

## Crime Victim Law Update

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*In re K.K.*, 756 F.3d 1169 (9th Cir. 2014). The petitioner-victim—a victim of mailbox theft—filed a writ of mandamus under the Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA), appealing the district court's denial of motions to quash two subpoenas duces tecum. Defendant sought the subpoenas under Federal Rule of Criminal Procedure 17(c)(3) and the district court found the information sought met the standard for issuing a Rule 17(c) subpoena. The Ninth Circuit Court of Appeals denied the writ, finding that the district court did not abuse its discretion or commit legal error in denying the motions to quash. The court found that the district court "appropriately balanced the victim's privacy interests against the defendant's right to 'investigate the case and prepare a defense for trial.'" The court did hold, however, that "given the sensitive nature of the documents sought, production and disclosure of the documents . . . shall initially be limited to the district court" for in camera review and analysis of whether disclosure to defendant would be "unreasonable or oppressive" under Rule 17(c) (2).

*Ward v. Uribe*, No. ED CV 13-1976 GAF (MRW), 2014 WL 2533819 (C.D. Cal. June 4, 2014). Defendant was convicted of extortion and attempted extortion after trying to extort money from the victim in exchange for compromising photos of the two engaged in sexual acts. The victim recorded calls with

defendant during which defendant explicitly blackmailed the victim. Defendant filed a habeas petition alleging, among other things, that the state committed a *Brady* violation by improperly withholding impeachment evidence regarding the victim's previous sexual offenses. The court found no *Brady* violation because there was no evidence that the prosecutor failed to disclose this evidence to the defense. Further, defendant did not explain how disclosure of this information could have been material in light of the overwhelming evidence against defendant at trial. "In light of that undeniably powerful proof, evidence regarding an additional example of the victim's sexual indiscretions was surely cumulative and not material" because "questions about the victim's believability were clearly insignificant to the actual issue of Petitioner's guilt at trial." Accordingly, defendant failed to demonstrate a reasonable probability of a different outcome based on the alleged *Brady* violation. Additionally, defendant argued that his constitutional rights were violated because the complaint named the extortion victim as "John Doe" rather than by his actual name. The Sixth Amendment requires that a defendant be informed of the nature and the cause of criminal charges to be presented at trial. However, there was no basis to conclude that the "Doe" designation deprived defendant of notice of the nature of the criminal charges or the victim's actual identity. Defendant was present when the victim testified at the preliminary hearing and at

trial and received discovery giving the victim's real name, and was otherwise aware of the victim's identity. Accordingly, the petition was denied and dismissed with prejudice.

*United States v. Crutchfield*, No. 5:14-cr-00051-DLJ (PSG), 2014 WL 2569058 (N.D. Cal. June 6, 2014). The government challenged the district court's issuance—at defendant's request—of a group of ex parte subpoenas pursuant to Federal Rule of Criminal Procedure 17. The government argued that the court violated Rule 17's protections requiring notice to the victim before the issuance of subpoenas requiring the production of personal or confidential information about the victim, and sought: (1) disclosure of copies of the subpoenas issued; (2) a temporary stay of the date of compliance with the subpoenas; and (3) a reasonable time in which to file a motion to quash the subpoenas on behalf of the victims. Defendant argued in response that the subpoenas were properly issued and that the government does not have standing to object to or quash the subpoenas. The court granted the government's motion in part, holding at the outset that the Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA) explicitly recognizes government standing to assert victims' rights. However, the court explained that the government is mistaken about Rule 17's notice requirements as notice to the victim is not required where defendant has proven to the court the existence of "exceptional circumstances," which include where the information sought would reveal defense strategy. As such, the court denied the government's request for disclosure of the subpoenas without prejudice to renewal after the court has resolved the "exceptional circumstances" issue, but granted the request for a temporary stay of the date of compliance with the subpoenas. The court also rejected the government's request for a reasonable time in which to bring a motion to quash without prejudice to renewal also pending resolution of the "exceptional circumstances" issue. The court then ordered that defense counsel submit an ex parte brief to the court outlining the exceptional

circumstances that justify foregoing the Rule 17 notice requirements, and "[u]pon reviewing the evidence presented in camera, the court will make a final determination." Lastly, the court noted the government's intent to appeal the court's decision to conduct the exceptional circumstances analysis ex parte.

*Barkley v. Beard*, No. C 11-1269 CW (PR), 2014 WL 991094 (N.D. Cal. Mar. 11, 2014). Defendant was convicted of a number of offenses arising out of sexual contact with a child-victim. After exhausting his state remedies, defendant filed a pro se petition for a writ of habeas corpus, alleging, *inter alia*, a due process violation arising from the exclusion of impeachment evidence, a due process violation arising from the court's admission of evidence of child sexual abuse accommodation syndrome (CSAAS) and the court's instruction relating to that evidence, and a due process violation arising from the trial court's decision not to disclose evidence from the victim's confidential file. The federal court found that the trial court did not act in an objectively unreasonable fashion in limiting evidence that had little probative evidence and that defendant's right to present a defense was not unconstitutionally impaired. The court further found that the jury instruction issued regarding the CSAAS evidence was not objectively unreasonable. With respect to the victim's juvenile court file and confidential psychological records, the trial court conducted an in camera review of the files and ordered the limited disclosure of one page from the victim's psychological records to defendant. In addition to the trial court's in camera review, the court of appeals reviewed the files and found that defendant had already received all information material to his defense. Consequently, the federal district court held that defendant had received "all of the process to which he was constitutionally due." For this and other reasons, the habeas petition was denied.

*United States v. Morrill*, Cr. No. 13-10147-MLW, 2014 WL 1381449 (D. Mass. Apr. 4, 2014) (slip copy). Defendant pleaded guilty to

one count of distribution of child pornography. Among the materials submitted for the court's consideration in anticipation of the sentencing hearing were eight series of Victim Impact Letters (the "Letters") that were written by the victims depicted in some of the child abuse images distributed by defendant, and also some written by family members of the victims. After being redacted to remove all identifying information, the Letters were provided to the court directly by Probation, but were not docketed for the public record. The court *sua sponte* ordered the parties to report their positions as to whether the Letters should be docketed and made public. Defendant took no position on the issue and the government argued that the Letters should only be made publically available with the consent of the victims who authored them. Consent had been obtained for four of the eight Letters. The court found that the Letters were subject to the presumptive, rebuttable right of public access to judicial records. The court then weighed the victims' privacy rights against the public's right of access and held that the Letters whose authors had consented were to be made a part of the public record. The court concluded that these four Letters formed a representative sample that would provide the public with a "reliable understanding" of the information used in defendant's sentencing. The remaining Letters were sealed by the court and not made public. The court clarified that requests to release them in the future were not precluded although "request[s] to unseal these series of Letters will be considered after the parties are given notice and an opportunity to be heard."

*Doe v. Oshrin*, 299 F.R.D. 100 (D. N.J. 2014). A victim depicted in child abuse images filed suit asserting federal and state tort claims and seeking civil damages from defendant. The victim moved to proceed by pseudonym, arguing that disclosure of her identity would exacerbate the pain and embarrassment she suffered and will continue to suffer and that disclosure of her identity could lead to pedophiles and child molesters locating her and revictimizing her.

The court considered a multifactor balancing test and after conducting a fact-intensive inquiry determined that the use of a pseudonym was appropriate, "particularly in light of the highly sensitive, personal nature of the alleged harm, the public interest in maintaining the confidentiality of Plaintiff's identity in light of this sensitive subject matter, and the risk of continued and/or future harm in the event that Plaintiff's identity is publicly disclosed." These considerations demonstrated a reasonable fear of severe harm sufficient to outweigh the public's interest in open judicial proceedings. Consequently, the court ordered that the victim's motion to proceed by pseudonym be granted.

*United States v. Belfort*, No. 98-CR-0859, 2014 WL 2612508 (E.D.N.Y. June 11, 2014). Defendant pleaded guilty to securities fraud, money laundering, and fraud in connection with numerous public offerings. A producer of the daily television news program *Inside Edition* (movant) filed a letter with the court requesting a copy of the names of the victims of defendant's crimes and the amount of restitution owed to each victim. The government opposed the request, citing the need to protect the victims' privacy. The court began by concluding that the document submitted to it by the government containing the victims' names and addresses and listing the amount of restitution each victim was entitled to receive "constitutes a judicial document" because of its relevance to the sentence the court imposed on defendant—therefore the presumption of the First Amendment right of the public to access this document applies to it. The court then addressed the weight that the presumption deserves, concluding that it does not receive significant weight as the "document at issue here did not play a substantial role 'in determining the litigants' substantive rights' and does not implicate 'conduct at the heart of Article III.'" The court further explained that although the "number of victims and the total amount they lost played an important role in [the court's] determination of the sentence, [ ] the specific

names and addresses of individual victims did not.” Citing the victims’ rights to privacy and to be treated with fairness, dignity, and respect under the Crime Victims’ Rights Act, 18 U.S.C. § 3771 (CVRA), the court further concluded that “[p]rotecting the victims’ privacy in this context presents a strong countervailing interest to the presumption of access to this document.” The type of information contained in the document at issue—the court determined—is traditionally viewed as private information, and “[a]s for the type of injury that the victims could potentially suffer if their names and addresses are made publicly available, there is embarrassment at being identified as a victim of a boiler-room scam, media contacts that may well be unwelcome, and perhaps worst of all, further victimization by fraudsters.” The court consequently denied movant’s request for the names of the victims and the amount of restitution owed, based on “the traditionally non-public nature of the specific information sought and the significant potential harm that could befall the already once-defrauded victims.”

*J.D. v. Hegyi*, 335 P.3d 1118 (Ariz. 2014). When victim-petitioner was 16-years-old, she accused her step-father of sexual abuse and the state initiated criminal proceedings against him. Pursuant to Arizona’s victims’ rights laws, mother and daughter refused to submit to a pretrial defense interview. Trial was continued several times and during the pendency of the proceedings, the victim-petitioner turned 18-years-old. Defendant then filed a motion to compel the mother to submit to a defense interview on the basis that Section 13-4433(G), which allows a parent to exercise victims’ rights on behalf of a minor-victim, limits the exercise of those rights until the child turns 18-years-old. The superior court granted defendant’s motion and victim-petitioner and her mother sought special action relief in the court of appeals. The court of appeals held that a victim reaching the age of majority extinguishes the parent’s right to refuse a defense interview, but the parent cannot be compelled to reveal any information

received while the victim was still a minor. Victim-petitioner and her mother appealed the decision to the Arizona Supreme Court. In resolving the issue, the court looked beyond the plain language of the statute and relied on the context, subject matter, historical background, and purpose and effect of Section 13-4433(G). The court reasoned that the court of appeals decision would invite collateral litigation over the scope of permissible questioning, and would be in tension with the fact that the legislature rejected a proposed amendment that would have allowed defense interviews of parents who were exercising the rights of minor children who were also witnesses in the case. The court then concluded that allowing a compelled defense interview of a parent who formerly exercised victims’ rights on behalf of a child solely based on the child reaching the age of majority, is contrary to the purposes of Section 13-4433(G), the statutory scheme as a whole, and the Victims’ Bill of Rights. As such, the court held that “a parent who exercises victims’ rights on behalf of a minor child is entitled to refuse a defense interview through the final disposition of charges, even if the child earlier turns eighteen.” The court then vacated the court of appeals opinion and the superior court order and remanded the case for further proceedings consistent with the opinion.

*People v. Eagle*, No. E054831, 2014 WL 667654 (Cal. Ct. App. Feb. 21, 2014). Defendant was convicted of committing a lewd and lascivious act on a child under the age of 14. Defendant appealed, arguing, *inter alia*, that the court erred in excluding evidence indicating that the victim may have been subjected to sexual abuse before defendant’s contact with her, that evidence of the victim’s prior interviews was admitted in violation of his Sixth Amendment right to confront the victim, and that a videotaped interview and an investigating officer’s testimony should have been excluded as inadmissible hearsay. The court of appeals affirmed the trial court’s exclusion of possible prior sexual abuse of the child-victim, finding that any possible prior act was not similar in any way to the abuse

alleged to have been committed by defendant and finding that the evidence regarding the nature of the abuse was “sketchy and unconfirmed.” Further, the court of appeals held that, to the extent any slight probative value could be gleaned from the evidence, the trial court could reasonably have concluded that this value would have been substantially outweighed by the probability of confusing the issues or misleading the jury. The court of appeals further rejected defendant’s argument that admission of the prior interviews and testimony about the interview violated his confrontation rights because the child-victim was unable to remember him or the incidents of abuse. After analyzing case law from a number of jurisdictions, the court of appeals found that the child-victim remembered talking with the forensic interviewer and remembered telling the truth to the interviewer. The court rejected defendant’s attempt to conflate a witness’s appearance for Confrontation Clause purposes with the a person’s unavailability as a witness for hearsay admission purposes, citing the Supreme Court in finding that one can be both present and subject to cross examination under the Sixth Amendment while still being deemed “unavailable” for hearsay purposes. The court of appeals similarly found no other errors in the trial court’s admission of evidence and affirmed the judgment.

*State v. Shaw*, 90 A.3d 936 (Conn. 2014). Defendant was convicted of sexual assault and risk of injury to a child. He appealed, arguing that the trial court erred in excluding evidence that alleged the minor victim had sexual intercourse with her older brother three days prior to the assault under rape shield. The court agreed. It first found that the evidence was relevant because the allegations, if proven, would allow the jury to conclude that the victim’s injuries were not caused by defendant and would go to a motive for fabricating the rape. The allegations consisted of defendant testifying he observed the victim and her brother together in an awkward position; that he had taped them and heard moaning; that the victim then told

defendant she had sex with her brother; and that when defendant told her mother she bought video surveillance equipment. Although the state argued that defendant failed to allege facts that would support a finding that the alleged contact with the victim and her brother would cause the sort of injuries sustained by the victim, the court stated that the rape shield statute “encompasses inferential as well as direct evidence of sexual conduct. Consequently, the defendant was not required to allege more detailed facts or rebut possible contrary evidence or testimony in order to satisfy his burden of showing that the proffered evidence was relevant and admissible.” The court also found that the evidence would not be more prejudicial than probative, noting that “it will almost always be deemed more probative than prejudicial because it implicates the defendant’s constitutional right of confrontation.” The court therefore concluded that the trial court abused its discretion and that that if the evidence had been admitted the outcome of the trial could have been different. The court reversed the judgment and remanded for a new trial. On retrial, testimony by the victim, her mother, and her brother regarding the alleged prior sexual conduct between the victim and her brother “may only be elicited after a proper foundation has been established, most likely during the defendant’s case-in-chief.” The dissent stated that this opinion eviscerated protections of rape shield, observing “all a defendant need do is state that he believes that the victim had sexual intercourse with another person and that she made statements to him confirming this belief, without submitting or even proffering any evidence that the prior sexual conduct or the victim’s alleged admission actually took place.”

*State v. Donald H.G.*, 84 A.3d 1216 (Conn. App. Ct. 2014). Defendant was convicted of sexual assault in the first and third degrees and risk of injury to child, in connection with his sexual abuse of the child-victim, his niece. Defendant appealed, arguing, *inter alia*, that the trial court erred in declining in camera review of the child-victim’s psychological records. The court

began by noting that it was not referring to the defendant's full name or identifying the victim or others through whom the victim's identity may be ascertained "[i]n accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child." The court then rejected defendant's argument, concluding that the trial court did not err in declining to order in camera review of the child-victim's psychological records. The court explained that with respect to confidential records like those at issue, defendant must show that they will "disclose material especially probative of the ability to comprehend, know and correctly relate the truth ... so as to justify breach of their confidentiality and disclosing them to the defendant in order to protect his right of confrontation." The court concluded that the trial court did not err in denying defendant's request for in camera review of the records because defendant's request was vague and speculative, and because he failed to make a threshold showing that the victim had a mental condition affecting her ability to perceive, recall or relate events or her testimonial capacity. Accordingly, the court affirmed defendant's convictions.

*State v. James H.*, 95 A.3d 524 (Conn. App. Ct. 2014). Defendant was convicted of multiple counts of sexual assault and two counts of risk of injury to a child, after sexually abusing the child-victims, his daughters, for nine years. The child-victims were teenagers when defendant was charged. On appeal, defendant argued, *inter alia*, that the trial court abused its discretion in (1) applying the rape shield statute and (2) preventing defendant from questioning the child-victims about the contents of their Department of Children and Families (DCF) records. The court began by stating that the rape shield statute is intended to protect victims from harassment and embarrassment in court, and that defendants seeking to admit evidence of victims' prior sexual conduct must first prove the evidence is relevant and then the court must find that the probative value of the evidence outweighs its prejudicial effect on the victims. The court described that defendant

had sought to question one of the child-victims about other sexual conduct because she had tested positive for chlamydia, although he was never diagnosed with the disease; however, upon further questioning, defendant's attorney admitted that defendant had never been tested for chlamydia. The court also explained that defendant submitted no evidence that the child-victim had engaged in sexual contact with anyone else, beyond a vague allegation that she "had a boyfriend." Therefore, the court held, the trial court acted well within its discretion in denying defendant's motion for a lack of good faith basis. The court also described that defendant filed a pre-trial motion for an in camera inspection of the child-victims' DCF records, but that defendant's motion was denied because he did not meet the "burden of showing that the records contained exculpatory material." At trial, however, defendant was allowed to cross-examine the child-victims solely on the topic of their denials of anything amiss at home. Defendant then attempted to recall the child-victims to the witness stand to question them about exculpatory remarks in their DCF records. The state objected because the evidence was cumulative, and the court sustained the objection. On appeal, defendant argued that the evidence was not cumulative and was relevant to the credibility of the child-victims. In reviewing the trial court record, the court determined that the child-victims had already been questioned on the topic and held that the trial court did not abuse its discretion in refusing to allow defendant to question them about their DCF records. In a footnote, the court explained that "[i]n accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child," it was declining to use the defendant's full name—referring to him instead by first name and last initial—"or to identify the victims or others through whom the victims' identities may be ascertained."

*People v. Baldwin*, 17 N.E.3d 746 (Ill. App. Ct. 2014). Defendant was convicted on numerous

counts following the sexual assault of the victim. He appealed on several grounds, including that the trial court erred in denying his motion seeking the admission of the victim's diagnosis of antisocial personality disorder, arguing that the diagnosis went to her truthfulness. The trial court had ruled that evidence of the victim's diagnosis was inadmissible under a section of the state's criminal code, which prohibits a court from requiring a witness who is the victim of an alleged sex offense to undergo a psychiatric or psychological examination. The trial court acknowledged that the examination resulting in the victim's diagnosis had already taken place as a condition of her probation and therefore did not technically fall within that section of the code, as that section prohibits the court from requiring a witness who is the victim of a sex offense to undergo a future psychiatric or psychological exam. However, the trial court stated that the section nevertheless "evinces a legislative intent that not only should people not be subjected to such during the discovery process while the case is pending, but it is not a relevant area of inquiry for an alleged victim of an alleged sexual assault because it's not relevant." On appeal, the court found that defendant had failed to show that the diagnosis was relevant to the victim's credibility. While deceitfulness is one of seven characteristics of antisocial personality disorder, only three need be present for a diagnosis. Defendant failed to argue or make an offer of proof that the deceitfulness factor was present in the victim's diagnosis. The court also noted that any error in excluding the evidence was harmless, because defendant was able to present considerable evidence at trial regarding the victim's mental health. The lower court's decision was affirmed.

*State v. Eddy*, 321 P.3d 12 (Kan. 2014). Defendant was convicted of multiple counts of sex-related offenses, arising out of criminal conduct perpetrated against a child-victim. Defendant appealed, arguing, *inter alia*, that the trial court erred in denying his request to have the four-year-old child-victim undergo

a psychological evaluation to determine the admissibility of her testimony. The Kansas Supreme Court observed that "[a]ppellate courts are typically loathe to find an abuse of discretion when a district court refuses to order a psychological examination of a young sex abuse victim, unless the circumstances are extraordinary." Under Kansas law, courts apply a nonexclusive list of factors when determining whether compelling circumstances exist, including: "(1) whether there is corroborating evidence of the complaining witness' version of the facts, (2) whether the complaining witness demonstrates mental instability, (3) whether the complaining witness demonstrates a lack of veracity, (4) whether the complaining witness has made similar charges against others that were proven to be false, (5) whether the defendant's motion for an evaluation appears to be a fishing expedition, and (6) whether the complaining witness provides an unusual response when questioned about his or her understanding of what it means to tell the truth." Because defendant failed to establish "any valid reason" to support a finding of compelling circumstances, the district court's denial of the evaluation motion was affirmed.

*State v. Garcia*, 322 P.3d 1026 (Kan. Ct. App. 2014). Defendant was convicted of one count of aggravated indecent liberties with a child. She appealed on numerous grounds, including that the court erred in denying her request for a complete psychological examination of the victim and that the court erred in denying her motion to admit evidence of the victim's prior abuse. As to the first issue, the trial court ordered a limited psychological examination for the sole purpose of determining whether the victim suffered from a mental condition that would affect her ability to tell the truth. Under the facts of this case, defendant failed to show compelling reasons for a full psychological examination, especially given that there was corroborating evidence supporting the victim's testimony of abuse. Thus, the court found the trial court did not abuse its discretion by

ordering a limited psychological examination. Defendant also argued that the court erred in denying her pretrial motion to admit evidence of the victim's prior sexual abuse. The court noted that defendant failed to properly raise the issue below, but even if she had the argument would fail because defendant failed to present evidence that would support a reasonable inference that the victim was transferring prior sexual abuse to defendant; defendant did not establish proximity in time between the prior acts and the current allegations or offer any meaningful evidence that the victim's prior sexual abuse was so factually similar to the current allegations as to diminish the victim's credibility. Defendant's conviction was affirmed.

*State v. Boudreaux*, 132 So. 3d 381 (La. 2014). Defendant, convicted of aggravated battery and attempted manslaughter, sought post-conviction production the victim's medical, education, and social security records. The trial court denied the state's motion to quash on the ground that the state has no standing; it scheduled a hearing on the production of certain hospital records; and it instructed the state to disclose the victim's contact information to the defense to allow the defense to notify the victim about the hearing and the opportunity to appear and respond. The state challenged the trial court's order, and the Louisiana Supreme Court granted partial relief. First, the court held that the trial court erred in finding the state lacks standing. The court concluded that state law imposes a statutory duty on prosecutors to protect crime victims' rights, and this duty provides the state with "sufficient interest to have standing to oppose the issuance of the subpoenas for the protection of the victim's privacy interests." Second, the court held that the trial court erred in scheduling a hearing on the production of X-rays and CAT-scans made during treatment of the victim's injuries immediately after the crime. The court concluded that the trial court should have determined, without a hearing, that that defendant's request for these graphic images met the standard for production of a

non-party's records; the victim "no longer has a privilege of confidentiality" with respect to his treatment history at that hospital given that the medical history had been introduced by the state during trial and has become a matter of public record; and the images are relevant and admissible. Lastly, the court directed the trial court to conduct a hearing with respect to the victim's other records and provide the victim with notice and an opportunity to be heard. The court determined that the state need not disclose the victim's contact information to the defense if the state were to "undertake[] the responsibility for producing [the victim] at the hearing."

*State v. Dube*, 87 A.3d 1219 (Me. 2014).

Defendant was convicted of gross sexual assault, unlawful sexual contact, and furnishing liquor to a minor. He appealed, arguing, *inter alia*, that the trial court erred in denying defendant access to records of the child-victim's hospitalizations, which occurred before the unlawful conduct alleged in the indictment. The motion was filed two days before trial was set to begin, and defendant objected to the state's participation in the motion hearings, as he believed it would disclose the defense's "working theory of the case." The trial court allowed the state to participate in the hearing and denied defendant's motion for the victim's medical records, finding that he had failed to make the necessary preliminary showing. Agreeing with the lower court that "defense counsel's speculation that the records might provide a basis to impeach the victim was no more than a fishing expedition," the Maine Supreme Court affirmed the denial of defendant's motion to access the victim's medical records. The court continued on to state that, under limited circumstances, a trial court may consider an *ex parte* application for pretrial production. As the defense in this case disclosed in the motion papers that the strategy he sought to advance by seeking the production of the victim's medical records was related to his advancement of a motive for the victim to lie. Because the motion papers did not assert that the defense could not meet its burden

without revealing defense strategy—and because the motion itself outlined the relevant defense strategy—the trial court did not err in permitting the state to participate in the hearing. The judgment was affirmed.

*State v. Marroquin-Aldana*, 89 A.3d 519 (Me. 2014). Defendant was convicted of gross sexual assault on a minor. Defendant appealed his conviction, arguing, *inter alia*, that the trial court erred by quashing his pre-trial subpoena of the child-victim’s mother’s U-Visa application and her immigration attorney’s files. In resolving the issue, the Supreme Judicial Court of Maine relied on the State’s Criminal Procedure Rule 17(c) and prior case law. The court noted that to survive a motion to quash, defendant must show that the requested materials were relevant, admissible, and described with specificity. The court found that defendant failed to specify what information the U-Visa application would contain that would be relevant to his defense. In addition, the court noted that the prosecutor had provided defendant with the U-Visa Certification, and that would allow defendant to challenge the witness’s testimony with a motive to fabricate. In regards to the attorney’s files, the court found that it was only a remote possibility that information from the immigration attorney’s file would appreciably affect the jury’s perception of the victim’s mother’s credibility. For these reasons, the court concluded that the trial court did not commit obvious error in granting the motion to quash the subpoena.

*Commonwealth v. Sealy*, 6 N.E.3d 1052 (Mass. 2014). Defendant was convicted of rape. The victim, an undocumented immigrant and defendant’s former romantic partner, sought a U-Visa as a victim of abuse. At trial, defendant used consent as a defense, arguing that the victim reported their consensual sexual conduct as rape in order to obtain immigration benefits. On appeal, defendant argued that the trial court erred in: (1) denying him the right to impeach the victim with evidence of a prior assault and its connection to previous immigration

status benefits she received; and (2) denying him access to the victim’s rape crisis center records, which were necessary to preserve his constitutional rights to confrontation and to present a defense. The court rejected both of these arguments and affirmed the trial court’s judgments. The court concluded that the trial court properly exercised discretion in precluding cross-examination regarding the prior assault. The trial court allowed the victim to be cross-examined regarding her prior knowledge of the U-Visa process, sufficiently establishing her motive to lie about the non-consensual nature of the sexual conduct. Furthermore, the court said, defendant did not make the required showing that the victim’s earlier assault was relevant to a motive to lie. With respect to the victim’s rape crisis center records, the court explained that because the victim met with an attorney and the records were protected by the attorney-client privilege, defendant was required to first make the threshold showing that the documents are evidentiary and relevant, which he failed to do. Instead, defendant’s motion and supporting affidavit couched all allegations in “hypothetical language[.]” for example “that production was necessary because the records ‘could contain statements indicating the alleged victim felt with respect to the alleged incident that she and [the defendant] were both to blame[.]’” The court found that “[s]uch unsupported assertions do not meet the defendant’s threshold burden” and as such, the trial court properly barred defendant from accessing the records.

*People v. Cutter*, No. 317355, 2014 WL 6679313 (Mich. Ct. App. Nov. 25, 2014). Defendant was convicted of sexually assaulting a 12-year-old girl. On appeal, he argued the trial court violated his right to present a defense when it excluded evidence that the victim had been sexually abused in the past under Michigan’s rape shield statute. On review, the court held that the rape shield statute applies in cases of child abuse and precludes evidence of both voluntary sexual conduct and involuntary sexual conduct. It further held that excluding this

evidence did not violate his constitutional right to confrontation because the evidence did not show the victim's bias, an ulterior motive for making a false charge, or that the victim had made false accusations of rape in the past. Accordingly, defendant's conviction was affirmed.

*People v. Kohlhoff*, No. 312456, 2014 WL 94360 (Mich. Ct. App. Jan. 9, 2014). Defendant was convicted of criminal sexual conduct in the third degree against a child, among other offenses. He appealed. Defendant contended that the trial court erred in overruling his argument regarding the prosecutor referring to the complainant as a victim because, until the verdict, complainant was only an alleged victim. The court held that defendant's Sixth Amendment right to a fair trial was not violated by the use of the term victim. Under the sexual conduct section of the criminal code, "the personal alleging to have been subjected to criminal sexual conduct" is a victim. The victim met that definition. Even if there were error, any resulting prejudice was cured by the court's jury instructions and any potential error was harmless. Defendant also argued that his Sixth Amendment right was violated because he was not permitted to question the victim about her history of sexual acts, due to the application of Michigan's rape shield, so as to demonstrate her lack of credibility. Defendant wished to introduce evidence that the victim had been sexually active prior to the night of the charged incident and that she had falsely told the interviewing detective that she was not. The court held, however, that defendant's interest in demonstrating that the victim was not truthful with investigators regarding her previous sexual experience was not significantly related to her accusations. To the extent the evidence went to her general candor, she did not testify in front of the jury that she did not previously have sexual experiences and defendant was able to introduce another instance when she gave a false statement to the police. The judgment was affirmed.

*State in Interest of A.B.*, 99 A.3d 782, 785 (N.J. 2014). The juvenile, charged with offenses that

would constitute aggravated sexual assault and endangering the welfare of a child if committed by an adult, requested and obtained a court order allowing him and his attorney to inspect the child-victim's home where the juvenile was alleged to have committed the crimes. The state challenged the family court's order on interlocutory appeal, arguing that the discovery order constitutes an invasion of the victim's privacy and a violation of the victim's rights under the Victim's Rights Amendment, the Crime Victim's Bill of Rights, and the Fourth Amendment. The intermediary appellate court upheld the order, and the New Jersey Supreme Court affirmed, holding that the family court did not abuse its discretion. In reaching its holding, the court concluded that the family court properly weighed the competing interests—the juvenile's need to prepare a defense versus the victim and her family's privacy interests and desire to avoid suffering needless additional trauma—and crafted an order that attempts to harmonize the respective rights. The court explained that New Jersey trial courts have broad power to order discovery beyond the categories permitted by the state court rules when necessary to "further the truth-seeking function or ensure the fairness of a trial." The court observed that a defense attorney's visit to the crime scene is an "ordinary undertaking" and the failure to inspect the crime scene may constitute ineffective assistance of counsel in some cases. The court determined that when the crime scene is the victim's home, the defense bears the burden of establishing that the inspection of the home is justified. It adopted a standard: the inspection should be granted when the defense has made a "legitimate request" for inspection and "articulated a reasonable basis to believe the inspection will lead to relevant evidence on a material issue," and the inspection must be subject to "appropriate time, place, and manner restrictions" designed to protect the victim's privacy interests. The court emphasized that a request is illegitimate when it "has as its objective causing intimidation, harassment, or abuse of an alleged victim," and a request "based on sheer speculation" that relevant evidence

exists will not be sufficient. Applying this standard, the court concluded that the juvenile had met his burden. The court found that the inspection would provide the juvenile with a fair opportunity to defend against the charges by allowing the defense attorney to view the scene of the crime, understand the layout of the rooms, view the sightlines, and take photographs that may support the defense argument that it was not possible for the acts alleged by the child-victim to have occurred undetected by the five adults who were in the house on the day in question. The court also found that the scope of the order was properly limited: it barred the juvenile's parents from visiting the home; it restricted the inspection to two rooms and to last no more than 30 minutes; it allowed an investigator from the prosecutor's office to be present during the inspection; it allowed the family to be in another part of the house or outside the house during the visit; and it did not require the presence of the child-victim. The court rejected the state's Fourth Amendment argument on the ground that the state had failed to explain why an authorized order to inspect the home, issued after notice and a reasonable opportunity to be heard, constitutes an unreasonable search. For these reasons, the court affirmed the judgment of the intermediary appellate court and remanded the case to the family court for further proceedings.

*State v. Montoya*, 333 P.3d 935 (N.M. 2014). Defendant was convicted of kidnapping with the intent to inflict a sexual offense. The conviction arose from his attempt to have sex with his girlfriend after they had argued. He appealed, arguing that the court erroneously excluded evidence that he and the victim had a sexual relationship and they had previously engaged in "make-up sex" under New Mexico's rape shield statute. The court reversed, concluding that defendant's Confrontation Clause rights were violated by the exclusion of the evidence. The court determined that defendant's argument that the victim's sexual conduct with defendant was relevant as to defendant's specific intent—namely, that he intended to have consensual

make-up sex with his girlfriend. The court further concluded that there were no other viable means to introduce evidence of his intent. The court emphasized that this evidence was not propensity evidence—because she had engaged in make-up sex in the past she was more likely to engage in it now—rather, "it goes solely to [defendant's] own thinking in light of an alleged pattern of conduct and understanding between the two parties in the context of allegedly similar circumstances." In balancing defendant's confrontation rights with the rights of the victim, the court also determined that this evidence would not be unduly inflammatory or prejudicial. Finally, the court concluded that the exclusion of the evidence was not harmless: "As we have already explained, the evidence that Defendant wished to elicit went to the heart of his case; it was the only evidence available to him by which he could establish his intent without sacrificing his right not to testify." Accordingly, defendant's conviction was reversed and remanded for a new trial.

*People v. McCray*, 12 N.E.3d 1079 (N.Y. 2014). Defendant appealed his conviction of first-degree rape, arguing that the trial court erred in failing to grant him access to all of the victim's mental health records. Defendant and the victim differed in their accounts of the encounter at issue, with defendant claiming it was consensual and the victim claiming it was rape. Before trial defendant sought the victim's mental health records. The court ordered that the records be reviewed in camera and eventually provided defendant with 28 pages out of the thousands of documents in the records. During trial, evidence revealed that the victim had been diagnosed with a number of psychiatric and other medical conditions, including bipolar disorder, Tourette's syndrome, post-traumatic stress disorder, and hypersexuality. The evidence also revealed that she had reported that she could sense the presence of dead people, was undergoing mental health treatment at the time of the incident, and took medications. Following his conviction, defendant appealed, arguing that the trial court violated his rights of confrontation and cross-

examination by limiting disclosure of the records. On appeal, the court recharacterized the issue as one better analyzed under *Brady*. The court reviewed the undisclosed documents, which contained references to the victim having hallucinations and to the victim's tendency to misremember or misunderstand events. The undisclosed records also referenced the victim's 2004 allegation that her father had attempted to sexually assault her, which was deemed "unfounded" in a separate record. The records also revealed that the victim made several previous complaints of sexual abuse that stemmed from individuals taking advantage of her hypersexuality before she reached 18-years-old. After reviewing the evidence and the undisclosed documents, the court found that the records were either cumulative or of little if any relevance to the case. In regards to the victim's prior complaints of sexual abuse, the court distinguished them from the current case in that they did not involve claims of violence to force sex on her. The court also found that the victim's allegations against her father were removed in time from the current charge and were factually disparate. Regarding the records that referenced the victim's tendency towards misunderstanding and misremembering, the court reasoned that in this case no juror could find that her claim of rape would be a failure to recollect or misunderstand the situation. For these reasons, the court held that the trial court could have reasonably concluded that there was no more than a remote possibility that the disclosure of the records would lead to defendant's acquittal, and it was within the trial court's discretion to find the victim's legitimate interest in confidentiality outweighed the records' relevance. The court then affirmed defendant's conviction.

*Commonwealth v. Berger*, 96 A.3d 1049 (Pa. Super. Ct. 2014). Defendant, accused of a number of offenses relating to inappropriate conduct with four child-victims, sought in camera review of notes and writings relating to interviews conducted by the Children's Resource Center (CRC) with each of the child-

victims. The prosecution also sought permission to play the interview videos at trial. The CRC opposed defendant's petition, and the trial court ordered the CRC to produce the documents for in camera review. The CRC appealed the trial court's order, arguing that it lacked authority to order the CRC, a private third party medical provider, to provide discovery in connection with a criminal case, and that the order violated the children's right to privacy in their medical records. The CRC further argued that the trial court should have appointed a guardian ad litem for the children and conducted a hearing at which the privacy interests could be argued on the record. Although the court acknowledged that the relevant rule of criminal procedure primarily addresses discovery obligations imposed on the government and does not address defendants' attempts to obtain discovery from third parties, the court cited a number of cases in which courts have occasionally ordered the disclosure of files in the possession of third parties. The threshold issue in determining whether the trial court acted properly in this case was determined to be whether the CRC acted as an agent of the government in conducting its interviews--in which case its records were discoverable--or whether it simply provided treatment to the victims--in which case its records were not subject to defendant's discovery request. The court on appeal found no reason to doubt the CRC's assertion that it was part of a private health care provider; however, the record did not support the finding that the victims sought treatment from the CRC, as investigating police officers observed at least some of the victims' interviews and relied on information learned from those interviews to support affidavits of probable cause in support of search warrants and the government's criminal complaint against defendant. The court observed that the presence of so many parties, including police officers, observing a video-recorded interview strongly undermined the CRC's privacy argument. Additionally, the court observed that the government was in possession of at least portions of the CRC's files, which would be in violation

of any absolute privilege that might attach to treatment-related materials. Because the record contained only limited information about the CRC's involvement in the case, and because the CRC had not established its authority to protect the records from disclosure, the court remanded to the trial court to direct the CRC to show cause why it should not be required to produce its documents for in camera review. The court additionally noted that the trial court "may, if necessary, appoint guardians ad litem to protect the . . . victims' privacy interests."

*State v. Robert Scott R., Jr.*, 754 S.E.2d 588 (W. Va. 2014). Defendant was convicted of committing 30 sexual offenses against four child-victims. Defendant appealed, arguing, *inter alia*, that the trial court erred in declining in camera review of one of the child-victim's psychological records. The court began by noting that it was referring to the defendant by first name and last initial and to the victims by their initials because of "the sensitive facts involved in this case." The court then rejected defendant's argument, concluding that the trial court did not err in declining to order in camera review of the child-victim's psychological records. The court explained that with respect to confidential records like those at issue, defendant must make a prima facie showing of relevancy and a legitimate need for the records, and that defendant did not satisfy this standard by "merely stating that he wants to see confidential records because the victim may have lied about something—anything—while at [the facility]." The court continued that this holding is consistent with its precedent prohibiting an in camera inspection "merely to see if evidence exists for the defendant to attack the witness' credibility." The court then affirmed defendant's convictions.

*State v. Schlatman*, 755 S.E.2d 1 (W. Va. 2014) (per curiam). Defendant was convicted of second degree assault arising out of the sexual assault of a child-victim. Defendant appealed his conviction, arguing, *inter alia*, that he was wrongly denied the right to inspect the victim's

medical and psychological records. During the pretrial period, defendant filed a motion to compel production of the victim's purported hospitalization for psychiatric treatment, as well as records relating to test results for sexually transmitted diseases. Defendant sought this information pursuant to *Brady v. Maryland*. The trial court acknowledged that the state had secured the necessary releases to obtain the records sought and ordered, for the protection of the victim's privacy and confidential information, that the state review the information and disclose only that information that clearly falls within the scope of its *Brady* obligations. Then, as an officer of the court, defense counsel would review any remaining information and, if she believed any of the remaining information was relevant and necessary to properly defend her client and the state disagreed, the trial court would conduct an in camera review of the materials. The court further ordered that the victim's records not be disclosed to any person not an attorney involved in the case, absent formal disclosure by the state or ordered disclosure by the court. The state provided the trial court with records from Appalachian Psychiatric Services for review, stating that it did not believe any of the records warranted mandated disclosure. The court affirmed that the records did not contain any exculpatory or impeachment evidence and ordered that they not be disclosed to defendant. The West Virginia Supreme Court observed that defendant proffered nothing more than "bold-faced intimations concerning the existence of relevant information." Further, both the prosecutor and the trial court reviewed the materials and determined them to be devoid of exculpatory content or impeachment value. The state supreme court held that there was no obligation to turn these materials over to defendant and, for this and other reasons, affirmed the conviction and sentencing order.

*Circuit Court of Eight Judicial Dist. v. Lee Newspapers*, 332 P.3d 523 (Wyo. 2014). The circuit court closed the courtroom during a

preliminary proceeding in a juvenile sexual assault case and sealed the court file. News organizations (appellees) were barred from attending any court proceedings and the court denied the existence of the case file. Appellees moved to intervene to gain access to information pertaining to the case, but defendant was bound over to district court before the circuit court ruled. Appellees then filed a declaratory judgment action in the district court. The district court found the trial court erred in closing the court proceeding and denying the existence of the case file. The circuit court appealed. On appeal, the court found a First Amendment right to access preliminary hearings, and to access judicial documents. However, the court also recognized that this First Amendment right is not absolute: the presumption of openness may be overcome if there is a compelling interest which makes closure essential to preserve higher values and that the closure is narrowly tailored to serve that compelling interest. If a compelling interest exists, the court must articulate its findings on the record. Here, the circuit court failed to articulate on the record any findings as to the compelling interest for closing and sealing the case and therefore violated the First Amendment. The court also found that the circuit court misread the statute under which the circuit court believed it had authority to close the courtroom. Under Wyoming statute “[p]rior to the filing of an information or indictment [for certain violations], neither the names of the alleged actor or the victim of the charged offense nor any other information reasonably likely to disclose the identity of the victim shall be released . . . to the public . . . .” However, reading this statute as requiring the sealing of the criminal case file and closing of all proceedings without a hearing or findings on the record would render the statute unconstitutional. Because it is presumed that the legislature does not intend to enact laws in violation of the Constitution, a statute will not be interpreted unconstitutionally if that interpretation can be avoided. In order to comply with the statute and the Constitution, the court concluded that the circuit court could

redact the file. Although redacting “may pose a higher risk of mistake,” that risk does not warrant the abridgment of the public’s First Amendment right of access. The court also dismissed the circuit court’s reasoning that if the hearing were open, someone may recognize the defendant and discover his name. “If a person from the public came to the hearing, saw the defendant and recognized him, it would not be the circuit court who had released the defendant’s name to the public, and there would be no statutory violation.” The district court’s grant of summary judgment was affirmed.

Research for this publication was supported in part by Grant No. 2014-XV-BX-K013, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions or recommendations expressed in this document are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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