ARIZONA SUPREME COURT

R.S. and S.E., Petitioners, v. HON. PETER A. THOMPSON, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, Respondent Judge, TEDDY CARL VANDERS, Real Party in Interest,	CR–19–0395–PR Court of Appeals No. 1 CA–SA–19–0080 Maricopa County Superior No. CR2017–132367–001

BRIEF OF AMICUS CURIAE ARIZONA ATTORNEY GENERAL IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

Constitutional Provisions

Rules

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

This case implicates a crime victim's constitutional right to refuse discovery, a defendant's constitutional right to a fair trial, and the State's interest in upholding statutory privileges.

The Arizona Attorney General, as the State's chief legal officer, *see* A.R.S. § 41–192(A), has a manifest interest in ensuring that victims' rights, as enumerated in article II, § 2.1 of the Arizona Constitution, are protected. *See Fund Manager, Pub. Safety Pers. Ret. Sys. v. Corbin*, 161 Ariz. 348, 354 (App. 1988) ("as 'chief legal officer of the state,' … the Attorney General [] has a duty to uphold the Arizona and United States Constitutions"). Additionally, the Attorney General's Office of Victim Services enforces victims' rights laws, resolves victims' complaints, and participates in collaborative efforts with courts and other state, county, and municipal agencies to promote and facilitate justice for Arizona's crime victims.

This brief is filed pursuant to Rule 31.15(b)(1)(B) of the Arizona Rules of Criminal Procedure.

ARGUMENT

The Court granted review on the following issue: "Did the court of appeals correctly hold that to be entitled to an *in camera* review of privileged records as a matter of due process, the defendant must establish a substantial probability that the protected records contain information critical to an element of the charge or defense or that their unavailability would result in a fundamentally unfair trial?" As discussed below, the court of appeals correctly held this "substantial probability" standard applies when a defendant seeks to obtain an *in camera* review of a victim's physician-patient privileged records. This standard is consistent with the Arizona Constitution, Arizona's statutory physician-patient privilege, the Arizona Rules of Criminal Procedure, and federal case law.

I

THE COURT OF APPEALS' SUBSTANTIAL PROBABILITY STANDARD SAFEGUARDS CRIME VICTIMS' CONSTITUTIONAL AND STATUTORY RIGHTS

The court of appeals correctly applied a substantial probability standard—providing for an *in camera* review of physician-patient privileged

records not subject to *Brady*[1] upon the defendant's showing (1) a substantial probability that the protected records contain information critical to an element of the charge or defense, or (2) "that their unavailability would result in a fundamentally unfair trial." *R.S. v. Thompson (Real Party in Interest Vanders)*, 247 Ariz. 575, 577, ¶ 3 (App. 2019) ("*Vanders*"). This standard appropriately balances a defendant's due process rights with a victim's constitutional right to refuse a defendant's discovery request under the Victims' Bill of Rights ("VBR") in the Arizona Constitution.

The court of appeals did not address the VBR when resolving Vanders' due process claim, instead relying on the physician-patient privilege codified in A.R.S. § 13–4062(4) to reach its conclusion. *Vanders*, 247 Ariz. at 578, ¶ 8. Notably, however, the VBR expressly grants crime victims a constitutional right "[t]o refuse an interview, deposition, or other discovery request by the defendant[.]" Ariz. Const. art. II, § 2.1(A)(5). Thus, the plain language of the VBR allows victims to refuse a defendant's discovery request. *See State v. Lee*, 226 Ariz. 234, 238, ¶ 9 (App. 2011) ("[T]o determine the meaning of the VBR and serve its purpose, we look first to its plain language[.]") (citing *Knapp v. Martone*, 170 Ariz. 237, 239 (1992)); *see also Jett v. City of Tucson*, 180 Ariz.

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

115, 119 (1994) (to determine the meaning of a constitutional provision, courts must determine "the intent of the electorate that adopted it"). Thus, the issue presented necessarily implicates the VBR. *See State ex rel. Montgomery v. Chavez ex rel. Cty. of Maricopa*, 234 Ariz. 255, 258, ¶ 18 (2014) ("Arizona has been a national leader in providing rights to crime victims, and courts should conscientiously protect those rights provided by law.") (internal quotation and citation omitted).

The VBR was added to our state constitution in 1990 when Arizona's electorate approved Proposition 104, a voter-initiative measure. *See* Ariz. Const. art. II, § 2.1, hist. n. The VBR was enacted "to provide crime victims with 'basic rights of respect, protection, participation and healing of their ordeals.'" *Champlin v. Sargeant*, 192 Ariz. 371, 375, ¶ 20 (1998) (quoting 1991 Ariz. Sess. Laws ch. 229, § 2). Ever since then, "[c]rime victims' rights in Arizona [have been] protected by our constitution, by statute, and by court rule." *State v. Nichols*, 224 Ariz. 569, 571, ¶ 7 (App. 2010); *see generally State v. Roscoe*, 185 Ariz. 68, 70 (1996) (providing historical summary of victims' rights in Arizona).

A crime victim's constitutional right to refuse a discovery request under article II, § 2.1(A)(5) has been further implemented by Arizona Rule of Criminal Procedure 39(b)(12), similarly providing victims with the rule-based

right to refuse a defendant's discovery request. As this Court has noted, the phrase "other discovery request" includes a request for a victim's medical records. *Chavez*, 234 Ariz. at 257, ¶ 11.

Victims' rights may occasionally be in tension with a defendant's due process rights. In such cases, Arizona courts must balance the conflicting interests involved—keeping in mind that a defendant has no constitutional right to pretrial discovery—in determining whether victims' rights should be infringed when the defendant claims that due process requires access to victim information. *See Norgord v. State ex rel. Berning*, 201 Ariz. 228, 233, ¶ 21 (App. 2001) ("It is well-established that there is neither a federal nor a state constitutional right to pretrial discovery.") (quoting *State v. O'Neil*, 172 Ariz. 180, 182 (App. 1991)). In balancing these interests, Arizona courts are required to construe the rules governing criminal procedure and the admissibility of evidence in a manner that protects victims' rights. Ariz. Const. art. II, § 2.1(A)(11).

Arizona Rule of Criminal Procedure 15.1 details the State's disclosure requirements, and Rule 15.1(g) governs the defendant's ability to seek discovery from a third party. Rule 15.1(g) authorizes a trial court to order "any person to make available to the defendant material or information not included in this rule if the court finds: (A) the defendant has a substantial need for the

material or information to prepare the defendant's case; and (b) the defendant cannot obtain the substantial equivalent by other means without undue hardship." Ariz. R. Crim. P. 15.1(g). Consequently, the rule itself imposes a significant showing by requiring the defense to establish a "substantial need" for the information and an inability to obtain this information by other means.

The court of appeals correctly interpreted Rule 15.1(g) in a manner that protects a victim's right to refuse a defendant's discovery request by requiring the defendant to make a similar showing of "substantial need" or a "substantial probability that the records contain critical information for the charge or defense" before disclosure is required. *See Vanders*, at 578, ¶ 10 (looking to Rule 15.1(g) in determining whether Vanders' state right to discovery would entitle him to the privileged records). The Arizona Constitution requires that victims are entitled to at least as much protection as any other third-party when the defense seeks such discovery. *See O'Neil*, 172 Ariz. at 182 (noting defendants have no right to pretrial discovery, and stating, "it should be clear that the [VBR] abrogated a defendant's right under Rule 15 to interview or otherwise seek discovery from an unwilling victim").

Because the VBR expressly provides victims with the right to refuse discovery, this constitutional right should not be easily overcome. Ariz. Const. art. II, § 2.1(A)(5). *See Lee*, 226 Ariz. at 237, ¶ 8 ("[N]either the legislature nor

court rules can eliminate or reduce rights guaranteed by the VBR.") (collecting cases). Arizona has been a leader in victims' rights by enacting victims' rights legislation early and providing victims with a broad array of rights.[2] Only a handful of other states have enacted victims' rights legislation that specifically grant victims the right to refuse a defendant's discovery request. *See* Or. Const. Art. 1, § 42(1)(c) (adopted 1999); Cal. Const. Art. 1 § 28(b)(5) (effective 2008); N.D. Const. Art. 1, § 25(1)(f) (approved 2016); S.D. Const. Art. 6, § 29(6) (effective 2018); Ohio Const. Art. 1, § 10(a)(A)(6) (effective 2018). Arizona's constitutional provision granting victims the right to refuse a defendant's discovery request further supports that a substantial probability standard is necessary to protect victims' rights.

And the requested information here—a victim's privileged records—is not only protected by the VBR and subject to a defendant's compliance with 15.1(g), but is also entitled to a third layer of protection via Arizona's privilege statute. Section 13–4062 addresses privileged communications, including the anti-marital fact privilege, the attorney-client privilege, the priest-penitent privilege, and the physician-patient privilege. A.R.S. § 13–4062. The statute

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[2] *Compare* Ala. Const. Art. I, §6.01; Colo. Const. Art. II, § 16a; Haw. Rev. Stat. Ann. § 801D-4 (West); Ind. Art.1 § 13(b); Kan. Art. 15, § 15 (providing fewer rights to crime victims than Arizona's VBR).

provides that "a person shall not be examined as a witness" in certain situations where the privilege applies, and aside from exceptions applying exclusively to the anti-marital fact privilege, the statute itself contains no other exceptions. A.R.S. § 13–4062(2)-(4). The court of appeals recognized the physician-patient privilege is "not absolute," but that its exceptions generally are limited and there is no exception for court-ordered disclosure. *Vanders*, at 579, ¶ 11. Arizona's statutory privilege protecting a victim's privileged records additionally justifies the substantial probability standard.

A lesser standard, such as a "reasonable possibility" standard, for example, would be incompatible with the VBR, the physician-patient privilege, and Rule 15.1(g). Also, as the court of appeals recognized, although a defendant has no constitutional right to discovery from a third party, "in the exceptional case," a victim's medical records may be discoverable to uphold a defendant's due process rights. *See Vanders*, 247 Ariz. at 581, ¶ 22. The "substantial probability" standard, therefore, strikes the correct balance between the competing interests.

II

THE COURT OF APPEALS' STANDARD IS CONSISTENT WITH OVERWHELMING FEDERAL AUTHORITY.

Moreover, to the extent Vanders relies on Supreme Court precedent to support his position (*see* Supplemental Brief at 5–7, 14, 18), the court of

appeals did not deviate from that precedent. The seminal Supreme Court case on the issue of pretrial access to privileged records is *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). There, the defendant was accused of sexually abusing his daughter and sought access to records of the Children and Youth Services (CYS), a state investigative agency. *Id.* at 43. The statute creating CYS stated that its records were generally privileged, but permitted disclosure upon eleven enumerated exceptions, including court order. *Id.* at 43–44. The trial judge refused to order disclosure, while the state supreme court held that by denying the defendant access to the CYS material, the trial court violated his constitutional rights. *Id.* at 44–45.

The Supreme Court examined a criminal defendant's claim that due process required the disclosure of the records by first citing three cases focusing on the government's duty to disclose evidence within its possession: *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976); and *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.* at 57. Consistent with *Bagley*, *Agurs*, and *Brady*, the Supreme Court stated that the government had an obligation to turn over evidence favorable to the accused and material to guilt or punishment. *Id.* The Supreme Court explained, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* The

Supreme Court concluded that, under the Pennsylvania statute at issue, the defendant was entitled to have the trial court review the CYS file *in camera* "to determine whether it contain[ed] information that probably would have changed the outcome of his trial." *Id*. at 58.

Critically, however, the Supreme Court expressly left open the question "whether the result in this case would have been different if the statute had protected the CYS files from disclosure to *anyone*[.]" *Id*. at 57 n.14. The Supreme Court emphasized that it was not dealing with "a state statute grant[ing] CYS the absolute authority to shield its files from all eyes," instead, "the Pennsylvania law provide[d] that the information [must] be disclosed in certain circumstances, including when CYS is directed to do so by court order." *Id*. at 57.

Thus, the statute at issue in *Ritchie* was qualified, not absolute, and expressly contemplated that the CYS files might be used in judicial proceedings. It follows that to overcome an absolute privilege, a defendant would have to meet an even higher burden than suggested in *Ritchie*. Indeed, after *Ritchie*, some state courts have strictly upheld absolute victim privileges, denying the opportunity for an *in camera* review in the face of a defendant's pretrial due process claims to discovery. *See State v. Famiglietti*, 817 So.2d 901, 906–07 (Fla. Dist. Ct. App. 2002) (when the privilege is absolutely

protected, due process did not permit invasion of the victim's privileged communications with her psychotherapist); *People v. Foggy*, 521 N.E.2d 86, 91–92 (Ill. 1988) (upholding the trial court's refusal to conduct an *in camera* review of victim's communications with her counselor, based on absolute statutory privilege of confidentiality of communications between rape victims and counselors, concluding this did not violate defendant's due process or confrontation rights); *Commonwealth v. Kyle*, 533 A.2d 120, 125, 130 (Pa. 1987) (defendant was not entitled to *in camera* inspection of psychologist-patient privileged records, noting that the law provided an absolute privilege for communications between a psychologist and client); *People v. District Court of Denver*, 719 P.2d 722, 726–27 (Colo. 1986) (in discussing whether defendant's right to confrontation required discovery of the victim's psychologist-patient privileged information, where victim did not waive the privilege, defendant was not entitled to an *in camera* review).

Likewise, because Arizona's privilege statute provides no exception for disclosure pursuant to court order, the court of appeals correctly required the defendant to satisfy the "substantial probability" showing (or demonstrate that the records' "unavailability would result in a fundamentally unfair trial") before requiring a victim to disclose privileged medical records for an *in camera* review.

Nine years after *Ritchie*, the Supreme Court flatly rejected the idea of applying a balancing test to the psychotherapist-patient privilege, because to allow such an invasion would defeat the purpose of the privilege:

> We reject the balancing component of the privilege implemented by [the court of appeals] and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn* [*v. United States*, 449 U.S. 383 (1981)], if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by courts, is little better than no privilege at all." 449 U.S. at 393.

Jaffee v. Redmond, 518 U.S. 1, 17–18 (1996).

It is important to consider the public policy interests that the privilege protects. *See id*. at 10 (effective psychotherapy depends on an atmosphere of confidence and trust, and "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment"). The privilege serves a public good that necessitates a substantial probability standard to protect a victim's interest in privacy.

Additionally, courts have recognized that *Ritchie*'s holding is further limited to material in the possession of the State or government agency. *See State v. Bell*, 469 P.3d 929, 936–37, ¶ 29 (Utah 2020) (finding defendant's

reliance on *Ritchie* misplaced, in part because, "in *Ritchie*, the Supreme Court based its decision on the fact that a criminal defendant's right to due process is implicated when the privileged records are in the State's possession, not when the privileged records are in the possession of a private party"); *Goldsmith v. State*, 651 A.2d 866, 873 (Md. 1995) (stating the privileged records were not kept by a state agency and therefore disclosure was not required under *Brady*, the records were prohibited from discovery by statute, and "nothing in *Ritchie*, *Zaal*, or *Avery* would constitutionally require the pre-trial discovery []of a private psychotherapist's records[.]"); *State v. Percy*, 548 A.2d 408, 415 (Vt. 1988) ("[t]he pretrial discovery right set out in *Ritchie* applies solely to information in the hands of the State.").

The defendant has a right to present a meaningful defense, but this right is not without limits. As discussed above, a defendant's ability to seek discovery is framed by Arizona Rule of Criminal Procedure 15.1(g). And a defendant has a constitutional right, under *Brady*, to material information when the information is held by the State. Outside of the prosecution's disclosure requirement, there is no constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

Thus, federal authority supports that (1) statutory privileges that have minimal exceptions should be granted higher degrees of protection; (2) public

policy supports heightened protections on physician-patient privileged information; and (3) when such materials are in the hands of a third-party, the Supreme Court does not mandate their disclosure. This authority further supports the court of appeals' decision below.

III

THE COURT OF APPEALS CORRECTLY REJECTED *ROPER'S* EXTENSION OF A DEFENDANT'S RIGHT TO PRESENT A COMPLETE DEFENSE.

As discussed above, *Ritchie* should not be read to expand *Brady* to material that is not within the State's possession. Arguably, this may have occurred in *State ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232 (App. 1992), and the line of Arizona cases holding that a defendant is entitled to an *in camera* review of the victim's medical records upon showing a "reasonable possibility" that the records contain evidence that the defendant is entitled as a matter of due process. Those cases failed to examine whether the information sought was in the possession of the State or a third party.

The *Roper* court acknowledged that it was not clear whether the sought-after material was in the possession of the State. *Roper*, 172 Ariz. at 239. The court stated that if the records were in the prosecutor's control, they were subject to *Brady*'s disclosure obligations. *Id*. But the court then concluded:

> If the medical records have not been made available to the prosecution (or any agent of the state such as law enforcement

> officers), then the victim has the right to refuse defendant's discovery request under the [VBR]. However, if the trial court determines that *Brady* and due process guarantees require disclosure of exculpatory evidence and, further, if the court determines that the medical records are exculpatory and are essential to the presentation of the defendant's theory of the case, or necessary for impeachment of the victim relevant to the defense theory, then the defendant's due process right to a fundamentally fair trial and to present the defense of self-defense overcomes the statutory physician patient privilege on the facts as presented here, just as the due process right overcomes the Victims' Bill of Rights on these facts.

Id. (alterations omitted).

As the court of appeals recognized below, *Roper* failed to explain why due process required the disclosure of privately-held records which were not in the State's possession. *See Vanders*, at 580–581, ¶¶ 18–20. *Roper*'s holding should therefore be limited to the facts of that case. *See State v. Connor*, 215 Ariz. 553, 558, ¶ 9 (App. 2007) (noting the "unique facts of *Roper* in which the defendant had attended at least some of the victim's treatment sessions").

Connor first announced the "reasonable possibility" standard in discussing *Roper*, and upheld the trial court's denial of the defendant's motion for discovery of the victim's medical records. *Id*. at 558, ¶ 10. While the reasonable possibility standard has been followed in subsequent cases, courts have not addressed *Connor*'s holding that a higher burden must be met when the defendant seeks the victim's privileged information possessed by a third-party:

> [C]onsistent with due process, when the defendant demonstrates a sufficient potential need for additional information not in the possession of the prosecutor, the trial court may order third parties to produce it so long as,[]the defendant (1) 'has substantial need in the preparation of the defendant's case for the material or information . . . and, (2), the defendant is unable without undue hardship to obtain the substantial equivalent by other means.' Ariz. R. Crim. P. 15.1(g). However, in a case such as this in which ordering any production of the information sought would also infringe on a victim's constitutional and statutory privileges, before the Court could order an *in camera* production of the materials for its review, the defendant would have to demonstrate that his "substantial need" for the information would, at least potentially, amount to one of constitutional dimension.

Id. at 561, ¶ 22.

Accordingly, *Connor* reached the conclusion similar to the one announced by the court of appeals—the substantial probability standard should apply when, as here, privileged material is protected by the VBR and held by a third party. This framework properly balances the constitutional rights of criminal defendants, while safeguarding the privacy of the victim and the societal values in protecting physician-patient privileged information.

CONCLUSION

The Court should affirm the court of appeals' holding that a defendant must meet the substantial probability standard to allow for an *in camera* review of a crime victim's physician-patient privileged records.

Respectfully submitted,

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