SUPERIOR COURT OF WASHINGTON
KING COUNTY

STATE OF WASHINGTON **Plaintiff,** **v.** **JOE JERKFACE** **Defendant.**	**No. _____** **MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENA DUCES TECUM**

I. INTRODUCTION and RELIEF REQUESTED

The undersigned represents to the Court the facts below and requests that the court grant the relief described herein. On [DATE] the Defendant issued subpoenas deuces tecum seeking production of the victim's (Suzy Strong's) medical, counseling, and education records. These records are all privileged or confidential. Therefore, Ms. Strong respectfully requests that the court issue a Protective Order under CrR 4.7(h)(4) and quash the subpoenas.

II. STATEMENT OF FACTS/DECLARATION OF SUZY STRONG

1. The Defendant is currently charged with Rape in the Second Degree, because he raped me in the bathroom of our high school. Trial is currently scheduled for [DATE].

2. On [DATE] I received a phone call from the Prosecuting Attorney on this case, Mr. Rambles. He said that he had received copies of subpoenas from the defense attorney. These subpoenas were never served on me, and I received no notice except from the prosecutor.

3. When I got copies of the subpoenas, I saw that they were addressed to my physician (Dr. Katie Kevorkian), my counselor at the local rape crisis center (Freida Freud), and the principal of my high school (Principal Barry Balding). I immediately contacted the three of them and informed them that I did not want them to release any of my records or otherwise disclose any information about me.

I declare under penalty of perjury and the laws of the state of Washington that the foregoing is true and correct.

Signed at Seattle, WA on [DATE].

_____
Suzy Strong

III. ARGUMENT

A. Every Record Subject to the Subpoenas is Privileged or Confidential.

All of the records described in the Subpoenas Duces Tecum are non-discoverable, as each is covered by an explicit statutory privilege or right to confidentiality under Washington law.

First, all of Dr. Kevorkian's records are privileged: "a health care provider … may not disclose health care information about a patient to any other person without the patient's written authorization." RCW 70.02.020; *see also* RCW 5.60.060(4). That privilege extends to the records kept by a doctor. *Randa v. Bear*, 50 Wn.2d 415, 421, 312 P.2d 640 (1957).

Second, Ms. Strong's counseling records are privileged: "A mental health counselor … may not disclose, or be compelled to testify about, any information acquired from persons consulting the individual in a professional capacity when the information was necessary to enable the individual to render professional services…." RCW 5.60.060(9). In *State v. Kalakosky*, the court emphasized the importance of this privilege in the context of sexual assault:

> [O]ld common law rules caused victims to be victimized a second time in the course of confronting the accused…. The qualified privilege afforded in the Victims of Sexual

> Assault Act reflects a careful effort to balance the accused's constitutional rights against the rights of the victim to seek counseling at a rape crisis center to aid in dealing with the trauma of rape and the right to expect such counseling will not be made public.

121 Wn.2d 525, 547-48, 852 P.2d 1064 (1993). The Victims of Sexual Assault Act created a qualified privilege for communications between a sexual assault victim and her advocate, which extends to the records of rape crisis centers. RCW 70.125.065; RCW 5.06.060(7).

Finally, Ms. Strong's education records are *per se* confidential under both federal and state law. Regulations promulgated under The Federal Education Records Privacy Act ("FERPA") govern the disclosure of student records. FERPA, 20 U.S.C. § 1232; 34 CFR 99.31, *et seq.* Records may be released by a school pursuant the written consent of the parent, the child (if age eighteen or older), or "a judicial order or lawfully issued subpoena …." 34 CFR 99.31 (a)(9)(i) and (ii). Moreover, under state law, student records are not public records. RCW 42.56.230(1). Provisions that parallel FERPA protections exist in Washington State statutes. See RCW 28A.600.475; RCW 28A.605.030.

B. The Defendant Failed to Provide Notice as Required by Statute.

In order to seek discovery of privileged health care records, the Defendant must provide notice to the provider and the patient as described by the statute. RCW 70.02.060. The Notice must: "indicat[e] the health care provider from whom the information is sought, what health care information is sought, and the date by which a protective order must be obtained to prevent the health care provider from complying." RCW 70.02.060(1). The notice "shall give the patient and the health care provider adequate time to seek a protective order, but in no event be less than fourteen days…." *Id.* Mental health care records also fall under this statute. RCW 70.02.010(5)(a).

Likewise, the Defendant was obligated to notify Ms. Strong of his intent to seek her education records. Under FERPA, the school may release records in response to "a judicial order or lawfully issued subpoena . . . only if the [school] makes a reasonable effort to notify the parent or

eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action...." 34 CFR 99.31 (a)(9). The Defendant did not provide any notice to the victim, either prior to or concurrent with the issuance of the subpoenas. Therefore, the subpoenas are voidable and should be quashed.

C. The Defendant Violated Washington Criminal Procedure in Issuing the Subpoenas.

Even if the Notices were adequate, this court should not permit the requested discovery because the Defendant failed to follow the rules of discovery. Discovery in criminal cases is governed by the Superior Court Criminal Rules, specifically CrR 4.7. *State v. Gonzalez.* 110 Wn.2d 738, 743, 757 P.2d 925 (1988). CrR 4.7 requires the Defendant to make a "showing of materiality to the preparation of the defense, and [that] the request is reasonable…." CrR 4.7(e) (1). If the Defendant makes such a showing, then the court has the *discretion* (not the obligation) to order production of the documents. CrR 4.7(e) (1). In this case, the Defendant has not attempted to make the CrR 4.7(e) (1) showing, which is a condition precedent to seeking access to any records, whether or not they are privileged.

Additionally, even if the Defendant had followed the proper procedure, the court would still have authority to enter a protective order. When the Defendant requests a discretionary disclosure, the court may deny the request in whole or in part, "if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment…." CrR 4.7(e) (2). Furthermore, "Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred…." CrR 4.7(h)(4). The fact that these documents are privileged constitutes good cause to restrict discovery and enter a protective order.

D. The Defendant has not made the Required Showing Under *Pennsylvania v. Ritchie*.

The courts have established a clear procedural and analytic framework when a criminal defendant seeks production of privileged records. These cases take it as a given that discovery of such documents is

an extraordinary request, and that they cannot be obtained through the standard discovery process. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987). Criminal defendants are not entitled to peruse victims' privileged records, particularly in sexual assault cases. *State v. Gonzalez*, 110 Wn.2d 738; 757 P.2d 925 (1988); *State v. Kalakosky*, 121 Wn.2d 525, 852 P.2d 1064 (1993).

The real question is not whether the records should be produced; the question is whether the Defendant has made a sufficient showing to justify *in camera* review of the records. *Ritchie*, 480 U.S. at *57*. In order to seek *in camera* review, the Defendant must make an adequate showing that the information contained in the records is favorable to the defense and material to guilt or sentencing. *Id.*

A "bare assertion" of materiality is inadequate. *State v Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). The Defendant must "advance some factual predicate which makes it reasonably likely" that the records contain evidence material to the defense. *Blackwell*, 120 Wn.2d at 830. The court must deny *in camera* review if the showing is based on "speculation and little factual basis or foundation." *State v. Diemel*, 81 Wn.App. 464, 469, 914 P.2d 779 (1996). To show favorability, the Defendant can't merely claim that the records could lead to discovery of other evidence. *Diemel*, 81 Wn. App. at 469. He must set forth a factual predicate to show that the contents will be "admissible at trial" and "exculpatory." *Gonzalez*, 110 Wn.2d at 748.

The Defendant has not attempted to make a showing of either element, as required by *Ritchie* and state law. Therefore, this court should quash the subpoenas and enter a protective order.

E. The Victim's Right to Privacy should Prevail Over the Defendant's Desire to View the Victim's Confidential Records.

In *Gonzalez*, the court emphasized that CrR 4.7 requires a balancing test, not a blind deference to the rights of the accused. 110 Wn.2d at 747. The court must find that usefulness of the specifically identified, relevant, admissible information outweighs the harm to the victim. *Gonzalez*, 110 Wn.2d at 747. Defendants can't just go on a "fishing expedition" through the records of the victims of sex

crimes, for several reasons. *Gonzalez,* 110 Wn.2d 738; *Kalakosky,* 121 Wn.2d 525. Traumatizing victims in the legal process by invading their privacy deters them from reporting crimes to law enforcement and assisting in any prosecution, thus preventing them from obtaining justice and undermining the state's interest in prosecuting crimes. *Gonzalez,* 110 Wn.2d 47-48.

Additionally, the harm to the victim lasts long after the litigation is finished, because "[A] key element in the successful counseling of sexual assault victims is the assurance of confidentiality…." *State v. Kalakosky,* 121 Wn.2d 525, 547, 852 P.2d 1064 (1993). Breaching privilege can cause a "chilling effect … and hinder further treatment." *Holbrook v. Weyerhaeuser Co.,* 118 Wn.2d 306, 309, 822 P.2d 272 (1992). In the context of post-rape medical care or counseling, this chilling effect could be particularly damaging.

IV. CONCLUSION

The Defendant disregarded the applicable procedures and notice requirements under federal law, state law, and the Washington Criminal Rules in his unlawful attempt to demand production Ms. Strong's records. Moreover, he has made no attempt to satisfy the showings required under CrR 4.7 and *Ritchie*. Therefore, Ms. Strong respectfully requests that this court protect her privacy by quashing the Defendant's subpoena and entering a Protective Order.

Signed at Seattle, WA on [DATE]

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Leslie Litigator, WSBA #12345
Attorney for Suzy Strong