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NATIONAL CRIME VICTIM LAW INSTITUTE
Protecting, Enforcing & Advancing Victims' Rights

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Protecting Victims' Privacy: Moving to Quash Pretrial Subpoenas Duces Tecum for Non-Privileged Information in Criminal Cases

In nearly every criminal case, counsel for the parties (both the defendant and the state) seek some amount of victim information pretrial.[1] Although this information may not always meet the legal standards necessary to qualify it as confidential or statutorily privileged,[2] it may nonetheless be information that the victim would prefer to keep private. For example, the parties may seek the victim's diary, Facebook account information, email, cell phone records, computer hard drives, or Google searches, each of which is likely to contain personal information.[3] The prospect of having to reveal this information to anyone, but particularly to one's perpetrator, may cause a victim to feel re-victimized and make it less likely that the victim will cooperate in the proceedings or choose to report the crime in the first instance.[4]

Despite it being common practice to seek a subpoena for such information from a victim pretrial, neither the state nor defendants have a constitutional right to the information. In contrast, victims have rights to privacy and to access courts under federal law, as well as a myriad of state constitutional and statutory victims' rights that afford protections from these requests. In addition, to obtain documents from a victim pretrial, parties seeking information by subpoena must show that their requests are material, relevant, and specific. This *Bulletin* briefly discusses each of these arguments, arming the practitioner with tools to assist them when they move to quash pretrial subpoenas for a victim's information.

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I. Victims Have Constitutional and Statutory Rights that Protect Against Compelled Disclosure of Information

Victims have a federal constitutional right to privacy.[5] Many states also grant victims constitutional and statutory rights to privacy, and the right to be treated with fairness, dignity, and respect, among others.[6] Although these rights to privacy are not absolute,[7] they provide a strong basis for quashing a subpoena, particularly because defendants do not have a general constitutional right to obtain pretrial discovery from victims and other third parties under federal law.[8] Nor do defendants have a constitutional right to pretrial discovery from non-government record holders[9] under the Confrontation Clause,[10] the Compulsory Process Clause,[11] or the Due Process Clause.[12] Most states follow federal precedent in interpreting state constitutional rights afforded to defendants.[13]

In addition to a general right of privacy, some states recognize the right of victims to refuse discovery requests from defendants.[14] In jurisdictions that grant this right, courts should quash a pretrial subpoena directed to the victim without the need to consider other victims' rights that would compel the same result.

Finally, quashing pretrial requests for victim information may be necessary to protect a victim's ability to access justice. "Access to justice" implicates an individual's access to courts, as well as the availability of remedies for violations of rights, and victims have a federal constitutional right to access the courts.[15] The failure of courts to protect victims' privacy may act as a disincentive for victims to report crimes and interfere with victims' ability to access the courts.[16]

[V]ictims' rights to privacy and to access the courts—as well as their rights to be treated with fairness, dignity, and respect—provide an independent and sufficient basis for quashing pretrial requests for victim information.

Because victims have federal and state constitutional and statutory rights that are directly implicated by pretrial subpoenas for victim information—and because defendants have no federal constitutional right to pretrial discovery from victims—defendants' pretrial requests for information should readily be quashed. Thus, advocates should argue in absolute terms that victims' rights to privacy and to access the courts—as well as their right to be treated with fairness, dignity, and respect—provide an independent and sufficient basis for quashing pretrial requests for victim information.[17]

II. Statutes that Permit the Pretrial Subpoena of Documents Are Limited in Scope and Require Defendants to Make Specific Showings

Setting aside the constitutional and statutory victims' rights-based arguments that should compel the quashing of parties' pretrial subpoenas for victim information under most circumstances, and setting aside that defendants have no constitutional right to pretrial discovery from victims, principles of due process and compulsory process may permit defendants pretrial access to evidence that is exculpatory or material to their defense. For this reason, federal and state statutes and rules allow for the subpoena of certain documentary evidence pretrial;[18] however, the purpose of these statutes and rules is not to provide an alternate means of discovery in a criminal case. Rather, the purpose of these statutes and rules is much more limited: to expedite trials by providing a time and place before trial for the inspection of certain evidence.[19] Many subpoenas for victim information should fail based on a straightforward application of the statutes and rules governing the use of pretrial subpoenas.

A. Requests cannot be unreasonable or oppressive.

A general limitation in the federal and state statutes and rules allowing pretrial subpoenas is that subpoenas may be quashed if they are "unreasonable or oppressive."[20] The Supreme Court interpreted the "unreasonable or oppressive" standard in *United States v. Nixon*.[21] Under this test, the moving party must show:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection

> in advance of trial and that the failure to obtain such inspection may tend to unreasonably delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."[22]

In brief form, this test requires the moving party to clear three hurdles: relevancy, admissibility, and specificity.[23] Many state courts follow the *Nixon* test, although there is considerable variation among jurisdictions.[24]

The *Nixon* test and its progeny set a high hurdle for parties seeking to discover victim information. For instance, the requirement that the materials requested be relevant and evidentiary generally means that discovery of documents relating to impeachment of a witness are not allowed pretrial, because such documents do not become evidentiary until the witness has testified at trial.[25] Additionally, the requirement that the materials be admissible eliminates the production of hearsay records,[26] or records that would be protected under rape shield laws.[27]

[A]lthough the practice of requesting voluminous personal records from the victim pretrial has become a matter of course, these requests should rarely be granted.

Notably, "[s]pecificity is the hurdle on which many subpoena requests stumble."[28] In order to establish sufficient specificity, requests must rest on reliable assertions, not on mere speculation that the evidence exists.[29] Thus, blanket requests for "any and all" information, or similarly worded requests, are properly viewed by courts as fishing expeditions and should be quashed.[30]

B. Many statutes and rules governing pretrial subpoenas include processes to protect victims' rights and interests.

Many courts have recognized the substantial weight that should be given to victims' privacy and other interests—including victims' rights to protection and to be free from intimidation and harassment—in the context of parties' subpoenas for victim information.[31] In recognition of these important rights and interests, some jurisdictions have enacted statutes and rules in addition to those embodied in general crime victims' rights provisions that explicitly provide protections for victims from whom personal information is sought. For instance, directly referencing the need for victims to be treated with respect for their dignity and privacy,[32] Federal Rule of Criminal Procedure 17(c)(3) was amended in 2008 to provide that a subpoena for the "personal or confidential information"[33] of a victim can only be served by court order, and with notice to the victim, unless "exceptional circumstances" exist.[34] Other states have also amended their subpoena rules to provide additional safeguards for victims.[35]

In sum, although the practice of requesting voluminous personal records from the victim pretrial has become a matter of course, these requests should rarely be granted. A motion to quash this type of request should argue that neither the state nor defendant has a constitutional right to compel pretrial disclosure; that victims, in contrast, do have federal and state constitutional and often statutory rights protecting their interests in nondisclosure; and that immaterial, sweeping, or harassing "discovery" requests are outside the scope of intended pretrial practice.[36]

Practice Pointers

When seeking to quash a pretrial subpoena for victim information, practitioners should consider making the following arguments:

- ✓ Defendants have no general constitutional right to pretrial discovery.
- ✓ Victims have a federal constitutional right to privacy.
- ✓ Victims have a federal constitutional right to access the courts.
- ✓ Victims have a state constitutional and/or statutorily recognized right to privacy.
- ✓ Victims have a state constitutional right to refuse defendants' discovery requests.
- ✓ Victims have a constitutional and/or statutorily recognized right to protection, and to be free from harassment and intimidation.
- ✓ Victims have a constitutional and/or statutorily recognized right to be treated with fairness and with respect for their dignity.
- ✓ Victims have the right to adequate notice of and to respond to any subpoena seeking their personal information.
- ✓ The subpoena seeks to discover information that is irrelevant and inadmissible, and the subpoena does not describe the information sought with adequate specificity.
- ✓ Additional arguments exist to support a motion to quash if the information sought is confidential and/or privileged in nature.

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[1] Although this *Bulletin* focuses on discovery requests from defendants to victims, the arguments discussed are relevant for requests from defendants to third parties who hold victims' records, as well as requests from the state to victims and third parties who hold victims' records.

[2] When the victim information sought is confidential or privileged, arguments beyond those discussed in this *Bulletin* may provide additional bases for quashing a subpoena. *See* Nat'l Crime Victim Law Inst., *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), June 2011, *available at* https://law.lclark.edu/live/files/11779-refusing-discovery-requests-of-privileged.

[3] *See, e.g., Riley v. California,* 134 S. Ct. 2473, 2488-90 (2014) (internal quotations omitted) (holding that the police may not conduct a warrantless search of the digital information on an arrestee's cell phone, finding the "privacy-related concerns" to be "weighty" as "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate" and that "[a]n Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been."); *Fisher v. United States*, 425 U.S. 391, 401 n.7 (1976) (discussing the "[s]pecial problems of privacy" that are "presented by a subpoena of a personal diary," because it is inherently a document created for a uniquely personal purpose); *Cantrell v. Cameron*, 195 P.3d 659, 661 (Colo. 2008) (en banc) ("Very often computers contain intimate, confidential information about a person."); *United States v. Gourde*, 440 F.3d 1065, 1077 (9th Cir. 2006) (Kleinfeld, J., dissenting) ("[F]or most people, their computers are their most private spaces. People commonly talk about the bedroom as a very private space, yet when they have parties, all the guests – including perfect strangers – are invited to toss their coats on the bed. But if one of those guests is caught exploring the host's

computer, that will be his last invitation."); *United States v. Delgado*, No. CR 11-30162-RAL, 2012 WL 4442810, at *1 (D.S.D. Sept. 25, 2012) (internal quotation omitted) (discussing prior order of the court quashing pretrial subpoena for victims' Facebook postings, text messages, and cell phone records because "such sweeping and unjustified discovery requests represented an impermissible pure total fishing expedition"); *In re Weekly Homes, L.P.*, 295 S.W.3d 309, 317 (Tex. 2009) ("Providing access to information by ordering examination of a party's electronic storage device is particularly intrusive and should be discouraged, just as permitting open access to a party's file cabinets for general perusal would be.").

[4] *See* note 16, *infra*; *see also* Nat'l Crime Victim Law Inst., *Excluding Evidence of Specific Sexual Acts Between the Victim and Defendant Under Rape Shield*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), September 2010, at 3, *available at* http://law.lclark.edu/live/files/11816-excluding-evidence-of-specific-sexual-acts-between.

[5] *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (noting that "[v]arious guarantees [in the Bill of Rights] create zones of privacy"); *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.").

[6] *See* Nat'l Crime Victim Law Inst., *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, *supra* note 2, at 3 n.30. Defense-initiated requests for victim information may also implicate a victim's right to protection, and to be free from harassment and intimidation. *See, e.g.,* 18 U.S.C. § 3771(a)(1) (guaranteeing crime victims the right to reasonable protection from the accused); Alaska Const. art. 2, § 24 (granting victims "the right to be reasonably protected from the accused"); Conn. Const. art. 1, § 8(b)(3) (guaranteeing victims "the right to be reasonably protected from the accused"); Ill. Const. art. 1, § 8.1(a)(7) (granting victims "[t]he right to be reasonably protected from the accused"); Mich. Const. art. I, § 24(1) (guaranteeing victims the "right to be reasonably protected from the accused"); Mo. Const. art. I, § 32(1)(6) (granting victims the "right to reasonable protection from the defendant or any person acting on behalf of the defendant"); N.M. Const. art. II, § 24(A)(3) (granting victims the "right to be reasonably protected from the accused"); Ohio Const. art. I, § 10a (according victims the "rights to reasonable and appropriate notice, information, access, and protection"); Or. Const. art. I, § 43(1)(a) (granting victims the "right to be reasonably protected from the criminal defendant"); S.C. Const. art. I, § 24(a)(6) (granting victims the right to "be reasonably protected from the accused or persons acting on his behalf"); Wis. Const. art. I, § 9m (granting victims the right to "reasonable protection from the accused").

[7] *See, e.g., The Florida Star v. B.J.F.*, 491 U.S. 524, 551 (1989) (White, J., dissenting) ("Of course, the right to privacy is not absolute. Even the article widely relied upon in cases vindicating privacy rights . . . recognized that this right inevitably conflicts with the public's right to know about matters of general concern-and that sometimes, the latter must trump the former."); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) ("The right to privacy, however, is not absolute. If the information is protected by a person's right to privacy, then the defendant has the burden to prove that a compelling governmental interest in disclosure outweighs the individual's privacy interest."). Importantly, courts have recognized that victims and the state have an interest in the non-disclosure of personal information relating to crimes of a sexual nature. *See, e.g., Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (recognizing that states have a legitimate interest in protecting rape victims' privacy); Anderson v. Blake, 469 F.3d 910, 914 (10th Cir. 2006) (holding that a rape victim has a constitutionally protected privacy interest in a videotape depicting the rape); *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998) (concluding that "a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape").

[8] *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in criminal cases, and *Brady* did not create one.").

[9] Defendants have a constitutional right to discover certain documents in the possession of the state under *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, "suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt

or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Because of the lesser protections afforded to documents in the hands of the state, victims should exercise caution in turning over personal documents to the prosecution.

[10] "The Confrontation Clause only protects a defendant's trial rights, and does not compel the pretrial production of information that might be useful in preparing for trial." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987).

[11] "The right of compulsory process is essentially a trial right, enabling an accused to present his own version of the facts to the trial jury . . . ." *People v. Chipp*, 552 N.E.2d 608, 613 (N.Y. 1990) (citing Supreme Court precedent). *See also People v. Cabon*, 560 N.Y.S.2d 370, 371 (N.Y. Crim. Ct. 1990) (emphasis added) (noting that trial courts have "*discretion* to grant compulsory process for documents before trial to facilitate trial preparation").

[12] *See Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) ("[T]he Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to acts of the states, not to acts of private persons or entities.").

[13] *But see, e.g., Commonwealth v. Lloyd*, 567 A.2d 1357, 1359 (Pa. 1989) (noting that states have the power to provide broader standards than those mandated by the federal constitution and finding in some instances that Pennsylvania's constitution provides stronger confrontation clause and compulsory clause protections than the federal constitution) (subsequently limited by *Commonwealth v. Aultman*, 602 A.2d 1290, 1297-98 (Pa. 1992) (noting that the *Lloyd* decision was based on a common law privilege rather than a statutory privilege)); *Commonwealth v. Stockhammer*, 570 N.E.2d 992, 1002 (Mass. 1991) (finding Massachusetts' constitutional rights to confrontation, compulsory process, and fair trial provided greater protections than the federal constitution with regard to defendant's access to privileged records).

[14] At least three states provide victims with an explicit constitutional right to refuse a defendant's pretrial discovery request. *See* Ariz. Const. art. II, § 2.1(A)(5) ("[A] victim of crime has a right . . . to refuse an interview, deposition, or other discovery request by the defendant . . . ."); Cal. Const. art. I, § 28(b)(5) ("[A] victim shall be entitled to . . . refuse an interview, deposition or discovery request by the defendant . . . ."); Or. Const. art. I, § 42(1)(c) (granting victims the right "to refuse an interview, deposition or other discovery request by the criminal defendant . . . ."). In addition, Idaho's constitution provides victims with the right "[t]o refuse an interview, ex parte contact, or other request by the defendant, or any other person acting on behalf of the defendant, unless such request is authorized by law." Idaho Const. art. I, § 22(8). Other states grant victims the statutory right to refuse a request for an interview and/or other communication by the defendant. *See, e.g.*, La. Const. art. I, § 25; Ala. Code. 1975 § 15-23-70; Ga. Code § 17-17-8.1; La. Stat. § 46:1844(C)(3); Mass. Gen. Laws ch. 258B, § 3(m); Tenn. Code Ann. § 40-38-117. *See also generally* Nat'l Crime Victim Law Inst., *Protecting Crime Victims from Discovery in Civil Proceedings During the Pendency of a Related Criminal Case*, NCVLI Violence Against Women Bulletin, (Nat'l Crime Victim Law Inst., Portland, Or.), Oct. 2013, *available at* https://law.lclark.edu/live/files/15659-protecting-crime-victims-from-discovery-requests.

[15] Courts recognize the fundamental nature of the right of all people to access the courts. *See, e.g., Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) ("Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment."); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting that access to courts is a fundamental right).

[16] *See, e.g.,* Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. Cal. L. Rev. 1019, 1050 (1991) ("One reason frequently mentioned by victims who do not report their rapes to the police is their uncertainty about whether they will be able to maintain their privacy if they do report the rape."); Anne W. Robinson, *Evidentiary Privileges and the Exclusionary Rule: Dual Justifications for an Absolute Rape Victim Counselor Privilege*, 31 New Eng. J. on Crim. & Civ. Confinement 331, 333 (2005) ("Subpoenaing records from every one of a victim's medical and counseling appointments constitutes a subtle form of intimidation . . . . Evidence has shown that a victim is less likely

to pursue legal action once she realizes that her counseling records may be revealed in court.").

[17] *See United States v. Bradley*, Crim. No. 09-40068-GPM, 2011 WL 1102837, at *2 (S.D. Ill. Mar. 23, 2011) (quashing subpoena requesting educational, juvenile court, and mental health records pertaining to the victim, stating that defendant's "request for such irrelevant materials is a blatant violation of the victim's right to be treated with respect for his dignity and privacy").

[18] *See, e.g.,* Fed. R. Crim. Proc. 17; Ala. R. Crim. P. 17.3; Alaska R. Crim. P. 17; Cal. Penal Code 1326; Colo. R. Crim. P. 17; Del. Super. Ct. Crim. P. 17; D.C. Super Ct. R. Crim. P. 17; Fla. R. Crim. P. 3.220; Ga. Code Ann. § 24-13-23; Haw. R. Penal P. 17; Idaho Crim. R. 17; 725 Ill. Comp. Stat. Ann. 5/115-17; Ind. R. Crim. P. 2; Iowa R. Crim. P. 2.15; Kan. Stat. Ann. § 60-245; Ky. R. Crim. P. 7.02; La. Code. Crim. P. art. 732; Me. R. Crim. P. 17; Md. R. 4-264; Mass. R. Crim. P. 17; Minn. R. Crim. P. 22.01; Miss. Unif. Cir. & County Ct. R. 2.01; Mo. Sup. Ct. R. 26.02; Mont. Code Ann. § 46-15-106; Neb. Rev. Stat. Ann. § 25-1273; Nev. Rev. Stat. Ann. § 174.335; N.J. Ct. R. 1:9-2; N.Y. Crim. Proc. Law § 610.25; N.C. Gen. Stat. Ann. § 7A-103; N.D. R. Crim. P. 17; Ohio Crim. R. 17; Okla. Stat. Ann. tit. 22, § 710; Or. Rev. Stat. Ann. § 136.580; Pa. R. Crim. P. 107; R.I. Super. Ct. R. Crim. P. 17; S.C. R. Crim. P. 13; S.D. Codified Laws § 23A-14-2; Tenn. R. Crim. P. 17; Tex. Code Crim. Proc. Ann. art. 24.02; Utah R. Crim. P. 14; Vt. R. Crim. P. 17; Va. Sup. Ct. R. 3A:12; Wash. Super. Ct. Crim. R. 4.8; W. Va. R. Crim. P. 17; Wis. Stat. Ann. § 885.01; Wyo. R. Crim. P. 17.

[19] *See Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951) ("Rule 17(c) [permitting pretrial subpoena of documents] was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials"); *Commonwealth v. House*, 295 S.W.3d 825, 828 (Ky. 2009) (stating that the rule on subpoenas "is not a discovery device, but rather a means of procuring evidence and of permitting pre-trial inspection of evidence when inspection at trial would disrupt the proceedings"); *State v. Watson*, 726 A.2d 214, 216 (Me. 1999) ("The principal purpose of the subpoena duces tecum is 'to facilitate and to expedite the trial . . . [not to] expand the discovery rights of the parties.'"); *State ex rel. St. Louis County v. Block*, 622 S.W.2d 367, 369 (Mo. Ct. App. 1981) ("The purpose of this rule is to enforce production of documents or objects at trial that contain evidence, material and relevant to the issues, and to require prior production and inspection of such records or objects if prior production will expedite trial.").

[20] *See, e.g.,* Fed. R. Crim. Proc. 17(c)(2) ("On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."); Ala. R. Crim. P. 17.3(c) ("The court, on motion made promptly, may dismiss or modify a subpoena duces tecum if compliance therewith would be unreasonable, oppressive, or unlawful"); Alaska R. of Crim. P. 17(c) ("The court on motion made promptly may suppress or modify the subpoena if compliance would be unreasonable or oppressive."); Colo. R. Crim. P. 17(c) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."); Del. Super. Ct. Crim. P. 17(c) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."); Ga. Code Ann. § 24-13-23(b) ("The court, upon written motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) Quash or modify the subpoena if it is unreasonable and oppressive . . . ."); Haw. R. Penal P. 17(b) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."); Idaho Crim. R. 17(b) ("The court on motion may quash or modify the subpoena if compliance would be unreasonable or oppressive."); Ind. R. Crim. P. 2 ("[T]he court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may: (1) quash or modify the subpoena if it is unreasonable and oppressive . . . ."); Iowa R. Crim. P. 2.15 ("The court on motion may dismiss or modify the subpoena if compliance would be unreasonable or oppressive."); Ky. R. Crim. P. 7.02(3) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."); La. Code Crim. P. art. 732 ("[T]he court shall vacate or modify the subpoena if it is unreasonable or oppressive."); Me. R. Crim. P. 17(c) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable, oppressive, or in violation of constitutional rights."); Mass. R. Crim. P. 17(a)(2) ("The court on motion may quash or modify the summons if compliance would be unreasonable

or oppressive or if the summons is being used to subvert the provisions of Rule 14."); Minn. R. Crim. P. 22.01(5) ("The court on motion promptly made may quash or modify a subpoena if compliance would be unreasonable."); Mo. Sup. Ct. R. 26.02(c) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."); Mont. Code Ann. § 46-15-106(3) ("The court, upon a timely motion, may quash or modify a subpoena if compliance would be unreasonable or oppressive."); Nev. Rev. Stat. Ann. § 174.335.2 ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."); N.J. Ct. R. 1:9-2 ("The court on motion made promptly may quash or modify the subpoena or notice if compliance would be unreasonable or oppressive . . . ."); N.D. R. Crim. P. 17(c)(2) ("On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."); Ohio Crim. R. 17(C) ("[T]he court, upon motion made promptly and in any event made at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if compliance would be unreasonable or oppressive."); R.I. Super. Ct. R. Crim. P. 17(c) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."); S.D. Codified Laws § 23A-14-5 ("A court on motion made promptly may quash or modify a subpoena if compliance would be unreasonable or oppressive."); Tenn. R. Crim. P. 17(d)(2) ("[T]he court may quash or modify the subpoena if compliance would be unreasonable or oppressive."); Utah R. Crim. P. 14(a)(2) ("The court may quash or modify the subpoena if compliance would be unreasonable."); Vt. R. Crim. P. 17(c) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."); Wash. Super. Ct. Crim. R. 4.8(b)(4) ("On timely motion, the court may quash or modify a subpoena for production if it (A) fails to allow reasonable time for compliance; (B) requires disclosure of privileged or other protected matter and no exception or waiver applies; (C) is unreasonable, oppressive, or unduly burdensome; or (D) exceeds the scope of discovery otherwise permitted under the criminal rules."); W. Va. R. Crim. P. 17(c) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."); Wyo. R. Crim. P. 17(d)("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.").

[21] 418 U.S. 683 (1974).

[22] *Id.* at 699.

[23] *Id.* at 700.

[24] *See, e.g.*, *People v. Spykstra*, 234 P.3d 662, 669 (Colo. 2010) (adopting the *Nixon* standard but adding an additional requirement); *State v. Block*, ID No. 9908006808, 2000 WL 303351, at *3 (Del. Super. Ct. Feb. 18, 2000) (relying on *Nixon* standard but not explicitly adopting it); *State v. Harman*, 270 S.E.2d 146, 153 (W. Va. 1980) (discussing standard in context of a civil case); *Schreibvogel v. State*, 228 P.3d 874, 882 (Wyo. 2010) (citing the *Nixon* test favorably, but not explicitly adopting it). For assistance in determining the standard employed in a specific jurisdiction regarding what constitutes an unreasonable or oppressive subpoena, please contact NCVLI.

[25] *See Nixon*, 418 U.S. at 701 ("Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial."); *United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir. 1980) ("[B]ecause [impeachment] statements ripen into evidentiary material for purposes of impeachment only if and when the witness testifies at trial, impeachment statements, although subject to subpoena under rule 17(c), generally are not subject to production and inspection by the moving party prior to trial."); *Block*, 2000 WL 303351, at *3 (internal citations omitted) ("Clearly, insofar as the requested materials are sought to impeach or otherwise attack the credibility of the complainant, such right of inspection does not arise until the time of trial.").

[26] *See United States v. Cherry*, 876 F. Supp. 547, 552 (S.D.N.Y. 1995) (finding that documents compiled by local police department concerning defendant's alleged offenses could not be subpoenaed under rule providing for subpoena for books, papers, documents or other objects, since they were inadmissible hearsay and thus could not be introduced as evidence at trial).

[27] *See generally* Nat'l Crime Victim Law Inst., *Excluding Evidence of Specific Sexual Acts Between the Victim and Defendant Under Rape Shield*, *supra* note 4, at 2-3. If confronted with a subpoena seeking

information related to the victim's sexual history, the practitioner should be prepared to quash based on the relevant rape shield law as well all arguments contained in this *Bulletin*.

[28] *See United States v. Jackson*, 155 F.R.D. 664, 667 (D. Kan. 1994) ("This requirement ensures that the subpoenas are used only to secure for trial certain documents or sharply defined groups of documents. It also serves to prevent the subpoena from being converted into a license for . . . a 'fishing expedition to see what may turn up.'") (citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951)).

[29] *See, e.g., United States v. Arditti*, 955 F.2d 331, 346 (5th Cir. 1992) (upholding lower court's quashing of pretrial subpoena and explaining that: "[Defendant] has demonstrated why he wants to look into the material, but he has not set forth what the subpoena's materials contain, forcing the court to speculate as to the specific nature of their contents and its relevance. Accordingly, it appears [defendant] was attempting to use the subpoena to gain knowledge that he could not obtain under [Federal Rule of Criminal Procedure] 16(a)(1), as much as to obtain evidence, i.e., that he was trying 'to use the subpoena duces tecum as a discovery device, which it is not.'") (quoting *United States v. Nixon*, 777 F.2d 958, 969 (5th Cir. 1985)); *Cuthbertson*, 630 F.2d at 146 (quashing subpoena when request for exculpatory information was based on the "mere hope" that such information existed); *United States v. Warshak*, No. 1:06-CR-00111, 2007 WL 2733936, at *3 (S.D. Ohio Sept. 13, 2007) (finding defendants failed to meet *Nixon* factors in seeking pretrial discovery of Internet protocol logs because defendants "premise their claim of relevance on speculation, and have not met their burden of demonstrating how they are impeded from preparing for trial"); *State v. Watson*, 726 A.2d 214, 216 (Me. 1999) ("In this case, defendant baldly asserted that the information would be used to impeach the victim based on his speculation as to what the notes might contain. In the absence of any preliminary showing that the subpoena was more than a fishing expedition, the court did not abuse its discretion in quashing the subpoena . . . ."); *State v. Love*, 395 S.E.2d 429, 432 (N.C. Ct. App. 1990) (emphasis in original) ("The disputed subpoenas requested *all* files and records relating to the child and made no reference to a specific time period, date, or contents. Such broad categories are inappropriate for subpoenas *duces tecum*."); *Commonwealth v. McEnany*, 667 A.2d 1143, 1149 (Pa. Super. Ct. 1995) ("[S]ubpoenas are not to be used to compel production of documents merely for inspection or for a 'fishing expedition.'"); *Welch v. State*, No. 06-10-00020-CR, 2011 WL 1364970, at *7 (Tex. App. Sept. 21, 2011) (denying pretrial request for production of the victim's computer because the oral motion requesting the information was neither written nor specific); *Martin v. Darnell*, 960 S.W.2d 838, 845 (Tex. App. 1997) ("[T]he mere assertion that the documents are material to the defense is insufficient. In order to be entitled to an *in camera* review, the defendant must allege with specificity, how he believes the evidence is relevant to the proceeding."); *Schreibvogel*, 228 P.3d at 882 (finding subpoena unreasonable and oppressive because it was irrelevant to the issues in question, was for a lengthy period of time, and was unduly burdensome).

[30] *See, e.g.*, *United States v. Wittig*, 250 F.R.D. 548, 552 (D. Kan. 2008) ("Although the proposed subpoena narrows the subject matter as well as the date range and recipient, it continues to read like a civil discovery request, including a broad description of materials requested and an expansive 'Definitions' section that seeks 'each' and 'every,' 'any' and 'all,' 'without limitation,' 'however denominated.' Moreover, although the present motion removes the wording 'if they exist,' with regards to the documents sought, counsel for defendant concedes that they do not know whether any such documents exist."); *United States v. Jackson*, 155 F.R.D. 664, 668 (D. Kan. 1994) ("The subpoenas employ such terms as 'any and all documents' or 'including, but not limited to;' these are indicia of a fishing expedition . . . . The subpoenas, in several instances, seek entire files, all correspondence, and all related records. This is more indicia of a fishing expedition."); *State v. Peters*, 264 P.3d 1124, 1133 (Mont. 2011) ("Appellants sought virtually all information regarding the use of every [breathalyzer test] in the State of Montana, from the day it was purchased to the date of the subpoena duces tecum, whether related to their individual cases or not. The District Court concluded that the information requested was unreasonably voluminous.").

[31] *See, e.g., Spykstra*, 234 P.3d at 671 (finding trial court abused its discretion in ordering the production of the victim's computer records because defendant failed to show a reasonable likelihood that the evidence sought existed and was relevant

and evidentiary, and because the subpoenas were unreasonable and oppressive, stating that the nature of the subpoenas "compelling disclosure of electronic information stored on a personal computer—makes more evident the inappropriateness of the trial court's order" given the sensitive information that may be contained therein); *People v. Chambers*, 512 N.Y.S.2d 631, 633-34 (N.Y. Sup. Ct. 1987) (quashing subpoena of murder victim's diary based on, among other reasons, the victim's family's "limited right to retain personal paper free from interference or harassment by defendant").

[32] Committee Notes to Fed. R. Crim. Proc. 17 (2008 Amendments) ("This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their 'dignity and privacy.' The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim.").

[33] *See United States v. Misquitta*, Crim. No. 10-185, 2011 WL 1337098, at *2 (W.D. Pa. Apr. 7, 2011) ("Confidential and personal information encompasses a wide range of material that may include privileged material, but that also includes non-privileged information.").

[34] Fed. R. Crim. Proc. 17(c)(3) (2008 Amendment). *See also United States v. Godfrey*, Crim. No. 11-10279-RWZ, 2013 WL 5780439, at *2 (D. Mass. Oct. 18, 2013) (failing to reach defendant's argument that "exceptional circumstances" existed under Fed. R. Crim. P. 17(c)(3) because his requests would reveal defense strategy as defendant's subpoena for victims' loan modification records were not relevant to the charges); *United States v. Wright*, No. 3:10-CR-161, 2012 WL 2088012, at *11 (E.D. Tenn. June 8, 2012) (finding that a Rule 17 subpoena for patient files of the victim would be improper because defendant "has failed to make any showing, much less the appropriate showing" to permit the court to issue one). The proper interpretation of "exceptional circumstances" under Rule 17 is a contested area of law. For more information about this subject, please contact NCVLI.

[35] *See, e.g.,* Colo. Rev. Stat. Ann. § 24-4.1-302.5 (d)(vii) (recognizing the right of a victim to be heard at any proceeding "[i]nvolving a subpoena for records concerning the victim's medical history, mental health, education, or victim compensation, or any other records that are privileged pursuant to section 13-90-107"); Utah R. Crim. Proc. 14(b) (providing additional protections for victims in the context of subpoenas, including requiring that notice be served on a victim of any hearing regarding the production of the victim's medical, mental health, school, or other non-public records); *see also* Vt. Stat. Ann. § 6607 (requiring that the prosecutor be given advance written notice prior to the service of a subpoena for a victim's educational records or other confidential records).

[36] For additional resources to assist in protecting victims from pretrial discovery requests, please contact NCVLI.

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NCVLI'S TOOLS: Legal Advocacy, Training & Education, and Public Policy

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