

## Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases

**CAUTION!** *This paper focuses only on pretrial discovery of privileged documents from third parties. Different analyses apply at the trial stage, when the documents are not privileged, or when they are in the state's hands. In particular, it is important to note that the state has an obligation to turn over documents in its hands that are favorable to the defense.<sup>1</sup>*

Although defendants routinely subpoena third parties to turn over documents pretrial, the general rule is that there is no constitutional right to pretrial discovery.<sup>2</sup> Further, constitutional protections afforded to victims under some states' victims' rights laws bar pretrial discovery.<sup>3</sup> Despite this general rule, many states have created processes by which defendants receive documents from third parties – including victims' privileged documents – pretrial. Requiring the victim to turn over privileged material – material like notes from therapy sessions and rape crisis counseling records – undermines victims' privacy rights and may even prevent victims from seeking help at all. This paper sets forth the standards courts often use in determining whether a victim must be required to turn over privileged material. It also arms the practitioner with arguments for why a victim should never be required to turn over such material pretrial.

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### I. The Lay of the Land

#### A. *The model rule: absolute privilege.*

A few jurisdictions simply do not allow a defendant to review a victim's privileged records pretrial, no matter the justification. These jurisdictions have "absolute" privileges, meaning the statutes facially prohibit disclosure of privileged documents absent waiver by the victim.<sup>4</sup> Further, courts have refused to dilute the absolute privilege in case law.<sup>5</sup> If you practice in one of these jurisdictions, you should never have to turn over subpoenaed documents unless the victim affirmatively waives the privilege.

### B. *The general practice: in camera review.*

Many jurisdictions, while they have absolute protections on the face of the statute, have diluted these protections through court action. Generally, these states allow *in camera* inspection of privileged documents by the court, despite the existence of an “absolute” privilege.<sup>6, 7</sup> *In camera* inspections are also generally allowed when the privilege is “qualified,” meaning the statute contemplates some use of the material at trial.<sup>8</sup>

Courts that allow an *in camera* review of the victim’s privileged documents will generally do so if the defendant can make a particularized factual showing that the information contained in the documents is relevant or material to the defense.<sup>9</sup> For instance, Michigan courts will allow *in camera* inspection of privileged records on a showing that the defendant has a “good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense.”<sup>10</sup> The documents will then be turned over to the defendant if the records are necessary to the defense.<sup>11</sup>

Some jurisdictions interpret this standard stringently. For instance, in Utah, a defendant must show “with reasonable certainty that exculpatory evidence exists which would be favorable to the defense” in order to obtain an *in camera* review of privileged documents.<sup>12</sup> The court cautioned that this is a “stringent test,” “necessarily requiring some type of extrinsic indication that the evidence within the records exists and will, in fact be exculpatory.”<sup>13</sup> If the defendant makes this showing, the court will only turn the documents over to the defendant after an *in camera* review if there is a reasonable

probability that if the evidence is disclosed the result of the proceeding will be different.<sup>14</sup>

In contrast, Wisconsin employs a looser interpretation. In order to obtain *in camera* review of privileged documents, the defendant must “set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence.”<sup>17</sup> However, the court continued, “[o]ur standard is not intended . . . to be unduly high for the defendant before an *in camera* review is ordered by the circuit court. . . . [I]n cases where it is a close call, the circuit court should generally provide an *in camera* review.”<sup>18</sup>

### C. *Outlier: Massachusetts.*

In Massachusetts, if the defendant establishes good cause that the privileged documents are evidentiary and relevant, are not otherwise procurable in advance of trial, that the defendant cannot properly prepare for trial without them, and that the application is made in good faith, the *defendant’s attorney* – rather than the court – will be entitled to inspect the documents.<sup>19</sup>

## II. Preventing Pretrial Discovery of Victim’s Confidential Records is Both Permissible and Desirable

### A. *In order to meet important policy goals, the privilege against disclosure must be absolute.*

Every state and the District of Columbia recognizes a patient-therapist privilege,<sup>21</sup> a patient-psychologist, or a patient-psychiatrist privilege.<sup>22</sup> Additionally, many states protect communications between a victim and a social worker, a child abuse counselor or sexual assault counselor.<sup>23</sup> The rationale behind these privileges are simple: for a victim to be able to speak candidly with a therapist and maximize recovery, the victim must be assured that what

### THE VICTIM MUST RECEIVE NOTICE!

It is important to remember that even in outlier jurisdictions like Massachusetts, the victim must receive notice of defendant’s subpoena for documents, even if the subpoena is going to a third party.<sup>15</sup> Failure to provide notice may result in exclusion of evidence and possible sanctions to the defense attorney.<sup>16</sup>

she says is kept confidential. The Colorado Supreme Court summarized, “[t]he purpose of the statutory psychologist-patient privilege is to aid in the effective diagnosis and treatment of mental illness by encouraging the patient to fully disclose information to the psychologist without fear of embarrassment or humiliation caused by disclosure of such confidential information.”<sup>24</sup>

When this privilege is chipped away at, the chances of recovery diminish. As a Florida court noted, “[r]outine disclosure of counseling confidences would discourage those in need from seeking help or from using counseling to its maximum benefit.”<sup>25</sup> If a court were to routinely turn over privileged records, then “[sexual assault] [c]ounselors [would] feel obliged to warn their clients beforehand that communications between them may be used as evidence in court, and they report that this knowledge often has an important chilling effect on the client’s willingness to be forthcoming.”<sup>26</sup>

To this end, it is imperative to recognize that *any* disclosure of the victims’ records – including to a court *in camera* – is a violation of the victim’s privacy and may have a chilling effect on this and future victims. One Florida court recognized this, stating “[e]ven in camera disclosure to the trial judge (and to court reporters, appellate courts and their staff) intrudes on the rights of the victim and dilutes the statutory privilege.”<sup>27</sup>

*B. Victims are entitled to privacy and to be treated with respect.*

In addition to the statutory protections found in states’ privilege laws, victims also have statutory and constitutional protections under victims’ rights law. Every state now has statutory or constitutional protections for victims of crime.<sup>28</sup> Some of these protections explicitly protect victims from pretrial discovery.<sup>29</sup> Others protect

crime victims more broadly by guaranteeing their rights to privacy, or to be treated with dignity, respect, or fairness.<sup>30</sup> In addition, victims have a Constitutional right to privacy.<sup>31</sup> These principles of privacy and fairness counsel in favor of protecting the victim from pretrial discovery of privileged materials.

**NO “FISHING EXPEDITIONS”**

Under any standard, a defendant is not entitled to the victim’s privileged records pretrial if the request is based on unsubstantiated claims or theories – often called “fishing expeditions.” Thus, an unsubstantiated request for documents upon a vague assertion that the documents “may contain details which may exculpate the accused or otherwise be helpful to the defense”<sup>20</sup> should be denied.

*C. Preventing pretrial discovery does not violate defendant’s Constitutional rights.*

Prohibiting pretrial discovery of victims’ privileged records also does not run afoul of defendant’s Constitutional rights. The Supreme Court recognized that “[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one.”<sup>32</sup> As the highest court in Maryland stated, “[n]either due process, compulsory process nor the right to confront adverse witnesses establishes a pretrial right of a defendant to discovery review of a potential witness’s privileged psychotherapy records.”<sup>33</sup>

Because there is no Constitutional imperative requiring that defendants receive access to victims’ privileged materials pretrial, and because, in contrast, victims have affirmative rights protecting these materials from disclosure, pretrial disclosure of victims’ records from third parties should be prohibited.

1 *Brady v. Maryland*, 373 U.S. 83 (1963).

2 *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.”).

3 A handful of states explicitly grant victims the right to refuse pretrial discovery in their state constitutions. *See, e.g.*, Ariz. Const. art. II, § 2.1(A)(5) (“[A] victim of crime has a right . . . to refuse an

### Practice Pointers

If you are confronted with a situation in which the defendant is seeking a victim's privileged records from third parties pretrial, consider arguing that defendant's request should be denied for the following reasons:

- The victim has a right to privacy or to be treated with respect, dignity, and fairness;
- The defendant has no Constitutional right to pretrial discovery;
- The defendant is engaging in a "fishing expedition";
- The defendant failed to meet the state's standard for establishing a right to receive the documents or for *in camera* review;
- The policy goals surrounding the privilege counsel in favor of keeping the records private.

NCVLI is committed to securing privacy and protection for victims of sexual assault, domestic violence, stalking, and other crimes against women. The current interpretation of the law in many jurisdictions undermines these rights to privacy and protection. For additional resources or ideas on how best to protect a victim under your jurisdiction's laws, please contact us.

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 (granting victims the right "to refuse an interview, deposition or other discovery request by the criminal defendant . . . .").

<sup>4</sup> See, e.g., Colo Rev. Stat. § 13-90-107(g); 23 Pa. Cons. Stat. 6339.

<sup>5</sup> *People v. Turner*, 109 P.3d 639, 642 (Colo. 2005) ("[T]he defendant may not obtain records of any assistance, advice or other communication provided by a victim's advocate unless he demonstrates that the victim has waived the privilege . . . ."); *Goldsmith v. State*, 651 A.2d 866, 873 (Md. 1995) ("[W]e find no common law, court rule, statutory or constitutional requirement that a defendant be permitted pretrial discovery of privileged records held by a third party."); *Commonwealth v. Wilson*, 602 A.2d 1290, 1297-98 (Pa. 1992) (finding that if the privilege is absolute, the defendant is not entitled to pretrial discovery).

<sup>6</sup> See, e.g., *Commonwealth v. Barroso*, 122 S.W.3d 554, 561 (Ky. 2003) (stating that a defendant may be entitled to pretrial discovery of mental health treatment records that would otherwise be subject to an "absolute" privilege upon a proper showing, and citing cases); *Lucas v. State*, 555 S.E.2d 440, 446 (Ga. 2001) (allowing *in camera* inspection despite the existence of a facially absolute privilege against disclosure).

<sup>7</sup> Less commonly, a court may allow the victim to refuse to disclose, but in return will exclude the victim from testifying. *State v. Shiffra*, 499 N.W.2d 719, 724-25 (Wis. Ct. App. 1993) (modified on other grounds, *Green*, 646 N.W.2d at 724-25) (upholding lower court's order suppressing the victim's testimony after the trial court found defendant had made a sufficient showing for pretrial discovery of victim's privileged records, and victim refused to waive the privilege to permit *in camera* inspection because suppressing testimony was necessary to protect defendant's fair trial rights).

<sup>8</sup> *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987) (stating, in the context of a pre-trial subpoena for qualifiedly privileged documents, that an *in camera* review was warranted upon defendant's showing of materiality and favorability to the defense).

<sup>9</sup> See, e.g., *State v. Pinder*, 678 So.2d 410, 417 (Fla. Dist. Ct. App. 1996) (“To obtain in camera review of confidential communications, or records . . . a defendant must first establish a reasonable probability that the privileged matters contain material information necessary to his defense.”); *In re Subpoena to Crisis Connection, Inc.*, 933 N.E.2d 915 (Ind. Ct. App. 2010) (stating that in order to obtain *in camera* review of privileged material pretrial, there must be a showing of particularity and materiality; if these showings are met, the court must grant the request unless there is a showing of paramount interest in non-disclosure by the state); *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (stating that defendant must make some plausible showing that the information sought would be material and favorable to the defense); *State v. Hoag*, 749 A.2d 331, 333 (N.H. 2000) (stating that when a defendant establishes a reasonable probability that confidential records may contain evidence that is material and relevant to the defense, the trial court must conduct an *in camera* review of those records); *Farish v. Commonwealth*, 346 S.E.2d 736, 738 (Va. Ct. App. 1986) (“When the evidence sought is material or if a substantial basis for claiming materiality exists, it is reasonable to issue the subpoena requiring the production of the evidence.”); *State v. Kalakosky*, 852 P.2d 1064, 1074 (Wash. 1993) (“We conclude that before a rape victim’s privacy should be invaded by a review of crisis center counseling notes that the defendant must make a particularized showing that such records are likely to contain material relevant to the defense.”); *State v. Green*, 646 N.W.2d 298, 310 (Wis. 2002) (“[T]he preliminary showing for an *in camera* review requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and that is not merely cumulative to other evidence available to the defendant. . . .”); *United States v. Nixon*, 418 U.S. 683, 713-14 (1974) (allowing *in camera* review of presumptively privileged materials upon proper showing by state).

<sup>10</sup> *People v. Stanaway*, 521 N.W.2d 557, 574 (Mich. 1994).

<sup>11</sup> *Id.*

<sup>12</sup> *State v. Blake*, 63 P.3d 56, 61 (Utah 2002) (internal citation omitted).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., Fed. R. Crim. P. 17(c)(3) (“[A] subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.”); *State v. Gonzales*, 125 P.3d 878 (Utah 2005) (quashing subpoenas served on hospital relating to victim’s records, excluding evidence obtained from trial, and requiring defense attorney to write an apology to the victim where defense attorney served subpoena on hospital without notifying victim).

<sup>16</sup> *Id.*

<sup>17</sup> *State v. Green*, 646 N.W. 2d 298, 310 (Wis. 2002).

<sup>18</sup> *Id.*

<sup>19</sup> *Commonwealth v. Dwyer*, 859 N.E.2d 400, 419 (Mass. 2006).

<sup>20</sup> *State v. Kalakosky*, 852 P.2d 1064 (Wash. 1993). See also *People v. Bush*, 14 AD3d 804, 804 (N.Y. Sup. Ct. App. Div. 2005) (finding the trial court did not err in refusing *in camera* review of confidential records from the department of social services where defendant made no showing other than one based on speculation that the victim may have made unfounded accusations in the past); *State v. Green*, 646 N.W.2d 298, 310 (Wis. 2002) (finding the trial court did not err in refusing *in camera* review of counseling documents based on the “mere assertion” that they may contain inconsistent statements). See generally *Farish v. Commonwealth*, 346 S.E.2d 736, 738 (Va. Ct. App. 1986) (finding defendant had not right to discovery upon assertion that victim may have had a rape fantasy).

<sup>21</sup> Tera Jckowski Peterson, *Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims’ Counseling Records in Utah*, 2001 Utah L. Rev. 695, 705.

<sup>22</sup> Clifford S. Fishman, *Defense Access to a Prosecution Witness’s Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, 5 (2007).

<sup>23</sup> *Id.* at 6.

<sup>24</sup> *People v. District Court*, 719 P.2d 722, 726-27 (Colo. 1986).

<sup>25</sup> *State v. Pinder*, 678 So.2d 410, 415 (Fla. Dist. Ct. App. 1996). See also *People v. District Court*, 719 P.2d 722, 726-27 (Colo. 1986) (“The purpose of the statutory psychologist-patient privilege is to aid in the effective diagnosis and treatment of mental illness by encouraging the patient to fully disclose information to the psychologist without fear of embarrassment or humiliation caused by disclosure of such confidential information.”); *People v. Foggy*, 521 N.E.2d 86, 91 (Ill. 1998) (“Because of the fear and stigma that often results from those crimes, many victims hesitate to seek help even where it is available at no cost to them. As a result they not only fail to receive needed medical care and emergency counseling, but may lack the psychological support necessary to report the crime and aid police in preventing future crimes.”) (citing Ill. Rev. Stat. 1985, ch. 110, Par. 8-802.1(a)); *State v. J.G.*, 619 A.2d 232, 237 (N.J. Super. 1993) (“Psychological scars of victims of violent crimes can often be ameliorated by counseling [and] treatment is most successful when the victims are assured their thoughts and feelings will not be disclosed . . . .”); *Commonwealth v. Wilson*, 602 A.2d 1290, 1295 (Pa. 1992) (noting that if “confidentiality is removed, . . . trust is severely undermined, and the maximum therapeutic benefit is lost”); *State v. Blake*, 63 P.3d 56, 61 (Utah 2002) (noting that privilege rules reflect “good policy choices, fostering candor in important relationships by promising protection of confidential disclosures”).

<sup>26</sup> *People v. Stanaway*, 521 N.W. 557, 566 (Mich. 1994) (citing Michigan’s House Legislative Analysis, H.B. 4609, Nov. 16, 1983). See also *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (“[I]f the purpose of the privilege is to be served, the participants in the confidential conversation ‘must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.’”) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

<sup>27</sup> *State v. Pinder*, 678 So.2d 410, 415 (Fla. Dist. Ct. App. 1996) (internal citation omitted). See also *People v. Foggy*, 521 N.E.2d 86, 92 (Ill. 1988) (noting that review by a judge in camera “would seriously undermine the valuable, beneficial services of [rape crisis support services]”).

<sup>28</sup> Douglas E. Beloof, *Weighing Crime Victims’ Interests in Judicially Crafted Criminal Procedure*,

56 Cath. U. L. Rev. 1135, 1169 (2007).

<sup>29</sup> See, e.g., 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 (granting victims the right “to refuse an interview, deposition or other discovery request by the criminal defendant . . . .”).

<sup>30</sup> Alaska Const. art. I, § 24 (“the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process”); Conn. Const. art. I, § 8(b)(1) (“the right to be treated with fairness and respect throughout the criminal justice process”); Idaho Const. art. I, § 22 (“the following rights: (1) to be treated with fairness, respect, dignity and privacy”); Ill. Const. art. I, § 8.1(a)(1) (“[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process”); Ind. Const. art. I, § 13(b) (“the right to be treated with fairness, dignity, and respect throughout the criminal justice process”); La. Const. art. I, § 25 (“shall be treated with fairness, dignity, and respect”); Md. Const. art. 47(a) (“shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process.”); Mich. Const. art. I, § 24(1) (“the right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.”); Miss. Const. art. III, § 26A (“shall have the right to be treated with fairness, dignity and respect throughout the criminal justice process”); N.J. Const. art. I, P 22 (“A victim of crime shall be treated with fairness, compassion and respect by the criminal justice system.”); N.M. Const. art. II, § 24(A)(1) (“the right to be treated with fairness and respect for the victim’s dignity and privacy throughout the criminal justice process”); Ohio Const. art. I, § 10a (“Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process...”); Okla. Const. art. II, § 34 (“To preserve and protect the rights of victims to justice and due process, and ensure that victims are treated with fairness, respect and dignity, and are free from intimidation, harassment or abuse, throughout the criminal justice process, any victim or family member of a victim of a crime has the right to know . . . .”) (listing information rights); Or. Const. art. I, § 42(1) (“[T]o accord crime victims due dignity and respect... the following rights are hereby granted...”)

(listing rights); R.I. Const. art. I, § 23 (“A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process.”); S.C. Const. art. I, § 24(A) (“To preserve and protect victims’ rights to justice and due process..., victims of crime have the right to: (1) be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process.”); Tenn. Const. art. I, § 35 (“To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights... 2. the right to be free from intimidation, harassment and abuse.”); Tex. Const. art. I, § 30(a) (“A crime victim has the following rights: (1) the right to be treated with fairness and with respect for the victim’s dignity and privacy throughout the criminal justice process.”); Utah Const. art. I, § 28(1) (“To preserve and protect victims’ rights to justice and due process, victims of crime have these rights, as defined by law: (a) to be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process.”); Va. Const. art. I, § 8-A (“[I]n criminal prosecutions, the victim shall be accorded fairness, dignity and respect by the officers, employees and agents of the Commonwealth...”); Wash. Const. art. I, § 35 (“To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.”) (listing rights); Wis. Const. art. I, § 9m (“This state shall treat crime victims ... with fairness, dignity and respect for their privacy.”) (taken from Douglas E. Beloof, *The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. Rev. 255, 262 n.19).

<sup>31</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (noting that “[v]arious guarantees [in the Bill of Rights] creates zones of privacy”); *Roe v. Wade*, 410 U.S. 113 (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.”).

<sup>32</sup> *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The Supreme Court has subsequently found that defendant’s confrontation clause rights were not violated by the lower court’s refusal to grant an in camera inspection of documents pretrial. *Pennsylvania v. Ritchie*, 480 U.S. 39, 54 (1987) (plurality opinion). The Court went on to state that

due process principles entitled defendant to an in camera inspection of the records – however, the Court’s analysis rested in part on the fact that the documents were in the hands of the state, not a third party.

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## NCVLI's Tools: Legal Advocacy, Training & Education, and Public Policy



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**Legal Advocacy.** We fight for victims' rights by filing amicus curiae (friend of the court) briefs in victims' rights cases nationwide. Through our National Alliance of Victims' Rights Attorneys (NAVRA), we also work to pair crime victims with free attorneys and work to ensure that those attorneys can make the best arguments possible. We do this by providing the attorneys with legal technical assistance in the form of legal research, writing, and strategic consultation.

**Training & Education.** We train nationwide on the meaning, scope, and enforceability of victims' rights through practical skills courses, online webinars, and teleconferences. We also host the only conference in the country focused on victim law.

**Public Policy.** We work with partners nationwide to secure the next wave of victims' rights legislation — legislation that guarantees victims substantive rights and the procedural mechanisms to secure those rights.

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**Donate to NCVLI.** You can make a difference in the life of a victim today by supporting our work. Your gift will support programs that protect and advance crime victims' rights and the pursuit of a more fair and balanced justice system. Visit the "Get Involved" page of our website, [www.ncvli.org](http://www.ncvli.org), to learn more.

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