IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

FRANCISCO RAMIREZ,
JACQUIELINE REYES-MENDOZA,
AND THEIR MINOR CHILD B.R.,

Victim-Witnesses – Petitioners

v. No. S-1-SC-39966

HONORABLE DAYLENE A. MARSH

District Court Judge – Respondent

and

DAVID PAULINO PADILLA-SUAZO,

Real Party in Interest – Defendant

ON PETITION FOR EMERGENCY WRIT OF SUPERINTENDING CONTROL AND REQUEST FOR STAY,
From the June 8, 2023, Order Denying Petitioners' Motion to Quash Subpoena
Eleventh Judicial District Court, Division VI, Case No. D-116-CR-2020-00835
The Honorable Daylene A. Marsh, District Court Judge

NATIONAL CRIME VICTIM LAW INSTITUTE'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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Pursuant to Rule 12-320(A) NMRA, the National Crime Victim Law Institute (NCVLI) moves this Court for leave to file an *Amicus Curiae* Brief in the above-entitled action in support of Petitioners Victim-Witnesses. As grounds for this motion, NCVLI asserts that it has a serious interest in and knowledge regarding the subject matter of this action, and that their brief may aid the Court in the resolution of the questions raised herein. More particularly, NCVLI asserts:

1. NCVLI is a section 501(c)(3) nonprofit legal education and advocacy organization based. The organization actively promotes comprehensive and enforceable legal rights for crime victims, as well as access to protect those rights through victim centered legal advocacy, education, and resources.

2. NCVLI has appeared as amicus curiae before this Court in the past and seeks to be heard on issues of public importance which affect the rights of crime victims seeking to participate during criminal court proceedings.

3. The movants wish to be heard in this matter because it involves an important application of the New Mexico Victims of Crime Act and the Victim's rights under Article II, Section 24 of the New Mexico Constitution. The interpretation of victims' rights is an area in which NCVLI has expertise and an ongoing interest.

4. On June 21, 2023, NCVLI notified all parties of its intent to file a motion seeking leave to file this *Amicus Curiae* Brief. Counsel for Victim-Witnesses-Petitioners and the Office of the Eleventh District Attorney advised they do not oppose

this Motion. Defendant Real Party in Interest advised he opposes this Motion. Respondent District Court Judge Marsh has not responded.

WHEREFORE, NCVLI requests leave to file this *Amicus Curiae* Brief, submitted contemporaneously as Exhibit A to this motion, supporting the position of Victim-Witnesses – Petitioners.

Respectfully submitted,

MARTINEZ, HART, SANCHEZ & ROMERO, P.C.

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Counsel for NCVLI

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was filed electronically and served to all counsel of record this 27th day of June 2023, via the Court's e-filing/service system:

MARTINEZ, HART, SANCHEZ & ROMERO, P.C.

/s/ Julio C. Romero
Julio C. Romero

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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NATIONAL CRIME VICTIM LAW INSTITUTE *AMICUS CURIAE* BRIEF IN SUPPORT OF VICTIM-WITNESSES-PETITIONERS

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Statement of Compliance – Length Limitations

Pursuant to Rule 12-320(D)(3) NMRA, this Amicus brief complies with the limitations set forth under Rule 12-318(F),(G) NMRA:

1. This Amicus brief was prepared using Times New Roman typeface set at a 14-point font size;

2. The body of this Amicus brief does not exceed the thirty-five (35) page limitation, and it is in compliance with Rule 12-318(F)(3) as this Amicus brief does not exceed eleven thousand (11,000) words by only containing a total of **4,045 words**; and

3. The word-count information was obtained using the word-count feature on Microsoft Word Office 2021.

MARTINEZ, HART, SANCHEZ & ROMERO, P.C.

Julio C. Romero

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INTRODUCTION[1]

The National Crime Victim Law Institute (NCVLI) supports the position of Victim-Witnesses-Petitioners and has moved the Court for leave to file this *Amicus Curiae* because of crime victims' significant privacy interests at issue before the Court. This *Amicus Curiae* brief is set forth in two parts. First, in *infra* Section I, the brief addresses victims' rights under the New Mexico Constitution and statutory law, which together prohibit disclosure of U Visa applications in this case. Second, in *infra* Section II, the brief analyzes Congressional intent underpinning U Visa applications, which confirms a historical legislative intent to protect the confidentiality of U Visa applications by prohibiting the improper disclosure ordered below.

Undocumented immigrants are among the most vulnerable to crime, and once victimized, they face significant barriers accessing justice and a high risk of revictimization. *See* Pauline Portillo, *Undocumented Crime Victims: Unheard, Unnumbered, and Unprotected*, 20 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 345, 354–55 (2018) ("When undocumented immigrants are on the receiving end of crime,

[1] Pursuant to Rule 12-320(C) NMRA, *Amicus* discloses that no party or party's counsel authored this brief in whole or in part. Also, no person, other than the National Crime Victim Law Institute and its counsel contributed money that was intended to fund the preparation or submission of this brief.

they face more barriers accessing the legal system and are more prone to victimization than immigrants with legal status and citizens. Undocumented immigrants are frequently targeted and often re-victimized because criminals understand an immigrant's lack of legal status and fear of deportation induces a reluctance to report criminal activity to police."). In fact, immigrant women and children are "frequently and specifically targeted as victims of rape, torture, kidnapping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage, and being criminally restrained." Amanda M. Kjar, *U-Visa Certification Requirement Is Blocking Congressional Intent Creating the Need for A Writ of Mandate and Training - Undocumented Immigrant Female Farmworkers Remain Hiding in the Fields of Sexual Violence and Sexual*, 22 SAN JOAQUIN AGRIC. L. REV. 141, 148–49 (2013).

Congress created the U nonimmigrant status ("U Visa") to address this tragic reality. The U Visa has the dual purpose of strengthening the ability of law enforcement agencies to investigate and prosecute crimes, while offering protection to these vulnerable, noncitizen crime victims.[2] Jamie R. Abrams, *The Dual*

[2] *See* U.S. Citizenship and Immigration Services, *Victims of Criminal Activity: U Nonimmigrant Status*, available online at www.uscis.gov/humanitarian/victims-of-criminal-activity-u-nonimmigrant-status ("Congress created the U nonimmigrant visa with the passage of the Victims of Trafficking and Violence Protection Act (including the Battered Immigrant Women's Protection Act) in October 2000. The

Purposes of the U Visa Thwarted in A Legislative Duel, 29 ST. LOUIS U. PUB. L. REV. 373, 379 (2010). To avail themselves of this protection, the law does not require that they open themselves up to a new risk of harm—being forced to disclose intimate details of their lives documented in their U Visa application to the very person (or persons) who harmed them. Indeed, federal law makes U Visa applications confidential and they cannot be disclosed except under certain specified circumstances, of which to a criminal defendant and/or state prosecutor are not one. *See* 8 U.S.C. § 1367(a)(2),(b). To hold otherwise would completely undermine the Congressional legislative intent for U Visas as it would reverberate a lasting chilling effect for victims within the immigrant community who otherwise would be eligible for U visa applications.

Further, crime victims in New Mexico have the constitutional and statutory rights to "be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process" and "to be reasonably protected from the accused throughout the criminal justice process." N.M. Const. art. II, § 24(A)(1),(3); NMSA 1978, § 31-26-4 (A),(C) (2019).

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legislation was intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of noncitizens and other crimes, while also protecting victims of crimes who have suffered substantial mental or physical abuse due to the crime and are willing to help law enforcement authorities in the investigation or prosecution of the criminal activity." (last visited June 24, 2023))

Despite the intended public policy and explicit legal protections that militate against disclosure, and a complete lack of showing below of the Defendant-constitutional need for the Victims-Witnesses-Petitioners' confidential U Visa application, the trial court ordered the Victims-Witnesses-Petitioners and their attorney to turn over their U Visa applications to Defendant. This Court should exercise its power of superintending control to correct the trial court's error and clarify that criminal defendants in state prosecutions are not entitled to discovery of U Visa applications that are not in the possession of the State of New Mexico.

NOTICE UNDER RULE 12-320(D) NMRA

Pursuant to Rule 12-320(D)(1) NMRA, NCVLI provided notice to all parties of NCVLI's intent to file this *Amicus Curiae* Brief. On June 16, 2023, Victim-Witnesses-Petitioners filed their Verified Petition for Emergency Writ of Superintending Control and Request for Stay. On June 21, 2023, NCVLI notified all parties of its intent to file a motion seeking leave to file this *Amicus Curiae* Brief. On June 21, 2023, the Victim-Witnesses-Petitioners and the Office of the Eleventh District Attorney responded stating they do not oppose the motion, while Defendant Real Party in Interest responded stating he opposed the motion. Respondent District Court Judge Marsh did not respond.

LEGAL ARGUMENT

I. Victims' Rights Prohibit Disclosure of U Visa Applications in this Case.

Based upon a mere assertion that the materials *may* be used to challenge the credibility of one of the witnesses, the trial court ordered the victims' attorney to turn over the U Visa applications to defendant in violation of the victims' rights.

New Mexico crime victims have statutory and constitutional victims' rights "to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process" and "to be reasonably protected from the accused throughout the criminal justice process." *See* N.M. Const. art. II, § 24(A)(1),(3); Section 31-26-4 (A),(C). "Both Article II, Section 24 and Section 31-26-3 provide victims of specific crimes listed in the Constitution and the Act with defined rights in judicial proceedings." *State v. Riordan*, 2009-NMSC-022, ¶ 17, 146 N.M. 281.

On the other side of the disclosure analysis is the fact that defendants have no constitutional right to discovery from third parties. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and Brady did not create one[.]"); *State v. Bobbin*, 1985-NMCA-089, ¶ 9, 103 N.M. 375 ("[C]riminal defendants do not have a constitutional right to discovery."). As such, reaching the conclusion that the records should not be disclosed is therefore simple. Yet, the magnitude of harm caused by the court's

erroneous finding is not.

To understand the magnitude of the harm from the court's order it is important to understand the records at issue. To obtain a U Visa and secure its protections, a crime victim must submit an application to the U.S. Citizen and Immigration Services (USCIS) that contains very personal information. The U Visa application consists of an I-918 form that contains a broad range of questions about a victim's criminal, immigration, and medical history. 8 C.F.R. § 214.14(c)(2). More specifically, U Visa applications contain questions that include whether the victim has ever engaged in prostitution, illegal gambling, assisting an alien illegally enter the country, received or anticipates receiving public assistance, abused an illegal drug, voluntarily participated in a totalitarian political party, and whether the applicant has a physical or mental disorder that has or may cause a threat to self or others. *See* USCIS Form I-918, *Petition for U Nonimmigrant Status*, available online at http://www.uscis.gov/files/form/i-918.pdf (last accessed June 26, 2023). Disclosure of these materials merely on a defendants' general accusation that a victim may have committed some wrongdoing amounts to an improper fishing expedition violating the victims' privacy. *See State v. Robinson*, 1983-NMSC-040, ¶ 6, 99 N.M. 674 (prohibiting testimony concerning suspicions of embezzlement because it did not amount to evidence of misconduct and holding that "It should be understood by all courts that the only relevant circumstances is actual conduct, i.e.,

the fact, not the mere charge, of having misbehaved.").

Notably, these categories of information are highly sensitive and prejudicial, and do not automatically engender a defendant's right to discovery absent first establishing a relevant purpose that outweighs its prejudicial effect. *See*, *e.g.*, *State v. Johnson*, 1997-NMSC-034, ¶ 25, 123 N.M. 640 (holding that a defendant's right of confrontation first hinges on the defendant establishing "a theory of relevance" of the evidence urged to be admitted); NMSA 1978, § 30-9-16(A) (1993) (prohibiting evidence of a victim's prior sexual history, which may be present in U Visa materials: "As a matter of substantive right, in prosecutions pursuant to the provisions of Sections 30-9-11 through 30-9-15 NMSA 1978, evidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct or of the reputation for past sexual conduct, shall not be admitted, and only to the extent that the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value."); Rule 11-412(A)(1),(2) NMRA (prohibiting the admission of evidence offered to prove that a victim engaged in other sexual behavior or to prove a victim's sexual predisposition)[3] .

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3 While disclosure does not equal admissibility, putting a victim through this additional step on mere speculation is a violation of their rights. By way of another example, whether a victim received public assistance is a highly sensitive matter. In criminal matters, victims are entitled to recover "actual damages" as restitution which means "all damages which a victim could recover against the defendant in a

Despite these deeply rooted protections, the trial court ordered the crime victims to turn over the U Visa applications in their possession to defendant for purposes of pretrial discovery on the mere suggestion that there may be information in an application that contradicts the current allegations. Speculation is not sufficient to overcome the victims' rights and interests in keeping the documents confidential. *See, e.g.*, *State v. Marroquin-Aldana*, 2014 ME 47, ¶ 32, 89 A.3d 519, 528 (finding no error in quashing defendant's subpoena for the victim's U Visa file despite his claim that it was "critical to his ability to impeach [the victim] and develop her motive to fabricate" because defendant failed to show what specific information the application would contain that would be relevant to his defense and was able to "vigorously" cross-examine the victim regarding her immigration issues and her motive to fabricate in order to resolve those issues). Notably, very few courts have addressed the issue of whether a state criminal defendant may obtain a victim's U Visa application that is not in the possession of the state. The few courts that have,

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civil action arising out of the same facts or events, except punitive damages and damages for pain, suffering, mental anguish and loss of consortium." NMSA 1978, § 31-17-1(A)(2) (2005). Analyzing restitution as actual damages recoverable in a civil action, it is clear that information about public assistance would be barred by the collateral source rule—confirming its irrelevance and significant prejudice if disclosed.

agreed with the above analysis, finding that defendant's rights were not violated when the application is kept confidential. *See, e.g.*, *Gomez v. State*, 245 So.3d 950 (Fla. Dist. Ct. App. 2018) (finding no Brady violation for the State's failure to produce impeaching evidence of the victim's U Visa application where the State neither had possession of the visa application nor did it have control over it, and it was equally available to the defense, who knew about it and could have subpoenaed the application).

The trial court's order effectively renders clear Congressional legislative intent, as well as victims' privacy rights, meaningless as it relates to U Visa applications. As such, this Court should exercise its power of superintending control to reverse the trial court's order.

II. The Trial Court Lacked Authority to Order Disclosure of the U Visa Applications.

The United States Government "has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). Federal law makes clear that absent a constitutional right, a defendant in a state criminal case is not entitled to any portion of the U Visa application. *See* 8 U.S.C. § 1367(a)(2) (prohibiting federal officials in any case to "permit use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which relates to an alien who is the beneficiary of an application for

[U Visa]"); 8 U.S.C. § 1367(b) (establishing eight specific exceptions to the nondisclosure). A defendant's constitutional rights are only implicated when the U Visa application is in the possession of the state. Here, the State does not possess the U Visa application, and there are no applicable exceptions to the statute's nondisclosure provision. Consequently, the trial court lacked authority to order disclosure because any disclosure of U Visa applications is preempted by federal legislation.

Congress intended to protect undocumented victims' privacy by making their U Visa applications confidential and subject to disclosure in only eight specific circumstances. State trial courts may not undermine federal law and order disclosures that fall outside of these exceptions. *See* Arizona, 567 U.S. at 299 (finding that absent an express preemption of state law in the federal statute, state laws are preempted when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *State v. Prieto-Lozoya*, 2021-NMCA-019, ¶ 16, 488 P.3d 715 (quoting *State v. Herrera*, 2014-NMCA-003, ¶ 7, 315 P.3d 311 ("Because the question of whether state law has been preempted by federal legislation depends upon whether Congress intended such a result, the purpose of the Congress is the ultimate touchstone.")). "In discerning [Congress'] purpose, courts look to whether Congress has expressly preempted state law and, in the absence of express preemption, to whether such a purpose can be

implied from the structure and purpose of the federal legislation in question." *Herrera*, 2014-NMCA-003, ¶ 7 (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992)).

Congress created the U Visa in 2000 with five original exceptions to nondisclosure. *See* V*ictims of Trafficking And Violence Protection Act of 2000*, PL 106–386, October 28, 2000, 114 Stat 1464 (amending statute to include the U Visa); *see also Omnibus Consolidated Appropriations Act*, 1997, PL 104–208, September 30, 1996, 110 Stat 3009 (creating the (b)(1)-(4), the first four exceptions to nondisclosure); *Balanced Budget*, PL 105–33, August 5, 1997, 111 Stat 251 (adding (b)(5), the fifth exception to nondisclosure). Since then, Congress enacted new exceptions two more times. *Violence Against Women and Department Of Justice Reauthorization Act of 2005*, PL 109–162, January 5, 2006, 119 Stat 2960; *Violence Against Women Reauthorization Act of 2013*, PL 113-4, March 7, 2013, 127 Stat 54.[4] In *none* of these legislative moments did the federal government provide an

[4] In 2006, an additional exception to nondisclosure was added to the federal regulations. Dept. of Homeland Security, *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 FR 53014-01 (September 17, 2007) ("In addition to disclosures to investigative agencies, DHS may have an obligation to provide portions of petitions for U nonimmigrant status to federal prosecutors for disclosure to defendants in pending criminal proceedings. This obligation stems from constitutional requirements that pertain to the government's duty to disclose information, including exculpatory evidence or impeachment material, to defendants. *See* U.S. Const. amend. V & VI; *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Accordingly, this rule incorporates this requirement at new 8 CFR 214.14(e)(1)(ix)."). This

exception for defendants or prosecutors in state criminal proceedings. *See* 8 U.S.C. § 1367 (b)(1)-(8).

This continued exclusion of an exception to non-disclosure for criminal defendants in state prosecutions is significant. The United States Supreme Court held that the due process clause of the United States Constitution requires that exculpatory and impeachment evidence that is in the possession of the prosecutor be turned over to a criminal defendant. *See Brady*, 373 U.S. at 87; *See also Giglio v. United States*, 405 U.S. 150, 154 (1972) (addressing the government's obligation to turn over evidence that affects a witnesses' credibility"). *Brady* and *Giglio* were decided decades before the U Visa was created. Congress is presumed to know the

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regulation created an exception to nondisclosure that is the most similar to the one at issue in this case. However, DHS limited the exception to federal prosecutors. It is unlikely that courts would find that state prosecutors have "cross-jurisdiction constructive knowledge" of the U Visa application in the possession of the Vermont Service Center. Federal courts have held that, under certain circumstances, evidence possessed by state agents may be constructively possessed by a federal prosecutor such that the prosecutor has a duty to obtain that evidence and disclose it to the defense. This is termed "cross-jurisdiction constructive knowledge" and it is determined on a case-by-case basis. The analysis consists of three questions: "(1) whether the party with knowledge of the information is acting on the government's 'behalf' or is under its 'control'; (2) the extent to which state and federal governments are part of a 'team,' are participating in a 'joint investigation' or are sharing resources; and (3) whether the entity charged with constructive possession has 'ready access' to the evidence." *United States v. Risha*, 445 F.3d 298, 303-06 (3d Cir. 2006). These factors weigh heavily against finding constructive possession as CFR – the application is privileged and the regulations' plain language explicitly applies only to "federal" prosecutors.

law. *See June Med. Servs. LLC v. Kliebert*, 158 F. Supp. 3d 473, 532 (M.D. La. 2016) (finding Congress is "presumed to know the [existing] law, including judicial interpretation of that law, when it legislates."). This means that time and time again when Congress created exceptions to nondisclosure to the U Visa documents they determined that the public policy of protecting victims' privacy was a more compelling interest than providing access to state criminal defendants.[5]

Notably, even if there was a proper claim for disclosure, federal law does not provide for an automatic court order. Rather, the request for disclosure would need to go to the Department of Homeland Security's counsel to determine whether disclosure is warranted. *See* Dept. Homeland Security, Implementation of Section 1367 Information Provisions, Instruction 002-02-001, (VI)(A)(1)(e)6 (directing all Department of Homeland Security employees that "[i]f DOJ or a state or local prosecutor requests protected information that is not subject to disclosure under one of the statutory exceptions and that will be disclosed to a court or another agency (other than DOS), please consult DHS counsel."

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[5] Amicus could not find any cases holding that *Brady* required USCIS to turn over U Visa material to state prosecutors in a state criminal proceeding where the federal government does not have some direct involvement.

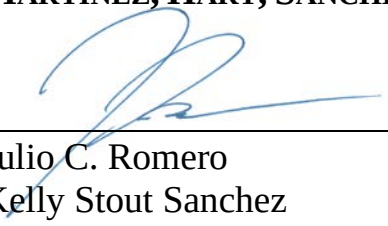
6 Available online at https://niwaplibrary.wcl.american.edu/wp-content/uploads/implementation-of-section-1367-information-provisions-instruction-002-02-001_0_0.pdf (last accessed June 26, 2023).

Congress understood that undocumented victims faced significant risks when reporting their crime and participating in criminal prosecutions. To reduce that risk, Congress created the U Visa with a confidential application process and providing only eight strict exceptions to nondisclosure. The trial court's order was unauthorized as there are no exceptions for providing the U Visa application to defendants in a state criminal proceeding. This Court should exercise superintending control to remedy this federal law violation and provide the victims with the privacy and protection to which they are entitled.

CONCLUSION

The U Visa is a tool to protect undocumented victims of crime and should not be used to harm them. The trial court's order violates the victims' constitutional and statutory rights, and completely undermines federal law and Congressional legislative intent. This Court should exercise its power of superintending control to correct the trial court's error and ensure that these and future victims will not have to give up their rights in seeking justice.

Respectfully submitted,
MARTINEZ, HART, SANCHEZ & ROMERO, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was filed electronically and served to all counsel of record this 27th day of June 2023, via the Court's e-filing/service system:

MARTINEZ, HART, SANCHEZ & ROMERO, P.C.

Julio C. Romero