained in Ohio Constitution, Article I, Section 10a(A)(1), are clear and unambiguous. Under Marsy's Law, Ohio victims are constitutionally entitled to be treated with respect for their privacy throughout criminal justice proceedings.

In addition to her Ohio constitutional right to privacy as an Ohio crime victim, X.X. has the same U.S. constitutional right to privacy afforded to all citizens. The United States Supreme

Court has held time and time again that all United States citizens have a constitutionally guaranteed right to privacy, and Ohio courts have followed suit. *See generally Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *see also State ex rel. Beacon Journal Publ'g Co. v. Akron*, 70 Ohio St.3d 605, 607-608, 640 N.E.2d 164 (1994) (recognizing that the City of Akron employees have a federal constitutional right to privacy and that right allows them to bar the disclosure of their social security numbers). The right to privacy is used to prevent disclosure of private information and to prevent government intrusion into private decisions. The Supreme Court 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, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

The Supreme Court of Ohio has also held that all citizens have a right to privacy under Ohio law. *See Housh v. Peth*, 165 Ohio St. 35, 38, 133 N.E.2d 340 (1956). In *Housh*, the Supreme Court of Ohio 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. If this Court does not quash Defendant's subpoenas and allows the release of X.X.'s psychiatric and medical records, 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 mental health 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. 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 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 and medical 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 violates 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 this Court quash Defendant's subpoenas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby state that a copy of the foregoing Motion was served upon the following by hand delivery, ordinary US mail, electronic mail, and/or facsimile transmission on this 20th day of December, 2019:

[REDACTED]

[REDACTED]

Bobbie Yeager (0085165)