

## **STATEMENT OF FACTS**

This matter comes before the court on defendant's motion to compel discovery specifically related to personal and private matters of the victim. Defendant was indicted by a Sussex County Grand Jury for several crimes of violence in which T.B., an adult female, is the victim. T.B. is represented in this matter by the New Jersey Crime Victims' Law Center.

Defendant is charged with two counts of 2<sup>nd</sup> degree aggravated assault, and one count each of 2<sup>nd</sup> degree possession of a weapon for an unlawful purpose, 3<sup>rd</sup> degree possession of a knife for an unlawful purpose, 3<sup>rd</sup> degree criminal restraint, 3<sup>rd</sup> degree possession of a firearm in violation of the Domestic Violence Act, 3<sup>rd</sup> degree terroristic threats and 4<sup>th</sup> degree aggravated assault with a firearm.

In defendant's discovery motion, he seeks the following: (1) to compel the victim<sup>1</sup>, T.B. to be examined by a mental health examiner for the defense; (2) to compel the furnishing of mental health records of the victim for her entire lifetime; (3) general medical records of the victim for the past ten years; and (4) records of the State of New Jersey Division of Youth and Family Services (DYFS) pertaining to victim.

Attached to defendant's motion is an eight page testimonial certification of defendant's attorney William D. Ware, Esq. to which he attaches copies of private

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<sup>1</sup> Defendant's moving papers incorrectly refer to T.B. as the "complainant" throughout. T.B. is the "victim" in this matter as defined by law, *see* N.J. Const. art. I, ¶ 22 and N.J.S.A. 52:4B-35, et seq. The complainant in this criminal matter is the State of New Jersey not the victim.

medical records of the victim. The release and filing of these records in this public judicial proceeding is without the consent of the victim, and is in violation of her rights as a crime victim...

Defendant's motion is opposed by the State of New Jersey, the victim and DYFS.

**I. THE REQUEST OF DEFENDANT FOR THE COMPELLED PSYCHOLOGICAL EXAMINATION OF THE VICTIM AND THE RELEASE OF HER MEDICAL AND MENTAL HEALTH RECORDS SHOULD BE DENIED BECAUSE IT VIOLATES THE VICTIM'S RIGHT TO PRIVACY UNDER THE FEDERAL CONSTITUTION AND RIGHTS AS A CRIME VICTIM UNDER THE NEW JERSEY CONSTITUTION AND STATUTORY BILL OF RIGHTS.**

**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 T.B., the victim of multiple acts of violence forced to suffer the further indignities of an invasive psychological examination by someone of his choosing in addition to a wholesale invasion of her privacy by foraging through her private medical and psychological records.

The thrust of defendant's argument is that he is entitled to the relief requested as the result of his right under the Federal and State Constitution to confront witnesses who will testify against him. Const. Art. 1, par. 10 and U.S.C.A. Const. Amends. 6 and 5. Defendant's argument is without merit.

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.** T.B., 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; both in protecting her private medical and psychological information that has no relevance concerning whether defendant committed these numerous acts of violence, and also by attempting to force her to be placed under a psychological microscope with the hope by defendant that he may discover something extraneous that will enable him to attack the victim's character at trial. Defendant's bold request in this matter strikes at the heart of the victim's right to privacy.

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).

**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.* at 256. (citations omitted),

The Court commented that the victim's father "recounted the humiliation, embarrassment, and suffering endured by [the victim] from the abusive incidents, . . ." *Id.* at 261; and in considering the defendant's request for a physical examination, the Court stated:

"Such an examination is inherently invasive and the record indicates the likelihood that it will engender significant emotional trauma and mental distress to [the victim]. *Id.*

In D.H.R., the Court discussed the significant adverse consequences that the defendant's discovery request could have upon the rape victim's emotional well being, concluding:

However much weight one assigns to such consequences, they should be avoided in the absence of a substantial need by defendant to subject [the victim] to an examination that clearly outweighs whatever detrimental effects the victim may suffer. *Id.* at 261-62.

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. . . .”<sup>2</sup> 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.”<sup>3</sup>

Defendant has proffered no showing of how or why the requested physical and emotional invasion of the victim or the trudging through of her medical and psychological records would support any defense he may have to these charges. There is no legally established need for any of this information other than to try to uncover something about the victim personally that defendant could use as a smokescreen at trial to attack the victim’s character. The tactic of the defendant in this case is a common one – intimidate the victim, blame the victim and attack the victim. The request of defendant is “inherently invasive” and the victim will be placed 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 this

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<sup>2</sup> *Id.* at 143, 32.

<sup>3</sup> *Id.* at 147, 35.

information except that it “may effect her capacity as a witness.”<sup>4</sup> trial photograph of the victim, and there can be no justification under the law to further invade the victim’s privacy. 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; . . .”<sup>5</sup>

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" provide 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

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<sup>4</sup> Defendant’s motion to compel a mental examination of the victim dated August 9, 2006.

<sup>5</sup> Gilchrist at 147, 35.

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.

In recent years the courts in New Jersey have also been progressive in recognizing the rights of crime victims. See, e.g.; State v. Muhammad, 145 N.J. 23 (1996) (upholding constitutionality of death penalty victim impact statute); State v. Faunce, 244 N.J. Super. 499 (App. Div. 1990) (rights of the victim must be considered before the court can order that the defendant's plea be non-evidential in a civil proceeding); State in the Interest of J.G., N.S., and J.T., 151 N.J. 565 (1996) (Supreme Court upholds victim's rights to require HIV testing of assailant); State v. Timmendequas, 161 N.J. 515 (1999) (the Constitutional rights of the victim survivors under the Victim's Rights Amendment are

sufficient to warrant a change of venue in a death penalty case); State v. Smith, 310 N.J. Super. 140 (App. Div. 1998) (permitting child victim to testify over closed circuit television); Gallara v. Koskovich, 364 N.J. Super 418 (Law Div. 2003) (court upholds claim of liability of sporting goods store for guns stolen and used in the murder of two victims); State v. Hill, 155 N.J. Super. (App. Div. 1998) (restitution may be ordered against defendant to pay third parties who have reimbursed a crime victim for losses suffered as a result of criminal conduct); State v. Cusumano, 396 N.J. Super. 305 (App. Div. 2004) (trial judge's act of advising those in attendance at trial that no persons would be permitted to leave or enter the courtroom while the victim was on the witness stand, constituted a reasonable and constitutionally permissible limitation on the public's right of access – relying on the Crime Victim's Bill of Rights N.J.S.A. 52:4B-36); and State in the interest of K.P., 311 N.J. Super. 123 (Chan. Div. 1997) (victim has standing to oppose petition by newspaper to open sexual assault trial of juveniles and victims have unalienable right to be present during a criminal proceeding, subject only to rules concerning sequestration.).

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 footing<sup>6</sup>” 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.

T.B. 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

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<sup>6</sup> N.J. Const. art. I, ¶ 22, Interpretive Statement

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, 381 N.J. Super. 138, 147, 885 A.2d 29, (App.Div. 2005)

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

1. **The New Jersey Privileges.** Defendant’s motion seeks a blanket intrusion into the psychological and medical history of the victim. This information is not subject to release without the consent of the victim under the following privileges:

- Rule 505. Psychologist Patient Privilege (N.J.S.A. 45:14B-28);
- Rule 506. Patient and Physician Privilege (N.J.S.A. 2A:84A-22.1-22.7);
- Rule 517. Victim Counselor 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. State v. L.J.P., 270 N.J.Super. 429, 637 A.2d 532 (App. Div. 1994); State v. McBride, 213 N.J.Super. 255, 517 A.2d 152 (App.Div.1986). Accordingly, the psychologist - patient

privilege is given greater scope and protection than the physician-patient privilege.

Discussing the breadth of this privilege in L.J. P., the court noted:

We have noted that the Sixth Amendment and the State constitution might even require the release of a psychological report to a defendant after an *in camera* review by a judge. . . . The privilege may also be pierced, as can the attorney-client privilege, under other circumstance such as, where: 1) there is a legitimate need to disclose the protected information; 2) the information is relevant and material to the issue before the court; and, 3) the party seeking to pierce the privilege shows by a “preponderance of the evidence” that “no less intrusive source” for that information exists. Id. at 439-440. (Citations omitted).

**2. The essence of defendant’s motion.** Defendant’s motion for discovery lacks any specificity. It is supported by a most amazing piece of dramatic fiction; *i.e.*, the eight page certification of defendant’s legal counsel in which he not only continually offers second hand testimony of the facts (“according to the defendant”)<sup>7</sup>, but he also proffers his own conclusions of law, medicine, psychology and even pharmacology. It is this document that is offered by defendant as the foundational basis for his quest to delve into the private and personal rights of his crime victim. There is no support for defendant’s motion. It is nothing more than a “fishing expedition” by a criminal defendant, State v. J.P., 2006 WL 1675714 (N. J. Super.App.) Div., 2006); Korostynski v. State, Div. of Gaming Enforcement, 266 N.J.Super. 549, 630 A.2d 342 (App. Div. 1993).

This certification does not demonstrate any “legitimate need to disclose the protected information”; it suggests no relevancy or materiality to the charges; nor does it show by a “preponderance of the evidence” that “no less intrusive source” for that information exists. See State v. L.J.P., 270 N.J.Super. 429, 439-440.

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<sup>7</sup> This practice not only places the attorney in the inappropriate and awkward position as a fact witness, but also by using the hearsay preface of to many of his statements as “according to the defendant”, it becomes obvious to the court and to counsel that defendant is indirectly testifying without subjecting himself to possible cross examination.

The objective of defendant is easily discernable - to find something that can be used at trial, however immaterial to the factual charges that can paint an unpleasant picture of the victim before the trial jury – and then make the victim’s character the primary issue during the trial of the defendant. Such trial conduct, and the journey by the defendant to arrive there using motions such as the one presently pending, constitute an egregious violation of the rights of the crime victim to fairness, compassion, respect, dignity and to be free from intimidation. “Unfair practices that deny crime victims fairness, compassion and respect are unconstitutional under the [victim’s rights] amendment. State in the Interest of K.P., 311 N.J. Super. 123, 135-136.

**3. Cases cited by defendant are inapposite.** Defendant cites State v. Henries, 306 N.J. Super. 512, 704 A.2d 24 (App.Div.1997) in support of his position. It is not Henries involved a defendant who was convicted of two murders and sentenced to two consecutive life terms. Two other individuals involved were also charged but were acquitted. The defendant was also charged with other offenses and during the proceedings involving one of the other defendants, the prosecutor became aware that the 11 year old witness to the murders had extensive and serious psychiatric problems, and the prosecutor then voluntarily provided the information, which was already public, to defendant’s counsel. Defendant on appeal requested a new trial due to newly discovered evidence. The court noted that the most significant issue in the trial was the eleven year old witness’ identification of the defendant and the psychiatric evidence provided went to the heart of the identification issue. Henries did not contain any discovery protection issues nor did it involve matters affecting the crime victim. The holding in Henries had no further relevance to the case at bar.

The other case cited by defendant State v. Franklin, 52 N.J. 399, 245 A.2d 356 (1968) is also not material to the issue in the instant matter. Franklin also did not involve the crime victim but centered on the issue of a competency hearing for an alcoholic eyewitness to the murder.

**4. Cases of other jurisdictions.** Individuals charged with crimes in the federal system and other states have not succeeded with similar requests as defendant in this matter. In affirming the denial of a motion for a psychiatric examination of the mentally retarded rape victim, the United States Court of Appeals for the District of Columbia Circuit, in United States v. Benn, 476 F.2d 1127 (D.C.Cir.1972), opined:

“[A] psychiatric examination may seriously impinge on a witness' right to privacy; the trauma that attends the role of complainant ... is sharply increased by the indignity of a psychiatric examination; the examination itself could serve as a tool of harassment; and the impact of all these considerations may well deter the victim of ... a crime from lodging any complaint at all. Since there is no exact measure for weighing these kinds of dangers against the need for an examination, the decision must be entrusted to the sound discretion of the trial judge in light of the particular facts.” *Id.* at 1131.

*Accord*, United States v. Butler, 481 F.2d 531 (D.C.Cir.1973). *See* Rasnick v. State, 7 Md. App. 564, 571-572, 256 A.2d 543 (1969), *cert. denied*, 400 U.S. 835, 91 S.Ct. 70, 27 L.Ed.2d 67 (1970).; Evans v. State, 304 Md. 487, 499 A.2d 1261 Md.,1985.

In Goldsmith v. State 337 Md. 112, 651 A.2d 866 (Md. Ct. App. 1995), the trial court denied the defendant's request for pretrial access to the sexual assault victim's privileged psychotherapy records. The defendant was convicted and on appeal, the Maryland Court of Appeals affirmed, holding : (1) the defendant possessed no common



law, court rule, statutory or constitutional right to pretrial discovery of the victim's psychotherapy records; (2) even if records were merely confidential, and not privileged, the motions court did not abuse its discretion in declining to issue a pretrial subpoena and declining *in camera* review of those records; and (3) the defendant was not entitled to the disclosure at trial of the records, since he failed to establish reasonable likelihood that records contained exculpatory information necessary for a proper defense<sup>8</sup>.

After a thorough analysis of the law, the court in Goldsmith concluded:

“Neither due process, compulsory process nor the right to confront adverse witnesses establishes a pre-trial right of a defendant to discovery review of a potential witness's privileged psychotherapy records. Thus, we find no common law, court rule, statutory or constitutional requirement that a defendant be permitted pre-trial discovery of privileged records held by a third party.” *Id.* at 127, 873.

See also, Harris v. State, 331 Md. 137, 626 A.2d 946 (1993) and Zaal v. State, 326 Md. 54, 83, 602 A.2d 1247, 1261 (1992) holding that to obtain pre-trial discovery of confidential records, the defendant must show a likelihood of obtaining relevant information; and Fisher v. State 128 Md. App. 79, 736 A.2d 1125 (Md.App.,1999) holding that the psychotherapist-patient privilege precluded disclosure of surviving victim's psychotherapy records.

While the privileges afforded to the victim/patient are not absolute, they are nevertheless, significant and will not be invaded without sufficient legal cause. Defendant has presented nothing legitimate to this court, either factually or legally, that would cause the court to entertain an attack on these personal privileges.

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<sup>8</sup> Similar to the “substantial need” test of D.R.H. and Gilchrist, *supra*.

## CONCLUSION

Paragraph #9 of defendant's counsel's certification is demonstrative of this application to the court. It states:

“9. A review of discovery reveals that Tamela Babcock may previously had [sic] serious mental health issues that may effect her credibility as to the veracity of these charges.”  
(Emphasis supplied)

Defendant's moving papers seek the private information of the victim under the guise of having a bearing on her “competency.” But “competency” is only a camouflage for “veracity” because defendant is on a broad fishing expedition to obtain something that he can use at trial to malign the victim's character and perhaps take the emphasis away from his acts of violence.

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 effectively 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 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)

Based on the foregoing it is respectfully requested that defendant's motion be denied.

New Jersey Crime Victims' Law Center

By \_\_\_\_\_  
Richard D. Pompelio, Esq.

Dated: December 4, 2006

