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APPELLATE COURT 3RD DISTRICT

No. 3-20-0121

In the
Appellate Court of Illinois
Third Judicial District

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee

v.

ISMAEL GOMEZ-RAMIREZ,

Defendant

(AMITA HEALTH ADVENTIST MEDICAL CENTER, BOLINGBROOK and ALEXIAN BROTHERS-AHS MIDWEST REGION HEALTH CO.,

Contemnors-Appellants)

Appeal from the Circuit Court for the Twelfth Judicial Circuit, Will County,
Case No. 2018 CF 1946
The Honorable Edward A. Burmila, Jr., Judge Presiding.

BRIEF OF *AMICI CURIAE* ILLINOIS COALITION AGAINST SEXUAL ASSAULT, NATIONAL CRIME VICTIM LAW INSTITUTE, AND CHICAGO ALLIANCE AGAINST SEXUAL EXPLOITATION IN SUPPORT OF APPELLANTS

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POINTS AND AUTHORITIES

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INTERESTS OF *AMICI CURIAE*

I. Illinois Coalition Against Sexual Assault.

Founded in 1977 as Illinois Coalition of Women Against Rape and re-named Illinois Coalition Against Sexual Assault ("ICASA") in 1984, ICASA is a not-for-profit organization that unites the services and resources of sexual assault crisis centers statewide. ICASA consists of 30 community-based sexual assault crisis centers working together to end sexual violence. Each center provides free, confidential services to victims of sexual assault, including 24-hour crisis intervention, counseling, and medical and legal advocacy. In Fiscal Year 2019, ICASA-certified centers provided 133,365 hours of direct services to victims of sexual assault.

ICASA's mission includes supporting victims, educating the community about sexual assault, and developing public policy that protects victims, promotes prevention, and advances justice. ICASA is a voice for sexual assault victims, and it participated in the amendment process that expanded rights for crime victims in the Illinois Constitution in 2014.

ICASA offers a unique perspective on the needs of victims of sexual assault in Illinois and can provide insight into the importance of privacy to victims. ICASA advocates for victims to be treated with dignity and respect; to have their privacy protected; and to have access to safe and confidential healthcare services.

II. National Crime Victim Law Institute.

The National Crime Victim Law Institute ("NCVLI") is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system

through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training of judges, prosecutors, victims' attorneys, advocates, law students, and community service providers; providing legal assistance on cases nationwide; analyzing developments in crime victim law; and advancing victims' rights policy.

As part of its legal assistance, NCVLI participates as *amicus curiae* in select state, federal and military cases that present victims' rights issues of broad importance. This is one of those cases as it involves the fundamental rights to dignity and privacy—specifically, the constitutional rights to have one's legitimate expectation of privacy in privileged medical records be free from unreasonable search and seizure by the government, and to notice and a hearing when such records are at risk of disclosure.

III. Chicago Alliance Against Sexual Exploitation.

The Chicago Alliance Against Sexual Exploitation ("CAASE") is an Illinois-based non-profit dedicated to transforming the cultural, systemic, and individual responses that lead to, support, or profit from sexual harm. CAASE engages in direct legal services, prevention education, community engagement, and policy reform. CAASE advocates for policies and practices that decrease vulnerabilities to sexual harm; and for victims to have their privacy protected, and to have access to safe and confidential healthcare services.

INTRODUCTION

This case concerns Illinois courts' duty to safeguard the constitutional rights of crime victims, including their unambiguous constitutional rights to be protected from warrantless search and seizure of privileged medical records, to privacy, to notice and to due process. See *People v. Mata*, 217 Ill. 2d 535, 546 (2005), *as modified on denial of reh'g* (Jan. 23, 2006) ("State courts have an obligation to enforce and protect every right granted by the Constitution of the United States whenever those rights are involved in a suit or proceeding before them.").[1]

It is difficult to overstate the importance of privacy for victims of sexual assault, sexual abuse, and domestic violence. See Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 Suffolk U. L. Rev. 467, 473 (2005) ("For most sexual assault victims, privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot."); see also Kimberly D. Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 Am. Crim. L. Rev.

[1] It is perplexing that this court is presented with a case that requires resolution of constitutional rights without the trial court having taken steps to ensure the real party in interest—the crime victim—was independently heard on these rights. At a minimum, the court should reverse and remand with direction that the trial court ensure the victim receives proper notice and an opportunity to be heard, and appoint counsel to represent the victim to ensure her federal constitutional rights can be fully litigated. See *Powell v. State of Alabama*, 287 U.S. 45, 68-69 (1932) (stating that "notice and hearing" is part of the "basic elements of the constitutional requirement of due process of law" and "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel[] [for] [e]ven the intelligent and educated layman has small and sometimes no skill in the science of law"); see also *People v. Hammond*, 196 Ill. App. 3d 986, 993 (1st Dist. 1990) (finding "it is not improper for a State's Attorney to suggest appointment of counsel for a witness nor for a judge to appoint counsel to advise a witness of his privilege against self-incrimination").

1777, 1786 (Fall 2012) (finding approximately twenty-two percent of domestic violence victims who did not seek criminal justice assistance cited privacy as the reason, per the National Crime Surveys of Victimization).

In this case, protecting the victim's constitutional rights in the face of the State's warrantless attempt to seek and inspect privileged medical records is consistent with the public's interest in a justice system that safeguards the rights of all parties. Here, proper legal analysis requires that the court must reverse to redress the arbitrary violation of the victim's rights.

ARGUMENT

I. The State's Subpoena and the Court's Order Compelling Appellant-Hospital to Comply with the Subpoena Violate the Victim's Fourth Amendment Right to Be Free from Unreasonable Search or Seizure.[2]

Under the fourth amendment, all individuals have a constitutional right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and

[2] While this argument was not raised by the parties below, *amici curiae* urge the court to consider a constitutional issue of great importance to all crime victims. *Cf. Graham v. Illinois State Toll Highway Auth.*, 182 Ill. 2d 287, 313 (1998) (addressing "an argument raised by *amici curiae* filing in support of the plaintiffs"); *In re P.S.*, 169 Ill. 2d 260, 273–74 (1996) (addressing issue not raised below by the parties but raised by *amicus* on appeal; citing *Teague v. Lane*, 489 U.S. 288 (1989), with the parenthetical that *Teague* "address[ed] the issue of retroactivity although issue was raised only by *amicus* brief"), *cert. granted, vacated on other grounds, sub nom. Illinois v. Kimery*, 518 U.S. 1031 (1996). The court's consideration in this case is especially important given that the record shows the State's Attorney's Office routinely uses the subpoena process to acquire crime victims' privileged medical records without notice to the victims. (R 14/8-14, A 100 [12/5/19 Hr. Tr.] ("[Assistant State's Attorney:] [A]s a matter of practice we are not required under the Illinois Constitution to notify the victim of a subpoena which is sent out for her medical records. * * * [W]e didn't send a copy of the subpoena to the victim in this matter. We don't do that."). "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. United States*, 116 U.S. 616, 635 (1886), *overruled on other grounds, Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

seizures." U.S. Const. amend. IV.[3, 4] The fourth amendment protects an individual's reasonable expectations of privacy from unreasonable government intrusion. See *Carpenter v. United States*, 585 U.S.__, 138 S. Ct. 2206, 2213 (2018) (explaining that "[w]hen an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' * * * official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause"). A court determines whether a reasonable expectation of privacy exists by looking at the nature of the records, not where the records are held. See, *e.g.*, *Carpenter*, 585 U.S. at __, 138 S. Ct. at 2217, 2219-20 (finding that defendant has a reasonable expectation of privacy in his cell phone location records; rejecting the argument that the expectation of privacy is not reasonable where the records are held by third party wireless carriers; and finding the government's acquisition of those records,

[3] The fourth amendment right is enforceable against state actions through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

[4] The crime victim, like all Illinois residents, also has a right to be free from unreasonable search and seizure under article I, section 6 of the Illinois Constitution. Ill. Const. 1970, art. I, § 6 ("The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means."). Article I, section 6 provides two relevant privacy rights. First, the provision includes a "search and seizure clause"—modeled after the fourth amendment—that generally affords no broader protection than the search and seizure clause of the fourth amendment. Illinois courts, with few exceptions that are not relevant here, follow federal fourth amendment jurisprudence. See *People v. Caballes*, 221 Ill. 2d 282, 290-204, 316 (2006) (discussing history of the state's search and seizure case law, and reaffirming the "limited lockstep approach" to interpreting the state search and seizure clause and the fourth amendment). Second, article I, section 6 includes a separate "privacy clause." See *id.* at 293, 317-29 (distinguishing the "search and seizure" clause from the "invasions of privacy" clause in article I, section 6 of the Illinois Constitution, and analyzing the scope of the separate privacy protection under the privacy clause). As more fully addressed below, the trial court's order also violates the privacy clause under article I, section 6.

even pursuant to a court order, "was a search within the meaning of the Fourth Amendment"). Where fourth amendment protection applies, the government action is reasonable only if conducted pursuant to a warrant issued upon a finding of probable cause, or pursuant to the application of an established exception to the warrant requirement. See, *e.g., Katz v. United States*, 389 U.S. 347, 357 (1967).

Individuals do not lose their fourth amendment rights, or have reduced levels of constitutional protection, merely because they are victims/witnesses rather than the accused in a criminal action. See *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) ("The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. [Citation] Its protection extends to offenders as well as to the law abiding." [Citation]), *abrogated on other grounds recognized, Arizona v. Grant*, 556 U.S. 332, 351 (2009). Crime victims, like all individuals, have a reasonable expectation of privacy in their privileged medical records. See, *e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (stating that "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent"); see also *Doe v. Broderick*, 225 F.3d 440, 450 (4th Cir. 2000) (reviewing a section 1983 civil rights action alleging a violation of the plaintiff's rights, and finding the plaintiff had a reasonable expectation of privacy in his treatment records and files held at a substance abuse treatment center).

Despite the constitutional magnitude of the protection to which this victim was entitled and the clarity of process necessary to invade this expectation of privacy, the court ordered appellant-hospital to turn over the victim's protected medical records

pursuant to the State's improper subpoena without a finding of probable cause for a warrant or a recognized exception to the warrant requirement. *Cf. Carpenter*, 585 U.S. at __, 138 S. Ct. at 2221-22 (rejecting Justice Alito's dissenting argument that "the warrant requirement * * * does not apply when the Government acquires records using compulsory process [because] subpoenas for documents do not involve the direct taking of evidence"; and explaining that "this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy"). As the *Carpenter* court cautioned, "[i]f the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement." *Id.* (*dicta*).

The fact that a trial court reviewed the State's request and issued an order compelling disclosure does not remove the government conduct from fourth amendment scrutiny. See, *e.g.*, *id*, at __, 138 S. Ct. at 2221 (finding a violation of the fourth amendment where the prosecutors acquired the cell phone location records pursuant to court orders under the Stored Communications Act because the " 'reasonable grounds' for believing that the records were 'relevant and material' " showing for the court orders "falls well short of the probable cause required for a warrant"); see also *Shelley v. Kraemer*, 334 U.S. 1, 14-19 (1948) (observing that "the action of the States to which the [Fourteenth] Amendment has reference, includes action of state courts and state judicial officials").[5]

[5] Recently, in an environmental enforcement action pending review in the Illinois Supreme Court, the Illinois Appellate Court held the fourth amendment applies to a discovery order compelling a property owner to comply with the Attorney General's Rule 214(a) discovery request to inspect the property. *People ex rel. Madigan v. Stateline Recycling, LLC*, 2018 IL App (2d) 170860, ¶ 39, *appeal allowed*, 132 N.E.3d 326 (Ill.

Here, it is undisputed that the State has not secured the crime victim's consent to the disclosure of her privileged medical records, that the trial court did not find probable cause for the issuance of a warrant, and that no warrant was issued. Further, there is nothing in the record regarding any argument or finding that an established exception to the warrant requirement applies. Under the circumstances, the order compelling appellant-hospital to turn over the victim's privileged medical records for inspection by the State is patently unreasonable and unconstitutional.

> "Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, * * * [and] [i]t may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

2019). In that case, the State argued the fourth amendment does not apply in a civil case, and the statutory discovery rules, along with judicial oversight, provide sufficient protection to address any privacy concerns without triggering fourth amendment analysis. See *id.* ¶¶ 41-44. The court disagreed. First, the court explained that whether "[t]he impetus for the governmental intrusion" is civil or criminal is not dispositive. *Id.* ¶ 41. Rather, the court reasoned that because the discovery was sought by the State, and the discovery sought access to property in which the private party maintains a reasonable expectation of privacy, the fourth amendment protection applies. *Id.* ¶ 45. The court then reversed upon finding the State had not made a showing that it satisfied the test for a warrantless search. *Id.* ¶¶ 60, 69. While the court noted that the case did not involve "a constructive search for information," *id.* ¶ 58, an issue not before the court, the rationale underlying the court's ruling applies equally to this case. As discussed above, this case concerns a government's intrusion into records in which the victim maintains an enforceable privacy interest. See *Ferguson*, 532 U.S. at 78 & n.14 (finding patients have a reasonable expectation of privacy in their medical records; and observing that the Court "ha[s] previously recognized that an intrusion on that expectation may have adverse consequences because it may deter patients from receiving needed medical care" (citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977))).

Boyd, 116 U.S. at 616. Because the court has "the duty * * * to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," the court should reverse the trial court's order. *Id.*

II. Crime Victims' Constitutional Rights to Privacy and to Notice and a Hearing Regarding Access to Privileged Records Must Be Enforced.

A. The State violated the victim's rights to privacy guaranteed by the United States Constitution and the Illinois Constitution.

All individuals, including crime victims, have a federal constitutional right to privacy.[6] See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing United States Constitution provides a right to personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) ("[A] right to personal privacy . . . does exist under the Constitution"); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (noting that "[v]arious guarantees [in the Bill of Rights] create zones of privacy"); *State Journal-Register v. Univ. of Illinois Springfield*, 2013 IL App (4th) 120881, ¶ 35 (acknowledging the United States Constitution provides a right to privacy and "a person has an 'individual interest in avoiding disclosure of personal matters.' ").

The Illinois Constitution provides a more specific right of privacy: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, *invasions of privacy* or interceptions of

[6] The fourteenth amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV. The fourteenth amendment's protection of liberty has been interpreted by the United States Supreme Court to provide a right to privacy. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

communications by eavesdropping devices or other means." Ill Const. 1970, art. 1 § 6 (emphasis added); see also *Carlson v. Jerousek*, 2016 IL. App (2d) 151248, ¶ 33 (recognizing that the " 'Illinois Constitution goes beyond federal constitutional guarantees by expressly recognizing a zone of personal privacy, and * * * the protection of that privacy is stated broadly and without restrictions' " (quoting *Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1997))).

The protections for the privacy of a person's papers extend to medical records. See *Ferguson*, 532 U.S. at 78 ("The reasonable expectation of privacy enjoyed by the typical patient * * * is that the results of those tests will not be shared with nonmedical personnel without her consent."); *Caballes*, 221 Ill.2d at 330 ("Privacy clause of the state constitution is implicated if, in the course of a criminal investigation, the State seeks access to medical or financial records that are within the scope of applicable protections.").

Individuals in Illinois have a constitutional right to be secure in their persons and their medical records against invasions of privacy. There is no indication in the record that the State or the court took into consideration the victim's constitutional rights to privacy in her medical records. The constitutional right to privacy cannot be tossed aside for convenience or expediency.

B. The State violated the crime victim's rights to privacy and protection of confidential information afforded by the Illinois Constitution.

Individuals do not forfeit their constitutional rights to privacy when they become victims of crime. In fact, additional constitutional rights have been established to protect victims. In Illinois crime victims are afforded twelve constitutional rights, which must be

taken into consideration during the criminal justice process. Ill. Const. 1970, art. I (amended 2014) § 8.1(a).

Two of these rights are particularly at issue in this case. First, victims have "[t]he right to be treated with fairness and respect for their dignity and privacy and to be free from harassment, intimidation, and abuse throughout the criminal justice process." *Id.* at § 8.1(a)(1).

The second state constitutional right at stake is "[t]he right to notice and to a hearing before a court ruling on a request for access to any of the victim's records, information, or communications which are privileged or confidential by law." *Id.* at § 8.1(a)(2). It is undisputed that medical records are privileged and confidential by law, based on both the physician and patient privilege in state law and the Health Insurance Portability and Accountability Act of 1996 in federal law. 735 ILCS 5/8-802; 42 U.S.C § 1320d-6.

The language in the Illinois Constitution is clear that the right to notice and a hearing applies to all requests for access to a victim's privileged or confidential records. The history of the House Joint Resolution, which resulted in passage of the crime victims' rights amendment in November 2014, also supports this position. As originally introduced, the provision related to disclosure of the victim's confidential records read: "(2) The right to refuse to disclose to the defendant information that is privileged or confidential by law, as determined by a court of law with jurisdiction over the case." 98th Ill. Gen. Assem., House Joint Res. HC0001, 2013 Sess. (as introduced). This provision was amended in the House to read: "(2) The right to notice and to a hearing before a court ruling on a request for access to any of the victim's records, information, or

communications which are privileged or confidential by law." 98th Ill. Gen. Assem., House Joint Res. HC0001, 2014 Sess. (HAM0002). This is the language that was ultimately approved by the voters. Ill. Const. 1970, art. I (amended 2014) § 8.1(a)(2).

The introduced version applied only to a defendant's request for the victim's records; however, the amendment eliminated that restriction, replacing it with a broader requirement. Had the General Assembly intended the provision to apply only to defendants, it would not have deleted the reference to defendants. See *People v. Parker*, 123 Ill. 2d 204, 209 (1998) ("The fundamental principle of statutory construction is to give effect to the intent of the legislature.")

This right is not limited to when the defendant seeks access to the victim's records; there is no exception for when a prosecutor seeks confidential records; and there is no option to opt out of affording victims their constitutional rights. It is critical that the right to privacy and the right to be given notice and a hearing are protected and enforced by the courts. It is well-established that the State of Illinois has a legitimate public interest in protecting victims' rights. See *People v. Richardson*, 196 Ill. 2d 225 (2001); see also *Michigan v. Lucas*, 500 U.S. 145, 149-150 (1991) (holding Michigan made "a valid legislative determination that rape victims deserve heightened protection against *** unnecessary invasions of privacy"); see also *Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989) (finding that "it is undeniable" that protecting the privacy of victims of sexual offenses is a "highly significant" state interest).

Despite the plain language of the constitution, the clarity of the privilege extending to the records, and the well-established duty owed to protect crime victim privacy, the State pursued the records. Victims of crime must be able to safely seek

appropriate medical care. If, despite clear constitutional rights, there is no protection for victims' medical records so long as the prosecutor wants those records, then victims face a constant threat of public use and disclosure of their private information. Constitutional protections do not and should not depend on who is requesting the documents. By failing to provide the victim notice and hearing, the State violated her constitutional rights. See *Powell*, 287 U.S. at 68 (stating that "notice and hearing" is part of the "basic elements of the constitutional requirement of due process of law").

III. The Rights of Crime Victims and Witnesses Act Does Not Limit Victims' Constitutional Rights.

As stated above, article 1 section 8.1 of the Illinois Constitution guarantees crime victims twelve rights, including the rights to be treated with fairness and respect for their privacy and to notice and a hearing when their privileged records are sought. Ill. Const. 1970, art. I (amended 2014) § 8.1(a)(1), (2). The purpose of the Rights of Crime Victims and Witnesses Act ("the Act") "is to implement, preserve, protect, and enforce the rights guaranteed to crime victims by Article I, Section 8.1 of the Illinois Constitution to ensure that crime victims are treated with fairness and respect for their dignity and privacy throughout the criminal justice system * * *[.]" 725 ILCS 120/2. "As the title of the Act suggests, it was intended as a shield to protect the rights of victims and witnesses forced, through no fault of their own, to participate in the criminal justice system." *People v Benford*, 295 Ill. App. 3d 695, 700 (1998). To this end, the Act re-affirms the twelve crime victims' rights afforded by the Illinois Constitution. See 725 ILCS 120/4(a).

The Act also delineates specific procedural requirements that must be met when the defendant seeks to subpoena the victim's confidential records. 725 ILCS 120/4.5(c-5)(9). The State argues that the existence of these specific requirements for defendants

means that there are no requirements for prosecutors. This argument ignores the broader rights established in the Constitution and repeated in the Act and contradicts the intent of the General Assembly, as described above.

The Act's imposition of process on defendants does not eliminate the State's obligation to afford victims their constitutional rights. If a law infringes on rights established in the Constitution, the Illinois Supreme Court has held that it must "assume that it was the intent of the framers thereof that there should be no curtailment of such rights." *People ex rel. Wellman v. Washburn,* 410 Ill. 322, 328-29 (1951); *Richardson,* 196 Ill. 2d at 231 (quoting the statement in *Wellman* as a settled principle and applying it to uphold protections in the Crime Victims' Bill of Rights). Statutes that have the purpose of implementing and protecting victims' rights should not be read to narrow them. See *State v. Roscoe,* 185 Ariz. 68 (1996) (holding statute and rule unconstitutional to the extent they narrowed the definition of "victim" in the Victims' Bill of Rights).

Nothing in the Act purports to or could lawfully limit the constitutional rights of victims. Prosecutors and courts must provide a victim with notice and the opportunity to be heard before a ruling is made regarding access to the victim's confidential or privileged records, and failure to do so is a violation of the victim's constitutional rights.

IV. The State Cannot Waive the Victim's Rights; Only the Victim Can Waive the Victim's Rights.

By subpoenaing a victim's medical records without the victim's consent, the State is attempting to waive the victim's physician-patient privilege, rights to privacy, and right to notice and a hearing. Third-person waiver of a right is not lawful.

Individuals may waive their rights, but "courts do not presume waiver of constitutional rights; indeed, courts indulge every reasonable presumption against waiver." *Raimondo v. Kiley*, 172 Ill. App. 3d 217, 225 (1988) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "'Waiver of a constitutional right is valid only if it is clearly established that there was 'an intentional relinquishment or abandonment of a known right * * *.'' " *People v. McClanahan*, 191 Ill. 2d 127, 137 (2000) (quoting *Johnson* 304 U.S. at 464 and *Brady v. United States*, 397 U.S. 742, 748 (1970)); accord *People v. Medina*, 71 Ill. 2d 254, 259 (1978) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege," citing *Johnson*, 304 U.S. at 464).

Further, a prosecutor does not have the authority to waive a victims' right. It is well-recognized that the holder of a right is also the one with the legal capacity to waive that right. Courts have recognized that the power to assert victims' rights is limited to the victim. See, *e.g.*, *Richardson*, 196 Ill. 2d at 231 (2001) (holding defendant lacked standing to raise violation of victims' rights on appeal because the amendment was passed to serve " 'as a shield to protect the rights of victims' " and should not be " 'used as a sword by criminal defendants seeking appellate relief' "); *State ex rel. Romley v. Superior Court*, 891 P.2d 246, 249 (Ariz. Ct. App. 1995) (finding it "well established that the prosecutor does not 'represent' the victim"); *People v. Brown*, 54 Cal. Rptr. 3d 887, 896 (Cal. Ct. App. 2007) (stating that "[v]ictim restitution may not be bargained away by

the People"); *Wilson v. Commonwealth*, 839 S.W.2d 17, 21 (Ky. Ct. App. 1992) (holding that a victim's rights "belong to the victim independent of the Commonwealth, and cannot be plea bargained away without the crime victim's actual approval").

Here, there are a number of rights at stake from privacy to dignity to notice. Each of these rights in the Illinois Constitution and the Act belong to the victim and only when the victim intentionally relinquishes them can they be deemed waived.

Furthermore, victims do not waive privilege or put their mental and physical health at issue by making a police report or participating in a criminal trial. See, *e.g.*, *People v. Hogan*, 114 P.3d 42, 54 (Colo. App. 2004) (concluding victim did not put her mental health at issue by revealing in an impact statement that she had gone back to therapy as a result of the defendant's criminal actions); *People v. Silva*, 782 P.2d 846, 849 (Colo. App. 1989) (ruling victim was not a "party-in-interest" in the criminal case and did not inject her mental condition into the case by testifying that she sought counseling as a result of being sexually assaulted by defendant). Participation by a victim in the criminal trial of their attacker is not an implied waiver of privilege.

Only victims can waive their rights and privileges. The Crime Victims' Rights Amendment and the Act make it clear that a victim must be given notice (and thus have knowledge of their rights) and an opportunity to be heard at a hearing before a court rules on a request for access to the victim's confidential or privileged records. The State concedes that the victim was not given such notice or opportunity to be heard, so no waiver can be inferred or asserted by the State.

V. The State Violated Its Duty to Safeguard All Persons' Rights When It Improperly Subpoenaed the Victim's Records to Protect A Phantom Right of Defendant.

The State argued, and the trial court agreed, that the State's "duty to everybody in the State of Illinois, including criminal defendants," includes an obligation to search for potentially exculpatory evidence in the possession or control of third parties. (R 15/13-19, A 101; R 11/8-9, A 97). While the first part of this assertion is accurate—*i.e.*, there is a duty to everyone in the State—as appellant-hospital correctly asserts the argument for application of this duty on behalf of defendant has no merit. Case law establishes that the State has no duty under either state law or *Brady v. Maryland* to search for records in a third party's control to discover potentially exculpatory evidence on defendant's behalf. See, *e.g., People v. House*, 141 Ill.2d 323, 387 (1990) (finding "[t]he State was not under a duty to discover and disclose" hospital records not in its possession or control); *United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002) (explaining that "*Brady* prohibits suppression of evidence[;] it does not require the government to act as a private investigator and valet for the defendant, gathering evidence and delivering it to opposing counsel"). Further, none of defendant's constitutional rights were implicated in any pretrial demand for records.[7]

[7] Indeed, even if the court were to accept the State's assertion that it has a duty to act for defendant and to search for all potential exculpatory evidence wherever it may be held, defendant would not be entitled to the requested privileged records in this case. Criminal defendants have no general constitutional right to pretrial discovery. See, *e.g.*, *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (finding "[t]here is no general federal constitutional right to discovery in a criminal case, and *Brady* did not create one"); *People v. Williams*, 87 Ill. 2d 161, 166 (1981) (reiterating that "there is no constitutional right to pretrial discovery"). Nor do defendants have an established federal constitutional right to pretrial discovery of a crime victim's records under the confrontation and compulsory process clauses. See, *e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (plurality opinion) (emphasizing that the right to confront is a trial right and that the Court has never held that a defendant has a right to pretrial discovery under the

In contrast, the victim has clear and unambiguous constitutional rights to be free from an unreasonable search and seizure, to privacy, to be treated with fairness and respect for her privacy, and to notice and a hearing before a ruling on any request to access her privileged or confidential records. The State disregarded these rights while adopting a legally unsupportable and expansive construction of defendant's rights. The State's abdication of its duty to protect victims' rights requires this court to reverse to ensure that the victim—the only individual with constitutional rights at stake in this instance—is afforded her rights. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (" '[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.' " (Quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934))); *People v. Aleman*, 281 Ill. App. 3d 991, 1008 (1996) ("The constitution demands fairness not only for the accused but, also, for the accuser." (Citing *Snyder*)).

Confrontation Clause); *id.* at 57-58 (majority opinion) (stating that the Court "has never squarely held that the Compulsory Process Clause guarantees the right to [pretrial discovery]" and declining to reach the issue; but concluding that the due process clause could provide the basis for the requested discovery in that case because, *inter alia,* a government agency had possession or control of the records at issue). Further, under state law, defendant must comply with the statutorily mandated procedures that require notice and written motion, an offer of proof, and specific findings by the trial court "before the subpoena is issued." 725 ILCS 120/4.5(c-5)(9). The State cannot avoid its Fourth Amendment obligations by claiming (or being directed) to act on behalf of defendant and then similarly evade the explicit procedural safeguards that exist to protect the victim from improper defense subpoenas.

CONCLUSION

Privacy is an important right for all people, and especially for victims of crime. Crime victims' privileged and confidential records are protected by the United States Constitution, the Illinois Constitution, and the Rights of Crime Victims and Witnesses Act. This court should uphold the requirements to provide notice and a hearing before ruling on access to a victim's confidential or privileged information as necessary steps to protect and enforce the victim's constitutional rights.

This court should reverse the trial court's orders denying appellant-hospital's motion to quash subpoena and motion for reconsideration, and remand with instructions to enter an order granting the motion to quash the subpoena because the subpoena violated the victim's constitutional rights.

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Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is nineteen pages.

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