E-FILED on 9/29/2008

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MARK HAWKE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, CITIZENSHIP AND IMMIGRATION SERVICES,

Respondent.

No. C-07-03456 RMW

ORDER DENYING FIRST AMENDED PETITION

[Re Docket No. 16]

Mark Hawke petitions this court to review the Department of Homeland Security's (DHS) denial of his request to produce his wife's immigration records. DHS opposes the petition. Mr. Hawke's wife has been apprised of these proceedings, but has not filed any opposition. *See* Docket No. 18. The court has reviewed the moving and responding papers and considered the arguments of counsel. For the following reasons, the court denies the petition.

I. BACKGROUND

Mr. Hawke married Lucia Herrera Hawke in April 2005. *See* Docket No. 16, First Amended Petition (FAP) ¶ 3. Because Mrs. Hawke's visa had almost expired, Mr. Hawke sponsored her

application for a K-1 visa.[1] *Id.* Mrs. Hawke appears to have used the K-1 visa and her marriage to Mr. Hawke to apply to become a lawful permanent resident on August 10, 2006, and she became a lawful permanent resident on September 21, 2006. *See id.* ¶ 6 & Ex. 2.

Unknown to Mr. Hawke, Mrs. Hawke had also applied for lawful permanent resident status pursuant to the Violence Against Women Act (VAWA) sometime in March or April of 2006.[2] *Id.* ¶ 6 & Exs. 2, 3. This petition was allegedly based on domestic violence Mrs. Hawke suffered "before immigration." *Id.* ¶ 7. The court cannot determine what Mrs. Hawke meant by this testimony. She may have meant that she had suffered domestic violence prior to coming to the United States or during her marriage to Mr. Hawke but prior to obtaining lawful permanent resident status. Anyway, Mrs. Hawke concealed this application from Mr. Hawke (hence her second application based on her marriage) because she did not want to tell him about it, though again, it is unclear whether she meant to conceal the application or that she may have been previously abused by another. *See id.* DHS denied Mrs. Hawke's first petition under VAWA in December 2006 because she had already become a lawful permanent resident thanks to her second petition based on her marriage to Mr. Hawke. *Id.* ¶ 6 & Ex. 2.

Petitioner Mark Hawke is now awaiting trial on a single count of misdemeanor battery against his wife. *Id.* ¶¶ 4-6 & Ex. 1. The alleged battery occurred on September 26, 2006. *Id.* ¶ 4 & Ex. 1. During divorce proceedings in early 2007,[3] Mr. Hawke became aware of Mrs. Hawke's other petition and the possibility that she had previously complained of domestic abuse. *Id.* ¶ 7. Mr. Hawke now seeks Mrs. Hawke's prior immigration application because he believes it may contain sworn testimony by Mrs. Hawke regarding the scope of any domestic abuse by Mr. Hawke. This is relevant because the district attorney has informed Mr. Hawke that the state will present evidence of

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[1] "A K-1 visa is issued for the sole purpose of facilitating a valid marriage between an alien and a United States citizen[.]" *Kalal v. Gonzales*, 402 F.3d 948, 949 (9th Cir. 2005).

[2] The immigration laws define a variety of petitioners as "VAWA self-petitioners." *See* 8 U.S.C. § 1101(a)(51). It is unclear what basis Mrs. Hawke claimed for being a VAWA self-petitioner. One possible basis is that she believed she qualified as an alien who in good faith married or intended to marry a citizen but was then subjected to domestic violence. *See* 8 U.S.C. § 1154(a)(1)(A)(iii).

[3] The record is silent as to the resolution of any divorce proceedings. As the parties all refer to Mr. Hawke's wife as Lucia Herrera Hawke, the court refers to her as Mrs. Hawke.

other acts of domestic violence in its criminal case against him. *See* FAP Ex. 2. Mr. Hawke hopes to use any material in Mrs. Hawke's application to impeach or contradict testimony of other acts of domestic violence. He therefore subpoenaed the Department of Homeland Security's Citizenship and Immigration Services division ("DHS") on April 26, 2007 to produce all of Mrs. Hawke's records and applications. *See id.* ¶¶ 8, 9 & Ex. 4.

DHS responded to the subpoena by letter noting that it would not disclose any information to Mr. Hawke because he had not complied with DHS's administrative procedures for requesting information. *See id.* Ex. 5. DHS outlined a number of reasons why it might not produce any information and suggested to Mr. Hawke that he could make a request under the Freedom of Information Act ("FOIA") and enclosed materials to enable him to make such a request. *See id.*

Mr. Hawke's attorneys corresponded with the district attorney expressing frustration that a FOIA request would take over a year to pursue and requesting his help in obtaining Mrs. Hawke's consent to enable DHS to disclose her records. *Id.* ¶ 11 & Ex. 6. The district attorney declined to help. *Id.* ¶ 12.

At this point, Mr. Hawke's counsel made a request for Mrs. Hawke's records, but not pursuant to FOIA. *Id.* ¶ 12. Mr. Hawke's counsel appears to have believed that a FOIA request would have been futile without Mrs. Hawke's consent. *See id.* Presumably, this belief stemmed from FOIA's exception for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *See* 5. U.S.C. § 552(b)(6). That aside, Mr. Hawke sought disclosure of Mrs. Hawke's records from DHS pursuant to its *Touhy* regulations[4] via an "informal request" on October 31, 2007. FAP ¶ 13 & Ex. 7.

On December 7, 2007, DHS denied the "informal request" and suggested that such a request must comply with DHS's *Touhy* procedures for responding to requests for information or be submitted under FOIA. *See id.* Ex. 8. Mr. Hawke filed an administrative appeal of the denial of his request (which he no longer referred to as "informal") a week later. *Id.* ¶ 15 & Ex. 9. DHS

[4] Federal agencies have regulations implementing policies for disclosing information, for example, in response to a subpoena. *See Mak v. FBI*, 252 F.3d 1089, 1092 (9th Cir. 2001). These regulations generally followed the Supreme Court's decision in *Touhy v. Ragen*, 340 U.S. 462 (1951) discussing how the government should respond to requests for information. DHS's *Touhy* regulations are codified beginning at 6 C.F.R. § 5.45.

responded to the appeal on January 30, 2008 by noting that its *Touhy* regulations do not permit appeals and that "[a]t this stage, the only viable course of action remaining to you on this issue is to seek judicial review of the agency's December 7, 2007, decision in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 101 *et seq.*" *Id.* ¶ 16 & Ex. 10.

Following DHS's parting advice, Mr. Hawke filed the pending petition pursuant to the Administrative Procedure Act to obtain an order from this court requiring DHS to produce any documents responsive to Mr. Hawke's original subpoena for this court's *in camera* review and, if appropriate, production of the documents to Mr. Hawke and the district attorney.

II. ANALYSIS

The parties agree that this court's review is governed by the Administrative Procedure Act (APA), specifically 5 U.S.C. § 706. More precisely, Mr. Hawke invokes the district court's authority to set aside an agency action that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). While Mr. Hawke's argument is sometimes difficult to follow, he expressly disclaims any argument that DHS's regulations are arbitrary and capricious or that DHS abused its discretion in denying his request for information. Reply at 1-2. Instead, Mr. Hawke argues only that DHS's refusal to provide him Mrs. Hawke's immigrations records denies him his constitutional rights, specifically his right to confrontation and right to due process.

A. Ripeness

DHS first points out that Mr. Hawke has not yet gone to trial, suggesting that his alleged constitutional harms have not yet occurred. DHS cites to *Mak v. FBI*, 252 F.3d 1089 (9th Cir. 2001) for the proposition that Mr. Hawke's claims that DHS has unconstitutionally withheld information do not become ripe until he has been tried and convicted. In *Mak*, an assassin was tried, convicted, and sentenced to death for thirteen execution-style murders. 252 F.3d at 1090. His death sentence was vacated in federal habeas proceedings, and the state sought to retry him to reinstate the death sentence. *Id.* at 1090-91. In preparation for the second trial, Mak sought from the FBI the names of two confidential informants. *Id.* at 1091. The FBI refused to disclose the confidential informants' identities. *Id.* Mak then brought suit under the APA arguing that, among other things, the FBI's refusal to disclose certain information violated his constitutional rights. *Id.* at 1093-94. The Ninth

Circuit did not decide whether the federal government must supply information to aid a defendant in state court proceedings, passing on that question and analyzing the right as though it existed. *Id.* at 1093-94. Doing so, the court concluded that such a right is only violated when "'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Id.* at 1094 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Based on the nature of the right, the court observed that Mak's challenge was premature because it could not yet assay the impact of the FBI's refusal to disclose information. *Id.* Likewise, the court declined to consider Mak's claim that withholding the informants' identities violated his Eighth Amendment right to present mitigating evidence in the death penalty phase of his trial because he had not yet been convicted and sentenced to death. *Id.* By contrast, Mak also claimed that the FBI denied him his Sixth Amendment right to compulsory process by refusing to serve subpoenas on the confidential informants. *Id.* at 1093. The court held that this too was premature, but because Mak had not sought or obtained subpoenas for the FBI to serve, not because Mak had yet to be convicted. *Id.*

As mentioned, DHS urges that *Mak* requires a defendant to be tried and convicted before resolving whether the federal government violated his constitutional rights by withholding requested information. This court disagrees that the holding in *Mak* is so general. Were it so, the Ninth Circuit would not have needed to analyze the Sixth Amendment claim separately from the other two. Instead, the Ninth Circuit analyzed each constitutional claim and determined when the harm of denying that right occurs. The court concluded it could not gauge the alleged Fifth and Eighth amendment violations until (and unless) Mak was convicted; therefore, it could not order the FBI to produce the information based on a constitutional violation until then. Notably, the Ninth Circuit did not use the same justification to find that it could not rule on the Sixth Amendment claim. Applying *Mak* to this case, the court believes it must analyze *when* Mr. Hawke will suffer the alleged constitutional violations, and then determine whether his claims are ripe.

B. Mr. Hawke's Sixth Amendment Rights

Mr. Hawke characterizes the Sixth Amendment as entitling him to "present an adequate defense" at trial, and that he therefore has the right to obtain materials to allow him to meaningfully cross-examine witnesses. Mr. Hawke does not sharpen his arguments, but generally invokes his

right to confront witnesses, cross-examine them and serve them with compulsory process, as well as his right to due process.

The parties largely confine their argument on this issue to a single case, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). The first question raised in *Ritchie* was whether a trial court's refusal to grant a defendant access to information held by a state agency interfered with his Sixth Amendment right to confront witnesses. *See* 480 U.S. at 51. Four justices shared the view that "nothing" in the case law supports the view that the Confrontation Clause contains "a constitutionally compelled rule of pretrial discovery." *Id.* at 52. Those justices read the Confrontation Clause as providing only "a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Id.* (emphasis in original). Three justices sharply disagreed, writing that the Confrontation Clause does include some constitutional right to access information before trial. *See id.* at 61-62 (Blackmun, J., concurring in part and dissenting in part); *id.* at 71-72 (Brennan, J., dissenting). Two justices did not reach the issue. *See id.* at 72 (Stevens, J., dissenting). Surprisingly, this ambiguity regarding the Confrontation Clause brought to light in *Ritchie* has not been resolved. *See People v. Hammon*, 15 Cal. 4th 1117, 1128-31 (1997) (Mosk, J., concurring). Absent further development in the case law, this court is bound to follow the plurality in *Ritchie* that the Confrontation Clause applies only at trial.

The Confrontation Clause is not the only basis for Mr. Hawke's petition though. Mr. Hawke also invokes the Compulsory Process Clause and his due process rights. The Compulsory Process Clause, while similar, is distinct from the Confrontation Clause and confers a separate constitutional right.[5] In *Ritchie*, the Court could not command a majority to address the question of whether the Confrontation Clause entitles a defendant to certain pretrial discovery, but it did decide the issue of whether the Compulsory Process Clause provides a defendant the right to access those materials. Comparing the Compulsory Process Clause to the Due Process Clause, the Court held that the defendant had the right to have certain information protected by a qualified privilege reviewed by

[5] The distinction is helpfully laid out in Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974).

the trial court, and that the court then had to disclose any relevant information to the defendant. *See* 480 U.S. at 55-58.

By focusing almost entirely on the Confrontation Clause discussion in *Ritchie*, DHS fails to meaningfully distinguish Mr. Hawke's compulsory process claim from that in *Ritchie*. DHS first misconstrues the Court's analysis in *Ritchie* and by seizing on the Court's brief discussion of the prosecutor's *Brady* obligation to turn over exculpatory evidence. DHS then argues that because it is not the prosecutor, it has no duty to disclose information to Mr. Hawke. DHS misses that neither the prosecution nor the defense possessed the privileged information at issue in *Ritchie*, Pennsylvania Children and Youth Services did. *See id.* at 57. Nothing in the analysis in *Ritchie* turns on whether the entity possessing the information is the prosecutor, and there is no reason to infer such a limit.

DHS next argues that Mr. Hawke would only be entitled to "investigative files of the charges against him." To the extent DHS means to suggest that Mr. Hawke is entitled to know the charges against him, the Sixth Amendment has always required that a defendant know the "nature and cause of the accusation." But again, there is no basis for reading *Ritchie* so narrowly, especially since *Ritchie* involved the prosecution's chief witness' file maintained by the Children and Youth Services agency, not the charges against Mr. Ritchie. *See id.* at 43.

To recap, Mr. Hawke possesses a constitutional right pursuant to the Sixth Amendment's Compulsory Process Clause and the Fourteenth Amendment's Due Process Clause to obtain access to information held by the government to allow him to mount his defense. *Ritchie*, 480 U.S. at 55-58; *see also United States v. Colima-Monge*, 978 F. Supp. 941 (D. Or. 1997). Unlike the Fifth and Eighth Amendment rights asserted in *Mak*, the court can discern whether Mr. Hawke's constitutional rights have been violated now. This follows from the fact that Mr. Hawke's constitutional right is a *pre-trial* right; it has been violated now regardless of the outcome of the trial. By contrast, the Fifth Amendment right in *Mak* was a *post-trial* right, namely, the right to have received exculpatory evidence that would have been reasonably likely to lead to acquittal. *See Mak*, 252 F.3d at 1094.

C. Balancing Mr. Hawke's Rights and DHS's Asserted Privilege

In *Ritchie*, the information the defendant sought was protected by a limited privilege. 480 U.S. at 57. Accordingly, the Court ordered the trial court on remand to examine the information *in*

camera and disclose any relevant information. *Id.* at 57-58. Because the privilege at issue in *Ritchie* was not absolute, the Court expressly did not reach whether the defendant's constitutional right could compel the production of documents protected by an absolute privilege. *Id.* at 57 & n.14; *but see Hammon*, 15 Cal. 4th at 1128 (holding that a defendant had no right to pretrial discovery of privileged psychotherapy records). The court therefore turns to consider the nature of the privilege asserted by DHS for withholding Mrs. Hawke's information.

Specifically, DHS contends that the Violence Against Women Act prohibits disclosure of any record that it may or may not have regarding Mrs. Hawke. The law provides that:

> Except as provided in subsection (b) of this section, in no case may the Attorney General, or any other official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any other official or employee of the Department of Homeland Security or Department of State (including any bureau or agency of either of such Departments)--
>
> (2) 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 relief under paragraph (15)(T), (15)(U), or (51) of section 101(a) of the Immigration and Nationality Act [8 U.S.C.A. § 1101(a)] or section 240A(b)(2) of such Act [8 U.S.C.A. § 1229b(b)(2)].

8 U.S.C. § 1367(a)(2).

Mr. Hawke acknowledges this confidentiality provision, but argues that it does not apply for two reasons. First, Mr. Hawke notes that the statute "shall not be construed as preventing disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of such information " 8 U.S.C. § 1367(b)(3). DHS argues that "judicial review of a determination" refers to judicial review of a VAWA self-petitioner's immigration petition, not any court proceeding. Mr. Hawke does not refute this argument, and while subsection (b)(3) is vague, the court agrees that "a determination" refers to the government's determination of a VAWA self-petitioner's immigration status. The court reaches this conclusion in part because subsection (a)(1) uses the term "determination" in this limited context. Accordingly, the exception in subsection (b)(3) does not apply to court proceedings like this one.

Mr. Hawke's second argument is that the confidentiality provision has expired. Mr. Hawke points out that"[t]he limitation under paragraph (2) ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted." 8 U.S.C. § 1367(a). The text of this

provision appears unambiguous, and DHS's only argument that it does not apply is that Mr. Hawke has not satisfactorily shown that Mrs. Hawke's application has been denied. But Mr. Hawke has included DHS's denial of Mrs. Hawke's petition on the grounds that she already was a lawful permanent resident. There is also no evidence that she appealed this determination.

It is important to note, however, that DHS denied Mrs. Hawke's petition because it was moot, not because she failed to qualify for residency because she did not meet the requirements of the law. To qualify for residency, a VAWA self-petitioner like Mrs. Hawke need only demonstrate that "(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien" and that "(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse." 8 U.S.C. § 1154(a)(1)(A)(iii). If such a petitioner's application is denied on the merits, it must be because they (a) never intended in good faith to marry the United States citizen or (b) there was no evidence to support the allegations of abuse. In either of those cases, there is no policy reason to protect the confidentiality of the petition, hence the statutory expiration of the secrecy. On the other hand, when an application is denied because it is moot, the petition may contain sensitive information that the policy behind VAWA still urges remain secret. For example, consider a VAWA self-petitioner who after filing her request for lawful residency decides she can no longer live in the same country as her abuser and wishes to return home. Her decision to stop seeking residency moots her petition. But her petition remains sensitive, and sound policy dictates that her file should not be disclosed.

These illustrations of the purpose behind the language in section 1367(a) compel the court to conclude that when Congress wrote "denied," the word meant "denied *on the merits*." The text of section 1367(a) harmonizes with this interpretation. The full provision dictates that the confidentiality expires "when the application for relief is denied *and all opportunities for appeal of the denial have been exhausted*." 8 U.S.C. § 1367(a). But a mooted petition cannot be appealed because there is nothing to appeal. Congress' focus on the exhaustion of all opportunities for review underscores its intent to limit the expiration of confidentiality to petitions that have been denied on the merits. This focus on the merits also accords with the fact that the confidentiality never expires

on *granted* petitions filed by the victims of abuse. To hold that a mooted petition is "denied" would defeat one of the primary purposes of the VAWA confidentiality provision, namely, to prohibit disclosure of confidential application materials to the accused batterer. *See* 151 Cong. Rec. E2605, E2607 (daily ed. Dec. 18, 2005) (statement of Rep. Conyers that VAWA confidentiality provisions "are designed to ensure that abusers and criminals cannot use the immigration system against their victims").

Accordingly, the strict confidentiality of the Violence Against Women Act still applies to any petitions filed by Mrs. Hawke. While Mr. Hawke's Sixth Amendment right to Compulsory Process permits him access to some information held by the government, it does not permit him to receive absolutely privileged information like any records held by DHS here.

III. ORDER

For the foregoing reasons, the court denies Mr. Hawke's petition.

DATED: 9/29/2008

Ronald M. Whyte

RONALD M. WHYTE
United States District Judge

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Counsel are responsible for distributing copies of this document to co-counsel that have not registered for e-filing under the court's CM/ECF program.

Dated: 9/29/2008

TSF
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United States District Court
For the Northern District of California