IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT, AT NASHVILLE

THE TENNESSEAN, ASSOCIATED PRESS, *CHATTANOOGA TIMES FREE PRESS*, *KNOXVILLE NEWS SENTINEL*, TENNESSEE COALITION FOR OPEN GOVERNMENT, INC., TENNESSEE ASSOCIATED PRESS BROADCASTERS, WZTV FOX 17, WBIR-TV Channel Ten, WTVF-TV Channel Five, *THE COMMERCIAL APPEAL* and WSMV-TV Channel Four,	]	
Plaintiffs/Petitioners,	]	No. 14-156-IV
vs.	]	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY	]	
Defendant/Respondent,	]	
JANE DOE,	]	
Victim-Intervenor.	]	

VICTIM'S RESPONSE IN OPPOSITION
TO PLAINTIFFS' REQUEST FOR RECORDS

Jane Doe, the victim in the underlying criminal cases that are the subject of the records requests at issue in this civil action, respectfully opposes the plaintiffs' request for records. In so doing, she asserts her rights under the Tennessee Constitution and the Victims' Bill of Rights.

In support of her opposition, Ms. Doe relies on the arguments, cases, and authorities cited in this filing, as well as the arguments and authorities raised at any subsequent hearing on the plaintiff's complaint.

SUMMARY OF ARGUMENT

This is a case about victims' rights. In Tennessee, these rights include the ability to prevent the government from releasing records (i) that are reasonably likely to lead to intimidation, harassment, and abuse of a crime victim, or (ii) whose release is incompatible with treating the victim with dignity and compassion. These rights are based on the plain terms of the Tennessee Constitution and the Victims' Bill of Rights. They also comport with the decisions of courts throughout this country that have addressed the intersection of victims' rights and the public's right to access information that rests in the hands of the government.

The plaintiffs in this case make their request for records about a violent crime pursuant to the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-501 *et seq.* (hereinafter "PRA"). Like any other statute, the PRA must be read in conjunction with the rest of the Tennessee Code, including the Victims' Bill of Rights, and its provisions are subordinate to the state constitution. To this end, the PRA explicitly provides that records can be protected from disclosure where "otherwise provided by state law." Tenn. Code Ann. § 10-7-503(2)(A).

In this case, Ms. Doe's rights as a victim, which are "state law" for purposes of the PRA, prohibit the disclosure of the records sought by the plaintiffs. As the victim of a violent crime, Ms. Doe has the right under the Tennessee Constitution "to be free from intimidation, harassment and abuse throughout the criminal justice system." Tenn. Const. art. I, § 35b. Pursuant to the Victims' Bill of Rights, she also has the right to "[b]e treated with dignity and compassion," and the right to "[p]rotection and support with prompt action in the case of intimidation or retaliation from the defendant and the defendant's agents or friends." Tenn. Code Ann. § 40-38-102(a). These rights necessarily limit the disclosure of otherwise public records

that, if released, would subject Ms. Doe to "intimidation, harassment and abuse" or whose release is incompatible with treating her "with dignity and compassion."

These harms would occur if the requested records were made available for public inspection. Ms. Doe was the victim of an aggravated rape that was perpetrated by multiple individuals and recorded, at least in part, by one of them. The records requested by the plaintiffs include graphic videos, photographs, and text messages that reference this sexual assault. Due to the identities of the defendants, the criminal case has been covered extensively by local and national media outlets, including television, radio, print, and online publications. In this atmosphere, the public release of the requested records is highly likely to result in harassment of Ms. Doe; publication of these materials has the potential to inflict substantial emotional abuse on her; and the release of the records would stand directly counter to treating Ms. Doe with dignity and compassion. Put simply, there is no fair reading of the constitutional and statutory protections afforded to Ms. Doe as a crime victim that would subject these materials to public inspection and copying.

Moreover, the plaintiffs' legal theory would result in extreme harm to victims of similar crimes throughout the state. As the Court is aware, the plaintiffs originally requested the video recording of the rape of Ms. Doe before later stating that they were not seeking a copy of that specific video. If the Court were to accept the plaintiff's legal theory, however, other private individuals or less scrupulous media companies could obtain this video and evidence like it in similar cases throughout the state. It is the natural consequence of the plaintiffs' legal position that the video of the rape of Ms. Doe, which was made by a defendant rather than a law enforcement officer, should be subject to inspection and copying. Once that door is opened, the court has no ability to control its further dissemination, and the video is likely to ultimately end

up on the internet. This is not hyperbole; it merely demonstrates the absurdity of the plaintiffs' position. Their request for records should be denied.

BACKGROUND

On June 23, 2013, Ms. Doe was the victim of a violent crime. The crime was investigated by the Metropolitan Nashville Police Department ("Metro Police"), and this investigation resulted in the indictment of four individuals on multiple counts of aggravated rape and aggravated sexual battery. One of the individuals also was charged with one count of unlawful photography and one count of tampering with evidence. These defendants have pleaded not guilty to the charges in Davidson County Criminal Court.

On October 2, 2013, Deputy District Attorney Tom Thurman and defense counsel for the four charged defendants agreed to a protective order, which the Court issued pursuant to Tenn. R. Crim. P. 16(d)(1). In relevant part, this order provides that "any and all photographs and videos provided in discovery by the State shall not be disseminated in any manner to any person other than the defense team." Upon information and belief, these materials include, *inter alia*, two videos: (i) a video recorded during the assault of Ms. Doe and (ii) a surveillance video that depicts time periods before and after her assault. In addition, upon information and belief, the discovery includes text messages that reference the assault and photographs of Ms. Doe taken during the assault.

On October 17, 2013, a reporter with *The Tennessean* made a request to Metro Police for "[a]ny records (as that term is broadly defined in the Act) regarding the alleged rape [of the victim]." The email memorializing the request specifically referenced copies of *any* "text messages received or sent and videos provided and/or prepared by any third-party sources." By the plain terms of the request, *The Tennessean* explicitly sought the video that depicts Ms. Doe's

sexual assault. Later, in a letter from its counsel on October 28, 2013, *The Tennessean* wrote that it "would like to clarify [its] request." The newspaper stated that it "has no intention of publishing the name of the alleged victim prior to trial without her permission" and claimed that it "is not interested in obtaining a copy of photographs or video taken by any of the defendants during the alleged assault." Nonetheless, it reiterated its desire for other evidence of Ms. Doe's assault, including the surveillance video, as well as any text messages she may have sent or received, and any text messages referencing the assault. Even while making this more-limited request, the plaintiffs knew that the evidence they requested was salacious: *The Tennessean* itself reported that the surveillance video depicts Ms. Doe being carried by four individuals with her "private area sometimes exposed." Brian Haas, *Vanderbilt accuser at first denied she was raped*, THE TENNESSEAN, Dec. 3, 2013, *available at* http://j.mp/1dKLdMV.

As the Court is aware, the request for these records was denied, and *The Tennessean* and other plaintiffs subsequently filed this civil action. Ms. Doe became aware of this action on February 11, 2014, filed a motion to proceed using a pseudonym, and subsequently filed a motion to intervene. The Court granted both of her motions.

On February 13, 2014, at a hearing on Ms. Doe's motion to intervene, the plaintiffs explicitly opposed her intervention, arguing in part that the open records law does not contemplate the involvement of victims and other third parties. The plaintiffs also argued that Ms. Doe's participation in the lawsuit would be cumbersome.

At that same hearing, the plaintiffs again attempted to "clarify" their request for records. Previously, in her motion to intervene, Ms. Doe had referenced the fact that the plaintiffs were aware that the surveillance video they requested as part of the lawsuit includes graphic and embarrassing depictions of her. Apparently in response to this submission, plaintiff's counsel

asserted at the hearing—for the first time—that the plaintiffs did not want a copy of the *entire* surveillance video but rather would accept an edited video that depicted the period of time before and after Ms. Doe was present in the video or, alternatively, an edited video that "blurred out" or otherwise obscured her. Although the plaintiffs reiterated this position at a status hearing on February 24, 2014, none of these alleged concessions have been further clarified or reduced to writing nor have the plaintiffs amended their complaint to exclude this aspect of the surveillance video from their request for records.

On February 16, 2014, one of the plaintiffs, *The Tennessean*, published an editorial in its daily paper that attacked Ms. Doe's involvement in the case and accused her counsel of acting not in her interest but rather at the behest of the Metro government. For example, the paper stated that Ms. Doe's counsel is not acting in her interests but rather is motivated "[t]o help Metro win a lawsuit." *Metro exploits rape case for own ends*, THE TENNESSEAN, Feb. 16, 2014, *available at* http://j.mp/1o20MWo. According to this plaintiff, Ms. Doe's counsel is "perpetuating a lie that local media are sensationalistic and trying to exploit that woman." *Id.* The plaintiff stated that it "has no intention to besmirch [its esteemed] position [in the community] by publishing the name of the alleged rape victim, or by publishing photos or video taken in the commission of the crime." *Id.* The plaintiff then argued that it should have access to "third-party records such as phone texts and university documents gathered during this criminal case." *Id.* Again, however, even after this editorial was published, the plaintiffs have *not* amended their complaint to remove videos and photographs from their request nor have they limited their request beyond the statements above. Accordingly, as the disconnect between the record in this case and the plaintiff's editorial makes plain, at least one of the plaintiffs either does not understand the records request that it has made or is purposefully misrepresenting that request to the public.

ARGUMENT

As the victim of a crime, Ms. Doe has specific constitutional and statutory rights. In the present context, these rights preclude the disclosure of at least some of the records the plaintiffs seek to obtain through this civil action pursuant to the Tennessee Public Records Act.

As a preliminary matter, Ms. Doe notes that her opposition to the plaintiff's petition does not extend to *all* possible records in the custody of Metro that relate to the criminal case at issue. Rather, she specifically objects to and opposes the release of records (i) that are reasonably likely to lead to intimidation, harassment, and abuse, and (ii) whose release is incompatible with treating her with dignity and compassion. She does not take a position about the release of other records that do not implicate these concerns, such as biographical information about the defendants, the identity of witnesses, or other information in the investigative file related solely to third parties that does not reference her or any facts about the assault she suffered.

Moreover, Ms. Doe notes that she opposes disclosure of the requested records even if they are *not* exempt from disclosure by Rule 16. In this manner, Ms. Doe's objections to the plaintiffs' request are independent of, and distinguishable from, any arguments that the state and local government may make. Based on the prior correspondence between the plaintiffs and Metro, Ms. Doe expects that the defendants will argue that the requested records are exempt from disclosure because they are part of the investigative file of a pending criminal case. Whether or not the Court agrees with the defendants on this point, however, it must consider Ms. Doe's argument that the laws protecting victims' rights in Tennessee provide a separate bar to disclosure. For example, even if the Court concludes that all records in an active investigative file are exempt from disclosure while the case is pending, this ruling would not end the matter. Because Ms. Doe's concerns and interests remain the same whether or not the underlying

criminal proceeding is active, the Court should decide whether the records are permanently exempted from disclosure by operation of the state laws protecting victims. *Cf. United States v. Patkar*, CR. 06-00250 JMS, 2008 WL 233062 (D. Haw. Jan. 28, 2008) (holding that, although the criminal case involving the victim had ended with the defendant's guilty plea, the victim "retains his right to be treated with fairness and with respect to his privacy" under the federal Crime Victims' Rights Act).[1]

As a result, it is Ms. Doe's position that the Court must conduct two separate inquiries. First, the Court must consider whether any or all of the requested records are exempt from disclosure under Rule 16. And, second, the Court must consider whether the Tennessee Constitution and the Victims' Bill of Rights prohibit disclosure of those records which would adversely impact the victim. As the plaintiffs' complaint and the correspondence between the parties makes clear, the first question is not new; Tennessee courts previously have considered the impact of Rule 16 on the PRA. On the contrary, the second question appears to be one of first impression in Tennessee. Fortunately, there are myriad cases outside this jurisdiction that have addressed the intersection between victims' rights and the disclosure of information to the public. *See, e.g.*, Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301, 315 n.115-n.120 (2012) (listing at least seven such cases in federal courts alone since 2005). These cases, as well as the plain language of the Tennessee Constitution and Victims' Bill of Rights, support the straightforward principle that Ms. Doe should not be harmed anew by the release of records that could result in intimidation,

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[1] Because this case was not published in a federal reporter, it is attached to this response in the Addendum, along with other cases and orders that are cited in this response but which are only available through online services, such as Westlaw.

harassment, and abuse, or whose release is incompatible with her right to be treated with compassion and dignity.

The plaintiffs in this case make their request for records related to Ms. Doe pursuant to the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-501 *et seq.* (hereinafter "PRA"). This statute "promotes public awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee." *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007). Because of the statute's purposes, courts "interpret the terms of the Act liberally." *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002). Like any other statute, however the PRA must be read in conjunction with the rest of the Tennessee Code, including the Victims' Bill of Rights, and its provisions are subordinate to the state constitution. To this end, the PRA explicitly provides that records can be protected from disclosure where "otherwise provided by state law." Tenn. Code Ann. § 10-7-503(2)(A).

When the General Assembly amended the language of the PRA by replacing the term "state statute" with "state law" in the phrase referenced above, it "recognized . . . that circumstances could arise where the reasons not to disclose a particular record or class of records would outweigh the policy favoring public disclosure." *Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004). At that time, the General Assembly not only identified these circumstances in "specific exceptions . . . in the public records statutes themselves" but also "acknowledged and validated both explicit and implicit exceptions from disclosure found elsewhere in state law." *Id.* As the amended language of the PRA contemplated, these "state law" exemptions are separate from, and in addition to, the specific statutory exceptions contained in the Act itself.

There are numerous implicit and explicit "state law" exemptions to disclosure of records that are located outside the specific provisions of the PRA. For example, Tennessee courts have held explicitly that these exemptions include, *inter alia*, (i) documents sealed by a protective order entered pursuant to the Tennessee Rules of Civil Procedure, *see Ballard v. Herzke*, , 662 (Tenn.1996); (ii) records protected by Tenn. R. Crim. P. 16, *see Swift*, 159 S.W.3d at 576; and (iii) documents protected by the work product doctrine, codified as Tenn. R. Civ. P 26.02, *see Arnold v. City of Chattanooga*, 19 S.W.3d 779, 786 (Tenn. Ct. App. 1999).

The sources of these exemptions are laws that neither reference the PRA nor explicitly purport to modify it. Rather, Tennessee courts have long held that the phrase "unless otherwise provided by State law" serves to bar disclosure when disclosure would conflict with the purposes and language of other state laws. In fact, the "permissible sources of exceptions from disclosure" broadly include "the common law, the rules of court, and administrative rules and regulations," as "each of these has the force and effect of law in Tennessee." *Swift*, 159 S.W.3d at 571-72. In this context, the victims' rights laws in Tennessee create another exemption from disclosure.

As the victim of a violent crime,[2] Ms. Doe has a right under the Tennessee Constitution "to be free from intimidation, harassment and abuse throughout the criminal justice system." Tenn. Const. art. I, § 35b. Pursuant to the Victims' Bill of Rights, she also has the right to "[b]e treated with dignity and compassion," and the right to "[p]rotection and support with prompt action in the case of intimidation or retaliation from the defendant and the defendant's agents or friends." Tenn. Code Ann. § 40-38-102(a).

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[2] Ms. Doe qualifies as a victim eligible for constitutional and statutory protection because she is "[a] natural person against whom a crime was committed," and the "crime" in question was an "offense the punishment for which is a . . . felony." Tenn. Code Ann. § 40-38-302(4)(A), (a)(A).

These constitutional and statutory rights are not unique to Tennessee. Over the last thirty years, "nearly two-thirds [of the states] have passed amendments to their state constitutions granting victims' rights in the criminal justice process." Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 83 (2010).[3] These states have done so "because of a perceived imbalance in the criminal justice system" whereby "victims' absence from criminal processes conflicted with a public sense of justice." Cassell, *supra,* 5 PHOENIX L. REV. at 303. In promoting these changes, "[v]ictims' advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims." *Id.* And these changes not occurred only in state legislatures; over the past twenty years, the federal government has passed multiple laws intended to protect victims. *See, e.g.*, Victims' Rights and Restitution Act of 1990, PUB. L. NO. 101-647, 104 STAT. 4789 (1990); the Crime Victims' Rights Act ("CVRA"), PUB. L. NO. 108-405, 118 STAT. 2260 (2004). The development of victims' rights laws across the states and in Congress did not occur in a vacuum; the rights afforded by each jurisdiction generally align with other jurisdictions, as victims' rights advocates worked together to pass the laws nationwide before turning their attention to similar efforts in Congress. *See* Cassell, *supra,* 5 PHOENIX L. REV. at 303. For example, the federal CVRA provides protections similar to those afforded by

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[3] These constitutional provisions include: Ala. Const. art. I. § 6.01; Alaska Const. art. I, § 24; Ariz. Const. art. 2, § 2.1; Cal. Const. art. 1, § 28(a)-(b); Colo. Const. art. II, § 16a; Conn. Const. art. XXIX; Fla. Const. art. 1, § 16(b); Idaho Const. art. I, § 22; Ill. Const. art. 1, § 8.1; Ind. Const. art. I, § 13(b); Kan. Const. art. 15, § 15; La. Const. art. 1, § 25; Md. Const. art. 47; Mich. Const. art. 1, § 24; Miss. Const. art. 3, § 26A(1); Mo. Const. art. 1, § 32; Neb. Const. art. I, § 28; Nev. Const. art. 1, § 8; N.J. Const. art. 1, ¶. 22; N.M. Const. art. II, § 24; N.C. Const. art. I, § 37; Ohio Const. art. I, § 10a; Okla. Const. art. 2, § 34; Or. Const. art. I, § 42; R.I. Const. art. 1, § 23; S.C. Const. art. I, § 24; Tex. Const. art. 1, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. I, § 35; Wis. Const. art. 1, § 9m.

the Tennessee Victims' Bill of Rights. *Compare* Tenn. Code Ann. § 40-38-102(a)(1) (providing victims with the right to "[b]e treated with dignity and compassion") *with* 18 U.S.C. § 3771(a)(8) (providing victims the right "to be treated with fairness and with respect for the victim's dignity and privacy").

The similarity between victims' rights laws across jurisdictions is important because courts outside of Tennessee have addressed the issues implicated by the present lawsuit. Notably, in these cases, courts have regularly interpreted victims' rights laws to limit the media's access to information that might harm the victim or adversely impact her dignity. *See, e.g.*, *State in Interest of K.P.*, 709 A.2d 315 (N.J. Ch. Div. Dec. 29, 1997) (relying on the state's Crime Victim's Bill of Rights to deny a motion by the press to access juvenile court proceedings); *United States v. Kaufman*, No. 04-40141, 2005 WL 2648070 (D. Kan. Oct. 17, 2005) (interpreting the federal CVRA to prohibit a news station's courtroom artists from sketching the likenesses of victims); *United States v. Patkar*, No. 06-cr-00250, 2008 WL 233062 (D. Haw. Jan. 28, 2008) (relying on victims' rights laws to deny the AP's motion for access to "materials that comprised the basis of the [charged] extortion [scheme] such that if revealed, would cause damage to the reputation of the victim"); *United States v. Madoff*, 626 F. Supp. 2d 420, 425-28 (S.D.N.Y. 2009) (upholding the government's request to withhold from the media identifying information about some of the victims pursuant to their "right to be treated with fairness and with respect for [their] dignity and privacy" under the CVRA); *United States v. Robinson*, Cr. No. 08-10309-MLW, 2009 WL 137319, at *1-3 (D. Mass. Jan. 20, 2009) (relying on the CVRA and *Patkar*, *supra*, to deny the motion of a newspaper seeking disclosure of the identity of a victim who was subject to extortion after a sex-for-fee relationship); *Gueits v. Kirkpatrick*, 618 F. Supp. 2d 193, 198 n.1 (E.D.N.Y. 2009) *rev'd on other grounds*, 612 F.3d 118 (2d Cir. 2010) (deciding

sua sponte not to publish the victim's name in a court decision "out of respect for her dignity and privacy").

For example, in *State in Interest of K.P.*, a trial court in New Jersey explicitly held that the state's constitutional amendment and statute protecting victims' rights created substantive rights for victims, including the right of "all victims" to be free from "pending harm." *See* 709 A.2d at 142, 143-44. In so doing, the court noted that the state's laws "mandate[] the criminal justice system to treat a victim with dignity and compassion," while "[t]he [constitutional] amendment, essentially, augmented victims' statutory rights by raising them to constitutional significance." *Id.* In this context, the court found that "ignor[ing] the victim's request [to bar media from the proceeding], despite the unquestionable harm that will result, is inconsistent with fair, compassionate and respectful treatment [of the victim]." *Id.* at 143. Because the court believed that barring the media was "necessary to exercise [its authority] to protect the victim in this case," the court found that it had the power to do so. *Id.* at 144. As a result, the court barred the media from the judicial proceeding, even in the face of strong First Amendment considerations, after determining that the media' presence could result in a "a second victimization by the judicial process." *Id.*

All of the factors that led to the court's decision in *State in Interest of K.P.* are present here. As in New Jersey, the people of Tennessee "augmented victims' statutory rights by raising them to constitutional significance," *id.* at 143-44, when they passed via referendum a victims' rights amendment, codified at Art. I, § 35. And the considerations that led the New Jersey court to determine that it could act "to protect the victim in this case," *id.* at 144, are no different here than they were there: Like New Jersey, the Tennessee legislature has enacted a comprehensive Victims' Bill of Rights, codified at Tenn. Code Ann. §§ 40-38-100 *et seq.*, which provide a

broad panoply of rights. As the New Jersey court reasoned, "[i]t is difficult . . . to imagine that the Legislature intended to give victims these expansive rights, yet specifically intended that they should not be a factor for a court to consider when there is compelling evidence that a detrimental effect upon a victim will occur if the court ignored their request [to bar media]." *Id.* at 134. This reasoning is sound and should control here.

The district court in *Kaufman* made similar determinations about the impact of victims' rights on press access, albeit in the context of a federal court proceeding. There, the district court interpreted "the congressional mandate to protect the privacy and dignity of victims under the Crime Victims' Rights Act, 18 U.S.C. § 3771," to require "that sexually-graphic videos of mentally ill victims [be] shown in a manner so that they are not viewable by individuals in the [court's] gallery," including the press. *Kaufman*, *supra*, at *1-2. Further, the district court prohibited sketch artists working for local news companies from sketching the likenesses of victims. *Id.* at *4. To support this restriction, the district court found that subsection (a)(8) of the CVRA "*require[d]* that sketch artists' activities . . . be restricted under the circumstances of this case." *Id.* (emphasis added). This section of the victims' rights statute affords victims "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). The court reasoned that, if sketch illustrations of the victims were allowed, "the victim[s] undoubtedly would . . . face considerable additional distress and loss of dignity." *Kaufman*, *supra*, at *4. Notably, the section of the federal CVRA that the district court relied upon in *Kaufman* is analogous to one of the provisions of Tennessee's Crime Victims' Bill of Rights, specifically section 40-38-102(a)(1), which provides victims with the right to "[b]e treated with dignity and compassion." Pursuant to Ms. Doe's right to be treated in this manner,

the Court has ample authority—which it should exercise—to prohibit the disclosure of any records that could cause her harm or adversely impact her dignity.

The district court's decision in *Patkar* provides a good template for conducting this analysis. There, the court relied on federal victims' rights laws to deny a motion by the Associated Press for access to "materials that comprised the basis of the [charged] extortion [scheme]." *Patkar*, *supra*, at *5. Specifically, the AP sought "email communications" between the defendant and the victim that were attempts by the defendant to extort the victim. *Id.* at *2. The government resisted disclosure and argued that, if revealed, the materials "would cause damage to the reputation of the victim." *Id.* The district court agreed. In so doing, it noted that the CVRA "was intended to provide meaningful rights, and not a simple laundry list of aspirational goals as to how the government and courts should treat victims." *Id.* at *5. Through this statute, the court explained, "Congress . . . has determined that failure to treat a victim with fairness and with respect to privacy works a clearly defined and serious injury to the victim." *Id.* The court concluded that, "[i]n order to protect [the victim's] statutory right to be treated with fairness and with respect to his privacy, good cause exists to limit disclosure of [the requested] materials." *Id.* Further, the court found that, if it had to balance the interests at stake, "the crime victim's right to be treated with fairness and respect for his privacy *clearly outweighs* any public interest in disclosure." *Id.* at *6 (emphasis added).

The court's analysis in *Patkar* has direct application here. As a preliminary matter, the moving parties rely on the same doctrine: In *Patkar*, the AP sought the requested records pursuant to the public access doctrine, *id.* at *2; here, the Tennessee "public records law is essentially a codification of the public access doctrine." *Ballard*, 924 S.W.2d at 661 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)). Like Congress, the Tennessee

legislature created *rights* for victims, rather than aspirational goals. *See, e.g.*, Tenn. Code Ann. § 40-38-101(a) ("The general assembly finds and declares that victims and witnesses shall have certain *rights* in this state and that they shall be made aware of these rights.") (emphasis added). And the Tennessee Victims' Bill of Rights, like the CVRA, "itself provides no exceptions to the rights afforded." *Patkar*, *supra*, at *6. Thus, the victims in both cases "ha[ve] an unquestionable right 'to be treated with fairness and with respect for [their] dignity and privacy." *Id.* at *5. And, finally, regardless of how the criminal case proceeds—and even after it is resolved—the victim "retains his right to be treated with fairness and with respect to his privacy." *Id.* at *5.

Taken together, *State in Interest of K.P.*, *Kaufman*, and *Patkar* stand for the straightforward proposition that (i) victims' rights are substantive rights, (ii) that must be afforded ample consideration, especially when codified in the state constitution, and (iii) which mandate that the judicial system protect victims from harm and treat them with dignity. In each of those cases, this understanding led the court to limit or prohibit access to the media to otherwise public records when the victim objected. As in those cases, Ms. Doe objects to the plaintiffs' request for disclosure of records, and she asserts all of the rights afforded to her under the Tennessee Constitution and Victims' Bill of Rights.[4] When construed in the appropriate light, these rights operate to exempt the requested records from disclosure under the PRA.

The application of these rights to the PRA is straightforward. As noted above, the PRA explicitly provides that records can be protected from disclosure where "otherwise provided by state law." Tenn. Code Ann. § 10-7-503(2)(A). Two provisions of "state law" are applicable here. First, Ms. Doe has a *constitutional* "right to be free from intimidation, harassment and abuse throughout the criminal justice system." Tenn. Const. art. I, § 35. As noted above, Ms. Doe

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4 The affidavit of Jane Doe is attached as Exhibit 1.

was the victim of an aggravated rape that was perpetrated by multiple individuals and recorded in part by at least one of them. The records requested by the plaintiffs include graphic videos, photographs, and text messages that reference this sexual assault. Due to the identities of the defendants, the criminal case has been covered extensively by local and national media outlets, including television, radio, print, and online publications. In this atmosphere, the public release of the requested records is highly likely to result in the harassment of Ms. Doe, and publication of these materials has the potential to inflict substantial emotional abuse on her. For example, as recently as today, some of the plaintiffs have reported extensively on a leaked police report in such a manner that, intentionally or not, could subject Ms. Doe to harassment and abuse. *See, e.g.*, Nick Beres, *Police Interview With Alleged Vanderbilt Rape Victim, Suspect*, NewsChannel5, Feb. 25, 2014, *available at* http://j.mp/1o41CC7; Kimberly Curth, *Prosecutor: Someone trying to intimidate Vanderbilt rape victim*, WSMV, Feb. 24, 2014, *available at* http://j.mp/1o41Skp. These reports contain details that, if true, and if publicly disclosed further by the release of additional records, would result in re-victimization.

Further public scrutiny and harm is likely to follow if the requested records are released, and the release of the records would directly and adversely impact Ms. Doe's well-being. The possibility is neither illusory nor remote; examples abound of harassment in similar circumstances. *See, e.g.*, Mark Memmott, *Two Steubenville Girls Arrested After Allegedly Threatening Rape Victim*, NPR, Mar. 19, 2013, *available at* http://j.mp/1dnNORy; Mary Chastain, *Threats Made Against Sorority of Girl Who Accused Jameis Winston of Rape*, BREITBART, Nov. 27, 2013, *available at* http://j.mp/1dnOq9T.

In addition, there is a second provision in "state law" that exempts the requested records from disclosure: Ms. Doe has the right to "[b]e treated with dignity and compassion" and to have

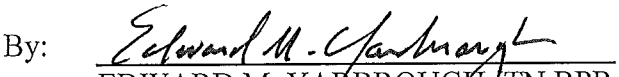
the State afford her with "[p]rotection and support . . . in the case of intimidation or retaliation from the defendant and the defendant's agents or friends." Tenn. Code Ann. § 40-38-102(a). These rights, standing alone, should bar disclosure of the requested records. Put simply, there is no fair reading of the statutory protections afforded to Ms. Doe as a crime victim that would open the requested materials to public inspection and copying. There can be no reasonable debate that the disclosure of records that refer to the rape of Ms. Doe, or depict any part of the crime, or any time near the crime, can plausibly be done in a manner that treats Ms. Doe with dignity and compassion. She has the right to such treatment, however, and that right supersedes whatever interest the plaintiffs' may have in exposing this information to public scrutiny.

Finally, the plaintiffs' legal theory would result in extreme harm to victims of similar crimes throughout the state. As the Court is aware, the plaintiffs originally requested the video recording of the rape of Ms. Doe before later stating that they were not seeking a copy of that specific video. If the Court were to accept the plaintiff's legal theory, however, other private individuals or less scrupulous media companies could obtain this video and evidence like it in similar cases throughout the state. It is the natural consequence of the plaintiffs' legal position that the video of the rape of Ms. Doe, which was made by a defendant rather than a law enforcement officer, should be subject to inspection and copying. The plaintiffs' position is plain: if a record in an investigative file is not created by the government, then it should be open to inspection. The results of this position are absurd. Such materials could include child pornography created by defendants, photographs of non-governmental witnesses to an ongoing sexual assault (as were taken in the highly-publicized rape case in Steubenville, Ohio), and text messages that relay between defendants the heinous acts they have committed.

Here, of course, the plaintiffs have promised the Court repeatedly that they are not seeking any such evidence. But what is notably lacking from the plaintiffs is either a rationale for that decision or a limiting principle. By backing away from requesting the most obscene and objectionable materials, the plaintiffs implicitly concede that some evidence in the case file should not be open to public view. They do not provide any basis for their position, however, other than their good intentions. As the Court is aware, the PRA is not a statute meant only for traditional news organizations, such as the plaintiffs. *Any* individual can make a request to view public records—including those records that the plaintiffs are too kind to request. If the Court agrees with the plaintiffs' position, and does not recognize the victim's right to object to, and prevent, disclosure of such records, there is no limit to the type or amount of salacious and harmful records that other parties can procure. Once that door is opened, the court has no ability to control its further dissemination, and records like the video of Ms. Doe's rape are likely to end up on the internet. This is not hyperbole; it merely demonstrates the absurdity of the plaintiffs' position. Their request for records should be denied.

WHEREFORE, on the basis of the arguments and the facts submitted herein, and for good cause shown, Ms. Doe respectfully requests that the Plaintiff's Petition For Access To Public Records be DENIED.

Respectfully submitted,

By: 

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Counsel for Jane Doe

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2014, a true and exact copy of the foregoing Victim's Motion to Intervene has been forwarded, via U.S. Mail, postage prepaid, to the following:

Robb S. Harvey, Esq.
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Office of Attorney General
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By: Edward M. Yarbrough
EDWARD M. YARBROUGH
Counsel for Jane Doe

EXHIBIT 1

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT, AT NASHVILLE

THE TENNESSEAN, ASSOCIATED PRESS, *CHATTANOOGA TIMES FREE PRESS*, *KNOXVILLE NEWS SENTINEL*, TENNESSEE COALITION FOR OPEN GOVERNMENT, INC., TENNESSEE ASSOCIATED PRESS BROADCASTERS, WZTV FOX 17, WBIR-TV Channel Ten, WTVF-TV Channel Five, *THE COMMERCIAL APPEAL* and WSMV-TV Channel Four,	]	
Plaintiffs/Petitioners,	]	No. 14-156-IV
vs.	]	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY	]	
Defendant/Respondent,	]	
JANE DOE,	]	
Victim-Intervenor.	]	

AFFIDAVIT OF JANE DOE

Jane Doe, being duly sworn, deposes and states as follows:

1. I make this Affidavit in support of the Victim's Response in Opposition to Plaintiffs' Request for Records. I am over eighteen (18) years of age and have personal knowledge of the facts set forth in this Affidavit.

2. I attend college at Vanderbilt University in Davidson County, Tennessee.

3. I am the victim of the crimes charged in criminal case number 2013-C-2199, brought by the State of Tennessee in Davidson County against former members of the Vanderbilt

football team. The defendants in this case include Brandon Banks, Cory Batey, Jaborian McKenzie, and Brandon Vandenburg.

4. I seek through the attached response to assert my rights as a crime victim under the Tennessee Constitution and state statutes, including but not limited to Tenn. Const. art. I, § 35b and the Victims' Bill of Rights. Specifically, I assert my right to protection from intimidation, harassment, and abuse throughout the criminal justice system. I also assert my right to be treated with dignity and compassion, and for the State to provide me with protection and support throughout the pendency of the criminal action.

5. At no time have I waived the rights afforded to me as a crime victim, nor do I intend to do so.

6. I have no intention or desire to bring media attention to myself or Vanderbilt University. To this end, through my counsel, I have turned down numerous requests for interviews with the media.

7. I am personally aware of the content of some of the records at issue in this case. Given the nature of these records and the publicity already given to the criminal case by the media, I believe that the release of these records would subject me to harassment, abuse, and intimidation. I also believe it would better protect my right to dignity if these records were not released to the public.

. . . continued . . .

FURTHER THE AFFIANT SAITH NOT.

Jane Doe
JANE DOE

STATE OF TENNESSEE]
COUNTY OF DAVIDSON]

Because this affidavit has been filed using a pseudonym, I have confirmed that the person signing this affidavit and the person who originally filed the motion to proceed using a pseudonym are one in the same.

SWORN TO AND SUBSCRIBED before me this 24 day of February 2014.

Linda B. Coe
NOTARY PUBLIC

LINDA B. COE
STATE OF TENNESSEE NOTARY PUBLIC
DAVIDSON COUNTY

My Commission Expires:

9/9/14

ADDENDUM

Westlaw

Not Reported in F.Supp.2d, 2008 WL 233062 (D.Hawai'i)
(Cite as: 2008 WL 233062 (D.Hawai'i))

Only the Westlaw citation is currently available.

United States District Court, D. Hawai'i.
UNITED STATES of America, Plaintiff,
v.
Rajdatta PATKAR, Defendant.

Cr. No. 06–00250 JMS.
Jan. 28, 2008.

Clare E. Connors, Office of the United States Attorney, Honolulu, HI, for Plaintiff.

ORDER RE: CONTINUED ENFORCEMENT OF THE JULY 3, 2007 STIPULATION AND ORDER RE: DISCOVERY

J. MICHAEL SEABRIGHT, District Judge.

I. *INTRODUCTION*

***1** The Associated Press (the "AP") seeks an order from this court dissolving a July 3, 2007 Stipulation and Order Re: Discovery ("July 3, 2007 Stipulation and Order") entered between the United States and defendant Rajdatta Patkar ("Patkar"), arguing that the July 3, 2007 Stipulation and Order was entered without the required showing of good cause pursuant to Federal Rule of Criminal Procedure 16(d). Pursuant to Local Rule 7.2(d), this motion can be decided without oral argument. After careful consideration of the issues raised, the court DENIES the AP's request to dissolve the July 3, 2007 Stipulation and Order.

II. *BACKGROUND*

On April 27, 2006, Patkar, an Indian national residing in Japan, was charged by a federal grand jury sitting in the District of Hawaii with five counts of transmitting in foreign commerce threats to injure the reputation of another in violation of 18 U.S.C. § 875(d). Although each count of the Indictment charged acts occurring on different dates, each count alleged that Patkar willfully and knowingly intended to extort money from "R.A." by transmitting emails in interstate or foreign commerce, which "contained a threat to injure the property and reputation of R.A." FN1

> FN1. The events leading to the Indictment are summarized as follows: While residing in Tokyo, Patkar developed a long-distance internet relationship with "J.J.", a woman residing in the Philippines. After losing contact with J.J., Patkar hacked into her email account and located emails from another woman, "M.E." He then hacked into M.E.'s email account, and learned that R.A. encouraged J .J. and M.E. to meet R.A. and R.A.'s friend for a romantic weekend. Patkar then apparently hacked into R.A.'s email account. Patkar subsequently sent emails to R.A., demanding $35,000 in exchange for not publically disclosing the information that he learned. Rather than pay Patkar the $35,000, R.A. contacted law enforcement.

In a March 30, 2007 letter to Assistant United States Attorney Clare E. Connors ("AUSA Connors"), Patkar's counsel, Assistant Federal Public Defender Pamela J. Byrne ("AFPD Byrne") requested that the government provide discovery of R.A.'s emails to two women in the Philippines that formed the basis of the threats. Doc. No. 42, Ex. B. AFPD Byrne wanted assurance that disclosure of R.A.'s emails "would subject [R.A.'s] reputation to unfavorable scrutiny." *Id.* AFPD Byrne also stated in her letter that, "[i]f absolutely necessary, we can draft a limited agreement not to reveal the content, at least not until trial." *Id.*

On April 18, 2007, AUSA Connors provided additional discovery to Patkar, including "the emails that comprise the basis of the extortion...." Doc. No. 42, Ex. C. With the discovery, the United States enclosed a proposed protective order. *Id.* AFPD Byrne did not sign the proposed protective order; instead, on June 12, 2007, she filed a Motion to Clarify Necessity for Government's Proposed

Order Restricting the Dissemination of Information Concerning this Case ("Motion to Clarify"). In that Motion, Patkar sought clarification of the government's request that "the name of the alleged victim and certain details of the instant offense are not revealed unless and until there is a trial on the merits." Doc. No. 12, at 2. In a response to the Motion to Clarify, the government represented that it disclosed to the defense "the very information the defendant had threatened the victim he would disclose if the victim did not pay him the sum of $35,000." Doc. No. 15, at 6. On the same date, the United States filed, under seal, a Supplement to Response to Defendant's Motion to Clarify Necessity for Government's Proposed Order Restricting the Dissemination of Information Concerning this Case with three attached exhibits ("Supplemental Response to Motion to Clarify"). Doc. No. 16.

***2** Prior to ruling on the Motion to Clarify, the parties entered into a stipulation, which was approved by Magistrate Judge Leslie E. Kobayashi. The July 3, 2007 Stipulation and Order, originally filed under seal, provides:

> IT IS HEREBY STIPULATED AND AGREED by and between the parties herein that disclosure by the Office of the Federal Public Defender of the discovery materials related to the extortion of the victim, herein described by the initials R.A., and more particularly described below, provided by the United States Attorney's Office shall be limited to the defendant, the staff of the Office of the Federal Public Defender, and any experts retained by the Federal Public Defender. The discovery materials covered by this stipulated order are documents Bates stamped 654 through 745, which were provided to the Federal Public Defender by the United States on April 18, 2007.
>
> IT IS FURTHER STIPULATED by and between the parties that this agreement and court order shall continue until further order of the court.

Based on media inquiries, on November 6, 2007, this court entered an Order to Show Cause Why Documents Filed under Seal Should Remain under Seal; Order Regarding July 3, 2007 Stipulation and Order Re: Discovery ("November 6, 2007 Order"). Doc. No. 36. The November 6, 2007 Order first ordered the parties to show cause why the Supplement to Response to Defendant's Motion to Clarify and the July 3, 2007 Stipulation and Order should remain sealed. The court subsequently entered an order unsealing these documents (other than redaction of the victim's name). Doc. No. 41.

The November 6, 2007 Order also directed the United States to:

> provide a more detailed explanation to the court as to the type of documents subject to the Stipulation and Order (that is, a general description of the documents subject to the Stipulation and Order), the good cause for the entry of the Stipulation and Order during the discovery phase, and the good cause for the Stipulation and Order to remain effective now that the criminal proceeding has concluded.

The United States described the documents as "materials that comprised the basis of the extortion such that if revealed, would cause damage to the reputation of the victim. Most of these materials are in the form of email communications." Doc. No. 40, at 4. It explained its good cause, in part, as fulfilling its obligation under 18 U.S.C. § 3771 "to respect a victim's privacy." [FN2] *Id.* at 5.

> FN2. The United States further responded that "[n]ow that the case has concluded, there is no legitimate reason for the defense either to continue to possess or to disclose these materials. If the materials were to be returned voluntarily to the United States, the need for maintaining the Stipulation and Order concerning disclosure might be obviated. Otherwise, the United States requests that it remain in effect." Doc. No. 40, at 5. Patkar

subsequently refused to return the discovery material to the United States. Doc. No. 43.

The Order to Show Cause Why Documents Filed Under Seal Should Remain Under Seal was scheduled for a hearing on November 28, 2007. Prior to the hearing, the court received a letter from counsel for the AP, seeking permission to participate in the November 28, 2007 hearing. Doc. No. 46. The court subsequently granted the AP's request to intervene. Doc. No. 48. On December 14, 2007, the AP filed its Memorandum Regarding July 3, 2007 Stipulation and Order Re: Discovery. Doc. No. 49. The government filed a Memorandum in Opposition to Intervenor Associated Press's Memorandum Regarding July 3, 2007 Stipulation and Order Re: Discovery on January 4, 2008. Doc. No. 50.

III. *ANALYSIS*

***3** The AP's request for the court to dissolve the July 3, 2007 Stipulation and Order presents an issue not previously addressed by this court or this circuit. The court recognizes that courts in our country have long acknowledged a "general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'n, Inc.,* 435 U.S. 589, 597 & n. 7 (1978); *see also Kamakana v. City & County of Honolulu,* 447 F.3d. 1172, 1178 (9th Cir.2006). "Indeed, there is a strong presumption in favor of the common law right to inspect and copy judicial records." [FN3] *Phoenix Newspapers, Inc. v. U.S. District Court for the District of Arizona,* 156 F.3d 940, 946 (9th Cir.1998); *see Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.,* 307 F.3d 1206, 1212 (9th Cir.2002) (The common law right of access applies to "all information filed with the court."). The court further recognizes that "members of the public have a right of access to criminal proceedings secured by the First Amendment." *Tennessee v. Lane,* 541 U.S. 509, 523 (2004) (*citing Press–Enterprise Co. v. Superior Court of Cal., County of Riverside,* 478 U.S. 1, 8–15 (1986)). Indeed, "public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system." *Press–Enterprise Co.,* 478 U.S. at 12.

> FN3. In the Ninth Circuit, a strong presumption of access to judicial records may be overcome only on the presentation of articulable facts, not unsupported hypothesis or conjecture. *See Hagestad v. Tragesser,* 49 F.3d 1430, 1434 (9th Cir.1995).

In determining the AP's request, however, the court is guided by what is—and what is not—presented in this case. This is not a civil case, but a criminal action that never proceeded to trial. Further, the documents at issue were never submitted to the court; they are not part of the judicial record of this case. Instead, the government provided the documents as part of its Federal Rule of Criminal Procedure 16 discovery obligation to the defendant.[FN4] It is with these facts that the court determines the issue presented—whether there was good cause to issue the July 3, 2007 Stipulation and Order preventing disclosure of discovery materials provided to Patkar's counsel, and if so, whether the good cause dissipated based on Patkar's guilty plea and sentencing.

> FN4. In a criminal case, "[d]iscovery is neither a public process nor typically a matter of public record. Historically, discovery materials were not available to the public or press." *United States v. Anderson,* 799 F.2d 1438, 1441 (11th Cir.1986); *Cf. In Re San Juan Star Co. v. Barcelo,* 662 F.2d 108, 115 (1st Cir.1981) ("Nor can the discovery process lay claim to the long tradition of openness enjoyed by criminal or civil trials.").

Pursuant to Federal Rule of Criminal Procedure 16(d)(1), "Protective and Modifying Orders," a "court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate

relief." "[T]he trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect." *Alderman v. United States,* 394 U.S. 165, 185 (1969). As explained by the Advisory Committee Notes to the 1974 amendment:

> [D]iscovery should be accomplished by the parties themselves, without the necessity of a court order unless there is dispute as to whether the matter is discoverable or a request for a protective order under subdivision (d)(1). The court, however, has the inherent right to enter an order under this rule.

***4** The Ninth Circuit has yet to define what constitutes "good cause" to restrict discovery pursuant to Federal Rule of Criminal Procedure 16—whether for documents found in the judicial record, or for unfiled discovery materials. From the court's review of caselaw, the Third Circuit appears to be the only circuit that has set forth a standard under Federal Rule of Criminal Procedure 16(d)(1), albeit one related to access of judicial records, not records provided in discovery never made part of a judicial record. Specifically, *United States v. Wecht,* 484 F.3d 194, 211 (3d Cir.2007), adopted the same standard it applies for access to civil judicial records under Federal Rule of Civil Procedure 26(c).[FN5]

> FN5. In *United States v. Wecht,* 484 F.3d 194, 211 (3d Cir.2007), the Third Circuit found that:
>
> > Good cause [under Federal Rule of Criminal Procedure 16(d)] is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing. The good cause determination must also balance the public's interest in the information against the injuries that disclosure would cause.
> >
> > (*quoting Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 786, 787–91 (3d Cir.1994) (internal quotation signals omitted)).

This court is not convinced that the Ninth Circuit would apply these civil standards to protective orders in criminal actions. Further, the facts presented here differ from *Wecht* —the R.A. documents have not been filed with the court or otherwise incorporated into the court's proceeding,[FN6] and are therefore not judicial records.[FN7] *See Wecht,* 484 F.3d at 208 (finding that the public has a common law right to access the records at issue, because, among other things, the "documents were filed with the motion for *in camera* review which 'clearly establishes' them as judicial records"). The court nonetheless finds reference to Federal Rule of Civil Procedure 26(c) a useful tool to review the government's claim that they have established good cause pursuant to Federal Rule of Criminal Procedure 16(d).

> FN6. While it is unclear to the court if the government submitted the documents to the United States Probation Office ("USPO") for the presentation of the presentence report, even if the USPO did receive the documents, the Presentence Investigation Report remains sealed pursuant to this court's August 21, 1990 General Order Regarding Guideline Sentencing and was never made part of the court record at any time, including sentencing.
>
> FN7. Thus, the AP does not seek release of the R.A. documents by the court. Rather, should the July 3, 2007 Stipulation and Order be vacated, the AP would then presumably approach Patkar (or the Office of the Public Defender) to seek access to

the documents.

Federal Rule of Civil Procedure 26(c) provides that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... forbidding the disclosure or discovery." In this circuit, to prevent access to unfiled discovery materials, "[a] party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted." *Foltz v. State Farm Mut. Auto. Ins. Co.,* 331 F.3d 1122, 1130 (9th Cir.2003) (*citing Phillips v. Gen. Motors,* 307 F.3d 1206, 1212 (9th Cir.2002)). "[B]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman Ind., Inc. v. Int'l Ins. Co.,* 966 F.2d 470, 476 (9th Cir.1992).

Here, the government argues that the statutory provisions of the Crime Victims' Rights Act ("CVRA") constitute good cause for the July 3, 2007 Stipulation and Order. A crime victim, among other rights, has the right "to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8).[FN8] The AP suggests that the CVRA does not provide any substantive relief, citing language from *United States v. Turner,* 367 F.Supp.2d 319, 335 (E.D.N.Y.2005), that "[n]either the text of the statute nor its legislative history provides guidance as to what specific procedures or substantive relief, *if any,* Congress intended this provision to require or prohibit." AP Mem. at 12 (emphasis added by the AP). In context, however, this quotation is both incomplete and misleading. After this quoted language, *Turner* continues:

> FN8. The term "crime victim" is defined as "a person directly and proximately harmed as a result of the commission of a Federal offense...." 18 U.S.C. § 3771(e). R.A. falls under this definition. *See also United States v. Adjani,* 452 F.3d 1140, 1151 (9th Cir.2006) (referring to "victims" of extortion in the context of 18 U.S.C. § 875(d)).

*5 The provision's broad language will undoubtedly lead to litigation over the extent to which courts must police the way victims are treated inside and outside the courtroom. Nevertheless, the Senate sponsors of the law were clear in their articulation of the overall import of the provision: to promote a liberal reading of the statute in favor of interpretations that promote victims' interest in fairness, respect, and dignity. "It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." *See* Senate Debate at S4269 (statement of Sen. Feinstein).
Turner, 367 F.Supp.2d at 335. As a result, the court applied § 3771(a)(8) "liberally to the extent consistent with other law." *Id. United States v. Heaton,* 458 F.Supp.2d 1271 (D.Utah 2006), reached a similar result, finding that § 3771(a)(8) requires the court to consider the views of a victim before giving leave of court to dismiss an indictment pursuant to Federal Rule of Criminal Procedure 48(a). The court found that its decision was consistent with the views of Senator Kyl, one of the CVRA's chief sponsors:

The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process.... This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.

Id. at 1272 (citing 150 CONG. REC. S10910 (daily ed. Oct. 9, 2004)). [FN9] *See also United States v. Kaufman,* 2005 WL 2648070, at *4

(D.Kan. Oct. 17, 2005) ("[T]he court finds that 18 U .S.C. § 3771(a)(8) requires that sketch artists' activities in the courtroom be restricted under the circumstances of this case."). That Congress provided victims with the ability to enforce the CVRA by filing a writ of mandamus likewise makes clear that the law was intended to provide meaningful rights, and not a simple laundry list of aspirational goals as to how the government and courts should treat victims.

> FN9. In a similar vein, Senator Leahy stated that the CVRA entitles "victims to assert a panoply of rights, regardless of whether the prosecution is already asserting the same rights on their behalf. For example, at the insistence of other sponsors, this bill will enable victims to bring mandamus actions alleging the denial of their statutory right 'to be treated with fairness and with respect for the victim's dignity and privacy,'...." 150 CONG. REC. S4230 (daily ed. Apr. 21, 2004).

R.A. thus has an unquestionable right "to be treated with fairness and with respect for [his] dignity and privacy." Congress, in effect, has determined that failure to treat a victim with fairness and with respect to privacy works a clearly defined and serious injury to the victim. This right fully supports a finding of good cause to limit disclosure of the R.A. documents. Although Magistrate Judge Kobayashi did not specifically make a finding of good cause, this court finds that the July 3, 2007 Stipulation and Order was supported by good cause. The documents subject to the July 3, 2007 Stipulation and Order were provided to Patkar after AFPD Byrne requested discovery of R.A.'s emails to J.J. and M.E. that formed the basis of Patkar's threats. In other words, the emails consist of the very materials upon which Patkar based his threats. As explained by the government, the July 3, 2007 Stipulation and Order prohibits dissemination of "materials that comprised the basis of the extortion such that if revealed, would cause damage to the reputation of the victim. Most of these materials are in the form of email communications." Doc. No. 40. In order to protect R.A.'s statutory right to be treated with fairness and with respect to his privacy, good cause exists to limit disclosure of these materials.

***6** Further, that Patkar has entered a plea of guilty and has been sentenced does not limit or restrict R.A.'s rights under the CVRA.[FN10] Regardless of how Patkar responded to the charges against him, R.A. retains his right to be treated with fairness and with respect to his privacy.

> FN10. The AP argues that the documents at issue would have become public if this action had gone to trial. While these documents might have become public, the court will not base a decision on what *might* have occurred in the future. The court repeats the obvious—the documents at issue never became part of the court's records in this case.

The court further rejects the AP's argument that the public's interest in disclosure overrides any showing of good cause. First, it is not clear that the public's interest in disclosure of discovery material, never made part of the public record, can override the CVRA's clear Congressional mandate. The CVRA itself provides no exceptions to the rights afforded, other than a balancing test that the court must apply in determining whether to exclude a victim from a public proceeding. *See* 18 U.S.C. § 3771(a)(3) (stating that a victim has a right not to be excluded from a public court proceeding "unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding."). In other words, Congress has determined, through enactment of the CVRA, that the public interest lies in treating a crime victim with fairness and with respect to privacy. Further, setting aside the July 3, 2007 Stipulation and Order would undermine the

public interest in having victims of crimes—even those embarrassed by their conduct—report offenses to law enforcement. The court understands that R.A., as a victim, came forward to law enforcement after Patkar's extortion attempt. Absent the July 3, 2007 Stipulation and Order, Patkar would be free to disclose the very material that formed the basis of his extortion. Such disclosure would certainly act as a deterrent to a victim reporting the commission of a crime.

The court finds that the government has satisfied its burden even if the court applies a traditional test balancing the interests of the victim against the interests of the public in disclosure. The charges involve extortion over R.A.'s relationship to one or more women in the Philippines; they do not involve allegations of wrongdoing by R.A. in any manner. Under these circumstances, the crime victim's right to be treated with fairness and respect for his privacy clearly outweighs any public interest in disclosure.

IV. *CONCLUSION*

For the reasons discussed above, the court DENIES the AP's request to dissolve the July 3, 2007 Stipulation and Order.

IT IS SO ORDERED.

D.Hawai'i,2008.
U.S. v. Patkar
Not Reported in F.Supp.2d, 2008 WL 233062 (D.Hawai'i)

END OF DOCUMENT

Westlaw

Not Reported in F.Supp.2d, 2005 WL 2648070 (D.Kan.)
(Cite as: 2005 WL 2648070 (D.Kan.))

Only the Westlaw citation is currently available.

United States District Court,
D. Kansas.
UNITED STATES OF AMERICA, Plaintiff,
v.
Arlan Dean KAUFMAN and Linda Joyce Kaufman, Defendants.

No. CRIM.A. 04–40141–01, CRIM.A. 04–40141–02.
Oct. 17, 2005.

Kristy Parker, Lisa Krigsten, U.S. Department of Justice, Washington, DC, Richard L. Hathaway, Tanya J. Treadway, Office of United States Attorney, Topeka, KS, for Plaintiff.

MEMORANDUM AND ORDER

BELOT, J.

***1** This case comes before the court on a Motion to Intervene and to Oppose Exclusion of Sketch Artists filed by Media General Operations, Inc., d/b/a KWCH–TV CHANNEL 12, a Wichita television station. (Doc. 275.) The court corrected several erroneous factual assertions in Channel 12's motion by written order. (Doc. 278.) The court also established a schedule for briefing and offer of proof on the issue of sketch artists. *Id.* The alleged victims in this matter filed a response (Doc. 283), and Channel 12 filed what it apparently perceived as an offer of proof; however, it only offered proof of irrelevant matters. The court also conducted a hearing on October 14, 2005. Channel 12's motion is GRANTED, subject to conditions, for reasons set forth herein.

I. FACTS

Defendants are charged in a thirty-four count second superceding indictment with, among other things, Medicare fraud, civil rights violations, and subjecting victims to involuntary servitude, all in violation of various provisions of Title 18 of the United States Code. (Doc. 121.) The case has garnered more than trivial interest in the local media. Unfortunately, this case involves allegations of sexual misconduct by defendants toward their mentally ill patients. Some of this conduct is recorded in graphic detail on video tapes. In light of the congressional mandate to protect the privacy and dignity of victims under the Crime Victims' Rights Act, 18 U.S.C. § 3771, the court has already directed that these videos be displayed on a screen that is visible to the jury, the court, and the parties, but not to people seated in the gallery. No objection has been made to this procedure by the parties or by the media. Other than that, and despite the graphic detail which already has come out and which is certain to come out through further witness testimony, the court has not otherwise closed the proceedings to the public. Both the media and the general public have the opportunity to attend the proceedings and describe what they witness to anyone who will listen.

When Channel 12 filed its motion seeking a ruling on whether sketch artists would be allowed in the courtroom (Doc. 275), the court questioned the parties, none of whom desired to have a sketch artist in the courtroom. On October 14, 2005, in open court, the court questioned the members of the jury regarding their feelings about being drawn by a sketch artist. No juror indicated any desire to have his or her likeness drawn and displayed on television. In anticipation of the court's inquiry to the jury, Channel 12 filed a document in which it stipulated that if sketch artists were permitted to conduct their operations in the courtroom, they would not sketch victims or jurors. (Doc. 287.) At the end of this inquiry, the court offered Channel 12 the opportunity to offer any additional evidence or argument that it wished. Channel 12 briefly reiterated its prior arguments.

II. ANALYSIS

The general principle that the public and the press have a First Amendment right of access to

criminal proceedings is well established. *See United States v. McVeigh,* 119 F.3d 806, 811 (10th Cir.1997) (citing *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 558–81, 100 S.Ct. 2814, 2818–30, 65 L.Ed.2d 973 (1980) (plurality opinion)). Nevertheless, "[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute." *Globe Newspaper,* 457 U.S. at 606, 102 S.Ct. at 2620. Any restrictions must be "necessitated by a compelling governmental interest, and ... narrowly tailored to serve that interest." *Id.* at 607, 102 S.Ct. at 2620.

***2** Here, the trial has been completely open to the press and the public with the exception that sexually-graphic videos of mentally ill victims are shown in a manner so that they are not viewable by individuals in the gallery. This restriction was necessary to protect the victims' "right to be treated with fairness and with respect for the victim[s'] dignity and privacy." 18 U.S.C. § 3771(a)(8). Other than this restriction, no limitation has been placed on the public's right to be present and hear the extensive, graphic testimony about the content of those videos. Accordingly, the threshold issue here is the much narrower question of if, and to what extent, the First Amendment grants *sketch artists* the right to attend and sketch the proceedings in a criminal trial.

As an initial matter, "representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion." *Globe Newspaper,* 457 U.S. at 609 n. 25, 102 S.Ct. at 2621 (internal quotations omitted). For the reasons set forth in its previous order (Doc. 278), the court was unaware of Channel 12's interest until it filed its Motion to Intervene. Therein, Channel 12 requested a hearing. Since a hearing would necessarily interrupt the underlying criminal trial, the court directed Channel 12 to file an offer of proof regarding any matters it intended to prove at the hearing. (Doc. 278.) Channel 12 filed an offer of proof in the form of an affidavit from one of its managers. (Doc. 281.) Unfortunately, that offer of proof only encompassed events related to communications between Channel 12 and the United States Attorney's Public Affairs Officer as it pertained to having sketch artists in the courtroom. Channel 12 offered no explanation regarding what its artist intended to sketch, which raised the court's concern that Channel 12 intended to sketch and show likenesses of protected witnesses and jurors. Nevertheless, the court still afforded Channel 12 an opportunity to be heard in open court on October 12, 2005. Hence, the court finds that Channel 12 has received its notice and opportunity to be heard. There is no purpose in conducting further hearings on this matter and Channel 12 has not requested one.

The court finds that sketch artists have no First Amendment right to attend and sketch the proceedings in a criminal trial. This is because the First Amendment interests vindicated by their activities are *de minimis.* In finding that the press holds a general First Amendment right of access to criminal trials, the Supreme Court focused on the important role of the media in keeping the public informed regarding the proper and effective functioning of their government, particularly in the area of criminal judicial proceedings. *Globe Newspaper,* 457 U.S. at 604–06, 102 S.Ct. at 2618–20. There can be no doubt that allowing the press to report on the trial is critical to keeping the public informed. Most citizens lack the time and opportunity to attend a criminal trial, particularly one of this extended duration. Their ability to stay abreast of the proceedings through newspapers, television, and other media outlets is thus essential to give practical meaning to the First Amendment right of access.

***3** However, unlike the written or spoken word, sketches of courtroom proceedings do little, if anything, to inform the public about the course of the trial. It conveys nothing about the allegations,

the testimony, or other non-testimonial evidence received in the case. Likewise, the sketches give no sense of whether the case is being handled in a fair, legitimate manner, or whether there is some problem with corruption, misconduct, or other irregularity that might indicate a failure in our system of justice. In fact, the one device that would provide visual images that could fulfill some of these important functions is a video camera. Yet, the Supreme Court has made clear that there is no constitutional right to have video cameras in the courtroom. *Estes v. Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).[FN1] In fact, Federal Rule of Criminal Procedure 53 expressly forbids photographing and broadcasting criminal proceedings.[FN2] *See also United States v. Kerley,* 753 F.2d 617, 622 (7th Cir.1985) (Rule 53 does not violate the First Amendment); [FN3] *United States v. Hastings,* 695 F.2d 1278, 1283–84 (11th Cir.1983) (same). Likewise, still cameras lack a constitutionally protected right of access to the courtroom. Indeed, the court can add little to the Eighth Circuit's recent summary of the law in this area:

> FN1. While *Estes* was a fractured opinion regarding whether a televised criminal trial was a *per se* violation of the constitution, the decision was essentially unanimous that there was no First Amendment right to televise a criminal trial. *See also Estes,* 381 U.S. at 588, 85 S.Ct. at 1662 (Harlan, J., concurring) ("No constitutional provision guarantees a right to televise trials.")
>
> FN2. The text of the rule reads as follows:
>
> > Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.
>
> Fed.R.Crim.P. 53.
>
> FN3. In *Kerley,* the Seventh Circuit provided a characterization of the case that is equally applicable here:
>
> > It is important to note that the issue is not between open and closed proceedings. Rather, we are only concerned with whether it is reasonable to conclude that the *marginal gains* from videotaping and broadcasting an already public trial, which members of the public and media will be free to attend and to report on, are outweighed by the risks and uncertainties the procedure, in the minds of some, entails.
>
> *Kerley,* 753 F.2d at 621 (emphasis in original)

While *Richmond* mandates that criminal trials be open to the public, no court has ruled that videotaping or cameras are required to satisfy this right of access. Instead, courts have universally found that restrictions on videotaping and cameras do not implicate the First Amendment guarantee of public access. *See Whiteland Woods v. Township of West Whiteland,* 193 F.3d 177, 184 (3rd Cir.1999) (holding that public has no right to videotape Planning Commission meetings that were required to be public); *United States v. Kerley,* 753 F.2d 617, 621 (7th Cir.1985) (holding that the public has no right to videotape trial even when the defendant wishes it to be videotaped); *Westmoreland v. Columbia Broadcasting System, Inc.,* 752 F.2d 16, 23 (2d Cir.1984) ("There is a long leap, however, between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised."), cert. denied, 472 U.S. 1017, 105 S.Ct. 3478, 87 L.Ed.2d 614 (1985); *United States v. Hastings,* 695 F.2d 1278, 1284 (11th Cir.), cert. denied, 461 U.S. 931, 103 S.Ct. 2094, 77 L.Ed.2d 303 (1983) (holding that the press had no right to videotape criminal trials); *cf. Nixon v. Warner Communications Inc.,* 435 U.S. 589, 609,

98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) (holding that no First Amendment right existed to publish or copy exhibits displayed in court); *United States v. McDougal,* 103 F.3d 651, 659 (8th Cir.1996), cert. denied, 522 U.S. 809, 118 S.Ct. 49, 139 L.Ed.2d 15 (1997) (holding that First Amendment right of access does not extend to videotaped deposition testimony of then-President Clinton). As the Second Circuit has observed, "the First Amendment right of access is limited to physical presence at trials." *United States v. Yonkers Bd. of Educ.,* 747 F.2d 111, 113 (2d Cir.1984).

***4** *Rice v. Kempker,* 374 F.3d 675, 678–79 (8th Cir.2004). Given that cameras and recording devices would tend to provide the public with a far better picture (no pun intended) of what transpired in the courtroom, and yet the Constitution does not mandate their admission, there can be little doubt that the First Amendment does not give sketch artists the right to sketch criminal trials.

The court now considers the restrictions proposed by Channel 12: that it will not sketch and televise likenesses of victims or jurors. Even in the absence of Channel 12's proposal, the court finds that 18 U.S.C. § 3771(a)(8) requires that sketch artists' activities in the courtroom be restricted under the circumstances of this case. First, there is a compelling government interest in protecting the dignity, as well as the physical and psychological well-being, of mentally-ill alleged crime victims who have been potentially exploited through extensive video recording of themselves engaged in bizarre sexual behavior under the tutelage of their social worker. *See Globe Newspaper,* 457 U.S. at 607–08, 102 S.Ct. at 2620–21 (finding that "safeguarding the physical and psychological well-being of a minor" in the context of a sex-crimes case was a compelling interest).

Next, the court finds that Channel 12's proposal is a narrowly tailored remedy that will protect this interest. Dr. Walt Menninger, whose name is well known to anyone having the remotest knowledge of psychiatry and mental illness, testified that schizophrenia is the "cancer of mental illness." Another highly respected witness, Dr. Bonnie Buchele, testified that many schizophrenics are fearful of everything. Most, if not all, of the witnesses entitled to protection under 18 U.S.C. § 3771 suffer from forms of schizophrenia. The court has already viewed the testimony of two mentally ill witness and observed the distress that these individuals exhibited trying to concentrate on the questions and formulate answers. If that distress was compounded with concerns that the witness' picture was going to be shown on television as one of those "victims" who appeared in the graphic videos, the victim undoubtedly would not only face considerable additional distress and loss of dignity, but the individual might not even be able to testify, thereby damaging the truth-seeking function of a criminal trial. *See Estes,* 381 U.S. at 544–50, 85 S.Ct. at 1634–36.

In addition, there are presently before the court three motions to quash subpoenas of mentally-ill witnesses based on, among other things, their inability to withstand the stress of testifying in open court. These motions contain statements and opinions from mental health professionals indicating that the mental health of these individuals may degenerate considerably if they are forced to testify. The court will have to give a great deal of consideration to balancing the health and welfare interests of these potential witnesses against the rights of the defendants who have subpoenaed them. The calculus would become even more difficult, and the potential harm to the victim-witnesses even greater, should these individuals be forced to face the additional stress of having a sketch artist working in the courtroom during their testimony. While the court has not yet ruled on these motions to quash subpoenas, the court finds that, absent Channel 12's proposed remedy, giving sketch artists unfettered leave to sketch in the courtroom could make it more difficult for the court to allow defendants to call these witnesses, thereby

encroaching on defendants' Sixth Amendment compulsory process right.

***5** Aside from the victims, the jurors have also gone on the record as being opposed to having their likenesses sketched. The court has authority to proscribe sketching jurors. *See, e.g., KPNX Broad. Co. v. Arizona,* 459 U.S. 1302, 1307–08, 103 S.Ct. 584, 587, 74 L.Ed.2d 498 (1982) (Rehnquist, Circuit Justice) ("I think that in all probability the trial judge's order would be more defensible on federal constitutional grounds if he had flatly banned courtroom sketching of the jurors, and if he had extended the ban to those who sketch for the print media as well as to those who sketch for television.")

In conclusion, the court finds:

1. Channel 12 has no First Amendment right to have sketch artists in the courtroom.

2. Title 18 U.S.C. § 3771 proscribes all forms of identification of the victims in this case, including, but not limited to, sketching for purposes of television.

3. Identification of jurors by sketching can be, and will be, prohibited.

4. Channel 12 will be permitted to have one sketch artist attend the trial. The artist shall not sketch jurors or victims. Channel 12 must identify, through communication with counsel for the parties, when a victim will appear as a witness. During each victim's appearance, no sketching materials of any kind will be visible in the courtroom.

5. This order applies only to Channel 12. No other sketch artists will be permitted in the courthouse or in the courtroom for the duration of the trial.

6. This order applies only to this trial. If must not be interpreted by Channel 12 or any other news provider as this court's general permission to allow sketch artists in the courtroom.

IT IS SO ORDERED.

D.Kan.,2005.
U.S. v. Kaufman
Not Reported in F.Supp.2d, 2005 WL 2648070 (D.Kan.)

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Westlaw

Not Reported in F.Supp.2d, 2009 WL 137319 (D.Mass.)
(Cite as: 2009 WL 137319 (D.Mass.))

Only the Westlaw citation is currently available.

United States District Court,
D. Massachusetts.
UNITED STATES of America,
v.
Michelle ROBINSON, Defendant.

Cr. No. 08-10309-MLW.
Jan. 20, 2009.

West KeySummary**Constitutional Law 92 2109**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)2 Criminal Proceedings
92k2108 Court Documents or Records
92k2109 k. In General. Most Cited Cases

Records 326 32

326 Records
326II Public Access
326II(A) In General
326k32 k. Court Records. Most Cited Cases

A newspaper was not entitled to an order compelling the government to disclose to the court the identify of the victim of extortion in a sex-for-fee relationship. The First Amendment right of access to documents used in criminal proceedings applies only to documents actually submitted to a court in the course of litigation. The privilege does not extend to documents which play no role in the adjudication process. The identity of the victim had not become known to the court, and the prosecutor's decision to not come forward with the identity of the victim did neither interfere with the rights of the defendant nor become relevant to the court's decision-making. U.S.C.A. Const.Amend. 1.

James P. Dowden, United States Attorney's Office, Boston, MA, for Plaintiff.

Mark D. Smith, Laredo & Smith, LLP., Boston, MA, for Defendant.

MEMORANDUM AND ORDER

WOLF, District Judge.

I. INTRODUCTION

***1** In this criminal prosecution the government alleges that the defendant, Michelle Robinson, extorted money from the victim, a prominent businessman in the Boston area, after a sex-for-fee relationship. *See* Indictment at ¶¶ 1-13. The defendant is charged with making threats in interstate communications, in violation of 18 U.S.C. § 875(d), and wire fraud, in violation of 18 U.S.C. § 1343. *Id.* at ¶¶ 14-19. The Globe Newspaper Company, Inc. (the "Globe"), has filed a Motion to Intervene and to Require Judicial Review of Victim's Anonymity (the "Motion"), and a supporting memorandum. At this time, the victim's identity has not been revealed to the court by either the government or the defendant. The Globe, however, asks for an order compelling the government to disclose to the court the victim's identity. It also asks that the court make the document disclosing his identity part of the public record.

The government has filed an opposition to the Motion. The victim has also filed an opposition. The defendant has filed a statement that she takes no position on the Motion at this time, but reserves the right to do so in the future. *See* Defendant's Response to Motion to Require Judicial Review of Alleged Victim's Anonymity and Government's Opposition Thereto.

For the reasons described below, the Motion is being denied.

II. ANALYSIS

There is a presumptive right of access to

documents used in criminal proceedings, based on both the First Amendment and the common law. The First Circuit has stated that:

> [t]his circuit, along with other circuits, has established a First Amendment right of access to records submitted in connection with criminal proceedings. The basis for this right is that without access to documents the public often would not have a "full understanding" of the proceeding and therefore would not always be in a position to serve as an effective check on the system.

Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 502 (1st Cir.1989) (citation omitted). In addition to this First Amendment right, the First Circuit has recognized that the common law establishes a presumption of public access to "relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings .... " *Federal Trade Commission v. Standard Financial Mgmt. Corp.,* 830 F.2d 404, 409 (1st Cir.1987). *See also In re Providence Journal Co., Inc.,* 293 F.3d 1, 9-10 (1st Cir.2002); *United States v. Sampson,* 297 F.Supp.2d 342, 344 (D.Mass.2003). These decisions are consistent with the Supreme Court's statement in *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id.* at 597.

However, this right of public access applies only to documents actually "submitted" to a court in the course of litigation. *See Pokaski,* 868 F.2d at 502; *Standard Financial Mgmt.,* 830 F.2d at 409. This is because "[t]he presumption of public access to judicial documents exists, in part, because public monitoring of the courts is an essential feature of democratic control and accountability." *United States v. Salemme,* 985 F.Supp. 193, 195 (D.Mass.1997). Therefore, "[t]he privilege extends, in the first instance, to materials on which a court relies in determining the litigants' substantive rights." *Standard Financial Mgmt.,* 830 F.2d at 408.

***2** The privilege does not, however, extend to "documents which play no role in the adjudication process." *Id.* Rather, "[d] ocuments that play no role in the performance of Article III functions ... lie entirely beyond the presumption's reach, and stand on a different footing ... than any [ ] document which is presented to the court to invoke its power or affect its decisions." *United States v. Amodeo,* 71 F.3d 1044, 1050 (2d Cir.1995) (citing *Bank of America National Trust and Savings Assoc. v. Hotel Rittenhouse Associates,* 800 F.2d 339, 343 (3d Cir.1986)). *See also Salemme,* 985 F.Supp. at 195 (holding that there is no right of public access to documents and information disclosed in discovery in a criminal case which are not relevant to judicial decision-making); *United States v. Patkar,* Cr. No. 06-00250, 2008 WL 233062, at *6 (D.Hawai'i 2008) (same).

As explained earlier, in this case, the government has not made a submission identifying the victim or otherwise notified the court of the victim's identity. Therefore, there is no sealed document or transcript identifying the victim by name that could be made part of the public record. Nor has the identity of the victim played a role in the adjudication process. Accordingly, the victim's identity is not a part of the judicial record that is presumptively open to public scrutiny. *Compare Standard Financial Mgmt.,* 830 F.2d at 408.

As described earlier, however, the Motion asks the court to order the government to divulge to it the identity of the victim and to make the submission doing so part of the public record. There is not a proper legal basis to grant this request.

The Globe has cited, and the court has found, no precedent for the claim that the court has the authority to compel the government to identify the victim. To the contrary, it is properly a matter of

prosecutorial discretion. *See Goldstein v. Moatz,* 364 F.3d 205, 215 (4th Cir.2004) ("Once a prosecutor possesses probable cause, he must decide whether to prosecute, which charges to initiate, what trial strategy to pursue, and a multitude of other important issues that require him to exercise discretion."). Unless and until the decision not to reveal to the court the victim's identity interferes with the rights of the defendant or the victim's identity becomes relevant to the court's decision-making, the court lacks the authority to compel the government to make the information public. *See United States v. Armstrong,* 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (holding that, absent a showing of constitutional violations, review of prosecutorial decisions is prohibited because doing so "asks a court to exercise judicial power over a special province of the Executive"); *United States v. Wilkerson,* 208 F.3d 794, 798 (9th Cir.2000) (stating that, while a trial judge's suggestions regarding prosecutorial decision-making do not violate the separation of powers principle, a judge's attempt to "force, require or coerce the government" with regard to decisions subject to prosecutorial discretion would raise separation of powers concerns).

***3** If this case proceeded to trial and the victim testified, or his identity became relevant to the adjudicative process in some other way and is revealed to the court, the analysis would become more complicated. The Globe could file another motion for the information it now seeks and the presumption of public access would apply. *See Standard Financial Mgmt.,* 830 F.2d at 409. However, even if the victim's identity were a part of the judicial record, public disclosure would not be automatic. Judicial documents "may be sealed if the right to access is outweighed by the interests favoring non-disclosure." *Salemme,* 985 F.Supp. at 195. "Among the countervailing factors favoring nondisclosure are: (i) prejudicial pretrial publicity; (ii) the danger of impairing law enforcement or judicial efficiency; and (iii) the privacy interests of third parties." *Id.* In this case, disclosing the identity of the purported victim, who was allegedly threatened with public exposure in an effort to extort money, would inflict the very harm this prosecution seeks to punish and, at least as arguably, discourage similarly situated victims from cooperating with law enforcement. *See Patkar,* 2008 WL 233062, at *6 (observing in an extortion case that "disclosure would certainly act as a deterrent to a victim reporting the commission of a crime").

The privacy interests at stake here are important. The Crime Victims' Rights Act ("CVRA"), enacted in 2006, provides that victims have the right "to be treated with fairness and respect for [their] dignity and privacy." 18 U.S.C. § 3771(a)(8). In *Patkar,* an extortion case in which the court decided not to lift an order prohibiting the parties from disclosing to the public documents produced in discovery that were potentially embarrassing to the victim, the court relied heavily on the CVRA. As it explained, the CVRA "was intended to provide meaningful rights, and not a simple laundry list of aspirational goals as to how the government and courts should treat victims." 2008 WL 233062, at * 5; *see also United States v. Heaton,* 458 F.Supp.2d 1271, 1272 (D.Utah 2006) (holding that § 3771(a)(8) requires a court to consider the views of the victim before dismissing an indictment pursuant to Fed.R.Civ.P. 48(a)); *United States v. Turner,* 367 F.Supp.2d 319, 335 (E.D.N.Y.2005) (stating that the import of 18 U.S.C. § 3771(a)(8) is "to promote a liberal reading of the statute in favor of interpretations that promote victims' interest in fairness, respect, and dignity."). Among other concerns, the court in *Patkar* relied on the fact that allowing public access to the documents at issue would subject the victim to precisely the harm threatened by the defendant in that case. *See* 2008 WL 233062, at *6. This reasoning is equally applicable here.

Accordingly, the Motion is without merit. As indicated earlier, however, if documents naming the

alleged victim are filed under seal, the Globe may request that they be made part of the public record.

III. ORDER

***4** In view of the foregoing, the Motion (Docket No. 24) is hereby DENIED.

D.Mass.,2009.
U.S. v. Robinson
Not Reported in F.Supp.2d, 2009 WL 137319 (D.Mass.)

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