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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

STATE OF ARIZONA,)	
)	
Plaintiff)	
)	NO. X
)	
v.)	
)	
)	VICTIM'S OBJECTION TO
)	DEFENDANT'S REQUEST FOR
)	ORDER COMPELLING STATE TO
)	OBTAIN AND DISCLOSE
)	VICTIM'S PRIVILEGED
)	PSYCHOLOGICAL RECORDS AND
)	SCHOOL RECORDS
)	
X ,)	(Honorable Judge X)
)	
Defendant,)	
)	
X ,)	
<u>Minor Victim.</u>)	

COMES NOW, the Minor Victim of this crime, by and through the undersigned counsel,
hereby moves this Honorable Court to deny the Defendant's request for an order compelling the
State to obtain and disclose the Crime Victim's counseling records and elementary school

records. Upon information and belief, these records are not in possession of the State.¹ Such a request is prohibited per the Arizona Rules of Evidence and constitutional rights under the Arizona Victim's Bill of Rights, the Arizona Constitution, Art. 2 §2.1 and the United States Constitution as well as Arizona case law as demonstrated by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 25th day of April 2003.

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¹ Since the requested documents are not in the possession of the State, defendant's citation of *Brady v. Maryland*, 373 U.S. 83 (1963) is inapplicable.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Defendant, in his April 15, 2003 *Motion to Compel Discovery*, states, “[w]hen a victim – or her spokesperson – raises victim’s rights as a privilege against discovery, a defendant’s due process rights trump that claim.” citing *State ex. Rel. Romley v. Superior Court (Roper, real party in interest)*.² Such an interpretation of the Court of Appeals holding misrepresents, misapplies and broadens the Court’s very fact-intensive and specific holding beyond recognition. Under the Arizona Constitution, Arizona statutory and case law, the Defendant’s request ought to be denied.

STATEMENT OF THE FACTS

The Defendant has been indicted for three counts of sexual conduct with a minor, one count of child molest, one count of attempted child molest and one count on child abuse. The victim is a X-year-old minor. In addition, there is currently an Order of Protection as well as Conditions of Release in place prohibiting the Defendant from contacting the minor victim.

ARGUMENT

I. The victim is under no obligation to disclose privileged and constitutionally protected information to the defense.

The case law in Arizona is very clear on the issue of whether or not a defendant is entitled to a victim’s medical records. In *State ex. Rel. Romley v. Superior Court (Roper, real party in interest, hereinafter Roper)*, 172 Ariz. 232, 238-39, 839 P.2d 445, 451-52 (App. 1992), the Court held that if the victim’s records have not been made available to the prosecution (or any agent of the State such as law enforcement officers), then the

² Defs. Mt. at 5, 5-6.

Victim has the absolute right to refuse the defendant's discovery request under the Victim's Bill of Rights. "...[W]e hold that under the Victim's Bill of Rights, the victim may assert the right and refuse to make available to the defense a victim's medical records." *Id.* at 238.

The Arizona Constitution provides:

To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.

.....

5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.

.....

11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.

Ariz. Const. Art. II, § 2.1(A).

The Court in *Roper* held that the victim's medical records came within the phrase "other discovery request", but also held that under the Victim's Bill of Rights, the victim may assert the right and refuse to make available to the defense a victim's medical records. In the instant case, the victim is now asserting her privilege pursuant to the Victim's Bill of Rights to refuse such a request.

In *Roper*, the real party in interest was charged with aggravated assault, a Class 3 felony. The State alleged she used a knife to cause physical injury to her husband. The defendant asserted the affirmative defense of self-defense. The defendant filed a motion

requesting the judge to compel the victim/husband to make available to the defense for copying “all of his past and present medical records from any institution in any jurisdiction.” According to the defense motion, the victim had received psychiatric treatment over the years for a multiple personality disorder. The motion alleged that, at the time of the assault, the victim “was manifesting one of his violent personalities.”

In addition, the record demonstrated that the defendant had called *911* at the time of the incident asking for help because “her husband was beating her and threatening to kill her with a knife.” *Id.* at 237. Also, the police report indicated that the victim had been arrested three times for assaulting the defendant and was convicted in Florida for assaulting the defendant. *Id.*

In this case, the defendant has been indicted for three counts of sexual conduct with a minor, one count of child molest, one count of attempted child molest and one count on child abuse. The defendant claims that all of the victim’s allegations are, in essence, a fabrication. A doctor treated the victim and those medical records, as well as any statements made by the doctor, have been provided to the defense. The defense has received transcripts from interviews with ChildHelp. The defense has photos from the law enforcement investigation. While the defendant may disagree with the doctor’s conclusions regarding opinions on how the victim was injured, it does not give him the right to harass and abuse the victim further by “fishing” through all of the victim’s psychological and school records. (Def. Mot. At 2, 18-23).

The defendant is currently prohibited from contacting the minor pursuant to an Order of Protection as well as Conditions of Release that prohibit contact. Disclosing information contained within the vague and overbroad request (Def. Mot. At 4, 12-15) for

the victim's elementary school records would reveal the victim's current location as well as other identifying information that could further harm the minor victim.

Compelling such disclosure would be contrary to public policy and may result in victims foregoing much needed counseling if the victim knows that their perpetrator can rummage through the victim's innermost thoughts and fears regarding the crime. Such a result may also implicate federal constitutional privacy concerns. *See, e.g. Whalen v. Roe*, 429 U.S. 489, 599-60 (1977) (holding that the Fourteenth Amendment's Due Process Clause includes the fundamental right in "avoiding disclosure of personal matters."); *Florida State v. B.J.F.*, 491 U.S. 524, 533 (1989) (stating that privacy rights are "plainly rooted in the traditions and significant concerns of our society.").

It is simply inconsistent with the victim's constitutional rights to compel her to disclose her intimate counseling records to review, either by the court or the accused sexual abuser and his counsel. Such an approach would truly victimize the victim once again.

The minor victim in this case also asserts her psychologist-patient privilege. *See Blazek v. Superior Court*, 177 Ariz. 535, 869 P.2d 509 (Ct. App. 1994) (because plaintiff saw psychologist for purposes of receiving treatment, it appeared that plaintiff's records would be privileged).³ A.R.S. § 32-2085 states that such a privilege may be waived only when the patient does so in writing or by in-court testimony, or when the patient pursues a course of conduct inconsistent with observance of the privilege. *Bain v. Superior Court*, 148 Ariz. 331, 714 P.2d 824 (1986).

³ It is important to note that the records at issue are X's – not the state's. X is not a party to this criminal case. Rather, her role stems from the fact that she reported a crime against her to the proper authorities. She has now been subpoenaed by the state as their witness for the trial. She does not forfeit her right to maintain the confidentiality of her records by virtue of honoring her civic responsibilities to report crimes and testify when called as a witness.

In the instant case, the Defendant rightly recognizes in his motion that the Victim's Bill of Rights is implicated. (Def. Mot. 5, 5-6). Unfortunately, the Defendant spends the remainder of his motion attempting to find creative ways to justify getting around this constitutional provision.

A crime victim's refusal to submit to an interview or any other discovery request *does not* deprive the defendants of due process or fundamental fairness. *Norgord v. State of Arizona ex rel. Berning*, 201 Ariz. 228, ___, 33 P.3d 1166, 1171 (App. 2001); *State v. O'Neil*, 172 Ariz. 180, 182, 836 P.2d 393, 395 (App. 1991). The victim's right to refuse defense discovery requests does not affect the defendant's right to confront and cross-examine witnesses, which can be fully exercised at trial. If the victims invoke the right, it *only* deprives the defendants of a method of discovery. There is no federal or state constitutional right to discovery.

Specifically, in *State v. O'Neil*, the respondent trial court ordered, per defense counsel's request, the state to record all conversations with the victims and to provide defense counsel with transcripts of the conversations even though the victims had invoked their right *not* to be interviewed by the defense. According to the court, such an order "...runs squarely afoul of the Victim's Bill of Rights." *Id.* at 181. The Arizona Court of Appeals, Division 2, concluded that the trial court abused its discretion and exceeded its authority. *Id.* In vacating the order the court noted that:

...we violate *no right* of the real party in interest since it is well established that there is neither a federal nor a state constitutional right to pretrial discovery. *Weatherford v. Bursley*, 429 U.S. 545, 97 S. Ct. 837, 51 L.Ed.2d 30 (1977); *State v. Warner*, 168 Ariz. 261, 812 P.2d 1079 (App. 1990). After *Warner*, it should be clear that the Victim's Bill of Rights abrogated a defendant's right under Rule 15 to interview or otherwise seek discovery from an unwilling victim.

Id. at 182 (*emphasis added*).

In *Norgord*, the accused brought motion to compel a defense interview with the alleged victim. The Court of Appeals held that the refusal of the alleged victim to submit to an interview by the accused did not deprive the accused of due process nor his right to cross-examination. *Norgord*, 201 Ariz. 228, 33 P.3d 1166 at 1171 (App. 2001) citing *State v. Riggs*, 189 Ariz. 327, 331-32, 942 P.2d 1159, 1163-64 (1997) and *O'Neil*, 172 Ariz. 180, 182, 836 P.2d 393, 395 (App. 1991).

II. Nothing in the criminal discovery rules authorizes the trial court to require the State to create or produce evidence, specifically privileged records, which it must then disclose.

The *O'Neil* court also specifically held that "...nothing in the criminal discovery rules authorizes the trial court to *require the state to create or produce evidence*, specifically statements, which it must then disclose." *Id.* at 181. The defendant cannot make the State its agent in order to gather evidence from the victim. In this case, the defense is attempting to force this Court to do exactly that. According to *Roper*, if the records in question have not been made available to the prosecution, then the victim has the right to refuse defendant's discovery request under the Victim's Bill of Rights. *Roper*, 172 Ariz. 232 at 239.

However, if this Court determines that X's privilege has somehow been waived, it must then, and *only* then, make the following *additional* findings, *in camera*, pursuant to *Roper*:

1. Which portions of the medical records, if any, are *essential* to the presentation of the defense of fabrication?

2. Which portions of the medical records, if any, are essential to the determination of the ability of the victim to perceive, recall, and/or accurately relate the events of the day in question.

Therefore, in order for the court to override the victim's constitutional rights, there must be a determination that (1) the psychological records are indeed exculpatory and (2) that the records are either *essential* to the presentation of the defendant's theory of the case or somehow necessary for the impeachment of the victim **relevant to the defense theory**.

In this case, the defense has only stated that the allegations against the Defendant arise out of a bitterly contested divorce and custody battle and that they are false. (Def. Mot. 1-2, 25-26; 1-11). It is clear from the medical records already provided to the defendant that there was no recantation between the victim's statements to her treating physician and her statements to law enforcement. In addition, the defense has only established that he believes she has fabricated the crime, which even if this court finds meets the foundation for the disclosure of the records, still does not meet the requirement for showing how the necessity of disclosing all counseling records – not initial disclosure - for her treatment which is not associated with any defense theory.

CONCLUSION

The Victim's assertion of her constitutional rights as a victim of crime and her psychologist-patient privilege prevents the defense from obtaining X's counseling records and her elementary school records. The defense has failed to establish any nexus of information showing that there is a necessity or need for any of the records requested. As a matter of law and public policy, the Victim respectfully requests this Court to toss in

the anchor and deny Defendant's fishing expedition for access to X's counseling and school records and permit this child to continue her treatment on her road to recovery without fear of further harassment and abuse from the defendant.

RESPECTFULLY submitted this 25th day of April, 2003

VICTIMS LEGAL ASSISTANCE PROJECT (VLAP)

BY _____

X

Attorney for Crime Victim

Copies of the foregoing faxed or hand delivered
this 25th day of April 2003:

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