

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL ACTION

COMMONWEALTH OF PENNSYLVANIA,

v.s.

GERALD A. SANDUSKY

No. CP-14-CR-2421-2011
CP-14-CR-2422-2011

AMICI CURIAE BRIEF IN SUPPORT OF
THE VICTIMS'¹ MOTION TO PROCEED BY PSEUDONYM

STATEMENTS OF INTEREST

Amici Curiae are seven nationally and locally recognized victim service organizations with expertise in protecting victims' rights, including the right to privacy.

The National Center for Victims of Crime (National Center), a nonprofit organization based in Washington, DC, is the nation's leading resource and advocacy organization for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, the National Center, among other efforts, advocates for laws and public policies intended to create resources that will secure the rights and protections for victims of

¹ The term "victim," as used in this brief, is merely the use of a legal term of art and not a commentary on defendant's guilt or innocence. "Victims" nationwide are now afforded rights in the criminal justice system; rights that exist independent of others in the criminal justice process. See Douglas E. Beloof, "Constitutional Implications of Crime Victims as Participants," 88 Cornell L. Rev. 282, 286 (Jan. 2003). The criteria for obtaining "victim" status varies among jurisdictions; however, since many victims' rights attach pretrial, if not pre-charging, the determination of who is a "victim" cannot be a factual determination dependent on defendant's guilt or innocence. See generally Douglas E. Beloof, Paul G. Cassell & Steven J. Twist, *Victims in Criminal Procedure* 52 (2d Ed. 2006). In Pennsylvania, "victims" is a legislated term which recognizes that "victims" have rights throughout the entire criminal justice system. Cf 18 P.S. § 11.102.

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crime. The National Center is particularly interested in this issue because of its commitment to ensuring that every victim's right to privacy is protected and enforced throughout the criminal justice process, and that every victim has access to the courts.

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys; researching and analyzing developments in crime victim law; and providing information to crime victims and crime victims' attorneys through its website, www.ncvli.org. NCVLI also participates as *amicus curiae* when a case presents an issue of importance regarding crime victims' rights and interests.

The Pennsylvania Coalition Against Rape (PCAR) is a private non-profit organization. Founded in 1975, PCAR is the oldest anti-sexual violence coalition in the country and is widely respected at both the state and national levels for its leadership in preventing sexual violence. Over the past 37 years, PCAR has successfully worked as an agent of change-educating society about the severe and long-lasting impact of sexual violence, confronting victim-blaming attitudes, challenging injustice and advocating for policies for victims of sexual violence to provide them with the compassion, privacy and dignity they deserve. At the core of PCAR's success is its statewide network of 51 rape crisis centers that provide counseling, crisis intervention, referral services; hospital, court and police accompaniment; prevention education, and community outreach. PCAR member centers offer confidential crisis support 24 hours a day, seven days a week. PCAR has been at the forefront of fighting to preserve the

confidentiality of victims. It is critical that we join with our colleagues in advocating for the safety and privacy of victims.

The Pennsylvania Coalition Against Domestic Violence (“PCADV”) is a private non-profit organization that provides services and advocacy on behalf of victims of domestic violence and their minor children. PCADV was established in 1976 and in its 30 years of operation, PCADV has grown to a membership of 60 organizations across Pennsylvania that, collectively, have provided safety and refuge to nearly two million victims and children from every corner of the Commonwealth. Our member programs provide a range of life-saving services, including emergency shelters, hotlines, counseling programs, safe home networks, legal and medical advocacy projects, and transitional housing projects for victims of abuse and their children. Victim confidentiality is a key component in every aspect of our work, as it enables victims to come forward to seek services and assistance without fear of retribution or retaliation. PCADV and its member programs are, thus, uniquely vested in maintaining strict confidentiality for victims of domestic violence and other victims of interpersonal crime in all stages of the criminal process.

Dauphin County Victim/Witness Assistance Program wishes to extend its support for the *amici curiae* brief protecting the privacy and safety of the victims in the Jerry Sandusky case. VWAP's mission is to ensure all crime victims are treated with dignity and respect while ensuring they are not traumatized further within the justice system. Allowing the victims in this case to maintain a level of anonymity while testifying in this very high profile case is a vital mechanism to ensuring their privacy and safety without jeopardizing the integrity of the criminal case they are participating in. We fully support this endeavor.

The Crime Victims Alliance of Pennsylvania is a group of advocates, organizations, survivors and our allies committed to ensuring crime victims' voices are heard in all facets of the justice system. We fully support the *amici curiae* brief to protect the interest of the victims' privacy in the Sandusky case and implore the judge to allow the victims in this case to be free from undue scrutiny throughout the criminal justice process.

Network of Victim Assistance (NOVA), is a non-profit community-based organization, based in Bucks County, Pennsylvania. NOVA's mission is to serve the Bucks County community by providing direct support to victims of sexual assault and other personal violations and to advance the rights of victims through advocacy and prevention education programs. NOVA strives to develop programs and services which empower individuals and promote respect for the privacy, uniqueness and dignity of all people.

This case involves issues that impact every sexual assault victim in Pennsylvania – specifically, protection of a victim's fundamental rights to privacy, protection, fair treatment, and access to courts for redress of harm. These rights can be protected in a way that does not infringe upon either the defendant's or the public's rights.

INTRODUCTION

While approximately one in every three to four women and one in five to six men are sexually abused as children, only 10% report their abuse to the authorities. Mary Gail Frawley-O'Dea, *Perversion of Power: Sexual Abuse in the Catholic Church*, 6-7 (Vanderbilt University Press 2007); What Do U.S. Adults Think About Child Sexual Abuse? Measures of Knowledge and Attitudes Among Six States, Stop It Now! 7 (2010), (www.StopItNow.org/rdd_survey_report).

While the reasons victims do not report may be many, key among these are fear of loss of privacy and media exposure. Kilpatrick, Edmunds, & Seymour, *Rape in America; A Report to the Nation*, 1992. These fears are not unwarranted. It is well-established in social science literature that victims can experience re-victimization at the hands of the justice process. *See, e.g.*, Dean J. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 *Wayne L. Rev.* 7, 25 (1987) (describing victims' further victimization by the criminal justice system); *see also* Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 *Social Justice Research* 313, 314 (2002) (noting that "secondary victimization" by the criminal justice system can negatively influence victims' "self-esteem, faith in the future, trust in the legal system, and faith in a just world"); Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 *S. Cal. L. Rev.* 1020, 1049 (1991) (noting that public disclosure before a victim is ready will often disrupt the healing process causing additional psychological harm). Building on this research, courts have recognized that re-victimization is particularly acute, and extends beyond mere embarrassment and humiliation, when victims of sex crimes have their identities or other private information revealed when they want it to remain private. *See, e.g., Doe v. Firm*,

No. CV065001087S, 2006 WL 2847885, *5 (Conn. Super. Ct. Sept. 22, 2006) (“To force the plaintiff to proceed without the protection of the pseudonym Jane Doe could only subject the plaintiff to additional psychological harm and emotional distress.”); *United States ex. Rel. Latimore v. Sielaff*, 561 F.2d 691, 694-95 (7th Cir. 1977) (“The ordeal of describing an unwanted sexual encounter before persons with no more than a prurient interest in it aggravates the original injury.”); *Globe Newspaper Co. Inc. v. Clerk of Suffolk County Superior Court*, No. 01-5588*F, 2002 WL 202464, *6 (Mass. Super. Feb. 4, 2002) (“[F]or many victims of sexual abuse, especially child sexual abuse, public revelation of the abuse, if not sought by them, victimizes them yet again.”)

The fear of loss of privacy and the concomitant diminished reporting is incredibly prevalent in acquaintance child sex abuse. Laura P. Chen, BS, et al., *Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders*, 85 (7) *Mayo Clin. Proc.* 618 (July 2010). In these situations, once the abuser has access to a child, the abuser begins the grooming process and ultimately gains the trust of the child and the family. Such trusting relationships prevent the children from disclosing the abuse out of fear they will not be believed, or will suffer embarrassment and/or ridicule. *See Id.* Unfortunately, we know that perpetrators of child sex abuse typically continue to abuse until they are caught. *See Kenneth V. Lanning, Child Molesters: A Behavioral Analysis*, 37 (4th ed. 2001).

Encouraging victim participation in the criminal justice system is critical to fulfilling the strong public policy of protecting children. In furtherance of this public policy, Pennsylvania has enacted several statutes recognizing the need to protect the privacy of children to encourage effective reporting. *See Pennsylvania’s Child Protective Services Law*, 23 Pa.C.S.A. § 6303(b) (“PURPOSE.-- It is the purpose of this chapter to encourage more complete reporting of

suspected child abuse”); *see also* Section 6701 et seq. (providing for the confidentiality for all child abuse cases under the child protective services law); *See Cf* U.S. Dept. of Justice, *Defending Childhood Initiative: About the Initiative*, at <http://www.justice.gov/defendingchildhood/about-initiative.html> (last accessed May 24, 2012) (“Children’s exposure to violence, whether as victims or witnesses, is often associated with long-term physical, psychological, and emotional harm. . . . This problem affects each one of us. Effectively addressing it must become our shared concern and our shared cause.”).

In this high profile case, the victims seek to be permitted to proceed through trial using pseudonyms in a case involving sex crimes committed against them. Together, the victims’ constitutional rights to privacy and to access courts; their state-based rights to be treated with dignity, respect, courtesy and sensitivity; and the compelling public policy in favor of encouraging victim participation in the criminal justice system, when weighed against the hypothetical and at best negligible harm to the public’s and defendant’s rights that honoring their requests would cause, strongly counsel in favor of granting the victims’ requests.

LEGAL ARGUMENT

I. THE VICTIM'S FEDERAL AND STATE RIGHTS TO PRIVACY, ACCESS TO COURTS, AND DIGNITY MILITATE IN FAVOR OF THE USE OF PSEUDONYMS THROUGHOUT THESE PROCEEDINGS, INCLUDING TRIAL.

A. Victims in this case have federal and state rights at issue.

The federal constitution and common law guarantee crime victims the right to privacy in matters of a personal nature. *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (holding that the constitutional right to privacy includes an “individual interest in avoiding disclosure of personal matters”); *Barbe v. McBride*, 521 F.3d 443, 459 (4th Cir. 2008) (recognizing that the government has “a valid interest in protecting victims of sexual abuse from needless harassment, humiliation, and ‘unnecessary invasions of privacy’”); *see generally* Judicial Conference Committee on Court Administration and Case Management, *Report on Privacy and Public Access to Electronic Case Files*, <http://www.privacy.uscourts.gov/Policy.htm> (“The authority to protect personal privacy and other legitimate interests in nondisclosure is based, like public access rights, in common law and constitutional principles.”). This right is often termed the right to “informational privacy.” *Bloch v. Ribar*, 156 F.3d 673, 683 (6th Cir. 1998).

Courts have found that the right to informational privacy encompasses a sexual assault victim’s legal interest in the non-disclosure of certain personal information. *See, e.g., Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (noting that crime victim’s right to privacy in information regarding her sexual assault may outweigh defendant’s constitutional right to confrontation); *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989) (finding that “it is undeniable” that protecting the privacy of victims’ of sexual offenses is a “highly significant” state interest and that such an

interest, under certain circumstances, may warrant the imposition of civil sanctions for the publication of the name of a rape victim); *Bloch*, 156 F.3d at 686 (finding 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 where no penological purpose is being served”); *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006) (holding that rape victim has a constitutionally protected privacy interest in videotape depicting her rape).²

In addition to their federal constitutional right to privacy, sexual assault victims, like the general public, also have a constitutional right to access the courts. *See Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir 2003) (“Access to the courts is clearly a constitutional right, grounded in the [right to petition clause of 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 access to courts is a fundamental right). To the extent that requiring victims to reveal their names during a public trial would cause a chilling effect on the victims’ willingness to pursue redress for sexual assault crimes, the requirement implicates victims’ right to access the courts. *See Cari Fais, Note, Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 Colum L Rev 1181, 1220-21 (2008) (discussing cases that support construing the First Amendment right to petition to “protect[] individuals seeking access to the court and access to the aid of law enforcement” and courts that have expressed “concern[] that exposing people to [certain damaging consequences] based solely on reporting activities to law enforcement would have a ‘chilling effect’ on other

² While the Supreme Court has not directly held that sexual assault victims have a constitutional right to privacy in preventing the disclosure of their names, the Court has recognized a rape victim’s interest in anonymity. *See Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989).

people's willingness to report criminal activity to the police"). Not protecting the identity of victims severely diminishes their access to the courts because they may forfeit seeking justice out of fear of disclosure. *Globe Newspaper Co. Inc. v. Clerk of Suffolk County Superior Court*, 2002 WL 202464, at 1282 (Mass. Super. 2002). In *Chappell*, the court recognized that "[a]ccess to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment and the Fourteenth Amendment." *Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir.) 2003; *see also, Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting access to the courts is a fundamental right).

Finally, under Pennsylvania law, a victim's right "to be treated with dignity, respect, courtesy and sensitivity" during the criminal justice proceedings is expressly guaranteed. Title 18 Pa. Stat. §11.102. This right must be enforced by the trial court "in a manner no less vigorous than the protections afforded criminal defendants." *Id.* Furthermore, this Commonwealth has a well established rule of common law rendering it the duty of trial court to protect victims from embarrassment, humiliation, or damage to one's reputation. *Commonwealth v. Knight*, 469 Pa. 57, 364 A.2d at 906 (recognizing the legislative intent behind the rape shield pretrial notice was to provide rape victims with heightened protection against surprise, harassment, and unnecessary invasion of privacy); *see also, Michigan v. Lucas*, 500 U.S. 145, 150 (1991) (recognizing the Michigan rape shield law represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment and unnecessary invasions of privacy.)

B. The Use of Pseudonyms is a Permissible and Reasonable Way to Protect Victims' Rights Without Violating Defendant's Rights.

Two of Defendant's rights may be argued to be at issue – the right to confrontation and the right to a public trial. Neither is impaired by the victims' use of pseudonyms.

i. Right to Confront Accusers is not violated by use of pseudonyms.

In Pennsylvania, it is not a defendant's absolute right that the victim's identity be disclosed.³ Pennsylvania trial courts permit victims to be identified by the use of a pseudonym.⁴ A search for authority at the state level for direction on how trial courts determine whether a pseudonym may be used throughout the trial could not be found. However, this issue has been addressed in the federal courts in Pennsylvania whereby a balancing test was established to determine if the use of a pseudonym should be permitted. *Doe v. Evans*, 202 F.R.D. 173, 175-76, 50 Fed.R.Serv. 3d (Callaghan) 872 (E.D.Pa. 2001); *Doe v. Hartford Life and Accident Ins. Co.*, 237 F.R.D. 545, 549 (D. N.J. 2006) (quoting *Doe v. Provident Life & Accident Ins. Co.*, 176 F.R.D. 464, 467-68 (E.D. Pa. 1997)). In conducting a balancing test, the courts balance factors compelling disclosure against the use of pseudonyms. Such factors compelling disclosure include the extent to which the identity of the litigant has been kept confidential; the bases upon which disclosure is feared or sought to be avoided and the substantiality of these bases; the magnitude of the public interest in maintaining the confidentiality of the litigant's identity; whether, because of the purely legal nature of the issues presented or otherwise, there is an

³ See 42 Pa.C.S.A. § 5982, (“in a prosecution involving a child victim of sexual or physical abuse, unless the court otherwise orders, the name of the child victim shall not be disclosed by officers or employees of the court to the public, and any records revealing the name of the child victim will not be open to public inspection.”)

⁴ See *Commonwealth v. Boich*, 2009 Pa.Super. 195 (2009) (following the trial court's use of a pseudonym in an adult rape case without criticism).

atypically weak public interest in knowing the litigant's identities; the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publically identified; and whether the party seeking to use pseudonym has illegitimate ulterior motives. Factors against the use of pseudonyms include the universal level of public interest in access to the identities of the litigants whether because of the subject matter of the litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's interest which is normally obtained, and whether the opposition to pseudonym by counsel, the public, or the press is illegitimately motivated. *Id.* at 550 (*quoting Id.* at 468).

Applying this test to cases involving adults testifying about abuse they suffered as a child, the analysis is in favor of the use of a pseudonym for the following reasons. These victims have a legitimate concern that if their identities are revealed as they testify about the intimate lurid details of the sexual abuse they may confront humiliating and embarrassing situations or it may harm to their reputations. Furthermore, they may feel intimidated while testifying which may diminish their ability to tell their story. The Pennsylvania legislature has made clear the important public policy interest in protecting victims' rights to encourage them to come forward.⁵ By permitting these victims to testify without revealing their identity, other victims in the Commonwealth will be encouraged to come forward. None of the factors against the use of

⁵ Pennsylvania's Crime Victims Act provides that:

- (1) In recognition of the civic and moral duty of victims of crime to fully and voluntarily cooperate with the law enforcement and prosecutorial agencies and in further recognition of the continuing importance of victim cooperation to State and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this Commonwealth, all victims of crime are to be treated with dignity, respect, courtesy and sensitivity.

pseudonym apply to this case. And in fact, applying the factors set forth above, these victims should be permitted to testify under a pseudonym.

- ii. **Right to public trial is not impaired by use of pseudonyms, and in fact, closure of the courtroom during victim testimony would also be permissible.**

The Sixth amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a ... public trial...” U.S. Const. amend. VI. Both the U.S. Constitution and the Pennsylvania Constitution provide this right has its boundaries, including boundaries ordered to protect victims and/or witnesses at trial. *Commonwealth v. Knight*, 469 Pa. 57, 364 A.2d at 906 (“the right to a public trial is not absolute . . . [but] must be considered in relationship to other important interests.”) *Id.* at 65. The Pa. Constitution provides no greater right of public access to judicial proceedings than those established under the U.S. Constitution. *Commonwealth v. Selenski*, 2010 Pa. Super. 68, n.5 (Pa. Super. Ct. 2010).

In *Commonwealth v. Knight, supra*, the Pennsylvania Supreme Court observed that “a court must assess all of the circumstances to determine if they present a situation in which an exclusion order is necessary to protect the victim. If the court determines a necessity exists, it may then issue an exclusion order; but the exclusion order must be fashioned to effectuate protection of the important interest without unduly infringing upon the accused's right to a public trial either through its scope or duration.” *Id.* 469 Pa. at 66, 364 A.2d at 906.

(2) The rights extended to victims of crime in [the Crime Victims Act] are to be honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants. Title 18 Pa. Stat. §11.102.

In *Stevens*, the court held that the defendant's right to a public trial was not violated and the circumstances justified the court closing the courtroom to the public while the adult rape victim testified about the embarrassing lurid details. *Commonwealth v. Stevens*, 237 Pa.Super. 457, 352 A.2d 509 (1975). Circumstances which justify the court in closing the courtroom to the public include the possibility of embarrassment and discomfort to victims of crimes when testifying about sensitive and personal details of the crime. *Id.* at 466-68, 352; *see also*, *Commonwealth v. Wright*, 255 Pa. Super. 512 (1977) (*citing Stevens*, the court held that the emotional breakdown of a fifty-two year old rape victim that occurred after direct examination provided "a compelling basis" for closing the courtroom during the remainder of her testimony. *Id.* at 515.); *Commonwealth v. Burton*, 459 Pa. 550, 558, 330 A.2d 833 (1975) (recognizing that appellant's wife and the Black Panthers might cause the witness to change her testimony out of fear, there was a compelling basis for closing the courtroom during witness' testimony.)

The twenty-three year old adult rape victim in *Stevens* feared embarrassment, harassment, and loss of reputation and explained that her testimony would be hindered without an exclusion order. In its holding, the court stated "[a]lthough an accused has a constitutional right to a public trial, this right is not without limitation. *Stevens*, 237 Pa.Super. at 467 (*citing Commonwealth v. Burton*, 459 Pa. at 465, 330 A.2d 833 (1974); *Commonwealth v. Principatti*, 260 Pa. 587, 104 A. 53 (1918). It is well-established, for example, that "the need to protect young complaining witnesses in rape cases against embarrassment, harassment and loss of reputation will suffice to invoke the shelter of limited privacy upon criminal proceedings." *See Commonwealth v. Stevens*, 237 Pa.Super. at 468 (*quoting Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532, 539-40 (2d Cir. 1974) (recognizing that "unlike the right to a trial by jury, or the privilege against self-incrimination, strict enforcement of the accused's demand for public proceedings can

occasionally infringe upon other important interests. Some, of course, are personal to the defendant. In such cases the strong policy against curtailment of publicity will yield to his paramount concern.” *Id.* at 539.) “Thus, the closing of the courtroom to spectators is a “frequent and accepted practice when the lurid details of such a crime [rape] must be related by a young lady.” *Stevens*, 237 Pa.Super. at 468 citing *Harris v. Stephens*, 361 F.2d 888, 891 (8th Cir. 1966) cert. denied, 386 U.S. 964, 87 S. Ct. 1040, 18 L. Ed. 2d 113 (1967).

Numerous other courts have had similar outcomes as the *Stevens* decision. *See, State v. Santos*, 122 R.I. 799, 808 (R.I. 1980) (recognizing appellant’s right to public trial was not violated when the trial court cleared the courtroom prior to twenty-two year old rape victim’s testimony); *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691, 694 (7th Cir. 1977) cert. denied, 434 U.S. 1076, 98 S. Ct. 1266, 55 L. Ed. 2d 782 (1978); (recognizing “[s]hame and loss of dignity, however unjustified from a moral standpoint, are natural byproducts of an attempt to recount details of a rape before a curious and disinterested audience. The ordeal of describing an unwanted encounter before persons with no more than a prurient interest in it aggravates the original injury. Mitigation of the ordeal is a justifiable concern of the public and of the trial court” and a substantial justification for excluding public during the twenty-one year old rape victim’s testimony.); *Harris v. Stephens*, 361 F.2d at 891 (recognizing appellant’s right to public trial was not violated when trial court cleared the courtroom prior to young rape victim’s testimony); *State v. Purvis*, 157 Conn. 198, 207, 251 A.2d 178 (1968), cert. denied, 395 U.S. 928, 89 S. Ct. 1788, 23 L. Ed. 2d 246 (1969) (recognizing appellant’s right to public trial was not violated when trial court cleared the courtroom prior to sixteen year old rape victim’s testimony); *State v. Smith*, 123 Ariz. 243, 249-50, 599 P.2d 199 (1979) (holding that “that protection of the dignity of the complaining witness in a rape case is a substantial justification for excluding

spectators); *Bivins v. State*, 313 So. 2d 471, 472 (Fla. App. 1975) (recognizing appellant's right to public trial was not violated when the trial court cleared the courtroom prior to sixteen year old rape victim's testimony); *People v. Latimore*, 33 Ill. App. 3d 812, 818-19, 342 N.E.2d 209 (1975) (recognizing appellant's right to public trial was not violated when the trial court cleared the courtroom, except the media or others claiming an interest, prior to rape victim's testimony because "the interest of a defendant in having ordinary spectators present during trial is not an absolute right but must be balanced against other interests which might justify excluding them." *Id.*); *State v. Padilla*, 91 N.M. 800, 802-803, 581 P.2d 1295 (1978) (recognizing appellant's right to public trial was not violated when the trial court cleared the courtroom of all disinterested people prior to rape victim's testimony); *State v. Santos*, 122 R.I. 799, 413 A.2d 58 (1980) (affirming trial court's reliance upon opening statements and information expected to be elicited from the adult rape victim for valid reason to close the courtroom to all spectators); *Price v. State*, 496 S.W.2d 103, 108 (Tex. Crim. App. 1973) (affirming trial court ruling to close the courtroom during adult sex assault victim testimony after balancing the defendant's right to a public trial against the interests of justice).

Notably, in this case the victims are merely asking for use of pseudonyms. Since closure of this courtroom during testimony would be fully supported, use of pseudonyms clearly strikes a proper balance of all of the interests at stake.

C. Allowing the Victims to Proceed by Pseudonym Does not Violate the Public's Right.

Under common law, the public has a general right of access to public records and documents, including those related to criminal proceedings. *Nixon v. Warner Comms., Inc.*, 435 U.S. 589, 597 (1978). Likewise, under the First Amendment of the United States Constitution,

the public has a right to attend public court proceedings and access certain judicial documents. *Id.* at 609. As with defendant's rights discussed above, these rights are not absolute, and courts have found that, under certain circumstances, these rights must yield to other legally protected interests. *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 580 (1980). Restrictions on the press' right of access requires a prior determination that an overriding interest will likely be prejudiced. *See Waller v. Georgia*, 467 U.S. 39, 48 (1984).

Victims' privacy interests are one type of legally protected interest that courts have found must be weighed against the public and media's right of access. *See, e.g., United States v. Madoff*, 626 F. Supp. 2d 420, 426 (S.D.N.Y. 2009) (stating that common law and constitutional rights of access must be balanced against the victims' privacy interests under the federal Crime Victims' Rights Act); *Curry*, 2009 WL 395247, at *2 ("When a court determines that interests favoring non-disclosure justify restricting the public's access, it must restrict access in a way that will minimize the burden on the public's right, for example, by sealing or redacting only those records or portions thereof that contain sensitive information."); *see generally* Judicial Conference Committee, *Report on Privacy and Public Access to Electronic Case Files* ("[P]ublic access rights are not absolute, and courts balance access and privacy interests in making decisions about the public disclosure and dissemination of case files."); Carol Shultz Vento, *Propriety of Publishing Identity of Sexual Assault Victim*, 40 A.L.R. 5th 787 (collecting and analyzing cases dealing with (1) the question of whether publication of identity of sexual assault victims constitutes proper grounds for criminal or civil sanctions imposed by statute and (2) tort liability for invasion of privacy).

Upon balancing these interests, many courts conclude that a victim's interest in the non-disclosure of his or her identifying information outweighs the public and media's right of access.

See, e.g., Wilpink v. Kanawha County Board of Education, No. 2:03-cv-179, 2006 WL 456021, at *3 (S.D. W. Va. Feb. 23, 2006); *Madoff*, 626 F. Supp. 2d at 426 (finding that victims' privacy interests outweigh common law and constitutional rights of access where victims expressed wish to not have identities disclosed); *Cape Publications v. City of Louisville*, 147 S.W.3d 731, 736 (Ky. Ct. App. 2003) (upholding policy of redacting identifying information of sexual assault victims from publicly available incident reports upon finding that, *inter alia*, the public's interest in disclosure did not outweigh "the privacy interests of victims of sexual offenses, particularly when those privacy interests are coupled with a compelling public interest in insuring the physical safety of the victims and encouraging them to report sexual offenses without fear of exposure"); *State v. Densmore*, 624 A.2d 1138 (Vt. 1993) (noting that "the privacy interests of innocent third parties [including crime victims] may well present a compelling interest sufficient to outweigh a qualified First Amendment Right of access under certain circumstances.").

CONCLUSION

Given the intense media coverage of this case thus far and the nature of the acts charged, it is highly likely that when they are compelled to disclose their names without protection these victims will face a courtroom overflowing with press and public. This will undoubtedly intimidate the victims, affect their ability to testify, and impact their recovery. It will also violate their rights to privacy, access to the courts, and dignity and respect. Failure to protect these victims' rights sends a clear message to all victims of sexual abuse: you have a Hobson choice: your privacy or your access justice. *Amici* urge this Court to avoid compelling this choice. Allowing victims to proceed by pseudonym recognizes the proper weighing of all of the rights and interests at stake in this case.

Respectfully Submitted,



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