

STATEMENT OF FACTS

The victim, M.J. is 13 years of age. Defendant is charged in a three count indictment for having committed a sex crime offense against the victim on or about August 10, 2007. On or about March 18, 2009 Indictment No. 09-03-00244-I/A was filed against the defendant charging him with the following:

Count One – Aggravated Criminal Sexual Contact – Third Degree;

Count Two – Aggravated Criminal Sexual Contact – Third Degree;

Count Three – Endangering Welfare of a Child – Third Degree;

Defendant’s counsel has filed a motion for discovery in the instant matter in which he seeks an order compelling the prosecutor to provide “copies of notes from victim counseling sessions.” As set forth in paragraphs 5 and 6 of defense counsel’s certification accompanying his notice of motion, he states the purpose of the motion:

I do not know, therefore, whether M.J. gave another version of this incident to anyone else. I am trying to determine this. . . . I recognize that such communications are under certain circumstances, privileged. . . . But without knowing what the communication was, to whom it was made, and the reason it was made, I cannot determine whether it is discoverable or privileged.

The victim received the following counseling related services:

- a. M.J. was a patient of Vineland Counseling Services from January 2008 to April 2008. During this time, she met with, Stephanie Benash, MFT Intern (Marriage Family Therapist.) Ms. Benash was supervised by Gerald J.

Washko, LMFT, LCADC (Licensed Marriage and Family Therapist, Licensed Clinical Alcohol and Drug Counselor).

- b. M.J. received treatment with Kimberly Brown, LPC (Licensed Professional Counselor) who is a certified sexual assault therapist. Kimberly Brown treated Megan from May 2008 through December 2008.

The defendant has not submitted to the court any other reason or factual basis for negating the privilege nor has he submitted a brief containing legal support for his request.

ARGUMENT

I. THE DEFENDANT SHOULD BE DENIED ACCESS TO THE VICTIM'S COUNSELING RECORDS BECAUSE THE VICTIM'S FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY AND NEW JERSEY CONSTITUTIONAL RIGHT TO BE TREATED WITH FAIRNESS, COMPASSION AND RESPECT OUTWEIGH THE DEFENDANT'S NON-CONSTITUTIONAL RIGHT TO DISCOVERY.

A. To grant the relief requested would violate the victim's right to privacy under the Federal Constitution.

1. Defendant's limited right to discovery. Defendant seeks to have the private confidential communications between M.J. a minor victim and her mental health counselor made non-confidential and non-private. The thrust of defendant's argument is that if the victim spoke at all to her counselor about what the defendant did to her, then the defendant has the right, through the discovery process, to pierce the privilege and review these private discussions because, "[W]ithout knowing what the communication

was, to whom it was made, and the reason it was made, I cannot determine whether it is discoverable or privileged.” Thus, defendant seeks to replace the authority of the New Jersey Legislature (under N.J.S.A. 2A:84A-22.13, et seq.) and the New Jersey Supreme Court (N.J.R.E.517) when they enacted and adopted respectively the Victim Counselor Privilege with the right of the defense to now make this determination. The defendant, nor the trial court, under the circumstances of this application have the authority to make such a determination. State v. J.G., 261 N.J.Super. 409, 619 A.2d 232 (A.D.1993), cert. denied 133 N.J. 436, 627 A.2d 1142 (1993).

A defendant does not have a federal constitutional right to discovery in a criminal case. Weatherford v. Bursey, 429 U.S. 545 (1977); Wardius v. Oregon, 412 U.S. 470 (1973); and likewise, a defendant in a criminal matter may be denied discovery and access to information without there being any violation of his state constitutional rights. *See, e.g.,* State v. Cusick, 219 N.J. Super. 452 (App.Div. 1987), where the court held that the trial court's refusal to grant the defendant access to files of the eight year old sexual assault victim maintained by the Division of Youth and Family Services and child treatment center did not violate the defendant's state or federal right of due process or his state or federal right to confront witnesses under Const. Art. 1, par. 10 and U.S.C.A. Const. Amends. 6 and 5.

2. The crime victim's right to privacy. M.J., as every citizen, has a right of privacy that is protected by the Federal Constitution. Griswold v. Connecticut, 381 U.S. 479, 483 (1965); and this constitutional privacy right of the victim has been recognized in criminal prosecutions. *See, e.g.,* United States v. Galloway, 963 F.2d 1388, 1390 (10th Cir. 1990). The motion of defendant creates a direct confrontation with the victim's right

to privacy in protecting her private psychological information. Defendant's bold request in this matter strikes at the heart of the victim's right to privacy.

For almost two decades, the issue of sensitivity to crime victims and the restrictions placed on the release of discovery material has received considerable attention among legal writers in the past several years, and the protection for victims and witnesses against invasive discovery requests has been thoroughly discussed. *See, e.g.,* The Victim's Right To Privacy: Imperfect Protection from the Criminal Justice System, 8 ST. JOHN'S J. LEGAL COMMENT. 205 (Fall, 1992); Raped Once, But Violated Twice: Constitutional Protections Of A Rape Victim's Privacy, 66 ST. JOHN'S LAW REV. 151 (1992); Comment, Arizona Criminal Procedure After The Victims' Bill Of Rights Amendment: Implications Of A Victim's Absolute Right To Refuse A Defendant's Discovery Request, 23 ARIZ. ST. L.J. 831 (1991). Prior to the victims' rights movement that began in the 1980's, the rights of crime victims were not sufficiently considered by the courts in assessing claims for discovery by criminal defendants. Significant changes began in the early 1990's as rights of victims were given enhanced consideration in the discovery process. *See, e.g.* N.J. Const. art. I, ¶ 22 (1991), the Victim's Rights Constitutional Amendment and N.J.S.A. 2A:84A-22.13, et seq., the Victim Counselor Privilege.

3. New Jersey Law protecting the privacy rights of crime victims. In State v. D.R.H., 127 N.J. 249 (1992), the New Jersey Supreme Court addressed the issue of the defendant's rights under the rules of discovery as contrasted to the victim's right to privacy. In D.H.R., the defendant was charged with aggravated sexual assault of a child. He moved for an order compelling the victim to submit to a second physical examination.

The trial court granted defendant's motion and the Appellate Division reversed holding that the defendant failed to establish a "substantial need" for the second examination. The Supreme Court affirmed, recognizing the potential harm in the form of emotional trauma and mental distress suffered by the victim. *Id.* at 256. The Court noted:

[C]riminal discovery has its limits. For example, defendants cannot transform the discovery process into an unfocused, haphazard search for evidence. . . . Another significant limitation on defendants' discovery rights is the chilling and inhibiting effect that discovery can have on material witnesses who are subjected to intimidation, harassment, or embarrassment. *Id.* (citations omitted).

In State v. Gilchrist, 381 N.J. Super. 138, 885 A.2d 29 (App.Div. 2005) the defendant filed a discovery motion requesting that a photograph of the victim be taken and provided to him in advance of trial. When the victim was informed of the defendant's request, she "expressed overwhelming fear that the giving of a photograph to the defendant would make it easier for the defendant to fulfill his earlier threats to find her and kill her." The trial judge acknowledged that he was uncertain why the defendant needed the victim's photograph; nevertheless, he granted defendant's motion, rationalizing, "Let's throw the law aside for a minute and let's be practical. . . ." *Id.* at 143, 32. The Appellate Division reversed. Speaking for the court, Appellate Judge Ronald B. Graves stated

"Here, any possible benefits to defendant from a court-ordered photograph of M.C. are entirely speculative and are outweighed by other important considerations, including M.C.'s right to privacy; her right to be treated with fairness, compassion, and respect; her right to be free from intimidation; and the need to encourage crime victims to

cooperate and participate in the criminal justice system.
Id. at 147, 35.

In the instant matter, defendant has proffered no showing of how or why the breaking of a constitutional right or a statutory privilege outweighs his rights. This motion is for a court supervised fishing expedition that is "inherently invasive" and will place this minor victim at substantial risk to suffer "significant emotional trauma and mental distress". See, D.H.R., 127 N.J. at 261. The burden of the defendant is to demonstrate to this court that his "substantial need" for this information "clearly outweighs whatever detrimental effects the victim may suffer." *Id.* at 261-62. (Emphasis supplied).

Defendant has failed to satisfy the substantial need test established by D.H.R., *supra*. Moreover, defendant has failed to demonstrate even a remote need for entering the private counseling sessions of the victim except that such a profound invasion will enable him to "*determine whether it is discoverable or privileged.*" See also, State v. Michaels, 264 N.J. Super. 579 (App.Div. 1993) where the court followed D.H.R. applying the "substantial need" test in criminal discovery request involving charges of sexual abuse on a minor; and State v. R.W. 104 N.J. 14, 514 A.2d 1287 (1986) where the court upheld the denial by the lower court of defendant's request to order a psychiatric examination of the three and one-half-year-old witness solely on grounds of her age applying the "substantial need" test.

B. To grant the relief requested would violate T.B.'s rights as a crime victim under the New Jersey Constitution and statutory Bill of Rights.

Judge Graves' decision in Gilchrist to deny the defendant's request for discovery was also based on the victim's constitutional and statutory rights as a crime victim to "be treated with fairness, compassion, and respect; . . . [and be] free from intimidation; . . ." State v. Gilchrist, *supra*, 381 N.J. Super. 147, 885 A.2d 35. The rights of crime victims in the criminal justice system in New Jersey were first established in the "Crime Victim's Bill of Rights", N.J.S.A. 52:4B-35, *et seq.* This legislation that calls for victims of crime to be "informed" and treated with "dignity and compassion by the criminal justice system" became law in 1985. The "legislative findings and declarations" to the "Crime Victim's Bill of Rights" provides a definitive statement of the intent and purpose to recognize and respect the rights of crime victims:

"The Legislature finds and declares that without the participation and cooperation of crime victims and witnesses, the criminal justice system would cease to function. The rights of these individuals should be given full recognition and protection. The Legislature has the responsibility to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of this, the improved treatment of these persons should be assured through the establishment of specific rights. These rights are among the most fundamental and important in assuring public confidence in the criminal justice system. N.J.S.A. 52:4B-35. (Emphasis supplied)."

On November 5, 1991 at the general election, the voters of the State of New Jersey adopted the Victim's Rights Amendment to the New Jersey Constitution. This amendment became law on December 5, 1991 and was the result of considerable effort on the part of legislators, prosecutors, crime victims and various individuals who sought

to bring equal justice for crime victims into the criminal justice system in the State of New Jersey. It established certain rights for crime victims that are guaranteed "as a matter of State Constitutional imperative" along with such further constitutionally recognized and protected "rights and remedies as may be provided by the Legislature. *See*, N.J. Const. art. I, ¶ 22 and Interpretive Statement. The Amendment guarantees to the crime victim the right to have presence in the criminal justice system along with the right to be treated with fairness, compassion and respect by those who work in the criminal justice system. *See, Id.* Interpretive Statement. Recognizing the impact of the amendment, the court in State in the Interest of K.P., 311 N.J. Super. 123 (Ch. Div. 1997) stated:

“This provision effects a fundamental change in the criminal justice system. Instead of adopting a two-party State v. Defendant, paradigm, this provision requires that the system consider interests of third parties, specifically crime victims. Unfair practices that deny crime victims fairness, compassion and respect are unconstitutional under the amendment. *Id.* at 135-36.”

The Victims' Rights Amendment in the State of New Jersey formed a part of the national victim rights movement which has continued to move with significant measure throughout the United States. The Victims' Rights Amendment was a direct response to the many reports of the lack of recognition and respect for crime victims in New Jersey that routinely included the practice of excluding the victims from the justice process.

The significant impact of the Victim's Rights Amendment on the criminal justice process has been recognized by the courts of this State. In State v. Muhammad, 145 N.J. 23 (1996), Justice Garibaldi, speaking for the Court, stated:

“Unlike most interpretations of constitutional provisions, we need not surmise what the founders intended when they drafted the Victim's Rights

Amendment. We know exactly what the founders of this constitutional amendment intended--fair treatment for victims. To hold the victim impact statute unconstitutional would require us to ignore the Victim's Rights Amendment and the will of the electorate that overwhelmingly approved the constitutional amendment. Over 1,200,000 citizens voted for the Victim's Rights Amendment while only 223,248 people voted against it. Manual of New Jersey, Two Hundred and Fourth Legislature (First Session) 1992, at 903. Beginning with the passage of the Criminal Injuries Compensation Act of 1971 (N.J.S.A. 52:4B-1 to -33), the people of New Jersey, speaking through the Legislature, have repeatedly expressed a very strong "public attitude" that victims should be provided with more rights. *Id.* at 42-43. (Emphasis supplied).”

The respect for this "public attitude" was noted by Justice (then Judge) Pashman in New Jersey Sports & Exposition Auth. v. McCrane, 119 N.J.Super. 457, 476-77, 292 A.2d 580 (Law Div.1971), *aff'd* as modified, 61 N.J. 1, 292 A.2d 545, appeal dismissed, 409 U.S. 943, 93 S.Ct. 270, 34 L.Ed.2d 215 (1972), where he stated:

It must be remembered that the greatest danger to people from the exercise of the judicial power is that there may be usurpation by the courts of the people's right to express in law, by overwhelming numbers of their elected legislators, their collective reasoning. *Id.* at 42.

The effect of the Victims' Right Amendment in New Jersey has been substantial in that there has been a clearly recognizable effort on the part of the executive, legislative and judicial branches of our State government to provide "fairness, compassion and respect" to crime victims and to continually reinforce the legislative intent under the Crime Victim's Bill of Rights that "these rights are among the most fundamental and important in assuring public confidence in the criminal justice process." *See* N.J.S.A. 52:4b-35.

New Jersey has been recognized as a national leader in respecting the rights of crime victims for well over a quarter century. It was one of the first states to provide for victim compensation under the Criminal Injuries Compensation Act of 1971 (N.J.S.A.

52:4B-1, *et seq.*), and for a Crime Victim's Bill of Rights in 1985 (N.J.S.A. 52:4B-34, *et seq.*) under which was established the State and 21 county offices of victim-witness advocacy. In addition, New Jersey was just the eighth state in the nation to adopt a victim's rights amendment to its state constitution. Since 1971 there have been no less than sixty (60) new laws passed involving the rights of crime victims.

The laws of New Jersey recognize the unique and vital interests of crime victims in the criminal justice system and give crime victims participatory, procedural rights in that system. The rights given are status rights that are automatically afforded to persons when they step into the legal role of "victim," and are independent of the facts of the alleged crime, any defense asserted, or the conviction of defendant. *See* N.J. Const. art. I, ¶ 22 [Victim's Rights Amendment] and N.J.S.A. 52:4B-36, *et seq.* [Crime Victims Bill of Rights]. As such, these rights arise simply because of an individual's status in the criminal justice system. All of these rights are about the criminal justice process; they are rights to participate in the process, to receive information about the process, to have interests adjudicated within the process, and to be safe throughout the process. *See State v. Ruffin*, 853 A.2D 311, 321, 371 N.J. Super. 371, 387 (App. Div. 2004) where Judge Collester commented:

"The rights of a crime victim are independent of the prosecutor. They are derived from common law and in this State, from the Constitution, *N.J. Const.* art. I, ¶ 22, and the Crime Victim's Bill of Rights, *N.J.S.A. 52:4B-34 to -38*. *See, State v. Timmendequas*, 161 *N.J.* 515, 737 *A.2d* 55 (1999)."

The recognition of the independent civil rights of crime victims through legislation and the judicial decisions of this State mandates that the rights of crime

victims must be placed on “equal footing¹” with the defendant in the justice system. Each of the rights of crime victims is connected to the criminal justice process as a whole or to an individual proceeding within this process. As such, they are procedural status rights – that is, they are rights that relate to the procedural steps in the criminal justice process. Importantly, many of these procedural rights are afforded immediately upon a crime victim’s entry into the criminal justice process, such as the rights to be treated with fairness, dignity and respect. Other rights accrue as the process continues because they are specific to various procedural stages of the process.

M.J., as a crime victim, is entitled to have her rights under the New Jersey Constitution and state statutes respected in the criminal justice system. The Victim’s Rights Amendment confers upon her the right to be treated with “fairness, compassion and respect”. The Bill of Rights affords to her the right to be “treated with dignity”; “to be free from intimidation”; and “to have inconveniences associated with participation in the criminal justice system minimized to the fullest extent possible”. See N.J.S.A. 52:4B-36 (a) (c) & (d).

In Gilchrist, the Appellate Division recognized that whether the court characterizes the protection of the victim from invasive and abusive discovery as a right of privacy under the Federal Constitution or as the right of a crime victim under the State Constitution and statutes, nevertheless, and in either event, the right of the victim must prevail over the defendant’s request for information, the value of which is speculative at best. State v. Gilchrist, supra, 381 N.J. Super. 147, 885 A.2d 29, (App.Div. 2005).

¹ N.J. Const. art. I, ¶ 22, Interpretive Statement

II. THE COUNSELING RECORDS OF THE VICTIM ARE NOT AVAILABLE FOR DISCOVERY TO DEFENDANT BECAUSE THEY ARE PRIVILEGED UNDER THE NEW JERSEY STATUTES AND RULES OF EVIDENCE.

Victims of crime, especially victims of sexual assault and domestic violence are afforded many protections by statute and court rule in New Jersey. The two primary statutory protections for victims' confidentiality are the psychologist patient privilege and the victim counselor privilege.

A. Psychologist Patient Privilege—N.J.S.A. 45:14B-28—N.J.R.E. 505.

The confidential relations and communications between and among a licensed practicing psychologist and individuals, couples, families or groups in the course of the practice of psychology are placed on the same basis as those provided between attorney and client, and these privileged communications cannot be disclosed by any such person. The psychologist-patient privilege was created by the New Jersey legislature in 1966 as a part of a comprehensive statutory scheme designed to license and regulate practicing psychologists. At the time it was created, the notion of victims' rights in New Jersey and the nation had not as yet been conceived. Nevertheless, the privilege was comprehensive in protecting the confidentiality of the patient. State v. L.J.P., 270 N.J.Super. 429, 438-39, 637 A.2d 532, 536-37 (App.Div. 1994) (citations omitted).

The psychologist-patient privilege is akin to the attorney-client privilege. The privilege belongs to the patient and any waiver of the privilege must be made by the patient. The privilege is given greater scope and protection than the physician-patient privilege. The nature of the psychotherapeutic process is such that full disclosure to the therapist of the patient's most intimate emotions, fears and fantasies is required. Id.

The privilege for communications between a patient and her psychotherapist is recognized in some form by all fifty states and the District of Columbia, and it been defended on the basis of both constitutional privacy interests and its advancement of the patient-therapist relationship. On the one hand, the psychotherapist-patient privilege protects the individual from public revelation of innermost thoughts and feelings that were never meant to be heard beyond the walls of the therapist's office. On the other hand, the privilege makes possible open and therefore productive relationships between therapists and patients, thereby advancing the public good accomplished when individuals are able to seek effective mental health counseling and treatment. Kinsella v. Kinsella, 150 N.J. 276, 295-96, 696 A.2d 556, 566 (1997).

The court in Kinsella commented:

Effective psychotherapy ... depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Id., citing as authority, Jaffe v. Redmond, 518 U.S. 1, 116 S.Ct. 1923 (1996).

B. Victim Counselor Privilege—Rule 517.

The victims' rights movement hit full stride in 1991 with the passage of the Victim's Rights Amendment to the New Jersey Constitution (Article 1, ¶ 22) and the amendments to the New Jersey Crime Victim's Bill of Rights (N.J.S.A. 52:4B-36). Recognizing that the healing of sexual assault and domestic violence victims was of paramount importance, the New Jersey Legislature enacted the Victim Counselor

Confidentiality Law of 1993 to insure that confidential statements by the victim to the counselor would be protected. The statute supersedes N.J.S.A. 2A:84A-22.11, which created a rape counselor privilege, and is intended to offer comparable protection to a broader class of victims. Biunno, *Current N.J. Rules of Evidence*, Comment to Rule 26A-5 at 415. The statutory language tracks that contained in a model law proposed by the United States Department of Justice, but the protection accorded by N.J.S.A. 2A:84A-22.15 is wider in scope. See, State v. J.G., 261 N.J.Super. 409, 417, 236 619 A.2d 232 (A.D.1993), cert. denied 133 N.J. 436, 627 A.2d 1142 citing the “*Final Report of the President's Task Force on Victims* (1982).”²

The statutory scope of the victim counselor privilege is set out in N.J.S.A. 2A:84A-22.13 to 16. It is also embodied in N.J.R.E. 517. The statutory provisions are as follows:

(1) N.J.S.A. 2A:84A-22.13:

The Legislature finds and declares that:

- a. The emotional and psychological injuries that are inflicted on victims of violence are often more serious than the physical injuries suffered;
- b. Counseling is often a successful treatment to ease the real and profound psychological trauma experienced by these victims and their families;
- c. In the counseling process, victims of violence openly discuss their emotional reactions to the crime. These reactions are often highly intertwined with their personal histories and psychological profile;
- d. Counseling of violence and victims is most successful when the victims are assured their thoughts and feelings will remain confidential and will not be disclosed without their permission; and

² This Report is universally considered to be the foundation for the establishment of victims' rights laws throughout the United States and it established the policies from which the victims' rights laws in New Jersey have developed.

- e. Confidentiality should be accorded all victims of violence who require counseling whether or not they are able to afford the services of private psychiatrists or psychologists.

Therefore, it is the public policy of this State to extend a testimonial privilege encompassing the contents of communications with a victim counselor and to render immune from discovery or legal process the records of these communications maintained by the counselor.

(2) N.J.S.A. 2A:84A-22.14 :

As used in this act:

- a. "Act of violence" means the commission or attempt to commit any of the offenses set forth in subsection b. of section 11 of P.L. 1971, c. 317 (C. 52:4B-11).
- b. "Confidential communication" means any information exchanged between a victim and a victim counselor in private or in the presence of a third party who is necessary to facilitate communication or further the counseling process and which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from an act of violence. It includes any advice, report or working paper given or made in the course of the consultation and all information received by the victim counselor in the course of that relationship.
- c. "Victim" means a person who consults a counselor for the purpose of securing advice, counseling or assistance concerning a mental, physical or emotional condition caused by an act of violence.
- d. "Victim counseling center" means any office, institution, or center offering assistance to victims and their families through crisis intervention, medical and legal accompaniment and follow-up counseling.
- e. "Victim counselor" means a person engaged in any office, institution or center defined as a victim counseling center by this act, who has undergone 40 hours of training and is under the control of a direct services supervisor of the center and who has a primary function of rendering advice, counseling or assisting victims of acts of violence.

(3) N.J.S.A. 2A:84A-22.15 :

Subject to Rule 37 [Rule 530] of the Rules of Evidence, a victim counselor has a privilege not to be examined as a witness in any civil or criminal proceeding with regard

to any confidential communication. The privilege shall be claimed by the counselor unless otherwise instructed by prior written consent of the victim. When a victim is incompetent or deceased consent to disclosure may be given by the guardian, executor or administrator except when the guardian, executor or administrator is the defendant or has a relationship with the victim such that he has an interest in the outcome of the proceeding. The privilege may be knowingly waived by a juvenile. In any instance where the juvenile is, in the opinion of the judge, incapable of knowing consent, the parent or guardian of the juvenile may waive the privilege on behalf of the juvenile, provided that the parent or guardian is not the defendant and does not have a relationship with the defendant such that he has an interest in the outcome of the proceeding. A victim counselor or a victim cannot be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location, or telephone number of a domestic violence shelter or any other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding.

(4) N.J.S.A. 2A:84A-22.16 :

Nothing in this act shall be deemed to prevent the disclosure to a defendant in a criminal action of statements or information given by a victim to a county victim-witness coordinator, where the disclosure of the statements or information is required by the constitution of this State or of the United States.

The decision of the Appellate Division in State v. J.G., 261 N.J.Super. 409, 619 A.2d 232 (A.D.1993), cert. denied 133 N.J. 436, 627 A.2d 1142 is apposite to the case at bar. In J.G. the court held that in addition to extending a testimonial privilege, the statute renders immune from discovery or legal process any records of the victim's statements. The privilege is sufficiently broad to encompass the confidential communications of both direct and secondary victims of violence so that statements made by the mother of a sexually abused child to the counselor are also protected from disclosure and the privilege may be waived only by the written consent of the victim or his or her guardian. Id. at 413, 234.

The court in J.G. further held that there was “*no basis to require an in camera inspection of confidential files. Absent some compelling reason, we view even such a limited disclosure as a substantial dilution of the statutory privilege.*” Id. Finally, the

court concluded that the mistaken release of confidential files by the victim's counselor does not constitute a waiver of the privilege. The privilege may be waived only by the written consent of the victim or his or her guardian.

C. **The victim counselor records are not subject to an *in camera* inspection by the court.** The essence of defendant's motion is that he is looking for an inconsistent statement that may have been made by the victim. He asks the court to pierce a privilege to aid in the search and if nothing that helps the defendant is uncovered, then the defense's position is "*no harm, no foul.*" Whether the defendant does the searching or calls upon the court to do it, nevertheless, there is a "harm" and there is a "foul." The privilege is absolute, and the invasion into the privacy of the conversations between the victim patient and counselor, no matter who does the invasion, a fortiori, still constitutes an invasion. The opinion of Judge Baime on behalf of the appellate panel in J.G. directly speaks to this issue:

We also reject defendant's argument that the files should have been examined by the trial judge *in camera* to determine whether the information was confidential and, if so, whether the accused's right to a fair trial nevertheless militated in favor of disclosure. In a variety of factual settings, we have required *in camera* inspection of otherwise confidential materials. *See, e.g., State v. Postorino*, 253 N.J.Super. 98, 601 A.2d 223 (App.Div.1991)³; *State v. Cusick*, 219 N.J.Super. 452, 530 A.2d 806 (App.Div.), *certif. denied*, 109 N.J. 54, 532 A.2d 1118 (1987)⁴; *Arena v. Saphier*, 201 N.J.Super. 79, 492 A.2d 1020 (App.Div.1985)⁵; *United Jersey Bank v. Wolosoff*, 196 N.J.Super. 553, 483 A.2d 821 (App.Div.1984).⁶ However, we are reluctant to adopt this course where, as here, the statute grants an absolute privilege. *See In re Maraziti*, 233 N.J.Super. 488, 559 A.2d 447 (App.Div.1989). We acknowledge that there are situations in which the defendant's constitutional rights are paramount

³ Involved a request by the defense at trial to ask the police informant to give his current name and address.

⁴ Review by the court did not involve the victim counselor privilege but N.J.S.A. 9:6-8.10a, and N.J.S.A. 30:4-24. Which were less protective of confidentiality and contemplated court review.

⁵ Medical malpractice where the patient's psychological injuries were in issue.

⁶ Action by bank against borrower involving attorney client privilege and rescission of stipulation of settlement.

and override the State's policy of protecting records and documents from disclosure. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987)⁷; *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)⁸. ***However, even a preliminary disclosure of the contents of confidential files intrudes upon the victim's rights and dilutes the statutory privilege. We hold that in the absence of compelling circumstances, communications between a crime victim and a counselor consulted for treatment are absolutely immune from disclosure.*** *Id.* at 418-19, 237. (Emphasis supplied).

The issue before this court presents contrasting and conflicting rights. The rights of the crime victim include the right of privacy under the Federal Constitution, the right to be treated with fairness, compassion, respect, dignity and free from intimidation under the New Jersey Constitution and Victims Bill of Rights, and the right to invoke specified statutory privileges. The defendant's assertions are based on his right to confront his witnesses.

The following passage from Judge Graves' opinion in *Gilchrist*, *supra*, articulates how the scales of justice balance these competing interests.

“The right to confront one's accusers is a concept that dates back to Roman times.”...The ultimate goal of the Confrontation Clause “is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”

“The right to question adverse witnesses, however, “does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.” ... (“The Confrontation Clause is not a constitutionally compelled right to discovery in a criminal case... (finding that trial court properly refused to permit defendant access to victim's records maintained by Division of Youth and Family Services and Arthur Brisbane Child Treatment Center

⁷ Involved a Pa. DYFS type file that required reports submitted to the court. The U.S. Supreme Court ruled that this confidential information to the trial court was not subject to release to the defendant.

⁸ Burglary defendant was not permitted to question prosecution witness on his juvenile probation record.

because “information was not determinative of any issues before the court or necessary for the conduct of the proceedings

In this case, defendant has failed to articulate any legitimate basis for obtaining M.C.'s photograph, and we conclude that neither the Sixth Amendment nor the Fourteenth Amendment requires the State to furnish him with her photograph. (“[A]llowing a defendant to forage for evidence without a reasonable basis is not an ingredient of either due process or fundamental fairness in the administration of the criminal laws.”). Emphasis supplied) (Citations omitted).

State v. Gilchrist, 381 N.J. Super. 138, 144, 885 A.2d 29, 33-34 (App.Div. 2005).

CONCLUSION

The right of this child victim to the protection of her privacy and confidentiality rests on a strong and substantial foundation anchored by the federal and state constitutional rights of crime victims to privacy, fairness, compassion and respect. The victim counselor privilege is built on this foundation and calls for absolute protection for the crime victim. Nothing has been presented to this court that should result in a compromise of the victim’s rights. Accordingly, the defendant’s motion should be denied without an *in camera* inspection by the court of the victim’s private records.

Respectfully submitted,

New Jersey Crime Victims' Law Center
Attorneys for Victim M.J.

By _____
Richard D. Pompelio, Esq.

Dated: June 11, 2009