DC Sample Motion to Quash

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – [UNIT NAME, IF APPLICABLE]

DISTRICT OF COLUMBIA, Plaintiff v. [DEFENDANT NAME], Defendant.	Case No.: [NUMBER] CRIME VICTIM'S[1] MOTION TO QUASH DEFENDANT'S PRETRIAL SUBPOENA FOR [NAME OR PSEUDONYM]'S[2] MENTAL HEALTH RECORDS AND MEMORANDUM OF LAW IN SUPPORT OF MOTION

[1] [Practitioner's Note: The National Crime Victim Law Institute (NCVLI) drafted this sample motion for a case involving a subpoena for mental health records in an adult criminal case. While this sample is styled as one to be filed by the victim, it can be adapted to one filed by the state. *See, e.g.*, 18 U.S.C. § 3771 (d)(1) (providing that "[t]he crime victim or the crime victim's lawful representative, and the attorney for the Government may assert [victims'] rights"); 18 U.S.C. § 3771 (e) (clarifying that victims' rights in this section apply in connection with prosecutions in the Superior Court of the District of Columbia); D.C. Code § 23-1901 (a) (mandating that "[o]fficers or employees of the District of Columbia engaged in the detection, investigation, or prosecution of crime or the judicial process shall make their best efforts to see that victims of crime are accorded the rights"). Please note that although NCVLI drafted this sample motion in opposition to a request for the pretrial disclosure of a victim's mental health records, many of the arguments included in this sample motion may be used to support motions to quash defense-initiated pretrial requests for victims' information. In addition, if defendant's attempt to subpoena a victim's records is initiated during trial (or is construed by a trial court to be a trial subpoena), the motion should also include additional trial-specific arguments. Please contact NCVLI for technical assistance relating to trial subpoenas.]

[2] [Practitioner's Note: If using a pseudonym for a crime victim in a brief for first time, add footnote: All references herein to the crime victim shall refer to [Doe #1 or alternative pseudonym] to protect [his/her/their] privacy in accordance with [his/her/their] federal constitutional rights. *See, e.g., Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing that the United States Constitution provides a right to personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) ("[A] right to personal privacy . . . does exist under the Constitution."). District of Columbia courts have long acknowledged and respected the privacy of individuals by protecting their real identities with the use of pseudonyms in court proceedings. *See, e.g., Roe v. Doe*, 73 A.3d 132, 133 n.1 (D.C. 2013) (noting that the trial court identified both parties by pseudonym in a civil case where the plaintiff asserted that defendant negligently infected the plaintiff with a sexually transmitted disease); *Doe v. Sullivan*, 291 U.S. App. D.C. 111, 115, 938 F.2d 1370, 1374 (1991) (identifying two litigants by pseudonym in representing a class of military personnel in a suit involving the use of unapproved, investigational drugs on military personnel in certain combat-related situations, without obtaining the service member's informed consent).]

COMES NOW [Name/Pseudonym] by and through undersigned counsel, and respectfully moves this Court to quash Defendant's pretrial subpoena for Crime Victim [Name/Pseudonym]'s counseling Records. [Name/Pseudonym] respectfully submits that [his/her/their] rights, including [his/her/their] federal constitutional right to privacy and [his/her/their] statutory rights to privacy, to protection, to be treated with fairness and respect for [his/her/their] dignity and privacy, and to protect the privilege and confidentiality of certain communications, would be violated if the victim's mental health records were disclosed to Defendant.

Dated: [DATE]

Respectfully submitted,

_____

[Attorney, Esq.] ([State] Bar # [number])
[Firm/Organization]
[Address]
[Phone number]
[Email address]

Counsel for the Crime Victim

MEMORANDUM OF LAW

STATEMENT OF FACTS

[*Insert relevant facts, including the nature of the criminal case, its status, and future hearing and trial dates; explain why the victim is seeking to assert victims' rights (e.g., concerns touching on the victim's rights to privacy and protection). Include whether the requested documents are within the government's possession or control. If the records are arguably within the government's possession or control, please contact NCVLI for additional technical assistance. Address the scope of the request (unbounded in time, covering a large period of time, whether the documents sought relate to the offense(s) charged, whether the subpoena was properly served, etc.). If you choose to attach documentation to support this motion or submit such information in connection with a hearing, redact any information that compromises the victim's privacy or safety.*]

ARGUMENT

I. THE VICTIM HAS STANDING TO PROTECT [HIS/HER/THEIR] RIGHTS.

Federal law guarantees crime victims numerous enforceable rights. *See, e.g.*, 18 U.S.C. § 3771 (a) (2015) (guaranteeing crime victims a number of enumerated rights, including the rights to protection from the accused and to be treated with fairness and with respect for the victim's dignity and privacy); 18 U.S.C. § 3771 (e) (2015) (clarifying that victims' rights in this section apply in connection with prosecutions in the Superior Court of the District of Columbia); D.C. Code § 23-1901 (b) (2010) (listing a number of rights guaranteed to crime victims, including the rights to be treated with fairness and with respect for the victim's dignity and privacy and the right to be reasonably protected from the accused offender). These rights may be enforced "by the crime victim or the crime victim's lawful representative, and the attorney for the Government." 18 U.S.C. § 3771 (d)(1) (2015).

[Name/Pseudonym] is a crime victim as defined by law. *See* 18 U.S.C. §3771 (e)(2) (2015) (defining "crime victim" to mean "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia" and, in cases where the victim is "under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court"); D.C. Code § 23-1905 (2) (2013) (defining "victim" or "crime victim"). [*Insert information demonstrating how the definition of "victim" is met in this case.*] [Name/Pseudonym] properly appears before this Court seeking enforcement of [his/her/their] rights.

II. THIS COURT SHOULD QUASH DEFENDANT'S SUBPOENA FOR THE VICTIM'S PRIVILEGED MENTAL HEALTH RECORDS.

Defendant's subpoena for the victim's mental health records violates [Name/Pseudonym]'s constitutional and statutory rights, and Defendant has failed to demonstrate adequate justification for infringing on these rights through the enforcement of the subpoena.

A. Victims Are Guaranteed Constitutional and Statutory Rights to Privacy, Alongside Statutory Rights to Protection and to Be Treated With Fairness and With Respect.

All individuals, including crime victims, have a federal constitutional right to privacy. *See, e.g.*, *Whalen*, 429 U.S. at 599-600 (recognizing that the United States Constitution provides a right to personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"); *Roe*, 410 U.S. at 152-53 ("[A] right to personal privacy . . . does exist under the Constitution."); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (noting that "[v]arious guarantees [in the Bill of Rights] create zones of privacy"); *In re W.M.*, 851 A.2d 431, 451 (D.C. 2004) (observing that "a constitutionally protected zone of privacy" may protect intimate or confidential matters); *see also Anderson v. Blake*, 469 F.3d 910, 914-18 (10th Cir. 2006) (affirming that a victim of rape has a constitutionally protected privacy interest in a videotape depicting the violation and collecting other

cases where constitutional privacy issues were identified); *Block v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998) (concluding that "a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape where no penalogical purpose is being served"); *cf. In re Johnson*, 699 A.2d 362, 369 (D.C. 1997) (noting that the "Constitutionally-protected right[] to privacy … may be implicated when an individual is compelled to submit to a psychiatric examination").[3]

In addition to the federal constitutional right to privacy, victims of crime in the District of Columbia are guaranteed statutory rights to privacy, along with the complementary rights to protection and to be treated with fairness and respect. *See, e.g.*, 18 U.S.C. § 3771 (a)(1) (2015) (guaranteeing victims of crime the "right to be reasonably protected from the accused"); 18 U.S.C. § 3771 (a)(8) (2015) (guaranteeing victims of crime, *inter alia*, the "right to be treated with fairness and with respect for the victim's dignity and privacy"); D.C. Code § 23-1901 (b)(1) (2010) (guaranteeing crime victims, *inter alia*, the right to "[b]e treated with fairness and with respect for the victim's dignity and privacy"); D.C. Code § 23-1901 (b)(2) (2010) (guaranteeing crime victims the right to "[b]e reasonably protected from the accused offender"). If victims are to be treated with fairness and respect for their dignity, as federal law mandates, their right to privacy must be honored and protected. *Cf. Schmerber v. California*, 384 US 757, 769-70 (1966) (observing in the context of searches and seizures that the Fourth Amendment protects the twin "interests in human dignity and privacy").

The protections provided by these rights reflect the fundamental nature of the victim's concerns in this case. *See, e.g.*, Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of*

[3] [Practitioner's Note: If relevant to the facts of the case, consider adding the following additional authorities: *Michigan v. Lucas*, 500 U.S. 145, 150 (1991) (recognizing that rape shield laws "represent[] a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy"); *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989) (finding that "it is undeniable" that protecting the privacy of victims of sexual offenses is a "highly significant" state interest and that such an interest, under certain circumstances, may warrant the imposition of civil sanctions for the publication of the name of a victim of sexual assault)].

Privacy, 44 San Diego L. Rev. 745, 763 (2007) ("Privacy . . . is not the trumpeting of the individual against society's interests, but the protection of the individual based on society's own norms and value."); Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 Suffolk U. L. Rev. 467, 473 (2005) (observing that for many victims, "privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot.").[4]

Defendant's subpoena for [Name/Pseudonym's] mental health records directly implicates these rights of privacy, protection, and fair and respectful treatment. [*Include additional, case-specific information, including detailing protection-related concerns that are implicated by the potential disclosure of the victim's mental health records.*]

B. The District of Columbia Protects Mental Health Records With Confidentiality and Privilege Guarantees.

In addition, District of Columbia law explicitly provides statutory confidentiality and privilege protections for mental health records. *See, e.g.*, D.C. Code § 7-1201.02 (2001) (imposing a prohibition

[4] When victim privacy is threatened as a result of reporting crime, this invasion of privacy has a chilling effect on the reporting of crime, which negatively implicates the effective administration of justice and impairs victims' constitutional right to access the courts. *See, e.g.*, *Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) ("Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment."); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting that access to courts is a fundamental right); *see also* U.S. Dep't of Justice, Office of Justice Programs, Office for Victims of Crime, *New Directions From The Field: Victims' Rights and Services for the 21st Century* (1998), at 21, https://www.ncjrs.gov/ovc_archives/ directions/pdftxt/direct.pdf ("Privacy remains a critical concern of victims of sexual assault, and a primary factor in non-reporting."). Not only may the substantive content of requested materials contain information that endangers the safety of the victim and put [him/her/them] at risk of harm from a criminal defendant, but the forced disclosure of information itself may result in harm being imposed on the victim as a result of defendant's subpoena for private information. *See, e.g.*, Ann Bartow, *A Feeling of Unease About Privacy Law*, 155 U. Pa. L. Rev. PENNumbra 52, 61 (2007) (stating that individuals may be "harmed in a significant, cognizable way when their personal information is distributed against their will"). [Name/Pseudonym] should not be forced to face a Hobson's choice between accessing the criminal justice system in the aftermath of crime and safeguarding [his/her/their] rights to privacy, fair and respectful treatment, and protection. *See generally Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate "Secondary Victimization" in the Criminal Justice System*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst, Portland, Or), March 2013, *available at* http://law.lclark.edu/live/files/13798-polyvictims-victims-rights-enforcement-as-a-tool.]

on the disclosure of mental health information); D.C. Code § 14-307 (2014) (addressing the privileged and confidential nature of medical and mental health information).

In the context of mental health records, the protection of private information is paramount, as the "psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.'" *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). Because mental health services depend on the communication of sensitive matters in confidence, those seeking such services must be assured that their communications will not be disclosed unless constitutional requirements will permit no other outcome. *See Jaffee*, 518 U.S. at 18 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." (quoting *Upjohn Co. v. United States*, 499 U.S. 383, 393 (1981)); *Diggs v. United States*, 28 A.3d 585, 596 n.20 (D.C. 2011) (observing that "[o]ne's psychiatric history is an area of great personal privacy" (quoting *Velasquez v. United States*, 801 A.2d 72, 79 (D.C. 2002))).

The District of Columbia's longstanding privilege statute, D.C. Code § 14-307 (2014), prevents testimony or disclosure, "without the consent of the client, or of [his/her/their] legal representative" of "any information, confidential in its nature, that [has been] acquired in attending a client in a professional capacity and that was necessary to enable [the mental health professional] to act in that capacity, whether the information was obtained from the client or from [his/her/their] family or from the person or persons in charge of [him/her/them]." D.C. Code § 14-307 (a) (2014). A number of narrow exceptions to privilege are included in the statute. These exceptions are:

> (1) evidence in a grand jury, criminal, delinquency, family, or domestic violence proceeding where a person is targeted for or charged with causing the death of or injuring a human being, or with attempting or threatening to kill or injure a human being, or a report has been filed with the police pursuant to § 7-2601, and the disclosure is required in the interests of public justice; (2) evidence relating to the mental competency or sanity of an accused in criminal trials where the accused raises the defense of insanity or where the court is required under prevailing law to raise the defense sua

> sponte, or in the pretrial or posttrial proceedings involving a criminal case where a question arises concerning the mental condition of an accused or convicted person; (3) evidence relating to the mental competency or sanity of a child alleged to be delinquent, neglected, or in need of supervision in any proceeding before the Family Division of the Superior Court; (4) evidence in a grand jury, criminal, delinquency, or civil proceeding where a person is alleged to have defrauded the District of Columbia or federal government in relation to receiving or providing services under the District of Columbia medical assistance program authorized by title 19 of the Social Security Act, approved July 30, 1965 (79 Stat. 343; 42 U.S.C. § 1396 et seq.), or where a person is alleged to have defrauded a health care benefit program; or (5) evidence in a criminal or delinquency proceeding where a person is charged with an impaired driving offense and where the person caused the death of or injury to a human being, and the disclosure is required in the interest of public justice.

D.C. Code § 14-307 (b) (2014).

[*Summarize the relevant facts of the current case, including facts demonstrating that the victim did not consent to or otherwise waive the privilege and that none of the statutory exceptions to privilege apply.*][5]

[5] [Practitioner's Note: Consider adding language similar to the following, if the "interests of justice" exception to privilege is asserted or potentially at issue in the case: Defendant has further failed to meet [his/her/their] burden of demonstrating that the records fall within the interests of justice exception to privilege. *See* D.C. Code § 14-307 (b)(1), (5) (2014). The statute does not provide a definition of "interests of justice." Based on the privacy rights at stake, case law, and the policy underlying the privilege, this exception is meant to be narrowly construed. Bare assertions by defendants that victim credibility is at stake or that potentially exculpatory information may exist within the protected materials are insufficient to justify disclosure of privileged records for *in camera* review. *See, e.g., Hammon v. United States*, 695 A.2d 97, 105-106 (D.C. 1997) (finding no error in the denial of a pretrial request by defendant for an *in camera* inspection of a juvenile witness's mental health records where defendant only proffered "vague allegations" and hearsay to support the request and, consequently, failed to overcome the witness's privacy interests); *Brown v. United States*, 567 A.2d 426, 427 n.5 (D.C. 1989) (referencing the Supreme Court's decision in *Ritchie* in requiring defendants to "make some showing to the trial court that the record sought contains material evidence" before the court may "examine the record *in camera*"). To find otherwise would eviscerate the privilege protections that the District of Columbia has long bestowed upon this type of information, and jurisdictions nationally have affirmed that defendants must meet a threshold showing before privileged information can be reviewed *in camera*. *See., e.g.,N.G. v. Superior Court*, 291 P.3d 328, 337 (Alaska Ct. App. 2012) (summarizing case law nationally); *State v. Kellywood*, 433 P.3d 1205, 1208 (Ariz. Ct. App. 2018) (observing that defendant's burden of demonstrating a "reasonable probability" that privileged records would contain exculpatory material "is not insubstantial"; recognizing that *in camera* review "represents a significant intrusion" on victim privacy; and affirming that the "mere possibility" a victim could have said something exculpatory "is not, as a matter of law, sufficient by itself to require" production of the records sought by defendant); *State v. Johnson*, 102 A.3d 295, 307-309 (Md. 2014) (concluding that defendants bear the burden of establishing "a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense"—a showing that requires more than a "speculative assertion" and which also requires defendant to "be able to point to *some fact* outside those records that makes it *reasonably likely* that the records contain exculpatory information" (emphases in original) (quoting *Goldsmith v. State*, 651 A.2d 866, 877 (Md. 2013))); *State v. Gonzales*, 125 P.3d 878, 887 (Utah 2005) (providing that only if "a defendant can show with reasonable certainty that exculpatory evidence exists which would be favorable to [the] defense" does *Ritchie* give defendant "the right to have the

Courts may not read additional exceptions into the privilege that the legislature did not explicitly create. *See Simpson v. Braider*, 104 F.R.D. 512, 521 (D.D.C. 1985) (analyzing D.C. Code § 14-307 and concluding that Congress would have included language to provide an additional exception to the physician-patient privilege if it had intended the privilege not to apply in other circumstances).[6]

[Name/Pseudonym]'s constitutional and statutory rights and privileges require the Court to protect the confidentiality of [his/her/their] mental health records and prohibit the compelled disclosure of [Name/Pseudonym]'s records unless federal constitutional guarantees demand otherwise. In this case, no countervailing federal constitutional interests exist to overcome these rights.

C. Defendant has no Countervailing Constitutional or Statutory Right to Disclosure of the Victim's Mental Health Records.

In contrast to crime victims' constitutional and statutory rights, criminal defendants have no general constitutional right to pretrial discovery under federal law. *See, e.g.*, *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general federal constitutional right to discovery in a criminal case, and *Brady* did not create one"); *Johnson v. United States*, 537 A.2d 555, 558 (D.C. 1988) (quoting

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otherwise confidential records reviewed by the court to determine if they contain material evidence" (quoting *State v. Cardall*, 982 P.2d 79, 85 (Utah 1999))).]

[6] [Practitioner's Note: Any disclosure of a crime victim's records to which the victim has not consented—including disclosure to a court for *in camera* review—is a violation of the victim's privacy and may have a chilling effect on this and future victims' access to healthcare and the courts. Consequently, any procedure that results in *in camera* review of victim information that occurs prior to an opportunity for the victim to object to this disclosure or review, violates victims' rights. *Cf. State v. Fields*, No. 1 CA-CR 16-0483, 2017 WL 3765289, at *2 (Ariz. Ct. App. Aug. 31, 2017) (unpublished) (recognizing that *in camera* review is an infringement on the victim's rights and holding that the superior court did not err in concluding that defendant "had failed to provide a sufficiently concrete basis to justify production of the victim's counseling records for an in camera review"); *People v. District Court*, 719 P.2d 722, 726-27 (Colo. 1986) (en banc) (observing that "it is of paramount importance to assure a victim of sexual assault that all records of any treatment will remain confidential unless otherwise directed by the victim" and finding no error in the trial court's refusal to conduct an *in camera* review of these records—or to allow defendant to access these records—based on speculation regarding the contents); *State v. Pinder*, 678 So. 2d 410, 415 (Fla. Dist. Ct. App. 1996) (internal citation omitted) (recognizing that even *in camera* disclosure "to the trial judge (and to court reporters, appellate courts and their staff) 'intrudes on the rights of the victim and dilutes the statutory privilege'"); *People v. Foggy*, 521 N.E.2d 86, 92 (Ill. 1988) (noting that even *in camera* review "would seriously undermine the valuable, beneficial services of [rape crisis support providers]"); *State v. Kalakosky*, 852 P.2d 1064, 1076 (Wash. 1993) (en banc) (recognizing that a victim's "privacy interests are infringed" by *in camera* reviews of a victim's records; affirming that before a victim's privacy is violated in this way, Washington law requires defendants to make a showing of need; and upholding the trial court's decision not to conduct an *in camera* review of the victim's counseling records).]

Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (plurality opinion), and adopting the plurality's refusal to "transform the Confrontation Clause into a constitutionally-compelled rule of pretrial discovery"). Nor do defendants have an established federal constitutional right to pretrial discovery of a crime victim's personal records under the Confrontation Clause. *See, e.g., Ritchie*, 480 U.S. at 52 (plurality opinion) (emphasizing that the right to confront is a trial right and that the Court has never held that a defendant has a right to pretrial discovery under the Confrontation Clause); *Brown v. United States*, 567 A.2d 426, 427 n.5 (D.C. 1989) (referencing the Supreme Court's decision in *Ritchie* in requiring defendants to "make some showing to the trial court that the record sought contains material evidence" before the court may "examine the record *in camera*"); *Johnson*, 537 A.2d at 558 (quoting *Ritchie*, 480 U.S.at 52 (plurality opinion) and adopting the plurality's position regarding the Confrontation Clause being a trial right).

Similarly, a criminal defendant does not have an established constitutional right to pretrial discovery from *non-government* record holders under either the Compulsory Process Clause or the Due Process Clause. *See Ritchie*, 480 U.S. at 55, 57-58 (majority opinion) (recognizing that the Court "has never squarely held that the Compulsory Process Clause guarantees the right to [pretrial discovery]" and declining to reach the issue; but concluding that the Due Process Clause could provide the basis for the requested discovery in that case because, *inter alia*, a government agency had possession or control of the records at issue); *Hammon*, 695 A.2d at 105 n.16 (adopting the analysis in *Ritchie*).

In the District of Columbia, criminal pretrial discovery is governed by the Rules of Criminal Procedure and the constitutional confines of *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); *Weems v. United States*, 191 A.3d 296, 300-01 (D.C. 2018) (discussing

Rule 16 and concluding that the duties of preservation and disclosure "extend only to evidence that actually is within the possession, custody, or control of the government").

Because pretrial discovery under the laws of the District of Columbia is limited to that provided by statute and by *Brady*, trial courts do not have unbounded authority to order third parties to provide defendants with pretrial access to all materials or information they may wish to obtain. *See, e.g*, *Brown*, 567 A.2d at 428 (observing that the rules governing pretrial subpoenas were "not intended to provide an additional means of discovery" (quoting *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951))); *cf. Nelson v. United States*, 649 A.2d 301, 308 (D.C. 1994) (finding no governmental obligation to produce hospital records that were "not in possession of the prosecutorial arm of the federal government, nor in the possession of the government at all"); *Myers v. United States*, 15 A.3d 688, 690-92 (2011) (holding that video recording made and kept by WMATA was never in the possession of the government for purposes of the rules governing disclosures in criminal cases and, therefore, was not subject to discovery).

In addition, the Rules governing Criminal Procedure in the District of Columbia provide explicit safeguards to prevent defendants from issuing subpoenas to obtain information about victims from third parties. *See* D.C. Super. Ct. Crim. R. 17 (c) (addressing the procedure to request a subpoena for the production of documents from third parties). Regarding private victim information, specifically, Rule 17 requires that any subpoena "requiring the production of personal or confidential information about a victim may be served on a third party only by court order." D.C. Super. Ct. Crim. R. 17 (c)(3). The court must "require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object." *Id.; see also Brown*, 567 A.2d at 428 (reiterating that "[w]hen D.C. Code § 14-307 applies and the exception relied upon is that contained in § 307 (b), *prior* leave of the court is required before any subpoenas may be served by anyone for the production of material covered

by that statute"); *cf. Y.J.K. v. D.A.*, No. DRB-1911-04, 2005 WL 2220021, at *5 (D.C. Super. Ct. Sept. 9, 2005) (citing constitutional privacy rights and statutory privilege protections in concluding that a parent in a custody proceeding had not "presented or proffered sufficient grounds to override the privilege" protecting certain mental health records relating to the other parent and denying the request for the order requiring production).

Here, Defendant has failed to provide the showing necessary to overcome the victim's constitutional and statutory rights and require production of the victim's mental health records for *in camera* review. [*Insert case-specific facts and arguments here regarding the nature of the showing, if any, offered by defendant.*][7] Defendant's attempt to obtain the victim's privileged mental health records amounts to nothing more than an unauthorized "fishing expedition." *Brown*, 567 A.2d at 428 (quoting *Cooper v. United States*, 353 A.2d 696 (D.C. 1976)).

Consequently, when the Court analyzes [Name/Pseudonym]'s federal constitutional and statutory rights in conjunction with Defendant's lack of any articulated countervailing rights, the Court must conclude that Defendant is not entitled to the mental health records sought and grant this motion to quash.

CONCLUSION

This case involves a victim with a reasonable expectation of privacy in [his/her/their] mental health records and both constitutional and statutory rights that are implicated by the potential disclosure of these records. In contrast, Defendant has no federal constitutional or statutory right to pretrial discovery of the victim's privileged mental health records and is limited in [his/her/their] ability to compel pretrial disclosure of information from third parties, including victims. To require

[7] [Practitioner's Note: Courts in the District of Columbia have repeatedly affirmed that "[e]vidence regarding mental illness is relevant only when it may reasonably cast doubt on the ability or willingness of a witness to tell the truth." *Tyer v. United States*, 912 A.2d 1150 (D.C. 2006) (quoting *United States v. Smith*, 316 U.S. App. D.C. 199, 204, 77 F.3d 511, 516 (1996)).]

[Name/Pseudonym] to disclose personal and private information based on Defendant's mere speculation that something in those records might be useful to a generalized defense would eviscerate [his/her/their] constitutional and statutory rights. For the foregoing reasons, [Name/Pseudonym] respectfully requests that this Court quash defendant's subpoena for [his/her/their] mental health records.

Dated: [DATE]

Respectfully submitted,

_____

[Attorney, Esq.] ([State] Bar # [number])
[Firm/Organization]
[address]
[phone number]
[email address]

Counsel for the Crime Victim