IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30327

STATE OF SOUTH DAKOTA,

Plaintiff and Petitioner,

v.

NATHAN ANTUNA,

Defendant and Respondent.

INTERMEDIATE APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
BRULE COUNTY, SOUTH DAKOTA

THE HONORABLE CHRIS S. GILES
Circuit Court Judge

PETITIONER'S BRIEF

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Order Granting Petition for Intermediate Appeal filed June 5, 2023

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PRELIMINARY STATEMENT

In this brief, Nathan Antuna is referred to as "Antuna" or "Defendant." The State of South Dakota is referred to as "State." Citations to the settled record and other documents are as follows:

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JURISDICTIONAL STATEMENT

On September 26, 2022, the Honorable Chris S Giles, Circuit Court Judge, First Judicial Circuit, entered an Order Regarding Defendant's Motion for Complaining Witness's Treatment Records. SR:94-95. On March 9, 2023, Judge Giles entered an Order Regarding Treatment Records Procedure. SR:167-68. Notices of Entry of the

orders were never filed or served upon the State. The State filed a Petition for Permission to Appeal those orders on April 28, 2023. On June 5, 2023, this Court granted the State's Petition. SR:376-77. This Court has jurisdiction under SDCL 23A-32-12.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. DID THE TRIAL COURT ERR IN ORDERING THE STATE AND K.B. TO OBTAIN K.B.'S MENTAL HEALTH RECORDS, IF ANY, WITHOUT FIRST APPLYING THE *NIXON* TEST?

Without requiring Defendant to meet any of the Nixon factors, the trial court ordered the State and the victim to produce, for *in camera* review, the victim's mental health records, if any exist, so the trial court could determine whether any of the records are relevant.

Milstead v. Johnson, 2016 S.D. 56, 883 N.W.2d 725

State v. Erickson, 525 N.W.2d 703 (S.D. 1994)

United States v. Meintzschel, 538 F.Supp.3d 571 (E.D.N.C. 2021)

United States v. Nixon, 418 U.S. 683 (1974)

II. WHETHER THE STATE PROPERLY INVOKED THIS COURT'S JURISDICTION?

The trial court did not rule on this issue.

Kallstrom v. Marshall Beverages, Inc., 397 N.W.2d 647 (S.D. 1986)

State v. Mulligan, 2005 S.D. 50, 696 N.W.2d 167

State v. Waters, 472 N.W.2d 524 (S.D. 1991)

STATEMENT OF THE CASE AND FACTS[1]

On the evening of August 2, 2016, K.B. drove her own vehicle to meet a friend at "The Busted Nut" bar in Chamberlain, South Dakota. There, K.B. and her friend consumed alcoholic beverages and interacted with a group of male construction workers including Defendant. K.B.'s friend left after a few drinks while K.B. stayed with Defendant and his co-workers. A bartender observed Defendant and K.B. leave together.

K.B. recalls drinking and interacting with Defendant and the group at the Busted Nut, but her next memory is waking up around 7:30 a.m. in her bed at home with no memory of how she got there. Once K.B. awoke, her mother asked K.B. to perform some simple tasks. K.B. struggled performing the tasks and recalling what she was told. K.B. also noticed that her vehicle was not at home. Due to those circumstances, K.B.'s sister took K.B. to the Chamberlain hospital where a rape kit was performed and toxicology samples from K.B.'s blood and urine were also taken. Later, K.B. and her sister found K.B.'s car parked at the Busted Nut.

During an interview the same day with Chamberlain Police, Defendant admitted to meeting K.B. the previous night and stated that they drank heavily. Defendant claimed that K.B. drove he and a couple

[1] The facts are taken from associated law enforcement reports and other materials that have been provided to defense counsel.

of his coworkers back to the hotel and left immediately after. Defendant denied having intercourse or sexual contact with K.B.

On September 15, 2021, the South Dakota Division of Criminal Investigation Forensic Laboratory conducted a periodic search of the Combined DNA Index System (CODIS) and matched sperm cell samples taken from K.B.'s rape kit vaginal swabs to Defendant's DNA. A known DNA sample was later obtained from Defendant which confirmed the DNA match to the sperm cells taken from K.B.'s rape kit.

In February 2022, a Brule County grand jury indicted Nathan Antuna on one count of Third-Degree Rape, a Class 2 Felony, in violation of SDCL 22-22-1(4). SR:1-3. Defendant moved for an order requiring the State to obtain from K.B., "the names of all counselors, therapists, or other mental health treatment providers that K.B. has conferred with regarding the allegations made in this case, or which document any mental health services she has received since the alleged crime in regard to the allegations she has made" and all records from such providers. SR:24.

After briefing and a hearing, the court ordered the State to (1) ask K.B. if she sought any mental health counseling; and, if so, (2) obtain those records and disclose them to the court for an *in camera* review to see if there is anything relevant to the case. MH1:52-54. The court did not require Defendant to meet any of the *Nixon* factors raised in the State's briefing, nor did the court determine whether K.B. had waived

psychotherapist-patient privilege to any of the hypothetical records. SR:40-50, 53. Instead, the court explained that, if K.B. objected, the court would balance the K.B.'s "privacy and protection versus the defendant's right to discoverable material at a later hearing." MH1:53. The trial court signed, attested, and filed its Order Regarding Defendant's Motion for Complaining Witness's Treatment Records on September 26, 2022. SR:94-95. Defendant did not file or serve a notice of entry regarding the court's order.

Thereafter, the State filed "State's Notice of K.B.'s Assertion of Rights and Privileges" providing notice that K.B. was asserting her rights as a crime victim under the South Dakota Constitution and her psychotherapist-patient privilege under SDCL 19-19-503. SR:100-03. Defendant filed a response and served a Subpoena Duces Tecum on K.B. ordering her to produce mental health, counseling, therapy, or other records in which she discussed the allegations in this matter and a list of all such providers who may have such records to Defendant's attorney. SR:106-38; 144-45. The State filed a Motion to Quash, arguing, among other things, that Defendant's subpoena did not comply with the *Nixon* test adopted in *Milstead v. Johnson*, 2016 S.D. 56, 883 N.W.2d 725. SR:147-59.

At the February 16, 2023, motions hearing, the court ruled that the *Nixon Test* was not applicable because the existence of any counseling or mental health records was unknown. MH2:26-27.

Instead, the court ruled that, under the discovery statutes and the constitutional rights of Defendant, the State was required to disclose whether K.B. sought counseling after the rape. MH2:24-7. Then, in applying its reading of *Karlen*, the court said Defendant could subpoena those therapist or counseling records for an *in camera* review. MH2:27-28. After further discussion, the court ordered the State to assist K.B. in disclosing whether she received any counseling and, if so, to obtain the counseling records Defendant requested in his subpoena for an *in camera* review. MH2:25-37. [2] The trial court signed, attested, and filed its corresponding Order Regarding Treatment Records Procedure on March 9, 2023. SR:167-68. Defendant did not file or serve any notice of entry regarding the court's order.

The State filed State's Petition for Permission to Take Discretionary Appeal on April 28, 2023. This Court issued an Order granting the State's Petition on June 5, 2023. SR:376-77.

ARGUMENTS

I. THE CIRCUIT COURT ERRED IN ORDERING THE STATE AND K.B. TO PRODUCE K.B.'S MENTAL HEALTH RECORDS, IF ANY EXIST, WITHOUT APPLYING THE *NIXON* TEST.

In its two orders, the trial court ordered the State to (1) ask K.B. whether she received counseling, therapy, or other mental health

[2] The State's acquiescence to this procedure at the hearing was offered to mitigate any possible harm to K.B.'s rights in light of the court's suggested procedure. The State does not agree that this proposed procedure was the correct procedure.

treatment since the events of this case; (2) assist K.B. in disclosing the names of those providers, if any, to Defendant and the court; and (3) acquire access, with K.B.'s assistance, to any and all corresponding counseling records so the court could conduct an *in camera* review. The trial court premised its ruling on the discovery statutes, the State's Due Process obligations under *Brady v. Maryland*, and this Court's decision in *State v. Karlen*, which analyzed a defendant's rights under the Confrontation Clause and a victim's right to psychotherapist-patient privilege. *Brady v. Maryland*, 373 U.S. 83 (1963); *Karlen*, 1999 S.D. 12, ¶¶ 27-46, 589 N.W.2d 594, 600-05; *see also* MH1:53-54. Relying on the "due diligence" language in the discovery statutes and on case law related to *Brady*, the court determined that, if the State had knowledge of materials in the possession of third parties related to the case, the State had an obligation to try to obtain those materials. MH1:12. The court interpreted the *Karlen* case to provide the procedure for discovery of this information. MH1:52-53.

"Ordinarily, [this Court] reviews the circuit court's rulings on discovery matters under an abuse of discretion standard. However, the question whether the circuit court erred when it interpreted [the discovery statutes] to permit discovery raises a question of statutory interpretation which" is reviewed de novo. *Milstead v. Johnson*, 2016 S.D. 56, ¶ 7, 883 N.W.2d 725, 729 (cleaned up) (citations omitted).

Claims of constitutional violations are also reviewed de novo. *State v. Schmidt*, 2012 S.D. 77, ¶ 12, 825 N.W.2d 889, 894.

A. Neither the Due Process nor Confrontation Clauses Require Production of the Records.

The trial court's reliance on Defendant's "constitutional rights" as a basis for the pretrial production of K.B.'s counseling records, if any, is misplaced. The *Brady* doctrine is not a discovery tool. *See State v. Erickson*, 525 N.W.2d 703, 710 (S.D. 1994) (citations omitted); *United States v. Grace*, 401 F.Supp.2d 1069, 1077 (D.M.T. 2005) (explaining that *Brady* is not a pretrial discovery tool, especially since "it is not possible to apply the materiality standard" before the outcome of the trial is known). Nor is the Confrontation Clause a constitutionally compelled rule of pretrial discovery. *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (citing *California v. Green*, 399 U.S. 149, 157 (1970) (other citation omitted).

Due Process

"A defendant has a constitutional right to due process," including "what might loosely be called the area of constitutionally guaranteed access to evidence." *State v. Jackson*, 2020 S.D. 53, ¶ 24, 949 N.W.2d 395, 403 (citations omitted). To that end, the United States Supreme Court has determined that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment,

irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87; *see also United States v. Bagley*, 473 U.S. 667, 682 (1985) (eliminating the requirement that a defendant request the information). "A *Brady* violation occurs when (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence has been suppressed by the State, either willfully or inadvertently; and (3) prejudice has ensued." *State v. Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d 103, 109 (citations omitted). In short, "*Brady* applies only where the prosecution has suppressed evidence." *Erickson*, 525 N.W.2d at 710.

In order to suppress evidence, the State must first possess it. *See State v. Guthmiller*, 2003 S.D. 83, ¶ 19, 667 N.W.2d 295, 303 (deciding *Brady* was not applicable because the State was not in possession of the evidence of which the defendant complained). Possession by the State, for *Brady* purposes, includes an individual prosecutor's "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d at 109-10 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). This duty is limited and "it is not the State's duty to conduct a discovery examination for a defendant" or "to take action to discover information which it does not possess." *Erickson*, 525 N.W.2d at 710. Instead, *Brady* applies only to materials already in the possession of the government or to which the government has a right to

possess. *Kyles*, 514 U.S. at 437; *United States v. Meintzschel*, 538 F.Supp.3d 571, 578-580 (E.D.N.C. 2021) (holding that prior caselaw does not alter "the basic requirement under *Brady* that exculpatory evidence must be in the possession of the government"); *Guthmiller*, 2003 S.D. 83, ¶ 19, 667 N.W.2d at 303.

"[C]ooperating witnesses [] stand in a very different position in relation to the prosecution than do police officers and other governmental agents." *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007). The State is not obligated under *Brady* to disclose material in the possession of a third party or witness simply because that third party or witness is cooperating. *Id.* (finding that a witness cooperating pursuant to a plea agreement was an independent actor from the government for *Brady* purposes); *State v. Bray*, 383 P.3d 883, 893 (Or.App. 2016) (finding no authority holding that *Brady* requires the prosecution to seek out or disclose evidence in the possession of third parties); *People v. Superior Court*, 80 Cal.App.4th 1305, 1314-15 (2000) ("A prosecutor's duty under *Brady* extends to evidence the prosecutor—or the prosecution team—knowingly possesses or has the right to possess."); *Meintzschel*, 538 F.Supp.3d at 578-80 (explaining why the defendant in a child sexual assault case was not entitled to the victim's mental health records under *Brady*); *State v. Jury*, 203 N.E. 222, 231-32 (Ohio Ct.App. 2022) (concluding that the State was not required to subpoena "CSLI data and text messages" from the defendant and

victim's wireless phone carriers because the defendant failed to show that the information existed, much less that the State (or its agents) were in possession or had knowledge of the information); *People v. Uribe*, 162 Cal.App.4th 1457, 1480-81 (2008) (explaining the difference between a nurse who is "acting on behalf of the government" for purposes of *Brady*, when she completes a sexual assault examination at the request of law enforcement and medical or mental health practitioners that the victim sees privately and voluntarily).

The victim in a criminal case is not under the control of the State, nor is the victim acting on behalf of the State for purposes of *Brady*. *IAR Systems Software, Inc. v. Superior Court*, 12 Cal.App.5th 503, 517 (2017) (noting that neither the defendant nor the Court were able to find a published case holding that a private party/crime victim is a "member of the prosecution team for purposes of *Brady*"). And of course, *Brady* does not require the State to inquire with a victim to see if she has received counseling or mental health care. *Erickson*, 525 N.W.2d at 710. In this case, the State is not and never has been in possession of K.B.'s mental health or counseling records. And K.B. is neither under the control of the State nor is K.B. acting on behalf of the State in any capacity. *Meintzschel*, 538 F.Supp.3d at 579-80 (holding that "*Brady* does not require the court to compel the government to disclose mental health records or related information about the alleged victim" when the records belong to the treatment providers, the government never had

copies of the records, and, therefore, the government has no knowledge or possession of any exculpatory evidence). As the trial court acknowledged, it is unknown whether the records even exist. MH1:52. As such, the State cannot possibly suppress the records Defendant seeks. *See Guthmiller*, 2003 S.D. 83, ¶ 19, 667 N.W.2d at 303. *Brady* does not give the trial court the authority to order the State to obtain and produce K.B.'s counseling records, nor does it allow the court to order K.B., or any other third party, to produce the records.

Confrontation Clause

The right to confrontation is a trial right, not a constitutionally compelled rule of pretrial discovery. *Ritchie*, 480 U.S. at 52 (citing *California v. Green*, 399 U.S. 149, 157 (1970) (citation omitted). "The ability to question adverse witnesses . . . does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. . . In short, the Confrontation Clause only guarantees an opportunity for effective cross examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.*, 480 U.S. at 52-54 (citations omitted) (using this rationale to eviscerate the defendant's reliance on *Davis v. Alaska*, 415 U.S. 308, (1974), for compelling production of materials under the Confrontation Clause prior to trial). "The Confrontation Clause has never been recognized as an independent method of enforcing pretrial disclosure of impeachment

information." *United States v. Wright*, 866 F.3d 899, 912, n.3 (8th Cir. 2017). Defendant cannot use a trial right to secure pretrial discovery. *United States v. Arias*, No. 21-1090, 2023 WL 4519967, at *5 (8th Cir. July 13, 2023) (holding the defendant had a constitutional right to the victim's mental health records when, during trial, the district court failed to sustain Arias's objection to the prosecutor's questioning about the victim's post-offense PTSD diagnosis and, after the evidence was introduced, the court failed to strike it)."

Likewise, the Sixth Amendment's Compulsory Process Clause "provides no greater protections in this area than those afforded by Due Process." *Ritchie*, 480 U.S. at 56 (noting that the Court has never held that the Compulsory Process Clause guarantees a right to discover the identity of witnesses or that it requires the government to produce exculpatory evidence). Defendant has no constitutional right to pretrial discovery of the records he seeks and the trial court erred in holding otherwise.

B. SDCL chapter 23A-13 Does Not Require Discovery of the Records.

The trial court appeared to interpret the language in SDCL 23A-13-3 and SDCL 23A-13-4 to require the State to, not only provide Defendant with discovery of materials in the State's possession, but also to use "due diligence" to search for and obtain materials from third parties to disclose to Defendant. MH1:10-13, 52-58; MH2:25-27. However, the discovery rules in SDCL chapt. 23A-13 deal exclusively

with "materials *that are in the possession of the Government* and provide[] how they may be made available to the defendant[.]" *Milstead*, 2016 S.D. 56, ¶ 17, 883 N.W.2d at 732-33 (quoting *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951)) (emphasis added). The language of the statute does not require the State to obtain possession of materials from third parties for Defendant, at his request or otherwise.

Instead, upon a defendant's request, the prosecuting attorney shall permit the defendant to inspect:

> SDCL 23A-13-3
> . . . papers [and] documents, . . . or portions thereof, *which are within the possession, custody, or control of the prosecuting attorney* and which are material to the preparation of his defense or intended for use by the State. . .
>
> SDCL 23A-13-4
> . . . any results or reports of physical or mental examinations . . . *which are within the possession, custody, or control of the prosecuting attorney, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney*, and which are material to the preparation of the defense or intended for use by the State. . .

(emphasis added). These statutes are similar to their federal Rule 16 counterparts, which require the government to permit inspection of:

> FRCRP 16(a)(1)(E)
> . . . papers, documents, . . . or portions of any of those items, if the item is *within the government's possession, custody or control* and the item is material to preparing the defense or the government intends to use the item in its case in chief at trial. . .
>
> FRCRP 16(a)(1)(F)
> . . . the results or reports of any physical or mental examination and of any scientific test or experiment if the item is *within the government's possession, custody, or control and the attorney for the government knows—or through due diligence could know—that*

> *the item exists*; and the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(emphasis added). This Court "routinely look[s] to the decisions of other courts for analytical assistance when a South Dakota statute is substantially the same as its federal counterpart, as such decisions are particularly instructive." *Milstead*, 2016 S.D. 56, ¶ 16, 883 N.W.2d at 732 (citation omitted).

The phrases "within the possession, custody, or control of the prosecuting attorney," in SDCL 23A-13-3 and 23A-13-4, like the language in Rule 16, refer to materials in the actual possession of the prosecuting attorney, while the phrase "the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney" in SDCL 23A-13-4 refers to things of which the prosecuting attorney has constructive possession. *United States v. Gatto*, 763 F2d 1040, 1048 (9th Cir. 1985) (noting that the "due diligence" language in Rule 16(a)(1)(A) denotes constructive possession where the lack of such language in Rule 16(a)(1)(C) only requires actual possession); *United States v. Mills*, 2019 WL 3423318 at *3 (E.D. Mich. July 30, 2019) (citing *United States v. Gregory*, 2006 WL 8439328, at *2 (E.D. Tenn. Oct. 6, 2006) ("because Rule 16(a)(1)(E) contains no due-diligence language, unlike Rules 16(a)(1)(D) and (F), it 'cannot be read as creating a disclosure obligation based on constructive possession;

only actual possession triggers the Government's obligation for disclosure under [Rule] 16(a)(1)(E)'")).

Courts define the scope of actual and constructive possession differently, but the reach in either situation only extends to other governmental agencies. *See United States v. Hamilton*, 107 F.3d 499 n.5 (7th Cir. 1997) (interpreting the phrase "within the possession, custody, or control of the government" in Rule 16(a)(1)(C) to include only those things within the actual possession of the federal government – meaning the prosecutor has no duty to obtain items controlled by state governments or police "even if the prosecutor is aware of the items."); *Mills*, 2019 WL 3423318 at *3 (explaining that actual possession under Rule 16(a)(1)(E) includes other governmental investigative agencies involved in the investigation); *Gatto*, 763 F.2d at 1048 (explaining that the due "diligence requirement establishing constructive possession relates solely to the [federal] prosecutor and whether he should have been aware of a statement in the possession of another *federal* agency;" state authorities are not included). Neither the State, nor any other governmental agency involved in the investigation, has possession or control of any counseling or mental health records related to K.B.

As a general rule, "[d]ocuments in the hands of cooperating third parties are not attributable to the Government" under Rule 16. *United States v. Tomasetta*, 2012 WL 896152, at *4-5 (S.D.N.Y. March 16,

2012) (explaining that a written agreement with a third party giving the government the right to obtain documents—i.e. a deferred prosecution agreement—may give the government "control" over those documents); *Erickson*, 525 N.W.2d at 711 (affirming the trial court's continuing order requiring disclosure of any counseling records or signed releases the victim provides to the State). And there is no language in the discovery statutes requiring the State to investigate or seek out information that it does not possess or control from a third party, including a victim, on a defendant's request. *See Erickson*, 525 N.W.2d at 710-11 (rejecting the defendant's argument that SDCL 23A-13-4 requires the State ask the victim if she received any counseling services); *United States v. Buske*, 2011 WL 2912707, at *8-9 (E.D.Wis. July 18, 2011) (noting it may be permissible to direct the prosecution to use its "best efforts" to obtain information from a third party (victim) but, if the third party refuses, "it is hard to see what the court could then do about it."); SR:100-03 (K.B.'s assertion of her rights and privileges, as a victim, under the South Dakota Constitution and statutes). And the fact that a third party "is cooperating with the Government's investigation—as many do—does not turn it into an 'agent' of the Government." *Tomasetta*, 2012 WL 896152 at *4; *see United States v. Fort*, 472 F.3d 1106, 1113 (9th Cir. 2007) (adopting the federal government's definition of "government agent" to include, at its broadest, state, local, and federal police officers whose work contributes to a federal criminal case).

In this case, there is no formal cooperation agreement between the State and K.B., nor is there an agreement between the State and K.B. allowing the State to obtain documents from K.B. or on K.B.'s behalf. *See Tomasetta*, 2012 WL 896152 at 4-5; *Erickson*, 525 N.W.2d at 711. Notably, if records do exist, they would be in the possession of whomever may have provided counseling services to K.B—making the records one more step removed from the State's possession. The trial court misinterpreted SDCL 23A-13-4 and abused its discretion when it required the State to obtain counseling records that were not within the State's possession or control.

C. The Trial Court Erred in Failing to Apply the Nixon Test to Defendant's Subpoena Duces Tecum.

Because neither SDCL ch. 23A-13, *Brady*, nor the Sixth Amendment allow the trial court to compel the State or K.B. to produce the requested records prior to trial, the only way for Defendant to obtain the information is through the subpoena process in SDCL 23A-14-5 (Rule 17(c)).

In this case, the trial court believed *State v. Karlen* was directly on point and provided the procedure for an *in camera* review of subpoenaed records. However, *Karlen* dealt with the victim's waiver of psychotherapist-patient privilege and the defendant's right to confront and cross-examine the victim *at trial*. Notably, while the defendant in *Karlen* sought the victim's counseling records via a subpoena duces

tecum, the decision did not discuss "the parameters for discovery of documents under. . . Rule 17(c)." *Milstead*, 2016 S.D. 56, ¶¶ 14-15, 883 N.W.2d 725, 731-32.

"Rule 17(c), in contrast [to Rule 16,] provides a method for the defendant to subpoena such documents and materials for his or her personal use if they are not put into evidence by the government. However, Rule 17(c) was not intended to provide an additional means of discovery."[3] *Milstead*, 2016 S.D. 56, ¶ 17, 883 N.W.2d 725, 732-33 (citation omitted). "To construe Rule 17 as a generalized tool for discovery would render Rule 16's requirements nugatory and meaningless." *Id.* (citations omitted).

Instead, the "chief innovation" of Rule 17(c) is "to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials." *Id.* Consistent with the specific and limited purpose, "in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that

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[3] Of note, South Dakota adopted the Federal Rule 17(c), pertaining to the subpoena of books, papers, documents, or other objects in 1978. *See* 23A-14-5; SL 1978, ch 178, § 180. In 2008, the federal government enacted the Crime Victims' Rights Act. *See* 18 U.S.C. § 3771(a)(8) (giving victims a right to respect for their dignity and privacy). Federal Rule 17 was amended to include subsection (c)(3) which requires giving notice to the victim before a subpoena is served on a third party requiring production of personal or confidential information about a victim so the victim has an opportunity to assert their rights. FRCRP 17(c)(3) advisory committee note. South Dakota has not since updated Rule 17, but it has adopted Marsy's Law which gives victims similar rights to with respect to privacy. S.D. Const. Art. 6, § 29.

they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.' " *United States v. Nixon*, 418 U.S. 683, 699-700 (1974) (other citations omitted). The condensed version of the *Nixon* test requires the proponent of a pretrial subpoena to show the materials sought are (1) relevant, (2) admissible, and (3) requested with adequate specificity. *Milstead*, 2016 S.D. 56, ¶ 20, 883 N.W.2d 725, 734 (adopting the test in *Nixon*).

In *Milstead*, this Court adopted and applied the *Nixon* test when the defendant in a criminal trial issued a subpoena duces tecum to the county sheriff in the hopes of securing pretrial disclosure of confidential law enforcement personnel records. *Id.* at ¶ 1, 883 N.W.2d at 727-28. This Court decided that the well-reasoned *Nixon* test prevented a subpoena from being used as a fishing expedition "based upon a party's 'mere hope' that it will result in the production of favorable evidence." *Id.* at ¶ 29, 883 N.W.2d at 736. This case fits squarely within *Milstead*. As explained above, the only avenue for Defendant to obtain the materials he seeks before trial is through a subpoena duces tecum. And courts around the country similarly require a defendant satisfy the *Nixon* test before a subpoena is issued for pretrial disclosure of

materials. *See e.g. United States v. Rand*, 835 F.3d 451, 462-63 (8th Cir. 2016) (applying *Nixon* and noting that "[t]he right to defend oneself does not extend to using the power of the Court to compel third parties to provide information that may not even be admissible at trial or at a hearing or that is merely 'investigatory.' "); *Meintzschel*, 538 F.Supp.3d 571, 578-580 (E.D.N.C. 2021) (applying *Nixon* and explaining when a witness's mental health treatment is relevant and material); *Commonwealth v. Jones*, 82 N.E.3d 1013, 1016-19 (Mass. 2017) (affirming the trial court's refusal to issue a subpoena for a rape victim's counseling records because the defendant failed to make the requisite showing under *Commonwealth v. Lampron*, 441 Mass. 265, 296 (2004) (applying the *Nixon* factors)); *State v. Dube*, 87 A.3d 1219, 1222-23 (Me. 2014) (affirming denial of subpoena duces tecum for sexual assault victim's medical records and commenting that the defendant's speculation that the records might produce something for impeachment was no more than a fishing expedition).

In this case, Defendant's subpoena requested: (1) "All mental health, counseling, therapy, or other records relating to any mental health treatment, counseling, therapy, or therapeutic services" K.B. received since August 2, 2016, that "discuss, refer to, describe, or otherwise mention the allegation of rape you have made regarding Nathan Antuna. . ."; and (2) the name, address, phone number, and organization of "all mental health professionals, counselors, therapists,

medical doctors, or other treatment or therapeutic services providers that you have consulted with in regard to the allegations of rape you have made regarding Nathan Antuna . . .." SR:144-45. The trial court's order was similarly broad. SR:167-68. A brief analysis of the *Nixon* test illustrates the wisdom of its application to this situation. Notably, while the decision in *Karlen* concerned the use of records for cross-examination at trial, and did not apply the *Nixon* factors, the "specialized showing" analyzed in the decision is informative.

Relevance

To fulfill this factor, Defendant "must establish a factual predicate showing that it is reasonably likely that the requested file will bear information both relevant and material to his defense." *Milstead*, 2016 S.D. 56, ¶ 25, 883 N.W.2d at 735 (noting that this requirement was consistent with the "specialized showing" in *Karlen*); *State v. Johnson*, 102 A.3d 295, 307 (Md. 2014) (requiring the defendant to make a similar showing when seeking the victim's privileged counseling records and noting that it must be more than the possible existence of impeachment evidence); *see also* SDCL 19-19-401.

Importantly, "the need for evidence to impeach witnesses is generally insufficient to require its production in advance of trial" and "an unrestrained foray" into protected records in the hope of finding unspecified information that would enable impeachment is not allowed. *Milstead*, 2016 S.D. 56, ¶¶ 22 & 26, 883 N.W.2d at 734-35; *Johnson*,

102 A.3d at 309 (explaining that allowing privilege to be abrogated based on the assertion that records *may* contain information relevant to credibility would "virtually destroy psychotherapist-patient privilege of crime victims."). In this case, Defendant claimed that he needed the counseling records, if any exist, to determine if K.B.'s recollection of the rape changed over time and to gather information about her mental condition—which, as he stated, related to her credibility. SR:28-29, 76; MH2:18. The trial court's order was also based on the potential uncovering of useful impeachment material related to K.B. MH1:53; MH2:27. The trial court explained that the only statements that would be "discoverable" are whether the victim recanted, provided inconsistent statements about the allegations, or made any other statements about the allegations. MH2:27.

However, unlike the victim in *Karlen*, K.B. has not provided inconsistent statements regarding the incident. *Milstead*, 2016 S.D. 56, ¶¶ 14-15, 25, 883 N.W.2d at 731-32, 735. This fact was important to the Court, because it showed the information the defendant sought was material and not just a generalized attack on the victim's credibility. *Milstead*, 2016 S.D. 56, ¶ 25, 883 N.W.2d at 735. Additionally, the victim's testimony in *Karlen* was the only evidence of the defendant's guilt. 1999 S.D. 12, ¶ 44, 589 N.W.2d at 604. In this case, as the trial court observed, the other evidence showing Defendant's guilt—i.e. physical evidence establishing that he and K.B. had sexual

intercourse—diminished the materiality of any general impeachment evidence related to K.B. MH1:21. Defendant has not shown that that the information he is seeking would produce relevant and material information.

Specificity

The specificity requirement "ensures that subpoenas are used only to secure for trial certain documents or sharply defined groups of documents" and not for fishing expeditions "based upon a party's mere hope that it will result in the production of favorable evidence." *Milstead*, 2016 S.D. 56, ¶¶ 27-29 883 N.W.2d at 735-36 (citations omitted). Defendant wants access to K.B.'s counseling records based on his mere hope that K.B. changed her story or has some ailment that affects her mental condition. SR:28-29, 76; MH2:18. And the trial court's order does nothing to limit the type of records to be produced (i.e. billing statements, schedules, notes, health insurance information, etc.) or to specify the information contained in the records or believed to be contained in the records. SR:95, 167-68; *Milstead*, 2016 S.D. 56, ¶ 28, 883 N.W.2d at 736. In addition, the trial court continued to acknowledge that the records which Defendant seeks may not exist. MH1:52; MH2:25.

In *Karlen*, the defendant issued a subpoenaed duces tecum to obtain the victim's counseling records from Henry Fulda, the victim's counselor. *Karlen*, 1999 S.D. 12, ¶ 28, 589 N.W.2d at 600. Here,

Defendant has no indication that K.B. has received counseling or therapy, much less the names of the counselors she may have used. Before the trial court, Defendant claimed that "the scope and power of subpoenas is limited and predicated on the assumption that the seeker knows the location of the materials." SR:73. The State agrees. Until Defendant is able to specify the location of the alleged documents, use of a pretrial subpoena is unavailable. *Meintzschel*, 538 F. Supp. 3d 571, 582 n. 10 (noting that the defendant could not meet the specificity prong where he could not name a specific therapist). In this case, Defendant's lack of specificity is akin to the court allowing him to cast a lure, not just in the hopes of finding fish, but also in hopes of finding a pond where the fish might be.

Admissibility

Regarding admissibility, Defendant must "make a preliminary showing that the requested material contains admissible evidence regarding the offenses charged." *Milstead*, 2016 S.D. 56, ¶ 29, 883 N.W.2d at 736 (citing *Nixon*). If there are any such records, Defendant has not shown that any information in the records would be admissible. Before the trial court, Defendant mentioned that the medical records produced showed K.B. was taking medicine that treats depression and anxiety. SR:136. However, medications can certainly have more than one use. And attacks on a witness's credibility based on general mental health matters is often a collateral issue that would confuse the jury

and have the capacity to influence the jury by illegitimate means. *See Meintzschel*, 538 F. Supp. 3d at 582-83; SDCL 19-19-403; *Kostel v. Schwartz*, 2008 S.D. 85, ¶¶ 80-81, 756 N.W.2d 363, 388; *e.g. State v. Rough Surface*, 440 N.W.2d 746, 752 (S.D. 1989);

Furthermore, Defendant has not shown that K.B. waived any privilege she would have related to counseling records. *See* SDCL 19-19-503; *United States v. Doyle*, 1 F.Supp.2d 1187, 1189-91 (D. Or. 1998) (analyzing the interplay of a defendant's need for evidence and privileged communications and noting that a defendant's constitutional rights do not always trump privilege); *Meintzschel*, 538 F. Supp. 3d 571, 582 (citing *Jaffee v. Redmond*, 518 U.S. 1 (1996) and noting the United States Supreme Court's view that psychotherapist-patient privilege promotes important public interests and outweighs the need for probative evidence). Defendant has not shown that K.B. disclosed the incident to multiple uninvolved third parties, like the victim in *Karlen*. 1999 S.D. 12, ¶ 32, 589 N.W.2d at 601 (detailing eight other individuals (friends, family, and professors) with whom the victim discussed the incident, in addition to his counselor). Instead, Defendant asserted that K.B. conferred with law enforcement, prosecutors, victim advocates, and her family about the allegations. SR:134-35. However, a rape victim does not waive privilege by reporting a crime. *United States v. Shrader*, 716 F.Supp.2d 464, 473 n. 4 (S.D.W. Va. 2010) (rejecting the defendant's argument that the victim waived privilege by cooperating

with law enforcement and noting that a victim does not have to choose between privacy and seeking the help of law enforcement). And Defendant has no knowledge of the extent to which K.B. has talked with her family about the allegations.

Finally, Defendant has not shown that any potential evidence would be used to show "biases, prejudges, or ulterior motives;" instead, the trial court only suggested that there may be the potential for impeaching contradictory statements. *See Karlen*, 1999 S.D. 12, ¶ 44 589 N.W.2d at 604 (approving admissibility of school counseling records to show "possible biases, prejudices, or ulterior motives of the witness"). Absent a showing that the records contain admissible evidence, Defendant's request can at best be characterized as an attempt to impermissibly attack K.B.'s character based on her possible use of mental health treatment. *Rough Surface*, 440 N.W.2d at 752 (citing *Davis*).

This cannot be allowed since the public has an "interest in protecting such information as it encourages patients to be open and candid with their counselors." *Karlen*, 1999 S.D. 12, ¶ 39, 589 N.W.2d at 602 (citing *Maynard v. Heeren*, 1997 S.D. 60, ¶ 8, 563 N.W.2d 830, 833); And the "mere invocation of [Defendant's rights] cannot automatically and invariably outweigh countervailing public interests." *Taylor v. Illinois*, 484 U.S. 400, 414 (1988). As Justice Konenkamp reiterated:

> [T]he public interest is served by encouraging individuals to seek help and treatment for both mental and physical illness. Any encroachment should be made with caution, as the very basis for treatment depends upon the free and complete disclosure of all thoughts and feelings of a patient, a process significantly thwarted when the privilege is unnecessarily transgressed. . . The mental health of our citizenry, no less than physical health, is a public good of transcendent importance.

Maynard, 1997 S.D. 60, ¶¶ 23-24, 563 N.W.2d at 837-38 (Konenkamp, J., concurring in part and dissenting in part) (citing *Jaffee*, 518 U.S. at 7-12 (other citations omitted).

In this case, the record strongly suggests that Defendant's subpoena is being used as a means for pretrial discovery and is oppressive and unreasonable—the impermissible practices *Nixon* was meant to guard against. Nevertheless, Defendant and the trial court contend *Nixon* is not applicable to the subpoena and that *Karlen* is the appropriate avenue through which Defendant may acquire pretrial discovery of the records. Their reliance on *Karlen* is misplaced. And, as shown in the above comparison, it is clear Defendant is trying to use *Karlen's* logic to achieve *Karlen's* result without meeting *Karlen's* requirements.

II. THE STATE PROPERLY INVOKED THIS COURT'S JURISDICTION.

After its ruling at the September motions hearing, the court signed, attested, and filed its corresponding Order Regarding Defendant's Motion for Complaining Witness's Treatment Records

("First Order") on September 26, 2022. SR:94-95. On October 3, 2022, the State received a letter from Defendant's counsel, dated September 29, 2022. *See* Appendix to State's Response to Defendant's Motion to Dismiss State's Petition ("APP") at 1. The letter attached a copy of the First Order and an order related to Defendant's other discovery motions and asked if the State needed anything to help facilitate production of the materials. APP at 2-7. The letter and attached orders were not filed with the court. The letter did not include a certificate of service or a request for admission of service, nor was any such document filed with the court.

Following its ruling at the February 2023 motions hearing, the electronic record indicates the court signed, attested, and filed its corresponding Order Regarding Treatment Records Procedure on March 9, 2023. SR:167-68. The State did not receive any notice from any source, including the UJS Attorney Notification System, of this signed and filed order. *See* APP at 9-14 (stating that neither of the attorneys for the State knew of or subscribed to the UJS Attorney Notification System which, in turn, logically means the attorneys did not receive any emails from this system). No notice of entry was filed for either the First or Second Orders.

On April 28, 2023, the State filed and served State's Petition for Permission to Take Discretionary Appeal ("Petition") regarding the two orders.

A. A Notice of Entry must be Served and Filed to Begin the Limitations Period for Filing a Petition for Permission to Appeal.

This Court's jurisdiction is clear from the face of the Petition. *See* Petition at 1. The State filed its Petition under SDCL 23A-32-12, which allows a party to appeal an intermediate order, before trial, in this Court's discretion. "The procedure as to the taking of such appeal, petition for allowance thereof, and allowance thereof, shall be set forth in §§ 15-26A-13 to 15-26A-17, inclusive, so far as the same are applicable." SDCL 23A-32-12.

According to SDCL 15-26A-13, the party wishing to appeal an order made before trial must file "a petition for permission to appeal, together with proof of service thereof. . . with the clerk of the Supreme Court *within ten days after notice of entry of such order.*" SDCL 15-26A-13 (emphasis added).[4] Unlike limitations periods that are measured by the entry or filing of an order, SDCL 15-26A-13 requires *notice* of the entry of the order. *Compare* SDCL 15-26A-13 *with* SDCL 23A-32-15 (requiring a defendant to appeal "within thirty days after the judgment is signed, attested, and filed) *and* SDCL 21-27-18.1 (requiring a party to file a motion for a certificate of probable cause "within thirty days from the date the final judgment or order is entered."). Thus, for

[4] The party appealing must also attach the notice of entry of the order sought to be appealed to the petition. SDCL 15-26A-15. The State did not attach a notice of entry of the orders being appealed because no notice of entry of order was provided for either order.

the limitations period to begin under SDCL 15-26A-13, the party appealing must have notice of the order after it is entered by the court.

In *State v. Sharpfish*, the petitioner acknowledged that an email from the judge with an uncertified and unfiled copy of the order attached "constitute[ed] notice of entry of order." *See Sharpfish*, 2018 S.D. 63, ¶ 12, 917 N.W.2d 21, 23. APP at 3 (judicial notice requested). However, for an order to be "entered," it must be signed, attested, and filed with the clerk. *Sudbeck v. Dale Electronics, Inc*, 519 N.W.2d 63, 66-67 (S.D. 1994) (drawing a distinction between the limitations period that begins after service of "notice of a final decision" under SDCL 1-26-31 and the period that begins after notice of entry of the judgement under SDCL 15-26A-6). Thus, notwithstanding the petitioner's suggestion that the "notice" in *Sharpfish* was sufficient, the email and uncertified order did not constitute notice of *entry* of the order at issue for purposes of SDCL 15-26A-13. *See Foss v. Spitznagel*, 97 N.W.2d 856, 858 (S.D. 1959) ("An order not having been attested by the clerk is not effective as an order."); *see* SDCL 15-6-58 ("[A]n order becomes complete and effective when reduced to writing, signed by the court or judge, attested by the clerk and filed in the clerk's office."); SDCL 16-21-4(1) (defining the "official record" that must be maintained by the clerks of court).[5]

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[5] *But see Christensen v. Weber*, 2007 S.D. 102, ¶¶ 2-4, 740 N.W.2d 622, 622-23 (noting that the limitations period to file a motion for probable

(continued...)

The exact language used for the notice of entry provisions in SDCL ch. 15-26A and SDCL ch. 23A-32 differs, but the purpose of the notice requirement is the same. *Compare* SDCL 15-26A-13 *with* SDCL 15-26A-6 ("An appeal from a judgment or order must be taken within thirty days after the judgment or order shall be signed, attested, filed and written notice of entry thereof shall have been given to the adverse party.") *with* SDCL 23A-32-15 ("[A]ny appeal other than from a judgment must be taken within thirty days after written notice of the filing of the order shall have been given to the party appealing."). As this Court has explained, a notice of entry of order gives the prevailing party the power to begin the period in which their adversary must appeal and assures both parties that the limitations period will not begin to run until such notice is given. *See Kallstrom v. Marshall Beverages, Inc.*, 397 N.W.2d 647, 650 (S.D. 1986) (interpreting a prior version of SDCL 15-26A-6 that required an appeal to be taken within sixty days after the judgment was "signed, attested, filed and written notice of entry" was given to the adverse party)[6] (other citations omitted).

(...continued)
cause, which is measured from when the order is entered, began when the court signed the order at issue).

[6] The current version of SDCL 15-26A-6 now includes a thirty-day time period instead of sixty days, but the remaining interpreted language is substantially the same.

Additionally, for the limitations period to begin, a notice of entry must be *served* on the parties in the action. *See* SDCL 15-6-5(a) (requiring notices to be served on each party); SDCL 23A-44-7 (requiring written motions, notices, and similar papers to be served upon each party); *State v. Mulligan*, 2005 S.D. 50, ¶ 2, 696 N.W.2d 167, 169 (noting that the defendant's time to file her petition for permission to appeal under SDCL 15-26A-13 began on the day she was *served* with a notice of entry of the order at issue). The notice, along with a certificate of service, must also be filed with the court. *See* SDCL 23A-44-10 (explaining that papers that are required to be served must also be filed with the court in the manner provided in SDCL 15-6-5(d)). Under SDCL 15-6-5(d), all papers served upon a party, including notices and orders, "shall, if not filed before service, be filed with the court, together with proof of such service, forthwith upon such service." This requirement of filing "applies to the notice of filing of an order and the notice of entry of a judgment together with proof of service thereof, both of which shall be filed forthwith" and, notably, "if [the documents are] not filed within ten days after service thereof, the time of service shall be deemed to be the date of filing of the notice and proof of service." *Id.*

These rules embody the purpose of the notice of entry requirement. If a prevailing party wants to ensure that the period is started, and hold the opposing party to that time limit, he or she must

prove the notice was served on the other party. *State v. Waters*, 472 N.W.2d 524, 525 (S.D. 1991) (failing to file sufficient proof of service would allow a party to claim they did not receive service "and destroy the effectiveness and efficiency of our service statutes."). It is not the trial court nor the clerk of court's responsibility to make sure the entered order is served on the parties. *See* SDCL 16-21-4(5) ("Court personnel will electronically file all official documents entered by the court. This applies to any electronic documents generated by the court and shall include orders, judgments, memoranda, papers, notices and any other official document."); SDCL 16-21A-7(1) ("The court *may* file *and* serve on registered attorneys and parties any judgments, orders, notices or other documents prepared by the court.") (emphasis added).

B. Defendant did not File and Serve Notices of Entry that Would Start the Limitations Period.

With regard to the First Order, Defendant mailed a certified copy of the order to the State and asked for the relevant materials to be produced. *See* APP at 1-7. Assuming that this letter and attached order would constitute notice of entry of the order, Defendant failed to file the order, notice of entry of the order, or sufficient proof of service with the court. Without such filings, the date of service—and the time in which the State must appeal the order—has not yet begun to run. *See* SDCL 15-6-5(d).

Furthermore, according to this Court's precedent, Defendant was, at the very least, required to file proof of service to begin the time to appeal. *See Kallstrom*, 397 N.W.2d at 650 (holding that notice by mail of judgment and decree, without a certificate of service or filing with the clerk of courts, did not commence the limitations period); *Canton Concrete Products Corp v. Alder*, 273 N.W.2d 120, 122 (S.D. 1978) (mailing of certified copy of the order, *along with an affidavit of service from the clerk of courts*, constituted written notice of the filing); *Porter v. Porter*, 1996 S.D. 6, ¶ 25, 542 N.W.2d 448, 452 (filing of divorce decree and stipulation with the clerk of courts, actual notice of the orders through certified mail, and *the filing of a signed admission of service* with clerk of courts began the limitations period). Indeed, completing and filing a certificate of service, or other proof of service, allows a presumption of service to arise that keeps this Court from being put in "the untenable position of judging the credibility of attorneys" if one party asserts that they did not receive service. *See Waters*, 472 N.W.2d at 525; *see also* SDCL 23A-44-8 (requiring service in criminal cases to be made in the manner provided in SDCL 15-6-5(b)).[7] In *Waters*, the trial court signed the order at issue and filed it with the clerk of courts

[7] In 2022, this Court amended SDCL 15-6-5(b) to include the phrase: "Unless otherwise ordered by the court, all documents filed with the court electronically through the Odyssey® system or served electronically through the Odyssey® system are presumed served upon all attorneys of record at the time of submission." SL 2023, ch. 213 (Supreme Court Rule 22-12). This language became effective on January 1, 2023, and applies to the Second Order, only.

on October 2nd. On that same day the defendant hand delivered a copy of the order to the State and filed a certificate of service in the court file. *Id.* at 524-25. In determining whether the petition was timely, the Court noted that because the defendant completed and filed a certificate of service, a presumption of service arose that defeated the State's unsupported claim that they did not receive notice of the order. *Id.* at 525.

As it relates to the First Order, because Defendant failed to file proof of service, notice of entry was not properly given and the State's time to appeal had not begun. Additionally, even if the first order cannot be appealed, this Court may still review it, and any related oral rulings, while reviewing the Second Order on appeal. *See* SDCL 23A-32-9 ("When the appeal is from an order subject to appeal, the Supreme Court may review all matters appearing on the record relevant to the question of whether the order appealed from is erroneous."); SDCL 15-26A-10 (same).

With regard to the Second Order, no notice of the entry of the order was served upon the State at all. Defendant did not file and serve the *signed and entered order* through the Odyssey® file and serve system, nor did he serve it by electronic mail, first class mail, facsimile,

or hand delivery. [8] *See* SDCL 15-6-5(b); *See* APP 9-14. The exhibits attached to Defendant's motion to dismiss show that *he* received an automated email, from a separate notification system maintained by the South Dakota Unified Judicial System ("UJS Notification System"), about an "event" related to the orders at issue. *See* Defendant's Motion to Dismiss at 6-7.[9] This automated email is not one of the methods of service approved in SDCL 15-6-5(b), nor does his email show that the State received similar notification. *See also* SDCL 23A-44-9 (requiring service to be made in the manner provided in SDCL 15-6-5(b)); SDCL 16-21A-2 ("Effective July 1, 2014. . . For criminal case types all documents, except the initiating pleading or documents specifically exempted by these rules or court order, shall be filed electronically."); SDCL 16-21A-1 (defining "Electronic filing system" as "the Odyssey® file and serve system maintained by the South Dakota Unified Judicial System.").

The time to perfect an appeal begins when the notice of entry is *properly* served. *See State v. Anders*, 2009 S.D. 15, ¶ 7, 763 N.W.2d 547, 550 (applying the rule to SDCL 23A-32-6, which requires appeals

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[8] Defendant served the State with his *proposed order* through Odyssey® file and serve, but he did not serve the State with a copy of the Second Order after it was signed, attested, and entered.

[9] According to the UJS website, the "UJS Attorney Notification System" allows attorneys to subscribe and be notified of "events" that occur in cases where he or she is attorney of record. *See* https://ujsattorney.sd.gov/Login.aspx?ReturnUrl=%2f.

to be perfected "ten days after written notice of entry of the judgment or order."). In *Anders*, the defendant served a notice of entry of order on the State through Interoffice Mail and filed a certificate of service stating that the notice of entry was served through Interoffice Mail and "hand delivered." *Id.* at ¶ 4, 763 N.W.2d at 549. This Court determined that, because Interoffice Mail is not enumerated as a method of service under SDCL 15-6-5(b), and the notice was not actually "hand delivered" as contemplated under the statute, the service was not properly effectuated and the time to appeal had not been triggered when the State filed their notice of appeal. *Id.* at ¶ 7, 763 N.W.2d at 550. In this case, not only did the State not receive actual notice of the entry of the order (through the UJS Notification System or otherwise), any purported service through the UJS Notification System would not have been proper service under SDCL 15-6-5(b). Nor would the UJS Notification System constitute sufficient proof of service. *See* SDCL 15-6-5(b) (listing the filing/service of a document in Odyssey®, an attorney's certificate of service, a written admission of service, or an affidavit of service as "sufficient proof of service."). Because the State was not given notice of the entry of the Second Order, the time frame to appeal under SDCL 15-26A-13 had not yet begun to run when the State filed its Petition.

With the introduction of the Odyssey® file and serve system, UJS simplified the process of filing and serving documents in civil and

criminal cases. Had Defendant filed a notice of entry of order in Odyssey®, as is the customary (and required) practice, the attorneys of record would have been served and the process would have instantaneously been documented.[10] SDCL 15-6-5(b)(2) ("Unless otherwise ordered by the court, all documents filed with the court electronically through the Odyssey® system or served electronically through the Odyssey® system are presumed served upon all attorneys of record at the time of submission"); *see generally* SDCL ch. 16-21A.

The above statutes and case law show that Defendant is required to file and serve notice of entry of an order and prove service thereof. Notice does not mean actual notice, by whatever means accomplish that objective. If this were the rule, there would be no way to know when the time to perfect an appeal began. Any other rule would require this Court to weigh the credibility of the attorneys with materials that are outside the settled record. *See Waters, supra.* Filing and serving a notice of entry through Odyssey®, or at least complying with the service and proof of service statutes, is the only way to effectuate the purpose of the notice of entry requirement and ensure that this same fight is not waged each time a notice of appeal or petition for permission to appeal is filed with this Court.

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[10] *See State v. Waldner*, Brule County Criminal File Nos. 21-159, 21-160, and 21-161 (judicial notice requested) (documenting the defendants' notices of entry of order and certificates of service that precipitated the petition for permission to appeal filed with this Court).

CONCLUSION

The State respectfully requests this Court reverse the trial court's orders and direct the court to apply the *Nixon* factors to Defendant's subpoena.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Petitioner's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Petitioner's Brief contains 9,214 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 20th day of July 2023.

/s/ Nolan Welker
Nolan Welker
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 20, 2023, a true and correct copy of Petitioner's Brief in the matter of *State of South Dakota v. Nathan Antuna* was served via email upon John Murphy at john@murphylawoffice.org.

/s/ Nolan Welker
Nolan Welker
Assistant Attorney General

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF BRULE	)	FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA	)	
	)	
Plaintiff,	)	
	)	07CRI22-32
vs.	)	
	)	ORDER REGARDING TREATMENT
	)	RECORDS AND STATE'S MOTION TO
	)	QUASH
NATHAN ANTUNA,	)	
	)	
Defendant.	)	

On Sept. 26, 2022, the Court granted Defendant's motion requesting the State disclose K.B.'s treatment records and ordered the State to (1) ask K.B. whether she received any mental health, counseling, or treatment since August 2, 2016, and ascertain where or from whom such services were provided and (2) attempt to obtain records from the providers with K.B.'s assistance for an *in camera* review. The Court stated that if K.B. refuses to cooperate or objects to disclosure of the records to the court, the State must notify the Court so further proceedings could be considered.

On November 29, 2022, the State, on behalf of K.B., filed a Notice of K.B.'s Assertion of Rights and Privileges, as an objection to the Court's prior order.

The Defendant served K.B. with a subpoena duces tecum, pursuant to SDCL 23A-14-5, on December 27, 2022, commanding her to produce:

> "All mental health, counseling, therapy, or other records relating to any mental health treatment, counseling, therapy, or therapeutic services [she] ha[d] received since August 2, 2016, in which [she] discuss[ed], refer[red] to, describe[d], or otherwise mention[ed] the allegations of rape [she] ha[d] made regarding Nathan Antuna. . . which allegedly occurred on or about August 1st or 2nd 2016," AND
>
> A list. . . of all mental health professionals, counselors, therapists, medical doctors, or other treatment or therapeutic services provider that [she] ha[d] consulted with in regard

to the allegation of rape [she] ha[d] made regarding Nathan Antuna. . . which allegedly occurred on or about August 1st or 2nd 2016."

The State filed a motion to quash the subpoena duces tecum on January 20, 2023. At a hearing on February 16, 2023, the Court made the following determinations:

1. At this point, neither the Court, the State, nor the defense knows whether any treatment records exist.
2. The State has no affirmative duty to complete Defendant's discovery.
3. But, SDCL 23A-13-4 requires the State to exercise "due diligence" to locate "any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof," even if those results are not in the possession of the prosecutor or anyone involved in the State's investigation, including law enforcement.
4. Because of the speculative nature of the documents in the case, the *Nixon* factors, first applied in *Milstead v. Johnson*, 2016 S.D. 56, 883 N.W.2d 725, do not apply in this case.
5. Instead, the facts of this case fall solely under the South Dakota Supreme Court's decision in *State v. Karlen*, 1999 S.D. 12, 589 N.W.2d 594.
6. Even though the Defense is unsure of whether K.B. i) has any counseling records to discover, or ii) waived the privilege that would be created if she did seek counseling, Defendant has a right to have the Court complete an *in-camera* review of all K.B.'s records, if they exist.
7. K.B. has a right to privacy, but her rights must yield to Defendant's constitutional rights.
8. Defendant has the right to discover the names and addresses of any counselors, therapists, or doctors seen by K.B. after the rape in this case, if any exist.

Due to the Court's determination that the treatment records, if they exist, must be produced, the parties agreed that in lieu of having K.B. testify as to which mental health treatment providers, counselors, or therapists she may have consulted with since August of 2016, the State would assist her in preparing an affidavit for submission to the Court. The parties also agreed to a framework for the process of obtaining and disclosing those records, if any exist, to the Court for its *in camera* review. As the procedures outlined at the hearing are agreeable to the Court, the Court does hereby:

ORDER that the State shall assist K.B. in preparing an affidavit setting forth which mental health treatment providers, counselors, or therapists she has consulted with since August of 2016, if any; and does

ORDER that if any such treatment, counseling, or therapy was received by K.B., the affidavit will include the name, address, and other pertinent contact information of that person or entity; and does

ORDER that said affidavit may be filed under seal with the Court, but that a copy thereof shall be served upon defense counsel; and does

ORDER that if any such persons or entities are identified by K.B., that the State shall subpoena the records of such treatment, counseling, or therapy; and does

ORDER that copies of these subpoenas shall be served upon defense counsel; and does

ORDER that the State shall direct the subject of the subpoena to provide the records directly to the Court for its in camera review, but that the cost of the production of such records shall be paid by the State, subject to later re-allocation of costs if the Court so determines that to be appropriate.

BY THE COURT:

Denied: 03/09/2023
/s/ Giles, Chris
Circuit Court Judge

ATTEST:

_____
Clerk of Courts
BY:

_____
Deputy

(SEAL)

STATE OF SOUTH DAKOTA : SS	)	IN CIRCUIT COURT
COUNTY OF BRULE	)	FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA Plaintiff,	)	07 CRI. 22-32
vs.	)	STATE'S OBJECTION TO DEFENDANT'S ORDER REGARDING TREATMENT RECORDS AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
NATHAN M. ANTUNA, Defendant.	)	

COMES NOW the State of South Dakota, by and through its attorneys, Nolan Welker and Chelsea Wenzel, Assistant Attorneys General, and hereby objects to the Defendant's proposed Order Regarding Treatment Records Procedure and submits the following proposed Findings of Fact, Conclusions of Law regarding K.B.'s counseling records:

PROCEDURAL HISTORY

The Defendant filed a motion, on July 19, 2022, requesting an order from the Court compelling the State to 1) disclose all reports related to K.B.'s mental condition between August 2, 2016 and present relating to the alleged rape; 2) obtain from K.B. the names of all counselors, therapists, or other mental health treatment providers that documented any mental health services she may have received since the alleged rape; and 3) that the State obtain all records from the providers K.B. identified and to release those records to defense counsel subject to a protective order. The Defendant claimed he was entitled to such information pursuant to SDCL 23A-13-3 and 23A-13-4.

The State objected to the Defendant's motion on August 17, 2022. The State maintained that Defendant failed to establish a right to pretrial discovery

of K.B.'s mental health records; K.B.'s mental health records were privileged, and the Defendant failed to set forth an applicable exception or waiver; and that the appropriate mechanism for obtaining the records was by subpoena, and the Defendant failed to meet the *Nixon* test for issuance of a subpoena. The State further requested a weighing of K.B.'s constitutional rights under Marsy's Law.

The Defendant replied to the State's objections on August 25, 2022. He argued the State has a duty, under SDCL 23A-13-4, to exercise due diligence in procuring K.B.'s mental health records. The Defendant further replied that K.B.'s privilege was statutorily waived pursuant to SDCL 19-2-3.2.

Following a hearing on September 21, 2022, the Court ordered the State to ask K.B. whether she received mental health services subsequent to August 2, 2016, and to ascertain any treatment providers; attempt to obtain K.B.'s mental health records with her assistance; and then to provide those records to the Court for an in camera review. If K.B. refused to cooperate or objected, the State was instructed to notify the Court.

The State notified the Court on November 29, 2022, that K.B. intended to assert her rights and privileges. On behalf of K.B., the State asserted 1) the Court lacked personal jurisdiction over K.B. to compel her to disclose any mental health information; 2) any mental health records were privileged; and 3) that K.B. was exercising her constitutional rights under Marsy's Law, which included the right to due process, right to privacy, and the right to prevent disclosure of confidential or privileged information.

Following the State's briefing, the Defendant issued a Subpoena Duces Tecum, on January 8, 2023, to K.B. for production of all mental health information subsequent to August 2, 2016 that relate to the alleged rape and a list of all medical providers she has seen regarding the alleged rape.[1] The Defendant demanded these materials be sent directly to his office.

The State moved to quash the Defendant's subpoena on January 20, 2023. The State argued that Defendant failed to meet the *Nixon* standard for issuance of a subpoena. The State further maintained that any mental health information was privileged, and that privilege had not been waived.

The Defendant responded to the State's motion to quash asserting he had only filed the subpoena to place himself in the same procedural position as the defendant in *State v. Karlen*. 1999 S.D. 12, 589 N.W.2d 594.

The Court held a hearing on the matter on February 16, 2023. The Court having considered the arguments of counsel, and the record herein, and being fully advised in the premises, now therefore enters the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On August 2, 2016, at approximately 7:30 p.m., K.B. met a girlfriend for drinks at a Chamberlain bar. While they were there, they met a group of men who were in town working on a construction crew. K.B.'s girlfriend

1. The Defendant filed a response to the State's Notice of K.B.'s Rights on January 4, 2023. However, because the Defendant served the subpoena duces tecum, the State's concerns regarding the Court's personal jurisdiction over K.B. and procedural due process were alleviated.

left the bar at approximately 11:30 p.m., and K.B. remained at the bar with the men.

2. On August 3, 2016, K.B. awoke at home in her bed. She had no memory of how she had gotten home. She recalled going to the bar the evening before, drinking two margaritas with her friend, and meeting the men from the construction crew—but nothing after that.

3. K.B. felt like her brain was "foggy." She was unable to do simple tasks and struggled processing conversations with her mother. She did not know where her car was, and she was missing her purse and phone. K.B. "did not think she had sexual intercourse but was not sure."

4. K.B.'s family took her to the hospital emergency room. When she was there, hospital personnel completed a sexual assault examination and took blood and urine samples to determine whether K.B. had been drugged.

5. On August 3, 2016, law enforcement interviewed the men from the construction crew. During the Defendant's interview, he admitted to drinking with K.B. at the bar. He alleged that K.B. drove him and his co-workers back to a motel where she dropped them off without coming inside. The Defendant expressly denied having sex with K.B.

6. The materials from K.B.'s sexual assault examination were sent to the South Dakota Forensic Laboratory for testing. K.B.'s vaginal swabs tested positive for the presence of sperm. Law enforcement procured a search warrant for a known sample of the Defendant's DNA. The Defendant's

known DNA sample was consistent with the sperm found on K.B.'s vaginal swabs.

7. The State filed an Indictment against the Defendant on February 27, 2022, alleging one count of Third-Degree Rape.

8. The Defendant filed a motion for K.B.'s mental health records, if any. The procedural history of the same is set forth above. The Defendant maintains that production of K.B.'s mental health records is required under the discovery statutes.

9. The State asserts K.B.'s mental health records, if any, are not within the possession, custody, or control of the prosecuting attorney.

10. The State further asserts the existence of any mental health records is unknown, and the existence may not become known by the exercise of due diligence on the part of the State considering K.B.'s assertion of certain rights and privileges.

11. K.B. is not a party to this case. The State and K.B. are not synonymous. K.B. can assert privilege and refuse to disclose the existence of any mental health records to both the State and the Defendant.

12. The Defendant served K.B. with a subpoena duces tecum on January 8, 2023.

13. At no point in the briefing, at the hearing on September 21, 2022, nor at the hearing on February 16, 2023, did the Defendant provide argument or evidence regarding the *Nixon* standard for issuance of a subpoena. The Defendant simply contends the *Nixon* standard does not apply.

14. The Defendant asserts that, instead, *State v. Karlen* is controlling as to why he is entitled to K.B.'s mental health records, if any.

CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a Conclusion of Law shall be appropriately incorporated in these Conclusions of Law, and vice versa.
2. This Court has jurisdiction over the parties to and the subject matter of this action.
3. SDCL 23A-13-4 provides:

> Upon written request of a defendant, the prosecuting attorney shall permit a defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, *which are within the possession, custody, or control of the prosecuting attorney*, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney, and which are material to the preparation of the defense or are intended for use by a prosecuting attorney as evidence in chief at the trial.

(Emphasis added).

4. The discovery rules contained in SDCL chapt. 23A-13 deal "with documents and other materials that are in the possession of the Government and provides how they may be made available to the defendant for his information." *Milstead v. Johnson*, 2016 S.D. 56, ¶ 17, 883 N.W.2d 725, 732 (quoting *Bowman Dairy Co. v. United States*, 341 U.S. 214, 217, 71 S. Ct. 675, 677, 95 L. Ed. 879 (1951)).
5. "[I]t is not the [S]tate's duty to conduct a discovery examination for a defendant." *State v. Erickson*, 525 N.W.2d 703, 710 (S.D. 1994).

6. "*Brady* clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess." *Id.* (quoting *U.S. v. Beaver*, 524 F.2d 963, 966 (5th Cir.1975), *cert. denied*, 425 U.S. 905, 96 S. Ct. 1498, 47 L. Ed. 2d 756).

7. Even if the Court were to compel the State to obtain K.B.'s medical records solely under the discovery statutes, the Court and the State have not acquired the necessary personal jurisdiction over K.B. to compel her to produce the information. It is well settled that courts do not have jurisdiction to direct orders upon non-parties. *See, e.g., Spiska Eng'g, Inc. v. SPM Thermo-Shield, Inc.*, 2011 S.D. 23, ¶ 8, 798 N.W.2d 683, 686; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110, 89 S. Ct. 1562, 1569, 23 L. Ed. 2d 129 (1969).

8. Further, requiring disclosure of K.B.'s mental health records, if any, solely under the discovery statutes without granting K.B. notice and an opportunity to be heard would violate her constitutional right to procedural due process. A crime victim has a constitutional "right to due process." S.D. Const. Art. VI, § 29(1).

9. The appropriate method for obtaining mental health records from a third party is via subpoena.

10. The subpoena process "provides a method for the defendant to subpoena such documents and materials for his or her personal use if they are not put into evidence by the government." *Milstead*, 2016 S.D. 56, ¶ 17, 883 N.W.2d 725, 732–33.

11. The subpoena process also protects the crime victim's constitutional right to due process and provides an avenue for notice and opportunity to be heard.

12. A party compelling information via subpoena must "establish that the desired evidence is (1) relevant, (2) admissible, and (3) requested with adequate specificity." *Milstead*, 2016 S.D. 56, ¶ 20, 883 N.W.2d 725, 734.

13. The Defendant is the requesting party in this matter and has failed to make such a showing as to any one of these requirements.

14. Under the relevancy prong, a defendant must "establish a factual predicate showing that it is reasonably likely that the requested file will bear information both relevant and material to his defense." *Milstead*, 2016 S.D. 56, ¶ 25, 883 N.W.2d 725, 735. The Defendant has failed to establish any factual predicate in this matter. Indeed, the Defendant has asserted he doesn't even know if any mental health records exist.

15. Regarding the specificity prong, "[i]f the moving party cannot reasonably specify the information contained or believed to be contained in the documents sought but merely hopes that something useful will turn up, this is a sure sign that the subpoena is being misused." *Milstead*, 2016 S.D. 56, ¶ 28, 883 N.W.2d 725, 736 (quoting *United States v. Noriega*, 764 F. Supp. 1480, 1493 (S.D.Fla.1991)). Again, the Defendant has no knowledge of any mental health records. He has simply requested the records in the hopes that something useful will turn up.

16. The final prong requires an examination of admissibility. Because the first two prongs have not been met, an analysis of admissibility is not required.

17. The South Dakota Supreme Court has found the *Milstead* case instructive in subsequent cases involving pretrial discovery of statutorily privileged information. *Ferguson v. Thaemert*, 2020 S.D. 69, ¶ 18, 952 N.W.2d 277, 282.

18. In *Ferguson*, the Court concluded that "[o]ther than attacking Dr. Thaemert's credibility, Ferguson has not identified a specific use for the records other than a cursory explanation that there could be something helpful in the records. Allowing a fishing expedition through confidential non-party patient records cannot be permitted where there has not been a sufficient showing that they are reasonably likely to contain or lead to evidence relevant to the issues of the case." *Ferguson*, 2020 S.D. 69, ¶ 19, 952 N.W.2d 277, 283.

19. Indeed, "[a] request to forage through [non-parties'] medical records in the hope of finding some possible basis for impeachment is not a proper basis to allow discovery of the medical records in this case. Without a showing of relevance, the non-party patient records are not discoverable under SDCL 15-6-26(b). The circuit court violated that statute in granting Ferguson's motion to compel and thus abused its discretion by making 'a choice outside the range of permissible choices.'" *Ferguson*, 2020 S.D. 69, ¶ 22, 952 N.W.2d 277, 283.

20. The Defendant contends that *State v. Karlen*, 1999 S.D. 12, 589 N.W.2d 594, grants the right to pretrial discovery in this matter.

21. *Karlen* predated *Milstead v. Johnson*, 2016 S.D. 56, ¶ 20, 883 N.W.2d 725, 734, wherein the South Dakota Supreme Court subsequently adopted the *Nixon* standard to evaluate whether a subpoena should be granted in a criminal matter.

22. In *Karlen*, the Court distinguished between general attacks on credibility and cross-examination "directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Id.* ¶ 44, 589 N.W.2d at 604.

23. The *Karlen* Court determined that the defendant's request for the victim's counseling records was more than a generalized attack on credibility because there was "no dispute that [the victim] has given several different renditions as to what occurred and that he was under the strong influence of alcohol and drugs at the time the incidents allegedly took place."[2] *Id.*

24. Even if *Karlen* were the only applicable case, the Defendant in this matter has failed to make such a specialized showing. K.B. has not given inconsistent statements in this matter.

25. Moreover, *Karlen* is distinguishable factually in that there was not any DNA evidence. In that case, it was a he-said/she-said and the credibility

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2. In *Milstead v. Johnson*, 2016 S.D. 56, ¶ 14, 883 N.W.2d 725, 731, the Court refers to this standard in *Karlen* as a specialized showing.

of the alleged victim was key. Here, there is DNA evidence. And K.B.'s credibility is not key in this case. In fact, K.B. admittedly has no memory of the night beyond drinking at the bar.

26. *Karlen* is further distinguishable procedurally. *Karlen* dealt with the right to confront witnesses at trial, whereas the Defendant in this matter is asserting a pretrial statutory right to discovery.[3]

27. Although instructive, *Karlen* is not dispositive of the pretrial discovery issue presented to this Court.

28. Because the Defendant has failed to meet his burden under the *Nixon* standard for the issuance of a subpoena, the Court does not reach the privilege issue asserted by K.B.

BY THE COURT:

Denied: 03/15/2023
/s/ Giles, Chris

Honorable Chris Giles
Circuit Court Judge

3. In *Milstead*, the Court noted in *Karlen* it "did not discuss the parameters for discovery of documents under SDCL 23A–14–5 (Rule 17(c)) as the issue was not raised." 2016 S.D. 56, ¶ 15, 883 N.W.2d 725, 732.

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF BRULE)		OF THE FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	07 CRI 22-32
	)	ORDER REGARDING
vs.	)	TREATMENT RECORDS PROCEDURE
NATHAN ANTUNA, Defendant.	)	

A hearing was held on February 16, 2023, on various matters related to K.B.'s treatment records. The parties agreed that in lieu of having K.B. testify as to which mental health treatment providers, counselors, or therapists she has consulted with since August of 2016, the State would assist her in preparing an affidavit for submission to the Court. The parties also agreed to a framework for the process of obtaining and disclosing those records, if any exist, to the Court for its *in camera* review. As the procedures outlined at the hearing are agreeable to the Court and strike a balance between K.B.'s privacy interests and Mr. Antuna's confrontation, due process, and discovery rights, the Court does hereby:

ORDER that the State shall assist K.B. in preparing an affidavit setting forth which mental health treatment providers, counselors, or therapists she has consulted with since August of 2016, if any; and does

ORDER that if any such treatment, counseling, or therapy was received by K.B., the affidavit will include the name, address, and other pertinent contact

information of that person or entity; and does

ORDER that said affidavit may be filed under seal with the Court, but that a copy thereof shall be served upon defense counsel; and does

ORDER that if any such persons or entities are identified by K.B., that the State shall subpoena the records of such treatment, counseling, or therapy; and does

ORDER that copies of these subpoenas shall be served upon defense counsel; and does

ORDER that the State shall direct the subject of the subpoena to provide the records directly to the Court for its *in camera* review, but that the cost of producing such records shall be paid by the State, subject to later re-allocation of costs if the Court so determines that to be appropriate.

Attest:
Miller, Charlene
Clerk/Deputy

BY THE COURT:
3/9/2023 4:59:36 PM

Chris S. Giles

Honorable Chris Giles
Circuit Court Judge

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF BRULE)		OF THE FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	07 CRI 22-32
Plaintiff,	)	
	)	ORDER REGARDING
vs.	)	DEFENDANT'S MOTION FOR
	)	COMPLAINING WITNESS'S
NATHAN ANTUNA,	)	TREATMENT RECORDS
Defendant.	)	

Defendant's Motion for Complaining Witness's Treatment Records came before the Court on September 20, 2022. Defendant Antuna appeared personally and through counsel, John R. Murphy. The State appeared through Assistant Attorney General Amanda Miiller. After considering the written submissions of counsel and the arguments presented at hearing, the Court does hereby:

ORDER that the State shall disclose documents and reports contained within, or which relate thereto, the "rape kit" performed and obtained from the complaining witness, K.B., on or about August 3, 2016. The parties shall endeavor to reach an agreement as to a stipulated protective order in regard to limiting the use and dissemination of these records; and does

ORDER that the State shall disclose all toxicology or pharmacology reports relating to the urine and blood samples taken from K.B. on or about August 3rd or 4th, 2016. The parties shall endeavor to reach an agreement as to a stipulated protective order in regard to limiting the use and dissemination of these records;

and does

ORDER that the State shall disclose all medical reports related to K.B.'s physical and/or mental condition between August 2, 2016, and the present, that relate to the allegations made in this criminal case. The parties shall endeavor to reach an agreement as to a stipulated protective order in regard to limiting the use and dissemination of these records; and does

ORDER that in regard to Defendant's request for access to K.B.'s mental health, counseling, or treatment records, the State shall: (1) make inquiries with K.B. as to whether she has received any mental health, counseling, or treatment since August 2, 2016, and ascertain where or from whom such services were provided; (2) attempt to obtain these records from the providers with K.B.'s assistance; (3) if such records are received by the State, for the State to provide them to the Court for its *in camera* review; and, (4) if K.B. refuses to cooperate with the State or objects to the disclosure of the records to the Court, for the State to notify the Court so that further proceedings may be considered.

9/26/2022 3:43:41 PM

Attest:
Miller, Charlene
Clerk/Deputy

BY THE COURT:

Circuit Court Judge

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL # 30327

STATE OF SOUTH DAKOTA,
Plaintiff and Petitioner,

v.

NATHAN ANTUNA,
Defendant and Respondent.

INTERMEDIATE APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
BRULE COUNTY, SOUTH DAKOTA

THE HONORABLE CHRIS S. GILES

APPELLEE'S BRIEF

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State of South Dakota

ORDER GRANTING PETITION FOR INTERMEDIATE APPEAL
FILED JUNE 5, 2023

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I. PRELIMINARY STATEMENT

In this brief, Defendant/Respondent is referred to as "Antuna," the Plaintiff/Petitioner as "the State," and the complaining witness as "K.B." The State's brief is cited as "SB." The following abbreviations are used:

App.	Appendix
SR	Settled Record, Brule County File 07CRI22-32
ARR	Arraignment Transcript (June 21, 2022)
MH1	Motions Hearing (September 21, 2022)
MH2	Motions Hearing (February 16, 2023)

II. JURISDICTIONAL STATEMENT

This Court does not have jurisdiction to consider this appeal.[1] The State failed to file its petition for intermediate review within the ten day time frame in SDCL 15-26A-13. Thus, the Court does not have jurisdiction to consider it. *State v. Mulligan*, 2005 S.D. 50, ¶ 5, 696 N.W.2d 167, 169.

III. STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to consider the State's Petition?

   Canton Concrete Prod. Corp. v. Alder, 273 N.W.2d 120 (S.D. 1978)
   State v. Mulligan, 2005 S.D. 50, 696 N.W.2d 167
   State v. Sharpfish, 2018 S.D. 63, 917 N.W.2d 21
   State v. Waters,, 472 N.W.2d 524 (S.D. 1991)

2. Whether the trial court abused its discretion when it issued two orders regarding procedures for review of mental health records?

   State v. Collier, 381 N.W.2d 269 (1986)
   State v. Karlen, 1999 S.D. 12, 589 N.W.2d 594
   United States v. Bagley, 473 U.S. 667 (1984)

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[1] On June 5, 2023, this Court issued its Order mandating "that each party shall brief upon the jurisdictional issue raised in Respondent's motion to dismiss in addition to the issue raised in the original petition." Order p. 1.

IV. STATEMENT OF FACTS

A. Facts Related to Jurisdiction Issue:

The State has been represented by four attorneys in this case: Theresa Rossow, Brule County State's Attorney; and, Amanda Miiller, Chelsea Wenzel, and Nolan Welker, Assistant Attorney Generals. On the date the First Order was issued, September 26, 2022, Rossow, Welker, and Miiller were the attorneys-of-record, appeared at hearings, filed pleadings, and/or received service through the UJS System. *See* ARR 1; MH 1; App. 1-2 (UJS August 11, 2023, Email)[2].

Beginning in February of 2023, Wenzel appeared in Miiller's stead. She appeared at hearings, filed pleadings, was listed as an attorney-of-record, and received notifications through the UJS Attorney Notification Service. MH 2; App. 1, 3, 5, 9[3]. On the date the Second Order was filed, March 9, 2023, all four attorneys were listed as "Service Contacts" for the case. App. 3; App. 5.

1. September 26, 2022 Order:

On July 19, 2022, Antuna moved for disclosure of K.B.'s counseling records, SR 24; the State objected on August 17, 2022, SR 35; Antuna replied on August 25, 2022, SR 61, 80; and, a hearing was held on September 21, 2022. At the hearing, the trial court ordered the State to ask K.B. whether records existed. MH1 52-53. If so, the trial court

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2 This email is not part of the record. It was solicited by counsel after the State filed its Petition. Antuna asks that judicial notice be taken of it, and other UJS records referenced herein. If the Court will not take judicial notice of these items, remand for development of the record is requested.

3 Appendix documents 3, 5, and 9 are UJS documents. *See* note 2, *supra.*

would review the records *in camera,* determine relevancy, and issue a protective order if records were to be released. MH1 53-55.

This procedure was memorialized in the First Order, which was signed, dated, attested, and filed on September 26, 2022. SR 94, App. 7. The Order was entered in to the UJS's "eCourts" system on that date. App. 9. The State received notice of the entry of the Order in multiple ways:

First, on September 29, 2022, Antuna sent Miiller, by United States Mail, a copy of the court's signed Order. App. 15.[4] The State has admitted receipt by mail of the First Order. State's Response to Motion to Dismiss, Appendix (May 11, 2023). It was placed in the Attorney General's Office's file on October 3, 2022.[5] App. 16.

Second, on September 27, 2022, Miiller was notified by email that the First Order had been filed. App. 14. On that date, Antuna's counsel forwarded to Miiller the UJS's Attorney Notification Service notice of filing of the First Order. App. 14. The subject line of the email was "Notification of Events Filed." App. 13-14. In the email, Antuna asked Miiller, "now that you have the orders," if he needed to do anything to assist in compliance. App. 14. She responded, "We should be good." App. 13.

Third, the State admitted knowledge of the First Order in court. At a hearing on February 16, 2023, Wenzel stated, "So, currently there is an order directing the State to

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4 This letter was filed by the State it its response to Antuna's motion to dismiss its petition for discretionary review.

5 The State has tacitly conceded that this constituted notice of entry of the First Order. SB 34 ("Assuming that this letter and attached order would constitute notice of entry of the order . . .").

find all medical reports related to K.B.'s physical and mental condition; also to converse with K.B. to find whether she has sought any mental health counseling and attempt to obtain the records if she has." MH2 4. The only Order with those conditions in effect at that time was the First Order. By this statement, Wenzel acknowledged she had notice of the First Order and its terms.

Fourth, the State received notice from the UJS Attorney Notification Service. In its Brief, the state noted that "[t]he trial court signed, attested, and *filed* its corresponding Order Regarding Defendant's Motion for Complaining Witness's Treatment Records on September 26, 2022." SB 5 (emphasis added). Parties with accounts in the UJS Attorney Notification Service receive electronic notice when orders are filed. App. 1. At that time, Miiller and Rossow had accounts and received notifications through the UJS Attorney Notification Service. App. 1. The notice would be the same as sent to Antuna. App. 12. It is the same notice Antuna Forwarded to Miiller on September 27, 2022. App. 13.

The State's petition for discretionary review of the First Order was filed April 28, 2023: 214 days after the State received notification of the filing through the UJS Attorney Notification Service (September 26, 2022); 213 days after Antuna emailed the notice to Miiller (September 27, 2022); 211 days after Antuna sent Miiller a copy by U.S. Mail (September 29, 2022); 207 days after the Miiller acknowledged receiving the Order (October 3, 2022); 207 days after Antuna's letter and copy of the Order were received by the Attorney General's Office (October 3, 2022); and, 71 days after Wenzel stated in court that she had notice of the First Order (February 16, 2023).

2. March 9, 2023 Order:

On November 29, 2022, the State filed its Notice of K.B.'s Assertion of Rights and Privileges, SR 100; Antuna responded on January 4, 2023, SR 106; Antuna filed a subpoena duces tecum on K.B. on January 20, 2023, SR 144; and, the State moved to quash that subpoena on February 2, 2023, SR 147. A hearing was held on February 16, 2023. MH2.

At the hearing, the trial court did not directly address the subpoena or motion to quash. Instead, it tried to formulate procedures for finding out whether K.B. had sought counseling and, if so, whether records existed. MH2 28-31.

Antuna was asked to prepare an Order consistent with the trial court's ruling, and to have it reviewed by the State prior to filing. MH2 37. The State did not agree with Antuna's proposed Order, so each party submitted proposed orders to the trial court. App. 17-19.

On March 7, 2023, the trial court told the parties that it had reviewed both proposed Orders, and that it was signing Antuna's and rejecting the State's (because it contained unnecessary information). App. 17-19. On March 9, 2023, Antuna served the State with his proposed Order through the UJS's notification service. App. 20. That day, the trial court signed, attested, and filed it. SR 167, SR 21-22; App. 10.

The State received notice of the entry of the Second Order in multiple ways:

First, the State doesn't dispute that "[t]he trial court signed, attested, and filed its corresponding Order Regarding Treatment Records Procedure on March 9, 2023." SB 6. According to the UJS, Rossow, Wenzel, and Miiller had emails processed to them from

the UJS Attorney Notification System notifying them that the Order had been filed. App. 1 ("These 3 attorneys had an email processed to be sent to them for the Orders filed on 3/9/23 and 9/26/22."). Antuna received the same notice, App. 23, which clearly states the title of the Order and that it had been filed.[6] Thus, Miiller, Wenzel, and Rossow received notice of filing from the UJS on March 10, 2023. App. 1; App. 23.

Second, on the date the Second Order was filed, March 9, 2023, Welker, Rossow, and Wenzel were listed as attorneys-of-record and service contacts in this file. App. 1, 3, 5, 9. On November 17, 2022, the South Dakota Supreme Court issued SD Order 0014 (C.O. 0014), which amended SDCL 15-6-5(b). Those amendments became effective January 1, 2023. One amendment states, "Unless otherwise ordered by the court, all documents filed with the court electronically through the Odyssey system or served electronically through the Odyssey system are presumed served upon all attorneys of record at the time of submission." SDCL 15-6-5(b)(2). Thus, all attorneys-of-record in the case were presumptively served on the date the Second Order was filed in the eCourts system by the UJS.

Third, the State had tacitly admitted that it had notice of the Second Order. In response to the Second Order, the State filed its Objection to Defendant's Order Regarding Treatment Records and Proposed Findings of Fact and Conclusions of Law on March 15, 2023. SR 169. The State couldn't file an objection to an Order of which it

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[6] The UJS Notification is dated March 10, 2023. The Second Order was filed at 4:59 p.m. on March 9, 2023. App. 22. Because documents are reviewed by the UJS before being entered, *see infra*, this would explain why notices were not sent out until March 10, 2023. App. 22.

had no notice.

The State filed its Petition on April 28, 2023, 50 days after the Second Order was filed in the eCourts system and presumptive service occurred (March 9, 2023); 50 days after an email was processed to Rossow and Wenzel by the UJS (March 9, 2023); 49 days after the automated Notice of Events Filed was sent by the UJS Attorney Notification Service (March 10, 2023); and, 45 days after the State filed its objection to the Second Order (March 15, 2023).

3. Facts Related to the Attorney Affidavits:

In response to Antuna's motion to dismiss the State's petition, the State submitted affidavits from two attorneys involved in this case. In regard to those affidavits, Antuna submits the following facts:

First, there is no affidavit from either Rossow or Miiller. Rossow has been listed as an attorney-of-record from the beginning of the case and appears on every register of actions, clerk's index, and UJS notice. She received notice of the filing of the First and Second Orders. App. 1. And, by statute, she was presumptively served with the Second Order. Miiller was listed as an attorney-of-record beginning in March of 2022, is a subscriber to the UJS Attorney Notification Service, and had notifications sent to her for the filing of both Orders. App. 1. Both Miiller and Rossow are listed *by the State* as a Service Contacts in this case. App. 3, 5. The State, as petitioner, has the burden of proving that it filed its petition in a timely manner and that the Court has jurisdiction to consider its case. Yet, neither Rossow nor Miiller has submitted affidavits denying notice of entry of the orders.

Second, the affidavits are surgical in their use of terms. In each affidavit, the attorneys state that they did not receive "notification from Odyssey file and serve related to the court's *entry* of the" March 9, 2023 Order. They do not deny that the State received notice of the *filing* of both Orders. The UJS System notifies parties of various events. Entry of an Order is not one of those events. Filing is, however, one of the events which parties are notified of. *See e.g.* App. 3, 5, 12, 20, 23. As discussed below, in the electronic filing system, filing and entry are the same thing. The State does not dispute that it received notice of filing of the Orders.

Third, both attorneys state that they did not find an e-mail "from the circuit court, clerk of courts, or defense counsel notifying me that the Second Order was entered." The attorneys are careful not to state that they didn't get notification of the filing of the Order. As set forth above, Rossow, Miiller, and Wenzel received notice through the UJS Attorney Notification Service. App. 1.

B. Facts Related to the Trial Court's Orders:

At the first hearing, the trial court *sua sponte* stated it was going to ensure that K.B.'s mental health records, if any existed, were subject to procedures to protect K.B.'s privacy, including *in camera* review and the issuance of protection orders. ARR 13-15.[7] And, the court cautioned that defense counsel might never see the records: "I have had a lot of cases where I don't disclose." ARR 15. The court felt these procedures were in compliance with *State v. Karlen,* 1999 S.D. 12, 589 N.W.2d 594. ARR 15.

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[7] Antuna was arraigned by the Honorable Bruce Anderson. Judge Anderson recused himself after the arraignment. Since then, the Honorable Chris S. Giles has presided over the case.

At the first motions hearing, the matter was addressed again. Antuna affirmed that he had no objection to *in camera* review and disclosure pursuant to a protective order as the court had done in previous, similar cases. MH1 49. The State objected to disclosure of the witness's counseling records. MH1 14.

Based on the State's objection, the trial court tried to fashion a remedy that protected K.B.'s privacy and Antuna's right to a fair trail. Relying on *Karlen,* the trial court directed the State to ask K.B. whether any records existed. MH1 52. If none existed, the issue was moot. MH1 52. If records existed, then the trial court planned to have the State obtain them and provide them to the court for *in camera* review. MH1 53. If the court determined that relevant material existed, a protective order would be issued. MH1 53. Because K.B.'s position on the matter was unknown, the court said it would re-address the matter if K.B. objected to the process. MH1 53. The court noted that it intended to protect K.B.'s right to privacy, and balance that with Antuna's right to access to exculpatory and impeachment evidence. MH1 53-54.

The court's procedures were memorialized in the First Order, signed, attested, and filed electronically by the court on September 26, 2022. SR 94, App. 7. That Order set forth the following procedures: (1) the State would ask K.B. if she received mental health counseling after the date of the allegation; (2) if so, the State would attempt to obtain the records; (3) if records were obtained, the State would provide them to the court; but, (4) if K.B. objected to the process, the State would notify the court so that further proceedings could be considered. SR 94, App. 7.

The State did not file an objection to the First Order or seek intermediate review. Instead, the State complied by notifying the court that K.B. objected. SR 100, App. 28.[8] In response, Antuna filed a subpoena duces tecum and admission of service by K.B. in which he asked her to provide records directly to him. SR 144. The State filed a Motion to Quash. SR 147.

Pursuant to the fourth term in the First Order, the trial court scheduled a hearing in light of K.B.'s objection. At that hearing (February 16, 2023), the court reiterated that it intended to proceed in a way that protected K.B.'s privacy and the confidentiality of the records. MH2 26. However, the court noted some specifics about the case that warranted special consideration. The alleged rape occurred in 2016, but Antuna was not charged until 2022. MH2 26. The court had been advised that, during this six year gap, the police had lost numerous recorded interviews with witnesses, and that Antuna had given conflicting information as to what investigation had occurred. MH1 7, 31-32, MH2 38-39.[9]

In the process of formulating procedures to protect K.B.'s privacy while also permitting court access to the records, the court acknowledged the importance of Marsy's law, re-asserted that all review would be *in camera*, re-iterated that no decision had been made that Antuna would have access to anything, and re-affirmed that "the only thing that would be discoverable would be if the victim recanted the allegations or provided

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8 The document is drafted as an assertion of rights by K.B., but it is signed by Miiller, not K.B. K.B. has never directly asserted her position on the matter.

9 An entire hearing was held to address the destruction of evidence by the police. Motions Hearing Transcript, April 20, 2023.

statements about the incident which are inconsistent with what she originally provided to law enforcement; essentially, exculpatory evidence." MH2 26-27. K.B.'s mental health conditions "would not be discoverable." MH2 27.

The initial process contemplated by the trial court was to have K.B. testify as to whether she had received counseling, and, if so, by whom. MH2 27. The court made clear that the inquiry would be limited to those two issues. MH2 27. The State interjected and proposed a different process. The State said that if K.B. was ordered to produce the records, she would comply. MH2 29. But, the State wanted procedures put in place to ensure that the process was confidential. MH2 29 ("But if she has seen counselors, keeping them also confidential except for before the Court would be our main concern.").

The trial court agreed with the State, and, in the course of a few minutes, the trial court and the parties worked out a set of procedures for obtaining and reviewing K.B.'s records, if any existed. MH 29-31. The agreement was that K.B. would not have to testify, but instead could submit an affidavit, which would be filed under seal, stating whether she had received any counseling since the incident, and, if so, by whom. MH2 29-30, 35. Further, if records existed, and if the court required those records to be produced, any subpoenas to the service providers would be filed under seal. MH2 35. Not only did the State agree to this process, it offered to "take on the costs of getting" the counseling records to ensure confidentiality. MH2 31-32. The court thanked the parties for being "on the same page" about the use of an affidavit. MH2 37.

As a result of that hearing and the procedures suggested by the parties, the trial court issued the Second Order on March 9, 2023. SR 167, App. 21. The Order noted that the parties had agreed to the framework for obtaining and reviewing records. SR 167, App. 21. The Order specifically outlined those procedures, which included the preparation of the affidavit, the filing thereof under seal, the submission of the documents to the court for its *in camera* review, and the apportionment of costs for the process. SR 67, App. 21.

Rather than comply with the Second Order, the State waited approximately two months, then filed its petition for discretionary review.

V. AUTHORITY AND ARGUMENT

A. The Court Lacks Jurisdiction to Consider the State's Petition:

1. Standard of Review:

Whether the Court has jurisdiction is reviewed *de novo. State v. Anders,* 2009 S.D. 15, ¶ 5, 763 N.W.2d 547, 549.

2. The State had Notice that the Orders were Entered on September 26, 2022, and March 9, 2023, through the Electronic Filing System:

The State has inaccurately described how the electronic document filing and notification system works in South Dakota in order to support its claim that it did not receive notice of either order. The State asserts that there are two distinct electronic filing and notification services: the Odyssey program and the Unified Judicial System's program. SB 37 ("The exhibits attached to Defendant's motion to dismiss show that he received an automated email, from a separate notification system maintained by the South

Dakota Unified Judicial System ('UJS Notification System'), about an 'event' related to the orders at issue."); SB 38 ("service through the UJS Notification system would not have been proper service under SDCL 15-6-5(b))" because that service is not the same as "the filing/service of a document in Odyssey."). This distinction between the UJS Notification System and the Odyssey program is incorrect and immaterial in this case.[10]

The UJS electronic filing system does not contain separate and distinct systems operating independently of one another, as suggested by the State. There is one electronic filing system operating in South Dakota: "the Odyssey file and serve system maintained by the South Dakota Unified Judicial System." SDCL 16-21A-1. The process is largely automated and has been mandatory since 2014.

In regard to court orders, the first step in the process is that the court submits its Order to the clerk of courts through the Odyssey program. SDCL 16-21A-2(2) (criminal court orders issued after July 1, 2014, must be filed in Odyssey). Both of the trial court's Orders in this case were submitted to the clerk of courts through the Odyssey program. App. 9-10 (eCourts register of actions).

The second step is that submitted documents are reviewed by the clerk for compliance. SDCL 16-21A-4(2). If accepted, they are entered in the Odyssey system. SDCL 16-21A-2. In this case, the Second Order must have been accepted as it appears in the register of action in eCourts on March 9, 2023. App. 9-10.

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[10] In addition to the fact that the State received notice of entry of the orders through the UJS process, as discussed in the subsequent sections of this brief, the State also received actual notice of both orders, and it was presumptively served notice of the Second Order.

The third step in the process involves notification when events, such as the filing of orders, occurs. SDCL 16-21A-2. Only registered users of the Odyssey system may file documents in the electronic filing system. SDCL 16-21A-2(1). All registered users of the system must designate an email address for service. SDCL 16-21A-2(1). "Registered users will receive electronic notice when documents are *entered* into the system." SDCL 16-21A-2(3) (emphasis added).[11] The act of registering for electronic filing also "constitutes written consent to electronic service of all documents filed in accordance with these rules and the Rules of Civil Procedure." SDCL 16-21A-2(3).

In this case, it is undisputed that Rossow, Miiller, Wenzel, and Welker, are all registered users of the system.[12] App. 1; App. 24-26. As such, all four had to provide the UJS with a designated email address for service. The two Orders were entered into the system. App. 8, 12, 23. Registered users automatically get "electronic notice when documents are entered into the system." SDCL 16-21A-2(3). Thus, all four attorneys were provided electronic notice that the orders had been entered into the system, and had consented in advance to electronic service thereof.

Further, Rossow, Miiller, and Wenzel were subscribers to the UJS's Attorney Notification Service.[13] App. 1. All three had emails processed to them notifying them that the Orders had been filed. Thus, in addition to notification that the Orders had been

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11 The distinction, or lack thereof, between "filed" and "entered" is discussed below.

12 Miiller, Wenzel and Welker filed pleadings in this case, which they could only do if they were registered users of the system. App. 24-26.

13 It appears that this service permits attorneys to receive notice of events regardless of whether they are the attorneys of record or registered users.

entered (as outlined by SDCL 16-21A-2(3)), Wenzel, Rossow, and Miillller received notice through the Attorney Notification Service.[14]

Additionally, a third layer of electronic notice was provided to the State in regard to the Second Order. The March 9, 2023 Order was presumptively served on Welker, Wenzel, and Rossow by operation of statute. SDCL 15-6-5(b)(2) (as amended effective January 1, 2023). SDCL 15-6-5(b)(2) states: "Unless otherwise ordered by the court, all documents filed with the court electronically through the Odyssey system or served electronically through the Odyssey system are presumed served upon all attorneys of record at the time of submission." SDCL 15-6-5(b)(2). On March 9, 2023, the attorneys-of-record were Rossow, Wenzel, and Welker.[15] As such, all three attorneys were presumptively served with the trial court's Second Order on the date that it was entered into the system.

In regard to the Second Order, the State ignores that, by operation of law, its three attorneys-of-record were presumptively served with the Order on the date it was entered in to the system. This is in addition to the notice they were provided through the Attorney Notification Service, and through the process outlined in SDCL 16-21A-2(3). As such, the time period for filing the petition in regard to the Second Order began no later than March 9, 2023.

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[14] Welker did not subscribe to this service. App. 1.

[15] Miiller never withdrew as counsel and remained a "service contact" but did not appear at court hearings after February of 2023.

The statutory changes in SDCL 15-6-5(b)(2) extend beyond what has been discussed above. It removes the requirement that an attorney be registered with Odyssey to be presumptively served with a document filed in the system. If you are an attorney-of-record in a case, you are presumptively served with all electronic filings therein. It places the burden on the attorney to monitor the electronic filing system and to take heed when electronic notifications are sent.

Another significant feature of this change in the law is that it removes the distinction between filing, entry, and service of documents. As set forth above, when a party files a document, that document is reviewed by the clerk, then entered. Upon entry, pursuant to this statute, that document is also presumptively served on all attorneys-of-record. This merging of functions is reflected in other statutes. *See* SDCL § 16-21A-2(3) (using "entered" and "filed" to describe the same process of accepting a document for electronic filing and providing notice thereof); SDCL 16-21A-4(2) (describing the process of the clerk receiving, scrutinizing, and filing/entering the document in to the system). This seamless process reflects the efficiencies of an electronic filing system.

The State scarcely mentions the impact and import of this statute in regard to the Second Order, or the statutory mechanisms that control the efiling system as it relates to both Orders. Rather, the State argues that regardless of this process, Antuna had an individual duty to re-file, re-notify, and re-serve the trial court's Orders. SB 34-37. In regard to the First Order, the State faults Antuna because *"Defendant* failed to file the order, notice of entry of the order, or sufficient proof of service with the court." SB 34, 36 (emphasis added). In regard to Second Order, the State faults Antuna because

"*Defendant* did not file and serve the signed and entered order through the Odyssey file and serve system, nor did he serve it by electronic mail, first class mail, facsimile, or hand delivery." SB 36-37 (emphasis added).

The issue is not what Antuna did, but whether any of the attorneys-of-record for the State received notice that the Orders had been entered. In regard to the First Order, Antuna provided notice to the State directly through email and U.S. Mail, the electronic filing system automatically notified the State that the Order had been entered, and the Attorney Notification Service provided additional notice. In regard to the Second Order, the electronic filing system filed and entered and presumptively served the Order upon it after the trial court signed, dated, and had it attested, and the Attorney Notification Service provided additional notice to Rossow, Miiller, and Wenzel. App. 1, 23.

The State faults Antuna for failing to "file the order." SB 34, 36, 37. Why would Antuna have to re-file the Orders when both had been filed and entered in the system? The State also faults Antuna for not providing it with notice that the Orders had been entered. SB 34, 36, 37. The electronic filing system provided automatic notice, the Attorney Notification Service provided additional notice, and, in regard to the Second Order, presumptive service had occurred. The State is promoting a process that completely negates the efficiencies created by the UJS's electronic filing system. This is absurd and no construction of the statutes supports this position.

3. The Plain Language of the Statute, Statutory Construction, and Case Law Support Antuna's Position that the State Received Adequate Notice of the Trial Court's Orders to Commence the Ten Day Period for Filing a Petition:

SDCL 15-26A-13 states in pertinent part:

> An appeal from an intermediate order made before trial as prescribed by subdivision 15-26A-3(6) may be sought by filing a petition for permission to appeal, together with proof of service thereof upon all other parties to the action in circuit court, with the clerk of the Supreme Court within ten days after notice of entry of such order.

The statute does not specify who has the responsibility of providing notice that an Order has been entered. The statute does not describe the form or manner by which notice must be received. The statute does not mandate that any particular document be filed in order to provide notice of entry.

Throughout its brief, the State claims that because Antuna didn't file a written notice of entry of order, the 10 day period in the statute never began.[16] The plain language of the statute does not mandate the filing of a written document for notice to have been established. It doesn't even require that the party received the actual order, just notice thereof.

> When conducting statutory interpretation, we determine the intent of a statute from what the Legislature said, rather than what we think it should have said, and must confine ourselves to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and this Court's only function is to declare the meaning of the statute as clearly expressed.

Long v. State, 2017 S.D. 78, ¶ 13, 904 N.W.2d 358, 364 (internal citations and quotations omitted). Nothing in SDCL 15-26A-13 requires the filing of a written notice or proof of service of the notice. And, it doesn't require that the notice comes from the opposing party as opposed to the UJS system.

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[16]SB 29, 31, 33, 34, 35, 36.

If the legislature intended to require the filing of a written notice of entry of order, it would have said so. In other statutes related to appeal time periods, the legislature has expressly stated if a written notice of entry of order is required. SDCL 15-26A-6 ("An appeal from a judgment or order must be taken within thirty days after the judgment or order shall be signed, attested, filed and *written notice of entry* thereof shall have been given to the adverse party.") (emphasis added); SDCL 23A-32-15 (". . . any appeal other than from a judgment must be taken within thirty days after *written notice of the filing of the order* shall have been given to the party appealing.") (emphasis added). No such language exists in SDCL 15-26A-13.

Additionally, requirements should not be added to what the text states; a matter not covered is to be treated as not covered. Scalia & Gardner, Reading Law (2012) p. 93 (discussing the Omitted-Case Canon). The constitutionally defined role of the Court prohibits it from adding language into statutes. *Matter of Est. of Gossman*, 1996 S.D. 124, ¶ 11, 555 N.W.2d 102, 106. If the legislature wanted to require the filing of a written notice of entry of order, it would have said so. *Id.* In this case, the omission of a requirement in the statute that written notice of the entry of an order be served on an opposing party means that no such requirement exists.

In addition to the plain language of the statute that discounts the State's argument that Antuna was required to file a written notice of entry of order, ample case law supports Antuna's position that the 10 day filing period commenced when the State received notice of these orders on September 26, 2022, and March 9, 2023.

State v. Sharpfish, 2018 S.D. 63, ¶¶ 12-13, 917 N.W.2d 21, 23, is relied upon extensively by the State in its Brief. SB 31. That case, and its underlying facts, supports Antuna's position. In *Sharpfish*, the State sought discretionary review of an order suppressing evidence. *Id.* That review was brought pursuant to SDCL 23A-32-5 and 23A-32-12.[17] The Court held that the State received adequate notice of entry of the trial court's order to commence the 10 day time period on the date the judge sent an email to the parties.[18] App. 27. That email advised the parties, "Attached is an uncertified copy of an Order I am filing today." App. 14.

Sharpfish undercuts most of the State's arguments. First, the notice in that case came from the trial court, not the defendant. This contradicts the repeated argument by the State that notice had to come from "the defendant." Second, the Order in question had not even been filed at the time the email was sent. The judge said he was going to file it. That email started the clock. Thus, it belies the notion that Antuna was required to do something more than that which was already done by the trial court, the clerk, and the UJS, to provide notification. Third, because the Order at issue in *Sharpfish* had not been filed at the time the email was sent, it could not have been attested, reviewed by the clerk,

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17 Interestingly, those two statutes both require that a notice of appeal be filed within 10 days of notice of the order being appealed, but each sets forth different requirements as to the form of the notice. SDCL 23A-32-5 references SDCL 23A-32-6, which requires the notice of appeal to be filed within 10 days of *written* notice of entry of the order. SDCL 23A-32-12 references SDCL 15-26A-13, which requires the notice of appeal to be filed within 10 days of notice of entry of the order.

18 The State filed the email in response to Antuna's motion to dismiss.

entered in to the Odyssey system, or subject to the automatic notification processes.[19] Yet, the judge's email was sufficient to commence the 10 day period. In Antuna's case, both of the Orders were signed, dated, filed, attested, reviewed, and entered on their respective dates. Both Orders were subject to the automated notification system through Odyssey, and the additional notification process through the Attorney Notification System; and, the Second Order was subject to the presumptive service statute. The Orders at issue in Antuna's case were at a more advanced stage in the process, and the State received much greater and more varied notice, than in *Sharpfish.*

The State directs the Court to a number of pre-2014 cases to make its argument. These cases support Antuna's position, not the State's. For instance, the State cites to *State v. Waters,*, 472 N.W.2d 524, 525 (S.D. 1991), repeatedly in its Brief, SB 35, 36, 39, for the proposition that Antuna was required to complete a written instrument notifying it that an order had been entered. The State's reliance on *Waters* is misplaced. First, *Waters* construed rules of procedure that have subsequently been repealed and replaced with the electronic service statutes. The statutes in existence now, which were discussed at length, *supra*, take over this process. Second, the focus of *Waters* is to address whether there had been *service* of documents. In this case, it is un-controverted that the State was served the September 26, 2022 Order. The State has admitted receiving Antuna's letter and copy of the Order, and placing them in their file as of October 3, 2022. In regard to the March 9, 2023 Order, it is un-controverted that this Order was entered in to the Odyssey system on that date, that notifications went out to registered users, that the Attorney Notification

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[19] Sharpfish's case was after the 2014 efiling system was put in place.

System sent out notices, and that presumptive service occurred on all attorneys of record pursuant to SDCL 15-6-5(b)(2) by operation of law. Thus, the concern raised in *Waters* – ensuring service – was addressed and accomplished in regard to both Orders in Antuna's case.

The State also relies upon *State v. Mulligan,* 2005 S.D. 50, 696 N.W.2d 167. SB 33. Twice in its Brief, the State cites *Mulligan* for the proposition that Antuna was required to serve the State with "a notice of entry." SB 33 ("for the limitations period to begin, *a* notice of entry must be served on the parties in the action") (the time period began "on the day she was served with *a* notice of entry of the order") (emphasis added). The use of the term "a" by the State suggests that Antuna was required to file a specific document. *Mulligan* doesn't require this. In *Mulligan,* the Court states, "On January 7, 2005, notice of entry of that order was served upon Mulligan by mail." *Id.* at ¶ 2. It doesn't specify whether the defendant received notice in the form of a letter, a copy of the Order thrown in the mail, or by an actual pleading called a notice of entry of order. What is clear is that on a specific date, the defendant learned an Order had been entered, and she failed to file a notice of appeal within 10 days therefrom. That is the operative fact. In this case, the State knew that the trial court's Orders had been entered on September 26, 2022, and March 9/10, 2023, and failed to file a notice of appeal until many weeks or months after the 10 day period had expired.

The State cites to *Kallstrom v. Marshall Beverages, Inc.*, 397 N.W.2d 647, 650 (S.D. 1986), for the proposition that Antuna was required to file a proof of service to begin the 10 day time period. *Kallstom* does not involve a discretionary appeal. It

involves a direct appeal taken under SDCL 15-26A-6. In the decision, the Court emphasized the language in SDCL 15-26A-6 that requires a party to have received *written* notice of the entry of an order. *Id.* at 650. No such requirement exists in SDCL 15-26A-13.

The State cites to *Canton Concrete Prod. Corp. v. Alder*, 273 N.W.2d 120, 122 (S.D. 1978). SB 33. Rather than support the State's position, *Canton* supports Antuna's jurisdictional challenge. In *Canton,* the Court expressly rejected the notion that notice of entry must come from the opposing party: "We find no requirement that the service of the certified copy must be made by the attorney for the prevailing party, particularly where the appellant's counsel admits that he received the certified copy mailed by the clerk." *Id.* at 122. This is opposite to the State's assertion that Antuna had to provide notice, regardless of whether it got notice by other means.

Finally, the State relies upon *State v. Anders,* 2009 S.D. 15, ¶ 4, 763 N.W.2d 547, 549, for the proposition that proper service is required to commence a filing deadline. *Anders* doesn't apply to this case. The statute at issue in *Anders* expressly required the service of a written notice of entry of order, *id.* ¶ *4*; a requirement not included in the statute at issue in this case. And, in *Anders* the alleged notice of entry was sent to the opposing party through an inter-office mail system. Notice of entry was not made through an official, recognized channel such as the United States Mail or the Odyssey/UJS System.

In this case, the State had notice of both Orders long before the State filed its Petition. It received notice of the First Order through an email from counsel (to which it

responded), in a letter from counsel (which it received), from a copy of the signed, dated, and attested order mailed to it by counsel (which it put in its file), through the Odyssey system when registered users were notified of filings, and through the Attorney Notification Service. In regard to the Second Order, the State received notice through the automated notification system that notified the State that the Order had been entered, through the Attorney Notification Service that notified the State that the Order had been filed, and through statutory service of the Order upon the State through the Odyssey system. And, the State's act of filing objections to the Second Order five days after it was filed shows that the State had actual notice thereof.

The State's petition was not filed in a timely manner, and this Court lacks jurisdiction to consider this appeal as a result thereof.

B. The Trial Court's Orders Were Appropriate:

1. Standard of Review:

The State is not appealing the trial court's interpretation of a specific discovery statute, nor its interpretation of a specific constitutional provision. Therefore, the *de novo* standard of review urged by the State, SB 7-8, is in appropriate. The issue in this case is whether the preliminary procedures for ascertaining the existence of records and the *in camera* review thereof were appropriate. As such, the trial court's orders are reviewed for abuse of discretion. *Anderson v. Keller*, 2007 S.D. 89, ¶ 5, 739 N.W.2d 35, 37 (matters related to discovery are reviewed for abuse of discretion).

An abuse of discretion is a fundamental error of judgment, outside the reasonable range of permissible choices, and which is arbitrary or unreasonable. *Coester v. Waubay*

Twp., 2018 S.D. 24, ¶ 7, 909 N.W.2d 709, 711.

2. The Procedures Set Forth in the Two Orders Were Not an Abuse of the Trial Court's Discretion:

Antuna's argument is primarily concerned with the Second Order, because the First Order is moot at this juncture. By its terms (specifically the fourth provision), once K.B objected to the First Order, the remaining terms in the Order were not subject to enforcement. The trial court had pre-determined that the parties would re-convene to address the issue if K.B. objected. After the parties re-convened, the Second Order was issued.

To review the terms of the Second Order, it is essential to understand their origin and context. During the early phase of the case, Antuna was seeking access through the State for K.B.'s counseling records. The State objected. ARR 14-15; MH1 14. In response to the State's objection, the trial court fashioned a compromise which was memorialized in the First Order. Though that Order placed obligations upon the State, it included the caveat (the fourth provision) that if K.B. refused to cooperate or objected to disclosure of the records, further proceedings would be held to consider the matter. SR 94, App. 7. Nothing in this order constituted a fundamental error of judgment outside the reasonable range of permissible choices, and it was neither arbitrary nor unreasonable.

At the second motions hearing, the trial court didn't address the terms of the First Order, Antuna's subpoena duces tecum, or the State's motion to quash. Instead, it tried to address how to ensure that Antuna had meaningful access to relevant information while also protecting K.B.'s privacy. The trial court was adamant that no records would be

disseminated to any party until it had first determined that the records were directly relevant to a material issue in the case.

At the parties's suggestion, and based on recommendations by the State, and based on the representation by the State that K.B. would provide the records if ordered to do so and that the State would bear the costs, the trial court deviated from its initial plan. The result of this discussion was the Second Order. SR 167, App. 21. The Order specifically outlined procedures that were consistent with the discussion among the parties at the hearing, which included the preparation of the affidavit, the filing thereof under seal, the submission of the documents to the court for its *in camera* review, and the apportionment of costs for the process. SR 167, App. 21.

The Second Order represents a reasonable, well-intended approach to address a difficult situation within the context of an atypical case. For reasons still unknown, K.B.'s rape complaint was made in 2016, the investigation was largely completed shortly thereafter, but not prosecuted until 2022. This has disadvantaged Antuna. The trial court was aware that during this six year gap, numerous recordings of interviews with Antuna and his witnesses' had been lost, and that defense counsel was being given different explanations as to what investigative actions had been taken. MH1 7, 31-32, MH2 38-39. In fact, after the Second Order was issued, but before the State filed its Petition, an entire hearing was held to address the destruction or loss of multiple recorded interviews of Antuna and his witnesses by law enforcement. Motion Hearing Transcript, April 20, 2023.

The Second Order does not represent an abuse of discretion. The approach taken by the trial court in the Second Order comports with, and advances the interests identified in, state and federal law relating to these matters, particularly in the context of sexual assault cases. This Court has noted that impeachment evidence is of particular significance in sexual assault prosecutions. *See State v. Karlen,* 1999 S.D. 12, ¶ 44, 589 N.W.2d 594, 602–05 (in a sexual assault case, the accuser's credibility is an issue, and mental health records that may be used to impeach the accuser should be disclosed to the defense). Antuna's right to access to information and to effectively confront his accuser may be denied if he is unable to access the counseling or mental health records of an alleged victim. *See State v. Karlen,* 1999 S.D. 12, ¶¶ 39-46, 589 N.W.2d 594, 602–05 (citing to *Pennsylvania v. Ritchie,* 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40, 53 (1987), and, *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). This is particularly true in sexual assault cases where counseling records may contain different versions of events recounted by the alleged victim. *Id* at ¶ 44 ("This is extremely important in this case, and in any sexual assault case, as this goes to credibility. Credibility was the key issue at trial since the only evidence from which the jury made its determination to convict [the defendant] [is] the credibility of [the accuser's] testimony verses [the defendant's] testimony."). *See United States v. Bagley,* 473 U.S. 667, 676-77 (1984) (when the reliability of a witness may be determinative of guilt or innocense, there is a heightened need for disclosure of evidence that affects credibility); *State v. Collier,* 381 N.W.2d 269, 272 (1986) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. Therefore, the

nondisclosure of evidence affecting the credibility of witnesses also violates due process.").

Procedures exist to protect both the complaining witness's interest in shielding his or her medical, mental health, or counseling records, and the defendant's interest in access to relevant information. Both this Court and the United States Supreme Court have held that "an in camera inspection of all relevant records" is the most appropriate way of handling such matters. *Karlen, supra,* at ¶ 45 (citing *State v. Sprik,* 520 N.W.2d 595, 600 (S.D. 1994), and at ¶ 41, *citing Ritchie, supra,* at 480 U.S. at 56–7).

The trial court's approach, as memorialized in the Second Order, addressed all of these interests and concerns in an appropriate, reasonable manner. It balanced these interests and set forth procedures to minimize inconvenience and ensure confidentiality. There was no abuse of discretion in the way this matter was resolved.

3. The State's *Brady* Argument is Incorrect:

The State argues that the Second Order constitutes an abuse of discretion because it orders the State to obtain K.B.'s counseling records for Antuna, and that this violates the parameters of its *Brady* obligations. SB 8-10. The State argues that, because the State does not possess the records and has no duty to obtain them from a cooperating witness, it has not violated the mandates of *Brady*. SB 8-10.

This is a false construct. The trial court has never suggested that the State had violated its obligations under *Brady v. Maryland,* 373 U.S. 83 (1963). The Second Order was a product of K.B.'s purported assertion of her rights under Marsy's Law, and the trial court's effort to fashion a remedy that protected her interests and Antuna's. Rather than

require K.B. to testify in a limited fashion on a discrete issue, the trial court adopted most of the State's suggestions for proceeding in a manner that advanced the State's "main concern" that confidentiality be maintained. MH2 29-31. These included allowing the State to take the lead on preparing the affidavit, filing it under seal, and arranging for the production of any records. It is disingenuous for the State to now argue that it is improperly being forced to do certain things when the trial court's initial plan didn't obligate the State to do anything, and when the terms of the Second Order came at the urging of the State.

4. The State's Statutory Argument is Misplaced:

The State asserts that the trial court erred because it interpreted Chapter 23A-13 of the South Dakota Code to require the State to use due diligence "to search for and obtain materials from third parties to disclose to the defendant." SB 13. This is not what the trial court ordered.

The trial court's preliminary plan was to seek basic information directly from K.B., specifically, had she gotten counseling since the alleged rape, and, if so, from whom. MH2 27. That was the extent of the information that the court was seeking from K.B. And, more importantly, at that juncture in the hearing, the trial court hadn't said it was going to order the State to do anything. MH 27.

It was only after the State interjected and offered to facilitate the process by creating an affidavit in lieu of testimony and paying for and obtaining the records that the State became involved in the logistics. MH 31-33. Now, the State has turned this sequence of events around and claims to this Court that the trial court used the discovery

statutes to order the State to obtain K.B.'s mental health records from the third parties. SB 13-16. Essentially, the State created the weather pattern that it now complains of.

This is particularly unfair in this case. The trial court could not have been more clear, at every stage in the case, that it was going to conduct all proceedings in such a way as to protect K.B.'s privacy and ensure that Antuna would only get to look at records that contained highly relevant material related to the facts of this case. There was no abuse of discretion.

5. The *Nixon* Test is not Applicable to this Case:

The State urges this court to apply the *Nixon* test to Antuna's subpoena duces tecum. SB 18-28. That argument makes no sense in this case.

Antuna's subpoena duces tecum asked K.B. to disclose *to him* all mental health providers she had seen since August of 2016, and to obtain and provide *to defense counsel* the records from these providers. SR 144. Essentially, Antuna asked for unfettered access to K.B.'s counseling records.

The trial court never endorsed Antuna's subpoena duces tecum or suggested that it would enforce it. In fact, the trial court repeatedly rejected the kind of access requested by Antuna in his subpoena and made it clear that in no circumstance would it grant such relief.[20] The approach outlined by the trial court at the second motion hearing and

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[20] MH2 27 (". . . the only thing that would be discoverable to the defendant, and this would be after an in camera inspection by the Court . . . would be if the victim recanted the allegations or provided statements about the incident which are inconsistent with what she originally provided to law enforcement") (Antuna would have no access to "anything she said in counseling, unless it goes back and relates to this incident and could be considered exculpatory"); MH2 28 ("The Court would diligently protect K.B.'s rights, and as I said, only look at material

memorialized in the Second Order is opposite to what Antuna had requested in his subpoena.

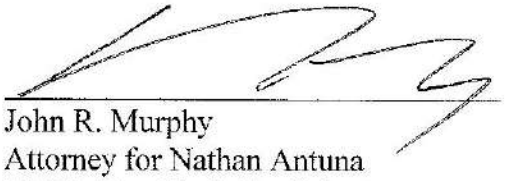
Therefore, the *Nixon* test is irrelevant to this case. There is no issue before this Court about enforcement of a subpoena, or whether it should have been quashed. The trial court's Second Order had the effect of quashing Antuna's subpoena because the relief it authorized was contrary to what Antuna had sought by way of subpoena.

CONCLUSION

This Court lacks jurisdiction to consider this appeal. The appeal should be dismissed. If the Court does not dismiss the appeal, it should find for Antuna because the trial court did not abuse its discretion in issuing either the First or Second Order.

Dated this 20th day of September, 2023.

MURPHY LAW OFFICE, P.C.



John R. Murphy
Attorney for Nathan Antuna
328 E. New York St., Suite 1
Rapid City, SD 57701

---

that's exculpatory that might be relevenant. It's very limited."); MH2 36 ("I don't really want to read K.B.'s counseling records, but I think I have an obligation as the gatekeeper, and the only thing that I'm going to be interested in is, is there anything exculpatory, and that's the only thing I think that would be admissible."); MH2 36 ("Here we are five or six years down the road, and if all of a sudden she remembered more or if she said more, that becomes relevant because she said she didn't remember anything. If she changes her story and tells the counselor it was consensual or something, that's very relevant because it's very exculpatory, but other things she talked to her counselor about and issues she worked on is not necessarily relevant in the Court's mind to this case, and so I would protect those things and just look at what is relevant.").

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, John R. Murphy, counsel for Respondent Nathan Antuna, submits the following:

The forgoing brief is 31 pages in length. It is typed in proportionally spaced 12 point Times New Roman. The left hand margin is 1.5 inches, the right hand margin is 1.0 inches. It contains 9,132 words and 45,060 characters.

Dated September 20th, 2023.

John R. Murphy
328 E. New York St., Ste. 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief was served upon the persons herein next designated, on the date shown below, by electronic filing at the e-mail addresses below, to wit:

atgservice@state.sd.us

Nolan Welker
Chelsea Wenzel
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501
(605) 773-3215

Dated September 20th, 2023.

John R. Murphy

APPENDIX TABLE OF CONTENTS

John Murphy

From: Arnold, Ashley <Ashley.Arnold@ujs.state.sd.us>
Sent: Friday, August 11, 2023 8:27 AM
To: John Murphy
Cc: UJS eSupport
Subject: RE: Identifying parties who participate in UJS Attorney Notification

Good morning Mr. Murphy –

Following up after our phone call on Wednesday afternoon with the information you requested.

The following attorneys have accounts in the Attorney Notifications site (https://ujsattorney.sd.gov), we are unable to see what they have selected for subscriptions but we are able to determine if an email was processed to be sent to them.

These 3 attorneys had an email processed to be sent to them for the Orders filed on 3/9/23 and 9/26/22. Since the emails would have been sent more than 3 months ago, we cannot confirm whether they went through or not.
Theresa Maule Rossow
Chelsea Wenzel
Amanda Miiller

No Account registered so no emails were processed for this attorney and the ATG service email.
Nolan Welker
atgservice@state.sd.us

Thank you,
Ashley Arnold
UJS eSupport

Our offices are open M-F from 7:30am to 5:00pm Central time. Our offices are closed for State Holidays.

From: John Murphy <john@murphylawoffice.org>
Sent: Wednesday, August 9, 2023 1:32 PM
To: UJS eSupport <ujsesupport@ujs.state.sd.us>
Subject: [EXT] Identifying parties who participate in UJS Attorney Notification

Dear Support:

I'm in the midst of an appeal pending before the South Dakota Supreme Court. An issue has arisen as to who received notifications through the Attorney Notification function within our efiling system.

The case at issue is State v. Nathan Antuna, Brule County Case Number 07CRI22-32. The Question is whether the South Dakota Attorney General's Office, the

Brule County State's Attorney's Office, Theresa Rossow, Amanda Miiller, Chelsea Wenzel, or Nolan Welker, are or were parties who received notifications through the UJS system for filings in this case.

Please let me know who I need to talk to about this matter, or how I go about obtaining this information. It is very important as I need to file a response brief in the matter.

Thanks.

John

John R. Murphy
Murphy Law Office, P.C.
328 East New York Street, Suite 1
Rapid City, South Dakota 57701
605.342.2909
www.murphylawoffice.org
www.facebook.com/murphylawoffice

Becky Beer

From: no-reply@efilingmail.tylertech.cloud
Sent: Thursday, March 09, 2023 8:34 AM
To: Becky Beer
Subject: Courtesy Copy of Service for Case: 07CRI22-000032, STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA for filing PROPOSED DOCUMENT, Envelope Number: 2811830

Copy of Service

Case Number: 07CRI22-000032
Case Style: STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA

This is a copy of service for the filing listed. Please click the link below to retrieve the submitted document.

Filing Details	
Case Number	07CRI22-000032
Case Style	STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA
Date/Time Submitted	3/9/2023 9:33 AM CST
Filing Code	PROPOSED DOCUMENT
Filing Description	Order Regarding Treatment Records and States Motion to Quash
Filed By	Lynell Erickson
Service Contacts	STATE OF SOUTH DAKOTA: Theresa Maule Rossow (sabrule@midstatesd.net) Amanda Miiller (Amanda.Miiller@state.sd.us) Nolan Welker (Nolan.Welker@state.sd.us) Chelsea Wenzel (chelsea.wenzel@state.sd.us) NATHAN M ANTUNA: John Murphy (john@murphylawoffice.org)

Document Details	
File Stamped Copy	View Stamped Document
This link is active for 90 days. A file stamped copy will be available after filing has been accepted by the clerk.	

Please do not reply to this email. It was automatically generated.

John Murphy

From: no-reply@efilingmail.tylertech.cloud
Sent: Thursday, March 09, 2023 8:34 AM
To: John Murphy
Subject: Notification of Service for Case: 07CRI22-000032, STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA for filing PROPOSED DOCUMENT, Envelope Number: 2811830

Notification of Service

Case Number: 07CRI22-000032
Case Style: STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA

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Filing Description	Order Regarding Treatment Records and States Motion to Quash
Filed By	Lynell Erickson
Service Contacts	STATE OF SOUTH DAKOTA: Theresa Maule Rossow (sabrule@midstatesd.net) Amanda Miiller (Amanda.Miiller@state.sd.us) Nolan Welker (Nolan.Welker@state.sd.us) Chelsea Wenzel (chelsea.wenzel@state.sd.us) NATHAN M ANTUNA: John Murphy (john@murphylawoffice.org)

Document Details	
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For assistance, contact UJSeSupport@ujs.state.sd.us

Please do not reply to this email. It was automatically generated.

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF BRULE)		OF THE FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	07 CRI 22-32
vs.	)	ORDER REGARDING DEFENDANT'S MOTION FOR COMPLAINING WITNESS'S TREATMENT RECORDS
NATHAN ANTUNA, Defendant.	)	

Defendant's Motion for Complaining Witness's Treatment Records came before the Court on September 20, 2022. Defendant Antuna appeared personally and through counsel, John R. Murphy. The State appeared through Assistant Attorney General Amanda Miiller. After considering the written submissions of counsel and the arguments presented at hearing, the Court does hereby:

ORDER that the State shall disclose documents and reports contained within, or which relate thereto, the "rape kit" performed and obtained from the complaining witness, K.B., on or about August 3, 2016. The parties shall endeavor to reach an agreement as to a stipulated protective order in regard to limiting the use and dissemination of these records; and does

ORDER that the State shall disclose all toxicology or pharmacology reports relating to the urine and blood samples taken from K.B. on or about August 3rd or 4th, 2016. The parties shall endeavor to reach an agreement as to a stipulated protective order in regard to limiting the use and dissemination of these records;

and does

ORDER that the State shall disclose all medical reports related to K.B.'s physical and/or mental condition between August 2, 2016, and the present, that relate to the allegations made in this criminal case. The parties shall endeavor to reach an agreement as to a stipulated protective order in regard to limiting the use and dissemination of these records; and does

ORDER that in regard to Defendant's request for access to K.B.'s mental health, counseling, or treatment records, the State shall: (1) make inquiries with K.B. as to whether she has received any mental health, counseling, or treatment since August 2, 2016, and ascertain where or from whom such services were provided; (2) attempt to obtain these records from the providers with K.B.'s assistance; (3) if such records are received by the State, for the State to provide them to the Court for its *in camera* review; and, (4) if K.B. refuses to cooperate with the State or objects to the disclosure of the records to the Court, for the State to notify the Court so that further proceedings may be considered.

9/26/2022 3:43:41 PM

Attest:
Miller, Charlene
Clerk/Deputy

BY THE COURT:

Chris L. Giles

Circuit Court Judge

South Dakota Unified Judicial System eCourts

Dockets are continuously updated during normal business hours, but cannot make assurances that the latest information on orders or filings available at the Clerk's Office have been recorded on the dockets.

CASE LEGEND

STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA

07CRI22-000032
Judicial Officer: Giles, Chris S
Type: Criminal Circuit
County: Brule
Date Filed: 2/28/2022
Status: Pending

PARTY INFORMATION

Plaintiff
STATE OF SOUTH DAKOTA
Address:

Attorney(s)
MAULE, THERESA
WENZEL, CHELSEA
WELKER, NOLAN G

Defendant
ANTUNA, NATHAN M
Address: 1023 E TALLENT ST RAPID CITY SD 57701
Date of Birth: 04/10/1989
Gender: Male
Race: White
Height: 5'8"
Weight: 155
Eyes: Brown
Hair: Black

Attorney(s)
MURPHY, JOHN R

DISPOSITION INFORMATION

1. 22-22-1 (4) (Class 2 Felony) - RAPE 3RD DEGREE INCAPABLE INTOX, MIND ALTER, ETC
Offense Date: 08/03/2021
Arrest Date:

Citation: NONUM - Citation Date: 08/03/2021
Plea Date: 06/21/2022 - Not Guilty

EVENT INFORMATION

Date	Type	Comment
02/27/2022	INDICTMENT	
02/28/2022	WARRANT OF ARREST	$10,000 CASH BOND
05/17/2022	BOND FINDINGS AND CONDITIONS OF RELEASE	CORRECTED COPY
05/25/2022	PERSONAL RECOGNIZANCE AND APPEARANCE BOND (2-PAGE)	INCORRECT COPY
05/25/2022	BOND RECEIPT	PAID BY JAMIE ANTUNA
06/03/2022	NOTICE OF APPEARANCE	
06/03/2022	DEFENDANT'S	DEFENDANT'S FIRST DISCOVERY MOTIONS AND MOTIONS IN LIMINE
06/03/2022	WAIVER OF THE 180 DAY RULE	
06/21/2022	DEFENDANT'S	MOTION FOR GRAND JURY TRANSCRIPT

EVENT INFORMATION

Date	Type	Comment
06/27/2022	ORDER FOR TRANSCRIPT-COPY	GRAND JURY TRANSCRIPT
07/19/2022	DEFENDANT'S	MOTION FOR COMPLAINING WITNESS' TREATMENT RECORDS AND MEMORANDUM OF AUTHORITY
08/17/2022	STATE'S	Objection to Motion for Treatment Records
08/22/2022	MOTION	AND NOTICE OF VOLUNTARY RECUSAL
08/22/2022	ORDER APPOINTING A SUBSTITUTE JUDGE	
08/25/2022	DEFENDANT'S	REPLY TO STATE'S OBJECTION TO DEFENDANT'S MOTION FOR COMPLAINING WITNESS' TREATMENT RECORDS
09/12/2022	STATE'S	RESPONSE TO DEFENDANT'S FIRST DISCOVEY MOTION AND MOTIONS IN LIMINE
09/12/2022	STATE'S	RECIPROCAL DISCOVERY MOTION
09/12/2022	CERTIFICATE OF SERVICE	
09/12/2022	DEFENDANT'S	RESPONSE TO STATE'S RECIPROCAL DISCOVERY MOTION
09/26/2022	ORDER	REGARDING DEFENDANT'S MOTION FOR COMPLAINING WITNESS'S TREATMENT RECORDS
09/26/2022	ORDER	REGARDING DEFENDANT'S FIRST DISCOVERY MOTIONS AND MOTIONS IN LIMINE
11/29/2022	STATE'S	Notice of K.B.'s Rights and Privileges
12/06/2022	CERTIFICATE OF SERVICE	
12/07/2022	SCHEDULING ORDER	ON MOTIONS
01/04/2023	DEFENDANT'S	RESPONSE TO STATE'S NOTICE OF K.B.'S ASSERTION OF RIGHTS & PRIVILEGES
01/05/2023	DEFENDANT'S	MOTION TO ENFORCE COURT'S DISCOVERY ORDER
01/18/2023	SUBPOENA	SUBPOENA DUCES TECUM AND ADMISSION OF SERVICE
01/20/2023	STATE'S	Motion to Quash
02/02/2023	DEFENDANT'S	RESPONSE TO STATE'S MOTION TO QUASH
03/07/2023	ORDER	REGARDING MOTION TO ENFORCE DISCOVERY ORDER
03/09/2023	ORDER	DENIED BY JUDGE GILES - Order Regarding Treatment Records and States Motion to Quash
03/09/2023	CERTIFICATE OF SERVICE	
03/09/2023	ORDER	REGARDING TREATMENT RECORDS PROCEDURE
03/15/2023	STATE'S	OBJECTION TO DEFENDANT'S ORDER REGARDING TREATMENT RECORDS AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW - DENIED BY JUDGE GILES
03/15/2023	CERTIFICATE OF SERVICE	
03/16/2023	TRANSCRIPT	OF MOTIONS HEARING 9/21/2022
03/16/2023	TRANSCRIPT	OF MOTIONS HEARING 2/16/2023
04/03/2023	SUBPOENA-CRIMINAL	Hutmacher
04/03/2023	SUBPOENA-CRIMINAL	Harmon
04/06/2023	STATE'S	WITNESS LIST FOR EVIDENTIARY HEARING
04/06/2023	CERTIFICATE OF SERVICE	

EVENT INFORMATION

Date	Type	Comment
04/27/2023	SCHEDULING ORDER	ON MOTIONS
04/27/2023	CERTIFICATE OF SERVICE	
05/04/2023	TRANSCRIPT	OF HEARING HELD 4/20/2023
06/05/2023	ORDER GRANTING INTERMEDIATE APPEAL	
06/12/2023	CLERK'S CERTIFICATE	WITH ALPHABETICAL AND CHRONOLOGICAL INDEXES
06/12/2023	LETTER	TO SC CLERK - TRANSMITTAL
06/12/2023	TRANSCRIPT	OF ARRAIGNMENT JUNE 21, 2022
06/21/2023	SECOND	CLERK'S CERTIFICATE WITH ALPHABETICAL AND CHRONOLOGICAL INDEXES
06/21/2023	LETTER	TO SC CLERK - TRANSMITTAL

WARRANT INFORMATION

Arrest Warrant issued on 02/28/2022 Status: Returned Status Date: 05/25/2022

BOND INFORMATION

Settings

02/28/2022
Warrant #07CRI22-000032 - 1
Type: BONDSMAN Amount: $10000.00
Bond Type
Bond #07BOND22-000029
Cash

$10,000.00

Surety and Other Bonds

Cash Bond Posted on 05/13/2022 Status $10,000.00 PAID IN FULL 05/13/2022

HEARING INFORMATION

Hearing Type	*Hearing Date/Time*	*Judge*	*Result*	*Cancel Reason*
Motions Hearing	06/30/2023 10:00 AM	Giles, Chris S	Cancelled	Other
All Other Hearings	04/20/2023 10:00 AM	Giles, Chris S	Held	
Motions Hearing	02/16/2023 10:00 AM	Giles, Chris S	Held	
Status Hearing	09/21/2022 11:00 AM	Giles, Chris S	Held	
Status Hearing	09/13/2022 1:30 PM	Anderson, Bruce	Cancelled	Other
Initial/Arraignment	06/21/2022 1:30 PM	Anderson, Bruce	Held	

Becky Beer

From: NoReply_UJS@ujs.state.sd.us
Sent: Monday, September 26, 2022 4:10 PM
To: John Murphy
Cc: Becky Beer
Subject: Notification of Events Filed

07CRI22-000032
STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA
Criminal Circuit
Brule
Giles, Chris S

UPDATE: ORDER
REGARDING DEFENDANT'S MOTION FOR COMPLAINING WITNESS'S TREATMENT RECORDS
4:55:25 PM

UPDATE: ORDER
REGARDING DEFENDANT'S FIRST DISCOVERY MOTIONS AND MOTIONS IN LIMINE
4:57:08 PM

John Murphy

From: Miiller, Amanda <Amanda.Miiller@state.sd.us>
Sent: Tuesday, October 11, 2022 1:09 PM
To: John Murphy
Subject: RE: Notification of Events Filed
Attachments: Protective Order Stip.doc

Hi John,

Sorry about that. For some reason I thought I already sent this out. Please find attached our office's standard protective order. I will let you know once the medical records start coming in. Thanks!

From: John Murphy <john@murphylawoffice.org>
Sent: Friday, October 7, 2022 5:19 PM
To: Miiller, Amanda <Amanda.Miiller@state.sd.us>
Subject: RE: Notification of Events Filed

Any word on the stipulation?

LMK. Would like to get moving on this if we can.

Have a good weekend.

John

John R. Murphy
Murphy Law Office, P.C.
328 East New York Street, Suite 1
Rapid City, South Dakota 57701
605.342.2909
www.murphylawoffice.org
www.facebook.com/murphylawoffice

From: Miiller, Amanda <Amanda.Miiller@state.sd.us>
Sent: Monday, October 03, 2022 8:14 AM
To: John Murphy <john@murphylawoffice.org>
Cc: Becky Beer <becky@murphylawoffice.org>
Subject: RE: Notification of Events Filed

We should be good. The only thing we need now is a stipulated protective order. I will work on getting you a draft. Thanks!

From: John Murphy <john@murphylawoffice.org>
Sent: Tuesday, September 27, 2022 1:53 PM
To: Miiller, Amanda <Amanda.Miiller@state.sd.us>
Cc: Becky Beer <becky@murphylawoffice.org>
Subject: FW: Notification of Events Filed

Amanda:

Do I need to do anything more in regard to getting the rape kit, blood/urine test results, medical records, or counseling records at this point now that you have the orders? LMK.

Also, LMK if you find out anything more about the missing recordings.

Thanks.

John

John R. Murphy
Murphy Law Office, P.C.
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Rapid City, South Dakota 57701
605.342.2909
www.murphylawoffice.org
www.facebook.com/murphylawoffice

From: NoReply_UJS@ujs.state.sd.us <NoReply_UJS@ujs.state.sd.us>
Sent: Monday, September 26, 2022 4:10 PM
To: John Murphy <john@murphylawoffice.org>
Cc: Becky Beer <becky@murphylawoffice.org>
Subject: Notification of Events Filed

07CRI22-000032
STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA
Criminal Circuit
Brule
Giles, Chris S

UPDATE: ORDER
REGARDING DEFENDANT'S MOTION FOR COMPLAINING WITNESS'S TREATMENT RECORDS
4:55:25 PM

UPDATE: ORDER
REGARDING DEFENDANT'S FIRST DISCOVERY MOTIONS AND MOTIONS IN LIMINE
4:57:08 PM

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MURPHY LAW OFFICE, P.C.

JOHN R. MURPHY
ATTORNEY AT LAW
johnjr@murphylawoffice.org

REBECCA BEER
PARALEGAL
beckyg@murphylawoffice.org

Attorney General
OCT 03 2022

September 29, 2022

Amanda Miiller
Assistant Attorney General
1302 East Hwy 14, Suite 1
Pierre, SD 57501

Re: State v. Nathan Antuna; 07 CRI 22-32

Dear Amanda:

Enclosed is a copy of the signed Order Regarding Defendant's Motion for Complaining Witness's Treatment Records, and Order Regarding Defendant's First Discovery Motions and Motions in Limine. Please let me know if you need anything to facilitate the production of these materials.

Sincerely,

John R. Murphy
JRM/rb

Enclosures

APP. 1

John Murphy

From: Giles, Judge Chris <Chris.Giles@ujs.state.sd.us>
Sent: Tuesday, March 07, 2023 10:27 AM
To: Welker, Nolan; John Murphy
Cc: Wenzel, Chelsea; Miller, Charlene; Johnson, Carol (UJS); Bradley, Tyler; Becky Beer
Subject: RE: State v. Antuna (Davison County File No. 22-32)

The order portion of the documents prepared by the parties appears to be almost identical.
I don't believe we need all of the background information contained in the State's proposed order.
The Defendant's proposed order properly reflects the Court's order.
Please submit it through Odyssey for me to sign.
I can see the other proposed order in the file but that has not been sent to me by the Clerk's Office to sign yet.

From: Welker, Nolan
Sent: Monday, March 6, 2023 5:01 PM
To: John Murphy <john@murphylawoffice.org>; Giles, Judge Chris <Chris.Giles@ujs.state.sd.us>
Cc: Wenzel, Chelsea <Chelsea.Wenzel@state.sd.us>; Miller, Charlene <Charlene.Miller@ujs.state.sd.us>; Johnson, Carol (UJS) <Carol.Johnson@ujs.state.sd.us>; Bradley, Tyler <Tyler.Bradley@ujs.state.sd.us>; Becky Beer <becky@murphylawoffice.org>
Subject: RE: [EXT] State v. Antuna (Davison County File No. 22-32)

Judge:

Attached is the State's version of the proposed Order Regarding Treatment Records and State's Motion to Quash. Please let us know if you would otherwise like us to file as proposed.

Thank you,

Nolan Welker

From: John Murphy <john@murphylawoffice.org>
Sent: Monday, March 6, 2023 4:39 PM
To: Giles, Judge Chris <Chris.Giles@ujs.state.sd.us>
Cc: Wenzel, Chelsea <Chelsea.Wenzel@state.sd.us>; Welker, Nolan <Nolan.Welker@state.sd.us>; Miller, Charlene <Charlene.Miller@ujs.state.sd.us>; Johnson, Carol (UJS) <Carol.Johnson@ujs.state.sd.us>; Bradley, Tyler <Tyler.Bradley@ujs.state.sd.us>; Becky Beer <becky@murphylawoffice.org>
Subject: RE: [EXT] State v. Antuna (Davison County File No. 22-32)

Judge:

Attached is my proposed Order for Treatment Records in Word format. Let me know if you need anything else.

The proposed Order to Enforce Discovery, which the State did not object to, has been efiled.

John

John R. Murphy
Murphy Law Office, P.C.
328 East New York Street, Suite 1
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605.342.2909
www.murphylawoffice.org
www.facebook.com/murphylawoffice

From: Giles, Judge Chris <Chris.Giles@ujs.state.sd.us>
Sent: Monday, March 06, 2023 10:26 AM
To: John Murphy <john@murphylawoffice.org>
Cc: Wenzel, Chelsea <Chelsea.Wenzel@state.sd.us>; Welker, Nolan <Nolan.Welker@state.sd.us>; Miller, Charlene <Charlene.Miller@ujs.state.sd.us>; Johnson, Carol (UJS) <Carol.Johnson@ujs.state.sd.us>; Bradley, Tyler <Tyler.Bradley@ujs.state.sd.us>; Becky Beer <becky@murphylawoffice.org>
Subject: Re: State v. Antuna (Davison County File No. 22-32)

I will wait to review your order and the State's proposed order.
I'm not sure about the status of the transcript from the hearing.
My court reporter is covering a jury trial with Judge Bern this week in Union County.
I'll review both orders and if I need to wait for the transcript I will.
After I look at my notes it is likely that I won't need to wait for the transcript.
It is possible I may draft my own order if I'm not satisfied with the contents of what I see from the parties. We will have to wait and see on that.
I would ask that each side email me a Word version of their proposed orders.
That will make it easier for me to modify one of them if needed.
Thank you for informing me of the status of the situation.

> On Mar 6, 2023, at 11:10 AM, John Murphy <john@murphylawoffice.org> wrote:
>
> Judge:
>
> We had a hearing back on February 16, 2023. The Court ordered that I prepare two orders related thereto.
>
> I prepared both orders and submitted them to the State several weeks ago.
>
> The first pertains to the motion to enforce discovery. The State has reviewed my proposed Order and has no objection to it. That proposed Order will be filed today through ecourts for your review and consideration.

The second order pertained to the treatment records issue. The State does not agree to my proposed Order. The State submitted its requested edits/additions this morning. I don't agree with many of their proposed additions/findings. Thus, we have been unable to reach an agreement as to form and content.

I have attached my proposed Order. It is my understanding that the State is going to propose its own Order. It is also my understanding that the State has requested the transcript of the hearing. I'm not sure the status of that transcript, or whether the Court wants to wait until it is produced to rule on the competing orders.

If you have any questions or concerns, or want to set up a telephonic hearing, please advise. I'm out for a federal trial and an out of state training this month, but will endeavor to make time available if we need to make a record.

John

John R. Murphy
Murphy Law Office, P.C.
328 East New York Street, Suite 1
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605.342.2909
www.murphylawoffice.org
www.facebook.com/murphylawoffice

Becky Beer

From: no-reply@efilingmail.tylertech.cloud
Sent: Thursday, March 09, 2023 2:36 PM
To: Becky Beer
Subject: Courtesy Copy of Service for Case: 07CRI22-000032, STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA for filing PROPOSED DOCUMENT, Envelope Number: 2812981

Copy of Service

Case Number: 07CRI22-000032
Case Style: STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA

This is a copy of service for the filing listed. Please click the link below to retrieve the submitted document.

Filing Details	
Case Number	07CRI22-000032
Case Style	STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA
Date/Time Submitted	3/9/2023 3:35 PM CST
Filing Code	PROPOSED DOCUMENT
Filing Description	ORDER REGARDING TREATMENT RECORDS
Filed By	John Murphy
Service Contacts	STATE OF SOUTH DAKOTA: Nolan Welker (Nolan.Welker@state.sd.us) Chelsea Wenzel (chelsea.wenzel@state.sd.us) NATHAN M ANTUNA: John Murphy (john@murphylawoffice.org)

Document Details	
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STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF BRULE)		OF THE FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	07 CRI 22-32
vs.	)	ORDER REGARDING TREATMENT RECORDS PROCEDURE
NATHAN ANTUNA, Defendant.	)	

A hearing was held on February 16, 2023, on various matters related to K.B.'s treatment records. The parties agreed that in lieu of having K.B. testify as to which mental health treatment providers, counselors, or therapists she has consulted with since August of 2016, the State would assist her in preparing an affidavit for submission to the Court. The parties also agreed to a framework for the process of obtaining and disclosing those records, if any exist, to the Court for its *in camera* review. As the procedures outlined at the hearing are agreeable to the Court and strike a balance between K.B.'s privacy interests and Mr. Antuna's confrontation, due process, and discovery rights, the Court does hereby:

ORDER that the State shall assist K.B. in preparing an affidavit setting forth which mental health treatment providers, counselors, or therapists she has consulted with since August of 2016, if any; and does

ORDER that if any such treatment, counseling, or therapy was received by K.B., the affidavit will include the name, address, and other pertinent contact

information of that person or entity; and does

ORDER that said affidavit may be filed under seal with the Court, but that a copy thereof shall be served upon defense counsel; and does

ORDER that if any such persons or entities are identified by K.B., that the State shall subpoena the records of such treatment, counseling, or therapy; and does

ORDER that copies of these subpoenas shall be served upon defense counsel; and does

ORDER that the State shall direct the subject of the subpoena to provide the records directly to the Court for its *in camera* review, but that the cost of producing such records shall be paid by the State, subject to later re-allocation of costs if the Court so determines that to be appropriate.

Attest:
Miller, Charlene
Clerk/Deputy

BY THE COURT:
3/9/2023 4:59:36 PM

Chris L. Giles

Honorable Chris Giles
Circuit Court Judge

Becky Beer

From: NoReply_UJS@ujs.state.sd.us
Sent: Friday, March 10, 2023 2:13 PM
To: John Murphy
Cc: Becky Beer
Subject: Notification of Events Filed

07CRI22-000032
STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA
Criminal Circuit
Brule
Giles, Chris S

UPDATE: ORDER
REGARDING TREATMENT RECORDS PROCEDURE
2:15:23 PM

STATE OF SOUTH DAKOTA) SS: COUNTY OF BRULE	)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, v. NATHAN M. ANTUNA, Defendant.	)	07 CRI. 22-32 CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the State's Objections to Defendant's Order Regarding Treatment Records and Proposed Findings of Fact and Conclusions of Law was served electronically through Odyssey File and Serve upon Nathan M. Antuna, by and through his attorney John R. Murphy, Murphy Law Office, at john@murphylawoffice.org, on this 15th day of March, 2023.

/s/ Nolan Welker
Nolan Welker
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

pld_NW Nathan M. Antuna – Certificate of Service (lde)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS:	
COUNTY OF BRULE	)	FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	07CRI22-32
Plaintiff,	)	
v.	)	CERTIFICATE OF SERVICE
NATHAN M. ANTUNA,	)	
Defendant.	)	

The undersigned hereby certifies that a true and correct copy of the proposed Order Regarding Treatment Records and State's Motion to Quash was served electronically through Odyssey File and Serve upon Nathan M. Antuna, by and through his attorney John R. Murphy, Murphy Law Office, at john@murphylawoffice.org, on this 9th day of March, 2023.

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

pld_ajm Nathan M. Antuna – Certificate of Service (mnj

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss.	
COUNTY OF BRULE	)	FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	
Plaintiff,	)	07CRI22-32
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
NATHAN ANTUNA,	)	
	)	
Defendant.	)	

The undersigned hereby certifies that true and correct copies of the State's Response to Defendant's First Discovery Motion and Motions in Limine and State's Reciprocal Discovery Motion in the above-captioned matter was served electronically by Odyssey File & Serve upon, Nathan Antuna by and through his attorney, John R. Murphy, Attorney at Law, at john@murphylawoffice.org this 12th day of September 2022.

/s/ Mandy Müller

Mandy Müller
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

pld_ajm (mb)

Wald, Sherri

From: Satterlee Josh <Josh.Satterlee@pennco.org>
Sent: Wednesday, July 05, 2017 2:32 PM
To: Wald, Sherri
Subject: FW: [EXT] State v. Sharp Fish 51CRI15-3586
Attachments: DOC061917.pdf

Joshua Satterlee
Deputy State's Attorney

From: Gusinsky, Judge Robert [mailto:Robert.Gusinsky@ujs.state.sd.us]
Sent: Monday, June 19, 2017 3:47 PM
To: Regalado Elizabeth; Satterlee Josh
Cc: Julie Jenter; Bogue, Mag Judge Scott
Subject: State v. Sharp Fish 51CRI15-3586

Dear Counsel:

Attached is an uncertified copy of an Order I am filing today.

Thank you.

RG

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF BRULE	)	FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA Plaintiff,	)	07 CRI. 22-32
vs.	)	STATE'S NOTICE OF K.B.'S ASSERTION OF RIGHTS AND PRIVILEGES
NATHAN M. ANTUNA, Defendant.	)	

COMES NOW the State of South Dakota, by and through its attorney, Mandy Miller, Assistant Attorney General, and hereby notifies the Court of K.B.'s intention to assert rights and privileges.

1. Pursuant to Art. VI, Section 29 of the South Dakota State Constitution, "the attorney for the government, upon request of the victim, may assert and seek enforcement of the rights enumerated in [Art. VI, §29] and any other right afforded to a victim by law in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right." Accordingly, on behalf of K.B., and with her express permission, the State asserts K.B.'s rights and privileges.

2. As previously set forth in the State's brief, the State, and now K.B., contend that this Court does not have the authority to compel K.B. to disclose her mental health information, if any exists. *See State v. Erickson*, 525 N.W.2d 703, 710-11 (S.D. 1994).

3. The Court lacks jurisdiction over K.B. to compel her to disclose "whether she has received any mental health, counseling, or

treatment since August 2, 2016" and "where or from whom such services were provided."

Criminal proceedings, by definition, are actions instituted by the State against a person charged with a crime. SDCL 23A-45-1. The alleged crime victim is not a party to the proceeding. It is well settled that courts do not have jurisdiction to direct orders upon non-parties. *See, e.g., Spiska Eng'g, Inc. v. SPM Thermo-Shield, Inc.*, 2011 S.D. 23, ¶ 8, 798 N.W.2d 683, 686; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110, 89 S. Ct. 1562, 1569, 23 L. Ed. 2d 129 (1969). Because this Court lacks personal jurisdiction over K.B., it cannot compel her to disclose mental information, if any exists.

4. If this Court were to properly acquire personal jurisdiction over K.B., any mental health information, is privileged. "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental, or emotional condition, including alcohol or drug addiction, among himself, physician, or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family." SDCL 19-19-503. K.B. is formally asserting that privilege.

The privilege has not been waived as K.B. has not placed her mental health in issue in this matter. *State v. Stuck*, 434 N.W.2d 43,

54 (S.D. 1988). Further, there is no allegation that K.B. waived privilege by sharing information with third parties. *See State v. Karlen*, 1999 S.D. 12, ¶ 33, 589 N.W.2d 594. The privilege is waived "if the client voluntarily discloses the contents of the communication to a third party." *Id.* No statements have been identified by the Defendant that "discloses the contents" of any alleged communications K.B. may have had with a mental health therapist.

5. Finally, K.B. affirmatively asserts her Rights of Crime Victim under the South Dakota Constitution. These rights include:

   a. the right to due process,

   b. the right, upon request, to prevent the disclosure to the public, or the defendant or anyone acting on behalf of the defendant in the criminal case, of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records, and

   c. the right, upon request, to privacy, which includes the right to refuse an interview, deposition or other discovery request, and to set reasonable conditions on the conduct of any such interaction to which the victim consents

The South Dakota State Constitution further requires that the Court ensure "that victims' rights and interests are protected in a manner

no less vigorous than the protections afforded to criminal defendants" and that "[t]he reasons for any decision regarding the disposition of a victim's right shall be clearly stated on the record."

Dated this 29th day of November, 2022.

/s/ Mandy Miiller
Mandy Miiller
Assistant Attorney General
SD Attorney General's Office
1302 E. Hwy 14, Suite 1
Pierre, SD 57501-8501
Phone: (605) 773-3215

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the State's Notice of K.B.'s Assertion of Rights and Privileges in the above-entitled matter was served by Odyssey File and Serve upon John R. Murphy at john@murphylawoffice.org on this 29th day of November, 2022.

/s/ Mandy Miiller
Mandy Miiller
Assistant Attorney General

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30327

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

NATHAN ANTUNA,

Defendant and Appellee.

INTERMEDIATE APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
BRULE COUNTY, SOUTH DAKOTA

THE HONORABLE CHRIS S. GILES
Circuit Court Judge

APPELLANT'S REPLY BRIEF

MARTY JACKLEY
ATTORNEY GENERAL

Nolan Welker
Chelsea Wenzel
Assistant Attorneys General
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Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

ATTORNEYS FOR PLAINTIFF
AND PETITIONER

John R. Murphy
328 E. New York Street, #1
Rapid City, SD 57701
Telephone: (605) 342-2909
Email: john@murphylawoffice.org

ATTORNEY FOR DEFENDANT
AND RESPONDENT

Order Granting Petition for Intermediate Appeal filed June 5, 2023

Filed: 10/20/2023 2:59 PM CST Supreme Court, State of South Dakota #30327

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30327

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

NATHAN ANTUNA,

Defendant and Appellee.

PRELIMINARY STATEMENT

In this brief, Nathan Antuna is referred to as "Antuna" or "Defendant." The State of South Dakota is referred to as "State." Citations to the settled record and other documents are as follows:

Settled Record (Brule County File 07CRI22-32)..... SR

Motions Hearing Transcript (September 21, 2022) MH1

Motions Hearing Transcript (February 16, 2023)..... MH2

Defendant's Appellee Brief..... DB

All citations are followed by the page number.

JURISDICTIONAL STATEMENT

On September 26, 2022, the Honorable Chris S Giles, Circuit Court Judge, First Judicial Circuit, entered an Order Regarding Defendant's Motion for Complaining Witness's Treatment Records. SR:94-95. On March 9, 2023, Judge Giles entered an Order Regarding

Treatment Records Procedure. SR:167-68. Notices of Entry of the orders were never filed or served upon the State. The State filed a Petition for Permission to Appeal those orders on April 28, 2023. On June 5, 2023, this Court granted the State's Petition. SR:376-77. This Court has jurisdiction under SDCL 23A-32-12.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. DID THE TRIAL COURT ERR IN ORDERING THE STATE AND K.B. TO OBTAIN K.B.'S MENTAL HEALTH RECORDS, IF ANY, WITHOUT FIRST APPLYING THE *NIXON* TEST?

Without applying the *Nixon* test, the trial court ordered the State and the victim to produce the victim's mental health records, if any exist, for *in camera* review to determine whether any of the records are relevant.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963)

Milstead v. Johnson, 2016 S.D. 56, 883 N.W.2d 725

State v. Karlen, 1999 S.D. 12, 589 N.W.2d 594

SDCL 23A-32-9

II. WHETHER THE STATE PROPERLY INVOKED THIS COURT'S JURISDICTION?

The trial court did not rule on this issue.

State v. Mulligan, 2005 S.D. 50, 696 N.W.2d 167

State v. Waters, 472 N.W.2d 524 (S.D. 1991)

SDCL 23A-32-12

STATEMENT OF THE CASE AND FACTS

The State relies on its Statement of the Case and Facts included in its Appellant brief.

ARGUMENTS

I. THE TRIAL COURT ERRED IN ORDERING THE STATE AND K.B. TO PRODUCE K.B.'S MENTAL HEALTH RECORDS, IF ANY EXIST, WITHOUT APPLYING THE *NIXON* TEST.

This appeal presents two questions to this Court: (1) whether the trial court can order the State to obtain and provide K.B.'s counseling or mental health records, if they exist; and (2) whether the trial court properly ordered K.B. to produce her own counseling or mental health records, if they exist.

In its First Order, the trial court ordered the State to "make inquiries with K.B. as to whether she has received any mental health, counseling, or treatment. . . and ascertain where or from whom such services were provided, and attempt to obtain these records from the providers with K.B.'s assistance[.]" SR:94-95 (Order Regarding Defendant's Motion for Complaining Witness's Treatment Records) ("First Order"). In doing so, the trial court determined that the State had a "due diligence obligation" to acquire the information at issue based on the discovery statutes in SDCL ch. 23A-13 and the constitutional considerations in *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny and *State v. Karlen*, 1999 S.D. 12, 589 N.W.2d 594. *See* SR:94-95; MH1:12,52-57; *see also* SR:96-98 (Order regarding discovery motions that references the State's "due diligence" requirements). The trial court's logic and oral pronouncement were largely based on Antuna's arguments asserting that he had a right to

K.B.'s counseling or mental health records under the Due Process and Confrontation Clauses and SDCL 23A-13-4 and claiming that the State had an obligation to obtain and provide the information. SR:24-34; MH1:10-12, 48-49.

In its Order Regarding Treatment Records Procedure ("Second Order")[1], the trial court used a similar logic to require both the State and K.B. to provide evidence of, and access to, K.B.'s counseling or mental health records. SR:144-46 (Antuna's subpoena duces tecum); SR:167-68 (Second Order specifically referencing the trial court's rulings regarding Antuna's "confrontation, due process, and discovery rights"); MH2:25-27 (trial court characterizing the issue as a "discovery request" and referencing Antuna's "statutory and constitutional rights"); Again, the court's oral ruling and explanations were based on Antuna's briefing and arguments. SR:106-138; MH2:14-23.

On appeal, Antuna claims that the trial court's order is reviewed for an abuse of discretion because it is merely a "balance of concerns and interests." DB:27-28. However, the "concerns and interests" at issue are based in statutory and constitutional law, as demonstrated in Antuna's brief. DB:27-28 (Antuna's continued arguments regarding the

[1] In retort to Antuna's confounding claim, the State did not agree with the Second Order, nor did the Second Order come about at the "urging of the State." DB:26, 28-29. Rather, faced with the trial court's oral ruling, the State attempted to negotiate the terms of the trial court's order in a sincere attempt to mitigate the harm that might be caused by putting K.B. on the stand to testify about privileged information. MH2:25-31.

Second Order in the context of Due Process under *United States v. Bagley*, 473 U.S. 667 (1984) and the Confrontation Clause under *Karlen*, 1999 S.D. 12, 589 N.W.2d 594). While this Court "reviews the [trial] court's rulings on discovery matters under an abuse of discretion standard," the trial court's interpretation of statutory language and application of constitutional rights are reviewed de novo. *Milstead v. Johnson*, 2016 S.D. 56, ¶ 7, 883 N.W.2d 725, 729; *State v. Schmidt*, 2012 S.D. 77, ¶ 12, 825 N.W.2d 889, 894; *see* DB:24.

Antuna alleges that the trial court never endorsed Antuna's subpoena duces tecum or suggested it would enforce it. DB:30. In reality, the Second Order is a modification of Antuna's subpoena duces tecum. SDCL 23A-14-5 ("A court on motion made promptly may quash or modify a subpoena if compliance would be unreasonable or oppressive"). As Antuna points out, the trial court described its plan going forward to include a hearing where K.B. would be subpoenaed to testify about whether and from whom she has received counseling or mental health treatment. MH2:27-28; DB:29. After that, Antuna could issue subpoenas duces tecum to any identified mental health providers and direct the production of any records to the court for an *in-camera* review. MH2:27-28. The effect of that plan and the later-negotiated Second Order was a modification of Antuna's subpoena duces tecum and still required production of any mental health records that may

exist without meeting the *Nixon* requirements. *See United States v. Nixon*, 418 U.S. 683 (1974).

Finally, contrary to Antuna's assertion, the First Order is not "moot." DB:25. The State appropriately invoked this Court's jurisdiction with regard to the First Order. *See* Appellant's Brief, Part II. Regardless, "When the appeal is from any order subject to appeal, the Supreme Court may review all matters appearing on the record relevant to the question of whether the order appealed from is erroneous." SDCL 15-26A-10 & 23A-32-9. Antuna also claims that "[t]o review the terms of the Second Order, it is essential to understand their origin and context" including the First Order. DB:25. The State concurs.

II. THE STATE PROPERLY INVOKED THIS COURT'S JURISDICTION.

The State relies on the arguments and authorities in its Appellant brief and incorporates the same here. The following arguments are offered in response to Antuna's assertions.

A. Odyssey File and Serve vs. UJS Notification System

While the Odyssey File and Serve System was designed to be a way to modernize and simplify the filing and serving of documents, the System is not nearly as integrated or omnipotent as Antuna claims.

The UJS Notification System is a separate and distinct system from the Odyssey File and Serve System. The distinction is important because, as of July 1, 2014, any party not otherwise exempt was required to register for an account with the "electronic filing system"

and use the system to file documents with the court. SDCL 16-21A-7. According to this Court's rules, the designated "electronic filing system" is Odyssey File and Serve. SDCL 16-21A-1. Undersigned counsels have not located a rule or statute requiring attorneys to sign up for the UJS Notification System and Antuna, likewise, has failed to identify any such rule or statute.[2]

To be registered for the two systems, an attorney must sign up using two different portals.[3] After the separate accounts are created, attorneys must log in to the accounts using the separate portals. The platform for Odyssey File and Serve is supported by Tyler Technologies, while the UJS Attorney Notification System is not.[4] When a registered

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[2] Antuna provides an email claiming undersigned counsel, Chelsea Wenzel, had a registered account with the UJS Attorney Notification System and received notifications on September 26, 2022, and March 9, 2023. First, Attorney Wenzel could not have received a notification in September 2022 because she was not an attorney of record on the case until February 2023. *See* State's Response to Defendant's Motion to Dismiss APP:9. Antuna acknowledges this in his brief. DB:2, 8 (complimenting the State's "surgical" affidavits but ignoring the part of Wenzel's affidavit that confirms the date she became an attorney of record). Second, as explained in her affidavit, Attorney Wenzel could not have received a notification from the UJS Notification system in March 2023 because she did not have an account with that system until May 4, 2023. *See* State's Response to Defendant's Motion to Dismiss APP:10; State's Reply APP:1.

[3] The South Dakota Attorney Notification System's portal is located at https://ujsattorney.sd.gov/. *See also* Defendant's APP:1. The Odyssey File and Serve System's portal is located at https://southdakota.tylertech.cloud/OfsWeb/.

[4] The website for the UJS Notification System does not identify the program that supports its platform, but the System's website address and the email notifications from the System suggest it is supported by UJS.

user receives a notification from the Odyssey File and Serve System, the email is generated from no-reply@efilingmail.tylertech.cloud while a notification from the UJS Notification System is generated from NoReply_UJS@ujs.state.sd.us. *See* Defendant's APP:5, 12.

The functions of the two systems are also separate and distinct. A registered user of Odyssey File and Serve is able to file documents with the court and serve documents on parties registered in the Odyssey System. SDCL 16-21A-2 & 16-21A-7; *see also* South Dakota Unified Judicial System Frequently Asked Questions ("Odyssey FAQ") at 4-7.[5] Notably, the filing and service functions in Odyssey are separate—i.e. a party can: 1) file a document with the court without serving it on other parties; 2) serve a document on other registered parties in a case without filing it with the court; or 3) both file and serve the document. *See* Firm and Criminal Filing Filer User Guide ("Filer User Guide")[6] at 162 (Filing Type Drop-Down List); Odyssey FAQ at 4-7.

Odyssey File and Serve provides two types of email notifications: filer notifications and service notifications. State of South Dakota File & Serve, UJS Firm/Filer Instructions ("Filer Instructions") at 16.[7] When a filer submits a document into the system, it is forwarded to the clerk and, if accepted, filed within the court's document management

[5] Accessed at: https://ujs.sd.gov/media/odyssey/file_serve_faq.pdf.
[6] Accessed at: https://ujs.sd.gov/media/odyssey/Firm_User_Guide_HTML5.pdf.
[7] Accessed at: https://ujs.sd.gov/media/odyssey/File_Serve_Filer_Instructions.pdf.

system as part of the "official record." Filer User Guide at 13-14; SDCL 16-21-1 & 16-21-4. The *party filing the document* is notified when the document is submitted into the system and when the clerk accepts or rejects the filing. Filer Instructions at 16-17; Odyssey FAQ at 6-7; SDCL 16-21A-2(3).

If the filer opted to serve the document, a service email notification is sent to the parties that filer selected to serve and to the filer confirming that the document was served on the selected parties.[8] Filer Instructions at 16-17; Defendant's APP:20. Importantly, when a document is filed, email notifications are sent to other parties in the case *only if* the filer opts to serve the document. Filer Instructions at 16-17; Filer User Guide at 13. When a party is served through Odyssey's service function, the email notification provides the served party with a link to access the served document, along with other filing information. Odyssey FAQ at 8; Defendant's APP:5. The party who served the document through the service function can see if the service contact received or opened the document and, if opened, the date and time it was opened. Odyssey FAQ at 5-7; *See also* State's Reply APP:3 (Odyssey notification explaining how to check the status of a served document).

[8] The filer can control which notifications he or she receives when filing and serving documents. Odyssey FAQ at 7; Filer User Guide at 30.

A filer may also file a "Proposed Document" with the court, for the court's approval and signature, and serve the proposed document on other parties. Defendant's APP:3. Unlike other filed documents, Proposed Documents are not immediately "file stamped" or entered into the official record. Odyssey FAQ at 5; Filer Instructions at 36. Instead, they are submitted to the clerk for approval and then forwarded to the judge's "signature queue." Filer Instructions at 36. After the order is signed (or denied), the clerk file stamps the order and enters it into the official court record. SDCL 16-21-4; Defendant's APP:17 (confirming the system's procedure with proposed documents). Importantly, "orders issued by the court do not go through the e-filing system." Filer Instructions at 17. Neither the court nor the clerks are required to provide service or notice of entry of the order through Odyssey File and Serve or otherwise. SDCL 16-21-4(5) (directing court personnel to electronically *file* orders from the court); SDCL 16-21-9 (directing the clerk to distribute orders electronically when practicable); SDCL 16-21A-7(4) (explaining the court *may* electronically file and serve orders on registered parties).

A registered user of the UJS Notification System can "subscribe" to receive notifications of specific events that occur in cases where the user is an attorney of record. *See, supra*, Note 4 (UJS Notification System website). This includes the "event" that occurs when the clerk enters a signed order into the official court record. *Compare*

Defendant's APP:12 (sending "Notification of Events Filed" regarding the First Order at 4:55PM) *with* SR:95 (showing that the court signed the First Order at 3:43PM). Users cannot file documents with the court or serve documents through the UJS Notification System. If an email notification is generated, the recipient must log into the eCourts system and locate the case to view the document. Filer Instructions at 17; Defendant's APP:12.

The only notification automatically provided when an order is entered into the official record is through the UJS Notification System. Filer Instructions at 17. Interestingly, Antuna claims that both Odyssey and the UJS Notification System provide email notification when a court enters an order, but he failed to provide the notification email he allegedly received from Odyssey File and Serve when the clerk filed the Orders at issue in this appeal. Instead, he attached email notifications confirming the filing and service of the *proposed* Orders from Odyssey File and Serve and the notification emails from the UJS Notification System for the "event" that occurred when the signed orders were entered into the record. Defendant's APP:3-5, 12, 20, 23. Neither the State nor Antuna received notification through Odyssey File and Serve when the clerk entered the signed Orders.

Antuna claims that the amendment of SDCL 15-6-5(b)(2) removed the distinction between filing, entry, and service of documents. If Antuna's assertion was true, at least two unworkable results would

occur. First, a plethora of statutes (or portions thereof), including those that govern the filing and service of documents and those that set and distinguish limitations periods, would be repealed by implication. This Court strongly disfavors repeal by implication. *Faircloth v. Raven Industries, Inc.*, 2000 S.D. 158, ¶ 10, 620 N.W.2d 198, 202. To avoid such results, this Court refrains from reading statutes in isolation. *Id.* at ¶¶ 7-8. Rather, statutes of the same subject are read together and harmonized when possible. *Id.*; *see also State v. Bettelyoun*, 2022 S.D. 14, ¶¶ 29-30, 972 N.W.2d 124, 133.

Second, if there was no difference between filing, service, and entry of an order, the filing of a proposed order would begin the time to appeal the order, even if the court had not signed the order. But the filing of a proposed order is not sufficient to begin the timeframe in which to appeal. Indeed, a judge is not required to sign the proposed order the same day it is filed, nor is the clerk obligated to enter the signed document into the record on the same day. And, because a "proposed order" is not an enforceable or effective order, it is not appealable. SDCL 15-6-58. The purpose of filing a document with the court is to have the court consider the matter at issue and to ensure it is entered into the official record. *Kovac v. South Dakota Reemployment Assistance Division*, 2023 S.D. 45, ¶ 18, 995 N.W.2d 247, 253. The purpose of "entering" orders into the official record is to make the order

effective and enforceable.[9] SDCL 15-6-58. The purpose of serving pleadings and orders is to give the opposing party notice of the filing of the document or order and to start any applicable limitations periods. *See Kallstrom v. Marshall Beverages, Inc.*, 397 N.W.2d 647, 650 (S.D. 1986). The terms filing, service, and entry of orders are distinct concepts.

Antuna also uses the language of SDCL 15-6-5(b)(2) to assert that a presumption of service arose when the "order was entered." DB:13-17. It is unclear if he is referring to his proposed order that was filed and served through Odyssey File and Serve (addressed above) or the Order that was signed by the court and entered into the record by the clerk. While SDCL 15-6-5(b)(2) suggests that a presumption of service would arise if the enforceable Second Order was filed "with the court" in Odyssey, in this case, neither the trial court, clerk, nor Antuna filed (or served) the enforceable Second Order using the Odyssey File and Serve System.

It appears that Antuna misunderstands the statutes that apply to *parties* filing documents "with the court" via Odyssey File and Serve and the statutes that apply to *the court and clerk's* handling of the court's official record through electronic means. SDCL 16-21A-2, 15-5-6(b)(2),

[9] The words "filing" and "entry" are used interchangeably when referencing the clerk's act of ensuring a document or order is recorded in the court's official record. However, as explained in this brief, the filing or entry of an enforceable order into the official record and a party's act of filing a document into Odyssey File and Serve are distinct.

and 15-6-5(e) require "registered users"—i.e. attorneys or parties registered with the electronic filing system (Odyssey)—to use Odyssey to electronically file documents "with the court," and SDCL 16-21A-7(1) requires *a party* who files a document electronically to also serve the document electronically using the Odyssey System. *See also* SDCL 16-21A-1(1) (defining "Registered User").[10]

Conversely, SDCL 16-21-4 requires *the clerk* to maintain the official court record and electronically file all documents entered by the court, including orders, into the official record. SDCL 15-6-5(b)(2) does not apply to a clerk's filing—i.e. entry—of an order into the official record, because the clerk is not "filing" the order "with the court." The order was already "with the court" and the clerk is ensuring the order is documented in the official record. *Compare* SDCL 16-21-4, *with* SDCL 16-21A-2 & 15-6-5(b)(2). And, as explained above, when the clerk files a signed order into the official record, that function is not completed using the e-filing and e-service system. Filer Instructions at 17; SDCL 16-21-4. Thus, Antuna cannot rely on SDCL 15-6-5(b)(2) to create a presumption of service because neither he, nor the court, nor clerk filed a copy (or notice) of the enforceable Second Order "with the court" using the Odyssey File and Serve System.

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[10] Filers using the Odyssey File and Serve System are directed to include a certificate of service with their documents, because the filer has the ultimate responsibility for accomplishing service. Odyssey FAQ at 7; *see also* E-filing Guidelines for Odyssey File & Serve at 1 (Accessed at: https://ujs.sd.gov/media/odyssey/E_Filing_Guidelines.pdf).

Finally, reading SDCL 16-21A-2(2) and 16-21A-4 together confirms that the registered user that files a document will get a notification when the document is entered into the system and when it is accepted. These statutes in no way suggest the attorneys of record in a case receive notification through the Odyssey File and Serve System when a document is entered into the System via a filer's submission of a document unless the filer also serves the document. Antuna's interpretation is squarely at odds with the guidance documents provided on the Unified Judicial System's website and the statutes and rules regarding these procedures. *See*, *supra*, pages 8-11.

If Antuna's interpretation of SDCL 15-6-5(b)(2) is correct, a presumption of service would arise if a document was filed in Odyssey, but not served on opposing counsel. As explained above, Odyssey does not send a notification email to the parties of record unless the filing party selects the service option. Thus, Antuna's position would allow a presumption of service to arise, even when the other parties of record have received no notice of the filing. *See* DB:16 (claiming that SDCL 15-6-5(b)(2) places the burden on the attorney to monitor the filing system). This is both troubling and inconsistent with statutes governing electronic filing and the prescribed limitations periods at issue. However, when inconsistent with the rules of civil procedure, the electronic filing statutes in SDCL ch. 16-21A govern. SDCL 16-21A-10. Antuna's interpretation of SDCL 15-6-5(b)(2) is squarely inconsistent

with SDCL 16-21A-7 (requiring documents filed electronically to be served electronically through Odyssey). The procedural statutes that govern the filing and service of documents and the applicable limitations periods, along with the user guides for Odyssey provided on the Unified Judicial System's website, support the State's explanation of the Odyssey File and Serve System and the UJS Notification System. *See also* Appellant's Brief at 30-34.

B. The Prescribed Limitations Periods.

Antuna claims that the "notice of entry of such order" language in SDCL 15-26A-13, when compared to other timeframes that require "written notice of entry" means that *any* notice that an order has been (or might be) entered will suffice, so long as the State knew the order was entered. While the impractical effect of Antuna's interpretation is obvious throughout his brief, his conclusion that the State definitely "knew" that the Second Order was entered on March 9 or 10 is untenable. DB:22; *see also* SR:168 (showing the court signed the Second Order at 4:59PM on March 9); Defendant's APP:23 (UJS Notification email regarding the entry of the Second Order dated March 10). Seeing as the limitation period for taking an appeal is jurisdictional, the difference of one day can matter. *State v. Mulligan*, 2005 S.D. 50, ¶ 5, 696 N.W.2d 167, 169. Antuna's opinion regarding "notice" is also inconsistent with SDCL 15-6-5(a), which requires "notice" to be "served on each of the parties" and SDCL 15-6-5(d), which

requires a party to file notice of entry of a judgment or order, and proof of service, with the court. *See also* SDCL 16-21A-7. Neither a party's "actual knowledge," nor notice through the UJS Notification System are sufficient. *See* SDCL 15-6-5(b). While SDCL 15-26A-13 does not require the defendant to be the one that serves notice of entry to begin the prescribed period, in this case, notice of entry of the enforceable Orders was not filed or served upon the State through the Odyssey File and Serve System, which is the designated "electronic filing system," nor was it served through any other approved method. *See* SDCL 15-6-5, 16-21A-1.[11]

Efficiency is best served by following the language of the statutes, reading statutes of the same subject together, and holding both parties to their obligations under the filing, service, and appeal statutes. *See e.g. Mulligan*, 2005 S.D. 50, ¶ 5, 696 N.W.2d at 169; *State v. Anders*, 2009 S.D. 15, ¶ 7, 763 N.W.2d 547, 550; *State v. Waters*, 472 N.W.2d 524, 525 (S.D. 1991); *Maynard v. Heeren*, 563 N.W.2d 830, 835 (S.D. 1997) (construing statutes according to their intent, which is determined from reading the statute as a whole, along with other statutes relating to the same subject).

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[11] While using Odyssey File and Serve to file and serve a written document explaining that the court's order has been entered, with the enforceable order attached, is the common practice, filing a copy of the signed and entered Order, without a written explanation, may also fulfill the requirements of SDCL 15-26A-13.

Finally, while this Court has previously applied the limitations period from SDCL 15-26A-13 to discretionary criminal appeals, the criminal statutes suggest that the limitations period in SDCL 23A-32-15, and calculation of such, is applicable to discretionary criminal appeals.

Both the State and the defendant are permitted to seek a discretionary appeal of any intermediate order made before trial, if the appeal is not allowed as a matter of right. SDCL 23A-32-12. "The *procedure* as to the taking of such appeal, petition for allowance thereof, and allowance thereof, shall be set forth in §§ SDCL 15-26A-13 to 15-26A-17, inclusive, *so far as the same are applicable.*" SDCL 23A-32-12 (emphasis added). The statutes provide the following guidance:

> First, the party appealing must file a petition for permission to appeal, with proof of service, with the Supreme Court clerk, along with the required filing fees. The limitations period is ten days after notice of entry of such order. SDCL 15-26A-13.
>
> The required contents of the petition and the required attachments are governed by SDCL 15-26A-14 and 15-26A-15.
>
> Second, the other parties in the case may file and serve a response with the Supreme Court clerk within seven days after service of the petition. SDCL 15-26A-16.
>
> Finally, if the Court grants the petition, the Supreme Court clerk will serve notice of the order on the clerk of the trial court and the parties in the action. The appeal then proceeds as if a written notice of appeal was served. SDCL 15-26A-17.

The criminal appeal statutes are not inconsistent with SDCL 15-26A-13 to 15-26A-17, except that SDCL 23A-32-15 requires *any appeal*, other than from a judgment, to be taken "within thirty days after written notice of the filing of the order shall have been given to the party appealing." While the aspects of SDCL 15-26A-13 to 15-26A-17 that govern the contents of the petition, the response to the petition, and the actions that occur after a petition is granted are purely procedural, the time frame in which an appeal must be filed is jurisdictional. *Mulligan*, 2005 S.D. 50, ¶ 5, 696 N.W.2d at 169. Thus, the time frame included in the criminal appellate statutes governing orders—thirty days after a written notice of the filing of the order is given to the party appealing—would be the applicable time frame, not the timeframe in SDCL 15-26A-13. The remaining jurisdictional aspects of SDCL 15-26-13, including the location where the petition must be filed, are not inconsistent with the criminal statues and would also be applicable under SDCL 23A-32-14.

Notably, if the timeframe in SDCL 23A-32-15 does not apply to discretionary appeals, that language would not apply to any appeal under the criminal statutes—making the language surplusage. *Faircloth*, 2000 S.D. 158, ¶ 9, 620 N.W.2d at 201. The ways in which the State or a defendant may appeal in a criminal action are confined to those specifically enumerated in the criminal appellate statutes. *State v. Edelman*, 2022 S.D. 7, ¶¶ 10-11, 970 N.W.2d 239, 241-42 (explaining

the orders and judgments from which a criminal defendant may appeal); *State v. Steffensen*, 2020 S.D. 36, ¶¶ 5-10, 945 N.W.2d 919, 921-22 (confining the orders from which the State may appeal in a criminal case to those enumerated in statute). The timeframe for talking an appeal under SDCL 23A-32-4 and 23A-32-5, which designate the orders from which the State may appeal as a matter of right, is governed by SDCL 23A-32-6 and is specifically excluded from SDCL 23A-32-15. Additionally, the language of SDCL 23A-32-22, which allows the State or the defendant to seek a discretionary appeal from an order involving an illegal sentence, requires the appeal to be taken in the same *manner* as intermediate appeals under SDCL 15-26A-3(6)—the jurisdictional statute governing civil appeals. SDCL 23A-32-22 does not include any limiting language, similar to that in SDCL 23A-32-12 or otherwise, that restricts the exclusive application of the civil statutes for those appeals. Defendants are permitted to appeal, as a matter of right, a judgment of conviction, but the language at issue in SDCL 23A-32-15 specifically excludes judgments. The appellate jurisdiction of this Court and a party's right to appeal, are limited to those situations and timeframes provided by the Legislature. *Edelman*, 2022 S.D. 7, ¶ 10, 970 N.W.2d at 242. In order to give the time frame related to orders in SDCL 23A-32-15 meaning, it must apply to discretionary appeals under SDCL 23A-32-12. *Faircloth*, 2000 S.D. 158, ¶ 9, 620 N.W.2d at 201.

As recognized in Antuna's brief, if the statute at issue included the words "written notice" the State's argument would likely be strengthened. DB:19. However, regardless of which limitations period applies, the State did not receive "notice" of the entry of the Second Order, written or otherwise, through any of the approved service methods. Because the prescribed period did not begin to run, the State timely filed the petition for permission to appeal and this Court has jurisdiction to consider this appeal.

CONCLUSION

The State respectfully requests this Court reverse the trial court's orders and direct the court to apply the *Nixon* factors to Antuna's subpoena duces tecum.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Petitioner's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Petitioner's Brief contains 4,678 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 20th day of October 2023.

/s/ Nolan Welker
Nolan Welker
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 20, 2023, a true and correct copy of Appellant's Reply Brief in the matter of *State of South Dakota v. Nathan Antuna* was served via Odyssey File and Serve, upon John Murphy at john@murphylawoffice.org.

/s/ Nolan Welker
Nolan Welker
Assistant Attorney General

State's Reply Brief Appendix

Wenzel, Chelsea

From: NoReply_UJS@ujs.state.sd.us
Sent: Thursday, May 4, 2023 3:52 PM
To: Wenzel, Chelsea
Subject: Attorney Event Notification Activation

Hello chelsea.wenzel@state.sd.us,

Welcome to the UJS Attorney Event Notification System!

Your account has been created but you need to activate the account before you can set up your Notification Subscriptions

Please CLICK HERE TO ACTIVATE YOUR ACCOUNT.

If you didn't create this account please forward this message to UJSESupport@ujs.state.sd.us

From: no-reply@efilingmail.tylertech.cloud
To: Bartholomew, Mary
Subject: [EXT] Filing Submitted for Case: 30327; STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA; Envelope Number: 2968384
Date: Thursday, July 20, 2023 5:01:48 PM

Filing Submitted

Envelope Number: 2968384
Case Number: 30327
Case Style: STATE OF SOUTH DAKOTA vs. NATHAN M ANTUNA

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Filing Attorney	Chelsea Wenzel

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