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SCHALLER, J., concurring in part and dissenting in part. I agree that the judgment of conviction must be reversed and the case remanded for a new trial because the defendant improperly was deprived of an opportunity to have access to the complainant's psychiatric records. I write separately, however, because I do not agree with the majority's analysis that leads to this conclusion. I also believe that in light of the procedural issues that may arise in the new trial, it is both unnecessary and inappropriate for this court to discuss the complainant's records in detail.

I conclude, as does the majority, that General Statutes § 52-146e and the confidential protection it offers, does not apply once a party who is protected by the statute voluntarily and affirmatively discloses a protected record. The privileged protection afforded to the complainant's records under § 52-146e dissolved in the present case once she agreed to disclose fully her treatment records and waived her right to keep them confidential.

I reach this conclusion as a matter of plenary review of § 52-146e (a) and based on our well established rules of statutory interpretation. Contrary to the majority's approach, I believe that it is crucial to begin the analysis with a discussion of § 52-146e because the applicability of the statute is a threshold matter in the present case.

Having reached the predicate conclusion that § 52-146e does not apply in this case, I further conclude, as does the majority, that because the records no longer were confidential or protected as such, the trial court had no authority to invoke its "gate-keeping" function in which it performs an in camera review of the confidential records and determines whether they should be disclosed to the party seeking them. Because an in camera review was not required, the court had no discretion to review or withhold the documents. Under these circumstances, *State v. Esposito*, 192 Conn. 166, 471 A.2d 949 (1984), and its progeny do not apply. As soon as the waiver was given, the defendant was entitled to disclosure of the records without any discretionary assessment or restriction by the court.

I do not agree that the decision as to whether the in camera review process applies in this case is an "issue [that] concerns the construction of a statute," as the majority asserts. I believe the construction of the statute is a predicate conclusion, as previously discussed, because if the statute does not apply, the court has no authority to perform an in camera review. Additionally, § 52-146e itself does not require an in camera review, so a discussion of the statute in this regard is inappropriate. The in camera review process is a judicial construct, created to ensure that the statutory protections are met.

The majority's discussion of § 52-146e in the context of the in camera review process is not appropriate. The decision as to whether an in camera review is necessary relies on the predicate decision as to whether the statute affords protection.

As the majority notes, the next step is to evaluate the impact of the nondisclosure. I believe that we should apply our well settled harmful error analysis for sixth amendment claims in which the appellant asserts that he was denied his right to confront and to cross-examine a witness against him. See *State v. Slimskey*, 257 Conn. 842, 859, 779 A.2d 723 (2001). Because the restriction that occurred implicates the defendant's constitutional right to impeach and to discredit a witness, whether this impropriety warrants a new trial depends on whether the state can demonstrate harmlessness beyond a reasonable doubt. See *State v. Rolon*, 257 Conn. 156, 173–74, 777 A.2d 604 (2001).

I would conclude, on the basis of our in camera review of the psychiatric records, that the state has failed to make such a showing. The records contain material that could be used by the defendant for impeachment purposes. Although the defendant did exercise his right of cross-examination of the complainant concerning her mental condition, he is entitled to the opportunity to do so after having access to the materials in question.

I disagree with the majority's detailed discussion of the records. It is not necessary or appropriate to discuss our opinion concerning what our own in camera review of the records revealed and how the records could be used by the defendant in the course of a trial. Such discussion is not necessary because, based on my interpretation of § 52-146e, the initial in camera review should not have been conducted at all. Our opinion concerning the relevance of the records, as opposed to that of the trial court, is immaterial. Apart from that consideration, we should not reveal the details of the records or suggest how they could be used to present a defense in this case.

Nor is that discussion appropriate. The complainant will undoubtedly be given the opportunity to decide whether to consent to disclosure of the confidential records again at the time of the new trial. Although the complainant did consent to disclosure at the first trial and may consent again, that eventuality cannot be predicted with certainty. See *State v. Olah*, 60 Conn. App. 350, 355, 759 A.2d 548 (2000). Should she decide not to do so at the new trial, an in camera review with its pertinent waiver procedures may be necessary. See *id.*; see also *State v. Slimskey*, *supra*, 257 Conn. 855–56 (discussing in camera review procedure). Should that be the case, the complainant may decide to maintain the confidential status of her records. See *State v. Olah*, *supra*, 355. The majority's discussion of the contents

of the records, accordingly, details records that, ultimately, may not be disclosed at all. Even if she does consent for purposes of a new trial, I believe that we should neither speculate about how the records may be used nor suggest ways in which they could be used.

There are compelling reasons why we should not expose the complainant's psychiatric records to discussion and analysis in our opinion. For all the foregoing reasons, I respectfully concur in the result reached by the majority and dissent with regard to its discussion of the records.
