IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, Plaintiff and Respondent, vs. MARK WALDNER, MICHAEL M. WALDNER, JR., and MICHAEL WALDNER, SR., Defendants and Respondents.	Appeal No. 30343 Circuit Court Nos. 07CRI21-159 07CRI21-160 07CRI21-161

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

THE HONORABLE BRUCE V. ANDERSON
Circuit Court Judge

PETITIONER E.H.'S BRIEF

Attorneys for Petitioner E.H.
Julie Dvorak
Jeremy Lund
Siegel, Barnett & Schutz, L.L.P.
415 South Main Street, Suite 400
PO Box 490
Aberdeen, SD 57402-0490
jdvorak@sbslaw.net
jlund@sbslaw.net

Attorneys for Respondent
State of South Dakota
Marty J. Jackley
Chelsea Wenzel
Assistant Attorney General
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501
atgservice@state.sd.us

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Attorney for Respondent Mark Waldner
Kent Lehr
Lehr Law Office
PO Box 307
Scotland, SD 57059
Telephone: (605) 583-4100
lehrlaw@gwtc.net

Attorney for Respondent
Michael M. Waldner, Jr.
Timothy R. Whalen
Whalen Law Office, P.C.
PO Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645
whalawtim@cme.coop

Attorney for Respondent
Michael J. Waldner, Sr.
Keith Goehring
Goehring Law Office
PO Box 851
Parkston, SD 57366
Telephone: (605) 928-3356
kgoehrng@santel.net

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PETITIONER E.H.'S BRIEF

JURISDICTIONAL STATEMENT

E.H. appeals the Order Denying Motion to Quash, which was filed on April 25, 2023. The Order's related Findings of Fact and Conclusions of Law were also filed on April 25, 2023. The Notice of Entry of Findings of Fact and Conclusions of Law and Order was filed on April 28, 2023.

The Petition for Permission to Appeal was filed May 8, 2023, and the Order Granting Petition for Allowance of Appeal from Intermediate Order was issued by this Court on June 16, 2023. This Court's jurisdiction will be discussed in detail below.

STATEMENT OF LEGAL ISSUES

1. WHETHER THIS COURT HAS JURISDICTION TO HEAR AN APPEAL FROM AN INTERLOCUTORY ORDER BROUGHT BY A NON-PARTY IN A CRIMINAL CASE OR OTHERWISE CURRENTLY HAS JURISDICTION TO DETERMINE THE ISSUE IN THIS APPEAL.

   No ruling was made by the trial court on this issue.

SDCL 15-26A-13;

SDCL 15-26A-92;

SDCL 23A-32-12;

SDCL 23A-28C-3;

S.D. Const. art. VI, § 29;

Milstead v. Johnson, 2016 SD 56, 883 N.W.2d 725;

Milstead v. Smith, 2016 SD 55, 883 N.W.2d 711;

Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjust., 2015 SD 54, 866 N.W.2d 149;

Rapid City v. State, 279 N.W.2d 165 (S.D. 1979).

2. WHETHER THE TRIAL COURT ERRED IN ORDERING AN IN CAMERA REVIEW OF E.H.'S DIARIES OR JOURNALS IN LIGHT OF E.H.'S CONSTITUTIONAL RIGHT TO PRIVACY, INCLUDING HER RIGHT TO REFUSE A DISCOVERY REQUEST; AND WHETHER IT FURTHER ERRED IN ORDERING AN IN CAMERA REVIEW WITHOUT FIRST FINDING E.H. WAIVED HER CONSTITUTIONAL RIGHTS AND WITHOUT HOLDING DEFENDANTS TO THEIR BURDEN UNDER THE APPLICABLE LAW.

The trial court rejected the assertion of E.H. that her constitutional right to privacy, including her right to refuse discovery requests, is absolute. The trial court failed to make the required finding that E.H. waived her constitutional right to privacy, including her right to refuse discovery requests. And it failed to hold Defendants to their burden to establish a factual predicate that it was reasonably likely that the diaries or journals would contain information both relevant and material to their defense. Instead, the trial court found the diaries or journals may shed light on E.H.'s general credibility. Ultimately the trial court concluded that Defendants' constitutional rights outweighed E.H.'s constitutional rights.

S.D. Const. art. VI, § 29(1)(2))(5)(6) and (9);

SDCL 23A-14-5;

SDCL Ch. 23A-28C;

Pennsylvania. v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987);

Milstead v. Johnson, 2016 SD 56, 883 N.W.2d 725;

Milstead v. Smith, 2016 SD 55, 883 N.W.2d 711;

United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L.Ed.2d 1039 (1974).

STATEMENT OF THE CASE

This criminal matter is pending in the First Judicial Circuit Court in Brule County. It is a consolidated case involving three alleged rapists with a common victim, E.H., who was a minor at the time of the rapes and other assaults. Defendants issued a Subpoena Duces Tecum commanding E.H. to produce:

> [T]he following described books, papers, or documents in your possession or under your control: Any and all statements, notes, video tapes, recordings, photographs, emails, text messages, computer maintained records, electronic records, social media records or recordings, diaries, journals, or other documents of any nature which you have in your possession or under your control or which you may be able to obtain from your records for the time period of January 1, 2010, through the present.

The focus of the subpoena was the diaries and journals. E.H. moved to quash the subpoena citing her constitutional right to privacy, including her specifically delineated right to refuse discovery requests under Marsy's Law. E.H. also asserted she had not waived her constitutional rights and that Defendants failed to make the requisite showing regarding the diaries and journals.

The trial court, the Honorable Bruce V. Anderson, denied the Motion to Quash and ordered E.H. to turn over the diaries and journals for an in camera inspection. That Order is the subject of this appeal.

STATEMENT OF THE FACTS

As indicated above, Defendants are facing charges of rape and other criminal activity. (Clerk's Record 1-6).[1] E.H., the victim, was a minor during the relevant time period. *Id.* E.H. and others were interviewed by Division of Criminal Investigation Agent Brian Larson prior to the indictment of Defendants. One of E.H.'s diaries or journals was provided to DCI. Defense counsel was later provided a copy of the same. (*See* generally transcript excerpts from June 2021 at Clerk's Record 303-18).

Defendants initially issued a Subpoena Duces Tecum to the victim, E.H., in June 2022. (Clerk's Record 243). Defendants had already filed a Motion for Further Discovery requesting the trial court order the State to obtain all the diaries or journals made by E.H. (Clerk's Record 203-06). The trial court ordered the State to prepare and submit a *Vaughn* index with the diaries for an in camera inspection. (Clerk's Record 245-46). The court also ordered the State to submit a brief setting forth the State's position as to the issues relative to the disclosure of the diaries and journals under Marsy's Law. *Id.*

As S.D. Const. art. VI, § 29 permits, E.H. sought independent counsel in July 2022. (Clerk's Record 255). Counsel filed a Motion to Quash the Subpoena Duces Tecum on E.H.'s behalf. (Clerk's Record 256-60). Defense counsel withdrew its Subpoena as they had been successful in seeking the diaries and journals through their

[1] All of Clerk's Record citations come from Criminal File 07CRI21-160.

Motion for Further Discovery. (Clerk's Record 261). Counsel for E.H. then filed a Motion to Vacate in part the Order Granting Motions for Further Discovery, particularly the matter regarding diaries or journals. (Clerk's Record 263-64). The Court heard arguments and issued an Order Granting the Motion to Vacate in November 2022. (Clerk's Record 324).

A new Subpoena Duces Tecum was served on E.H., pursuant to SDCL 23A-14-5, again commanding her to produce:

> [T]he following described books, papers, or documents in your possession or under your control: Any and all statements, notes, video tapes, recordings, photographs, emails, text messages, computer maintained records, electronic records, social media records or recordings, diaries, journals, or other documents of any nature which you have in your possession or under your control or which you may be able to obtain from your records for the time period of January 1, 2010, through the present.

(Clerk's Record 321). Counsel for E.H. again filed a Motion to Quash the Subpoena Duces Tecum arguing the Subpoena violated E.H.'s constitutional right to privacy, including her right to refuse discovery requests. (Clerk's Record 322). E.H. also asserted that Defendants failed to make the requisite showing regarding the diaries and journals and that she had not waived her constitutional rights.

The trial court denied the Motion to Quash and ordered E.H. to turn over the diaries and journals for an in camera inspection, as more thoroughly detailed in the Findings of Fact and Conclusions of Law on Journals and the Order Denying Motion to Quash. (Clerk's Record 669-679). That Order is the subject of this appeal.

The trial court indicated he would review E.H.'s diaries and journals and determine if any of her entries in those journals or diaries were relevant. *After* that, he would

determine whether they were protected from disclosure. (Motions Hearing 3/28/23 TR, p. 23, lines 22-25, APP 33).

ARGUMENT

1. THIS COURT HAS JURISDICTION TO DETERMINE THE ISSUE RAISED IN THIS CASE

A. A PETITION FOR INTERMEDIATE APPEAL IS THE APPROPRIATE VEHICLE FOR NON-PARTIES TO APPEAL DISCOVERY ISSUES IN A CRIMINAL PROCEEDING

There is precedent demonstrating this Court has jurisdiction to consider petitions for intermediate appeal from "interested parties," not the State or a defendant, who specifically want to obtain appellate review of an Order denying a Motion to Quash. *See Milstead v. Smith*, 2016 SD 55, 883 N.W.2d 711 (*Milstead I*); *Milstead v. Johnson*, 2016 SD 56, 883 N.W.2d 725 (*Milstead II*). The relevant facts of *Milstead I* and *Milstead II* are virtually identical. In both cases, the defendants had charges of simple assault on law enforcement involving officers with the Minnehaha County Sheriff's office. *Milstead I* at ¶ 2. *Milstead II* at ¶ 2. In each case, the defendants issued a subpoena *duces tecum* to Sheriff Milstead for all disciplinary records, reprimands, and complaints for the officers involved. *Milstead I* at ¶ 2. *Milstead II* at ¶ 2. Sheriff Milstead filed motions to quash the subpoenas *duces tecum* in both cases. *Milstead I* at ¶ 3. *Milstead II* at ¶ 3. In each case, the defendants argued that access to the records were necessary for effective cross-examination pursuant to the Sixth Amendment of the United States Constitution. *Milstead I* at ¶ 3. *Milstead II* at ¶ 3. In both cases, the trial court denied the motions to quash and ordered an in camera inspection. *Milstead I* at ¶ 4. *Milstead II* at ¶ 4.

In both cases, Sheriff Milstead petitioned this Court for permission for an intermediate appeal from a circuit court's order. *Milstead* I, at ¶ 5; *Milstead* II, at ¶ 5. In

both cases, this Court granted the Sheriff's petition for intermediate appeal. *Milstead I* at ¶ 5. *Milstead II* at ¶ 5. In both cases, the Sheriff was appealing a trial court order denying his Motion to Quash. That is the precise issue before this Court in the instant case.

The *Milstead* cases were decided just months before the approval of the initiated measure that created Marsy's law. They involved the pursuit of records pertaining to the victim of the cases. However, there is a key distinction between the *Milstead* cases and the instant case. The Milstead cases involved personnel records of the victims which merely had a statutory protection from being considered an open record pursuant to SD Ch. 1-27. *Milstead I* at ¶ 9. *Milstead II* at ¶ 9. In the instant case the victim, E.H., has a constitutional privilege to refuse discovery requests. S.D. Const. art. VI, § 29.

The *Milstead* cases stand for the premise that when a non-party to a criminal proceeding seeks to appeal the denial of a motion to quash, the appropriate method to appeal is a petition for intermediate appeal. E.H has relied on this Court's prior cases to pursue this appeal. *See Rapid City v. State*, 279 N.W.2d 165, 166 (1979) (Court found the appellant had properly relied upon its previous holdings in regard to how it sought appellate review thereby treating the filing in such a way as to determine the merits of the appeal and holding its decision altering its previous holdings would be prospective only). As such, E.H. asserts this Court has jurisdiction, as it did in *Milstead,* to hear this appeal.

B. THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL UNDER SDCL 23A-32-12

Intermediate appeals in criminal cases are allowed as follows:

> As to any intermediate order made before trial, as to which an appeal is not allowed as a matter of right, **either the state or the defendant** may be permitted to appeal to the

> Supreme Court, not as a matter of right, but of sound judicial discretion, such appeal to be allowed by the Supreme Court only when the court considers that the ends of justice will be served by the determination of the questions involved without awaiting the final determination of the action. The procedure as to the taking of such appeal, petition for allowance thereof, and allowance thereof, shall be as set forth in §§ 15-26A-13 to 15-26A-17, inclusive, so far as the same are applicable.

SDCL 23A-32-12. E.H. is neither the State nor the defendant in this case. However, E.H. filed the petition for permission to appeal in conjunction with the State. In its pleading entitled "Response to Petition for Permission to Take Discretionary Appeal," the State joined E.H.'s petition and asked this Court to grant E.H.'s request for permission to appeal. The State's response complies with the requirements of a petition for permission to appeal, especially when combined with E.H.'s petition.

While the State's response was not filed within the ten days allowed under SDCL 15-26A-13, SDCL 15-26A-92 allows this Court, for good cause shown, to enlarge or extend this time prescribed by SDCL 15-26A-13. E.H. and the State request this Court accept E.H.'s petition and the State's response, together, as a timely petition for permission to appeal under SDCL 23A-32-12 and 15-26A-13.

Importantly, failure to file a petition within ten days is not a jurisdictional defect that would deprive this Court of jurisdiction. It is well settled that this Court derives appellate jurisdiction from the Legislature. But, unlike the jurisdictional prerequisites enacted by the Legislature, the time period in SDCL 15-26A-13 is a claims processing rule enacted by this Court. *See* SL 2023, Ch. 220 (Supreme Court Rule 23-03); *Hamer v. Neighborhood Housing Services of Chicago*, 583 U.S. 17 (2017).

As this Court itself has noted in *Petersen v. South Dakota Board of Pardons and Paroles*, 2018 SD 39, ¶ 12, n.3, 912 N.W.2d 841, 844:

> [T]he failure to comply with statutory prerequisites does not always deprive the court of *subject matter jurisdiction*, which is the power of the court to determine certain types of cases. . . . some failures may be waived or forfeited, which is not the case for true jurisdictional defects. . . . We only caution careful use of the terms power, authority, and subject matter jurisdiction when discussing procedural requirements for appeals. This Court and others are beginning to address and clarify the distinctions when necessary to the outcome of the case.

Id. Citing *Hamer*, 583 U.S. at 19-21 (2017) (other citations omitted). *See also State v. Hirning*, 2020 SD 29, ¶ 11, n.2, 944 N.W.2d 537, 540.

In explaining the difference between jurisdictional appeal filing deadlines and claims processing rules, the Court in *Hamer* discussed a prior decision where Congress allowed for extensions of time to file a notice of appeal if a party did not receive notice of the order at issue. *Hamer* at 26-27. At the time, Congress's statute allowed for extensions up to fourteen days. The district court provided the party a seventeen-day extension. In holding that the court of appeals lacked jurisdiction over the appeal, the Court explained that "[b]ecause Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period" the party's failure to file the notice of appeal within the fourteen day time period was a jurisdictional defect. *Id.* In contrast, a time prescription set by court rule is not jurisdictional.

In this case, the time period in SDCL 15-26A-13 is not jurisdictional. As such, this Court may waive the prerequisites in that statute and consider the State's response in conjunction with E.H.'s petition. Waiving the prerequisites affords E.H. a remedy by due course of law, ensuring her right to appellate review of the trial court's decision on the

Motion to Quash is protected in a manner no less vigorous than that right would have been afforded to Defendants if the Motion to Quash had been granted and they sought appellate review.[2]

C. THE CONSTITUTION REQUIRES A VICTIM TO HAVE A RIGHT TO SEEK AN INTERMEDIATE APPEAL

E.H. has rights in the South Dakota Constitution as extensively argued throughout this brief in regard to her rights as an alleged victim.

> The victim, the retained attorney of the victim, a lawful representative of the victim, or the attorney for the government, upon request of the victim, may assert and seek enforcement of the rights enumerated in this section 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. The court or other authority with jurisdiction shall act promptly on such a request, affording a remedy by due course of the law for the violation of any rights and ensuring that victims' rights and interests are protected in a manner no less vigorous than the protections afforded to criminal defendants. . . .

S.D. Const. art. VI, § 29.

E.H. has a constitutional right to assert and seek enforcement of the rights enumerated in the Constitution "in any trial **or appellate** court." That includes this Court. This Court must ensure that E.H.'s rights and interests are protected in a manner no less vigorous than the protections afforded to Defendants. And it must afford her "a remedy by due course of law."

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[2] Such a fashioned remedy puts a victim's fate in the hands of the prosecution. In order for such a remedy to be meaningful, the State and victim have to be in lockstep. If the State and an alleged victim are at odds on the issue of pursuing an appeal, the State's discretion could effectively seal the victim's fate. Thus, E.H. urges this Court to grant jurisdiction under her argument in 1 A, argued above.

As the victim in these proceedings, E.H. also has a constitutional right to due process. S.D. Const. art.VI, § 29(1). "Due process requires adequate notice and an opportunity for ***meaningful*** participation." *Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment*, 2015 SD 54, ¶ 31, 866 N.W.2d 149, 160. (emphasis added). E.H.'s due process rights were first violated when an order was entered affecting her without her first being provided notice or an opportunity to participate. That violation was remedied when the trial court vacated its order granting motion for further discovery.

However, her opportunity for meaningful participation will be violated again if she is denied the opportunity for appellate review of the trial court's decision on her Motion to Quash. If the decision had been adverse to Defendants, they would have had a clear right under SDCL 23A-32-12 to request permission to appeal. This Court may be questioning whether E.H. has such a right. Her rights must be defended in a manner no less vigorous than a criminal defendant. Unequal treatment would be a violation of her right to due process and meaningful participation. There must be a remedy for this situation. The Constitution demands it. Thus, this Court must afford E.H. the ability to request an intermediate appeal.

D. A VICTIM'S ALTERNATIVES TO A DISCRETIONARY INTERMEDIATE APPEAL ARE CUMBERSOME AND UNDESIRABLE, BUT POSSIBLE

A potential remedy lies in SDCL 23A-28C-3.

> A victim may seek a cause of action for injunctive relief to enforce the victim's rights under S.D. Const., Art. VI, Section 29 or this chapter. No other cause of action exists against any person for a failure to comply with the terms of this chapter. If a victim asserts in writing to the court with jurisdiction over the case that a violation of this chapter has occurred, the court shall act promptly to ensure the victim's rights and interests are protected in a manner no less

> vigorous than the protections afforded to the defendant. The court, in its discretion, may determine if additional hearings or orders are necessary to ensure compliance with the chapter. The court shall clearly enter on the record the reasons for any decision regarding the disposition of a victim's rights. A violation of any right set forth in Section 23A-28C-1 does not constitute grounds for an appeal from conviction by a defendant or for any other relief from such conviction.

This statute provides authority for E.H., if precluded from obtaining appellate review of the Order forcing her to turn over her diaries and journals, to seek a cause of action for injunctive relief with this Court. If this Court dismisses this appeal for lack of jurisdiction, then E.H. could initiate an original action with this Court seeking to enjoin the trial court from enforcing its unlawful order regarding E.H.'s diaries and journals. This would be a cumbersome process. An original action in the Supreme Court is a rare species, yet specifically authorized by S.D. Const. art. V, § 5.

2. THE TRIAL COURT ERRED IN ORDERING AN IN CAMERA REVIEW OF E.H.'S DIARIES OR JOURNALS

The Order violates E.H.'s constitutional right to privacy including her unqualified right to refuse discovery requests. Even if her right is not absolute, Defendants failed to meet their burden to establish that she waived her right to privacy, including her right to refuse discovery requests. They further failed to meet their burden to satisfy the *Nixon* test.

A. E.H.'S CONSTITUTIONAL RIGHT TO PRIVACY, INCLUDING THE RIGHT TO REFUSE DISCOVERY REQUESTS, IS ABSOLUTE

"A victim shall have the following rights: . . . [t]he right, upon request, to privacy, which includes the right to refuse an interview, deposition or other discovery requests, and to set reasonable conditions on the conduct of any such interaction to which the victim consents;" S.D. Const. art. VI, § 29(6). This right is specifically delineated. It is

not conditional, nor does it contain any exceptions. Contrary to the argument made by Defendants and accepted by the trial court, the language of our Constitution indicates this right to refuse discovery requests is absolute.

As such, E.H. is under no obligation to comply with Defendants' subpoena and the Order denying the Motion to Quash was issued in error. Ordering the production of her diaries or journals is a violation of her constitutionally protected right to privacy, including her right to refuse discovery requests.

Further support for E.H.'s position that her right to privacy, including her right to refuse discovery requests, is absolute can be found in comparing South Dakota's version of Marsy's Law to other states. Compare South Dakota's constitutional language with Ohio's language regarding the same right.

> To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused: . . . (6) **except as authorized by section 10 of Article I of this constitution** [defendant's constitutional rights], to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused . . .

Ohio Const Art. I, § 10a. Victims in Ohio do not have an absolute right to refuse discovery requests. Unlike South Dakota, their constitution specifically provides for exceptions in relation to a defendant's constitutional rights. *See also* N.D. Const. Art. I § 25(1)(f); Wisc. Const. Art. I, § 9m(2)(L), (6).

Support for E.H.'s position that her constitutional right to privacy, including her right to refuse discovery requests, is absolute is also found in comparing it to statutory privileges. This Court has dealt with similar disputes in criminal cases before. *Milstead v.*

Johnson, 2016 SD 56, 883 N.W.2d 725; *Milstead v. Smith*, 2016 SD 55, 883 N.W.2d 711; *State v. Karlen*, 1999 SD 12, 589 N.W.2d 594. The restrictions on disclosure discussed in those cases—personnel records and counseling records—were not absolute. None of those cases involved an un-waived privilege. Unlike those cases, no such conditions or exceptions apply to E.H.'s constitutional right to privacy, including the right to refuse a discovery request.

The clear language of our Constitution provides victims, like E.H., an absolute right to privacy, including the right to refuse discovery requests. The trial court's order denying the motion to quash violates that right. E.H. asks that this Court reverse the trial court's decision and remand this matter with instructions to uphold her constitutional rights and grant her Motion to Quash the Subpoena.

B. E.H.'S CONSTITUTIONAL RIGHT TO PRIVACY, INCLUDING THE RIGHT TO REFUSE DISCOVERY, WAS NEVER WAIVED

Defendants have acknowledged that E.H. is asserting her constitutional rights. They argued constitutional rights can be waived and cited to *Kleinsasser v. Weber*, 2016 SD 16, ¶ 38, 877 N.W.2d 86, 99, in support of this proposition. E.H. agrees constitutional rights can be waived. This general proposition was listed in the Conclusions of Law signed by the trial court. (APP 9). However, no finding was made by the trial court that E.H. waived her constitutional right to privacy, including her right to refuse discovery requests.

Language from the very case cited by Defendants states: "It is critical not only that a [person] be advised of his rights . . . but also that the [person] intentionally relinquish or abandon these rights and that the record affirmatively establish the waiver." *Id.* at ¶ 38. There is nothing in the record to establish that E.H. knowingly and intentionally waived her right to privacy under the South Dakota Constitution, including her right to refuse

Defendants' discovery requests. Again, there was no finding by the trial court that she did so.

The trial court may have believed that providing proof of waiver of E.H.'s right to privacy, specifically in her diaries or journals, was not a hurdle that Defendants needed to clear. The trial court seemed to have good intentions in attempting to protect the rights of all parties, but seemed to believe that the court had the option, perhaps even duty, to perform an in camera review of any "potentially relevant evidence out there that would bear on guilt or innocence. . . ." (Motions Hearing 10/17/22 TR, pp. 152-153; APP 30-31).

Defendants argued the provision of one of E.H.'s journals to law enforcement prior to the indictment of Defendants constituted her waiver of her constitutional right to privacy, including the right to refuse discovery requests. There is no authority to support an argument that such disclosure constituted a waiver of this right. No discovery requests were pending. Even if the production of the diary to law enforcement prior to the indictment of Defendants constituted an intentional and knowing waiver of her constitutional right to privacy, including her right to refuse a discovery request, any such waiver was limited and conditional. It did not extend to all her diaries and journals.

Alternatively, if she waived her right to privacy and it extended to all her diaries and journals, any alleged waiver was rescinded by E.H. when she filed the Motion to Quash the Subpoena served on her and when E.H.'s counsel sent a letter to the State objecting to the gathering by the State of any such diaries. (*See* Motions Hearing 10/17/22 TR, p. 129, lines 11-14; APP 26). Criminal defendants can validly withdraw their consent to provide evidence or their consent to searches, etc. *State v. Hemminger*,

2017 SD 77, ¶ 27, 904 N.W.2d 746, 755. Certainly then, victims of criminal defendants can withdraw their consent to the same.

E.H. never waived her right to privacy, including her right to refuse a discovery request. If she did, she did not need a reason to rescind any waiver. If she did need a reason, she had a reasonable one.

1. E.H. has the right to prevent disclosure of information to Defendants or anyone acting on behalf of Defendants that could be used to harass her or her family. S.D. Const. art. VI, § 29(5).

2. E.H. has the right to be free from intimidation, harassment, and abuse. S.D. Const. art. VI, § 29(2).

As noted in Exhibit 1 filed under seal attached to E.H.'s Brief in Support of her Motion to Vacate, at least one Defendant contacted multiple third parties known to E.H.'s family in Montana and Canada revealing discovery information in an attempt to discredit, embarrass, and harass E.H. and her family. (Clerk's Record 277). Thus, if reason was needed to rescind any alleged waiver of her right to privacy, E.H. had one. Setting reasonable conditions regarding discovery requests to which a victim consents is allowed under Marsy's Law. S.D. Const. art. VI, § 29(6). To be clear, E.H. maintains she never waived her constitutional right to privacy, including her right to refuse discovery requests.

Defendants cited *State v. Karlen*, 1999 SD 12, 589 N.W.2d 594 in support of their position on waiver. Defense counsel argued that "none of this comes to light if E.H. hadn't produced the diary." (Motions Hearing 10/17/22 TR, p. 142; APP 28). Defense counsel went on to argue that the supposed waiver of E.H. producing one diary or journal

to law enforcement was the same waiver that *Karlen* addresses, calling it "the exact circumstance." *Id.* He argued that *Karlen* stands for the proposition that "if you are going to do this [produce a diary or journal], then you suffer the consequence." (Motions Hearing 10/17/22 TR, p. 143; APP 29).

The waiver of privilege relied upon in *Karlen* is wholly inapplicable to this case. In *Karlen*, the defendant issued a subpoena duces tecum for the victim's counseling records. *Id.* at ¶ 28. The trial court quashed the subpoena and the defendant appealed. On appeal, the State argued that the records were privileged pursuant to SDCL 19-13-21.2 (now 19-19-508.2) and neither of the two exceptions within the statute applied.

This Court observed SDCL 19-13-26 (now 19-19-510) was a *third* means to waive the privilege. That statute states: "A person upon whom *this chapter* confers a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This section does not apply if the disclosure itself is privileged." *Id.* at ¶ 32 (emphasis in original). "Since 19-13-21.2 is in the same chapter as 19-13-26, SDCL 19-13-26 provides an additional method of waiver that is applicable in this case." *Id. Karlen* went on to observe that the victim had discussed the incidents with his girlfriend, aunt, school staff and other individuals. Because the statements made to these individuals were not privileged, *Karlen* held that the privilege contained within SDCL 19-13-21.2 had been waived pursuant to SDCL 19-13-26. *Id.*

During a code reorganization several years ago, SDCL 19-13-26, the waiver of privilege discussed in *Karlen*, was transferred to SDCL 19-19-510. It continues to have the same limitations as it did in *Karlen*. The statutory waiver only applies to privileges

conferred within the same chapter of the South Dakota code. As noted above, E.H. has a privilege conferred by the South Dakota Constitution, not SD Ch. 19-19. The waiver provision in SDCL 19-19-510 does not apply. Nor does any other waiver provision.

As E.H. never waived her constitutional right to privacy, including her right to refuse a discovery request, her Motion to Quash the Subpoena should have been granted. In denying the Motion, the trial court violated her constitutional rights. As such, E.H. requests this Court to reverse the trial court's decision in that regard.

C. DEFENDANTS FAILED TO SATISFY THE *NIXON* TEST

In the *Milstead* cases, this Court adopted the test for allowing production of documents laid out by the United States Supreme Court in *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L.Ed.2d 1039 (1974). This Court acknowledged that courts routinely order the production of confidential and even statutorily privileged documents for in camera review in civil and criminal proceedings. *Milstead I*, 2016 SD 55, ¶ 33, 883 N.W.2d at 724. However, before an in camera review is ordered by a trial court, the *Nixon* test must be satisfied.

The *Nixon* test "obligates the requesting party to establish that the desired evidence is (1) relevant, (2) admissible, and (3) requested with adequate specificity." *Id.* at ¶ 20, 883 N.W.2d at 720. For the relevance element, Defendants must "establish a factual predicate showing that it is reasonably likely that the diaries and journals will bear information both relevant and material to [their] defense." *Id.* at ¶ 25, 883 N.W.2d at 722. *See also Milstead II*, 2016 SD 56, ¶ 25, 883 N.W.2d at 735. No such finding was ever made. Instead, the trial court found the diaries or journals may shed light on E.H.'s general credibility. (Finding of Fact ¶ 27; APP 8).

As in both *Milstead* cases, the *Nixon* test is unsatisfied here and as such the circuit court erred in ordering an in camera review of E.H.'s diaries and journals. *See Milstead I*, 2016 SD 55, ¶ 33, 883 N.W.2d at 723; *Milstead II*, 2016 SD 56, ¶ 33, 883 N.W.2d at 737. *See also Ferguson v. Thaemert*, 2020 SD 69, ¶ 16, 952 N.W.2d 257, 282.

Only after the *Karlen* court determined the privilege had been waived, did it consider whether the records should be produced as requested by the Subpoena. *Karlen* does not stand for the premise that defendants in criminal cases are entitled to an in camera inspection of all protected information. The holding of *Karlen* was **if** a privilege had been waived, AND **if** the defendant could make a further showing that the records contained material evidence, only then was an in camera inspection warranted. As noted above, E.H. has not waived her constitutionally protected right to refuse discovery requests, and the trial court did not make the required ruling that she did. Thus, this Court should not have to reach this issue to reverse the trial court.

Even before the inclusion of Marsy's Law in the South Dakota Constitution, Defendants' subpoena for E.H.'s diaries would not be allowed under the law. The Subpoena Duces Tecum is sought to mount a general attack on E.H.'s credibility. This Court has indicated that is not a sufficient justification. *See State v. Karlen*, 1999 SD 12, ¶ 44, 589 N.W.2d 594, 604. In *Karlen*, this Court distinguished between general attacks on credibility and cross-examination "directed toward revealing possible biases, prejudices, or ulterior motives . . . as they may relate directly to issues or personalities in the case at hand." *Id.* ¶ 44, 589 N.W.2d at 604. *Karlen* 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." *Karlen*, 1999 SD 12, ¶ 44, 589 N.W.2d at 604. In other words, the defendant made the required showing by identifying the information it intended to find in the requested records and then demonstrated a permissible use of that information for cross-examination. That did not take place here. Instead, the trial court found the diaries or journals may shed light on E.H.'s general credibility. (Finding of Fact ¶ 27; APP 8).

Since the *Karlen* decision, victims like E.H. now have a constitutionally protected right to be free from these types of requests. S.D. Const. art. VI, § 29. This stands in stark contrast to the statutory privilege for counseling records that had been waived by the victim in *Karlen*.

Defendants never met their burden to establish that it is reasonably likely that the diaries and journals will bear information both relevant and material to their defense. The trial court should not be able to acquire and search through E.H.'s records/documents for information that might be considered useful to Defendants. This is the very definition of a fishing expedition and should be denied. Defense counsel conceded as much at a motions hearing. (Motions hearing 10/17/22 TR, p. 139, lines 11-16; APP 27).

> If there was no disclosure of a diary, if we hadn't gotten one, and we didn't know about those, I don't think it's fair for the defendant to say, "hey, we think there might be diaries, give them to us." We don't know. So, I mean, I think that's a fishing expedition, so I agree, that's inappropriate.

"If 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 II* at ¶ 28,

883 N.W.2d at 736 (quotations omitted). The record establishes such misuse is taking place here.

As noted above, both *Karlen* and *Milstead* weighed *statutorily* protected rights and privileges against a defendant's *constitutional* rights. *Milstead II*, 2016 SD 56, ¶ 10, 883 N.W.2d at 730. This Court acknowledged in both cases, "[i]t is a basic [tenet] 'of American jurisprudence that a statutory provision never be allowed to trump a Constitutional right.'" *Id.* ¶ 10, 883 N.W.2d at 730. With the subsequent adoption of Marsy's Law in our State Constitution, the analysis has now changed. Even if Defendants' Subpoena met the tests set forth in *Milstead*, E.H. now has a clear constitutionally protected right to refuse the discovery request in the Subpoena. Thus, any outcomes in previous cases in favor of a defendant's pursuit of discovery are distinguishable from the situation here.

Lastly, it is important to note that we are discussing a court order directing an alleged rape victim to turn over her diaries and journals for review to determine if anything she might have written could be used by the very men alleged to have raped her to cross-examine her at trial. This is not a request for counseling records, medical records, personnel records, or the like.

Defendants argued that the diaries or journals may be used to impeach E.H. and quashing the subpoena would violate their confrontation rights. The Confrontation Clause is not being used in the proper manner here. "[T]he 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.'" *United States v. Owens*, 484 U.S. 554, 559, 108 S. Ct. 838, 842, 98 L. Ed. 2d 951, 957-958

(1988). Moreover, the Confrontation Clause does not create a constitutionally compelled rule of pretrial discovery. In *Pennsylvania v. Ritchie*, the U.S. Supreme Court rejected such an assertion:

> The Pennsylvania Supreme Court apparently interpreted our decision in *Davis* to mean that a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness' testimony.
>
> If we were to accept this broad interpretation of *Davis*, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view.

Pennsylvania. v. Ritchie, 480 U.S. 39, 52, 107 S. Ct. 989, 998-999, 94 L. Ed. 2d 40, 54 (1987).

> The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. **The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.** Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses.

Ritchie, 480 U.S. at 52-53 (emphasis added) (citations omitted). This authority shows that Defendants' reliance on the Confrontation Clause in this manner is misplaced.

CONCLUSION

The trial court's Order contradicts the South Dakota Constitution and violates the rights afforded to victims such as E.H. This Court has the jurisdiction, authority, and indeed the duty, to protect E.H.'s constitutional rights. Thus, E.H. respectfully requests this Honorable Court to reverse the trial court's Order Denying her Motion to Quash and

remand with instructions to the trial court to enter an order granting her Motion to Quash the Subpoena Duces Tecum.

Dated this 26th day of September 2023.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Julie Dvorak

Julie Dvorak
Jeremy Lund
Attorneys for Petitioner E.H.
415 S. Main Street, Suite 400
PO Box 490
Aberdeen, SD 57402-0490
Telephone No. (605) 225-5420
Facsimile No. (605) 226-1911
jdvorak@sbslaw.net
jlund@sbslaw.net

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this Brief, the body of the Brief contains 6,061 words and 30,753 characters (not including spaces).

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Julie Dvorak

CERTIFICATE OF SERVICE

The undersigned, attorneys for Petitioner E.H., hereby certifies that on the 26th day of September 2023, a true and correct copy of the foregoing PETITIONER E.H.'S BRIEF was served by electronic transmission on the following:

Kelly Marnette
Chelsea Wenzel
Marty Jackley
SD Attorney General's Office
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501
Kelly.Marnette@state.sd.us
atgservice@state.sd.us

Theresa Maule Rossow
Brule County State's Attorney's Office
300 S. Courtland Street #201
Chamberlain, SD 57325
sabrule@midstatesd.net

Timothy R. Whalen
Whalen Law Office, P.C.
PO Box 127
Lake Andes, SD 57356
whalawtim@cme.coop

Kent Lehr
Lehr Law Office
PO Box 307
Scotland, SD 57059
lehrlaw@gwtc.net

Keith Goehring
Goehring Law Office
PO Box 851
Parkston, SD 57366
kgoehrng@santel.net

Dated this 26th day of September 2023.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Julie Dvorak

APPENDIX

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STATE OF SOUTH DAKOTA : SS COUNTY OF BRULE	)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. MARK WALDNER, MICHAEL M. WALDNER, JR., and MICHAEL WALDNER, SR., Defendants.	)	FILES NO. 07CRI21-159 07CRI21-160 07CRI21-161 NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

TO: Kelly Marnette, Attorney General's Office, 1302 E. Highway 14, Suite 1, Pierre, SD 57501; Theresa Maule Rossow, Brule County State's Attorney, 300 South Courtland Street, #201, Chamberlain, SD 57325; Julie Dvorak, Siegel, Barnett & Schutz, LLP, 415 S. Main Street, Suite 400, P.O. Box 490, Aberdeen, SD 57402:

NOTICE IS HEREBY GIVEN that the FINDINGS OF FACT AND CONCLUSIONS OF LAW ON JOURNALS and the ORDER DENYING MOTION TO QUASH in the above entitled action have been entered by the Court on the 25th day of April, 2023, and filed with the Clerk of Courts of Brule County, South Dakota, on the 25th day of April, 2023, a copy of said Findings of Fact and Conclusions of Law on Journals and Order Denying Motion to Quash are attached hereto.

Dated this 28th day of April, 2023.

TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
Attorney for Defendant Michael Waldner, Jr.
whalawtim@cme.coop

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy. of the NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER with a copy of the Findings of Fact and Conclusions of Law on Journals and the Order Denying Motion to Quash attached thereto on the attorneys for the Plaintiff and E.H. at their email addresses as follows:

Kelly Marnette
Attorney General's Office
atgservice@state.sd.us

APPENDIX 1

Filed: 4/28/2023 11:14 AM CST Brule County, South Dakota 07CRI21-000160

Theresa Maule Rossow
Brule County State's Attorney
sabrule@midstatesd.net

Julie Dvorak
Siegel, Barnett & Schutz, LLP
jdvorak@sbslaw.net

by the UJS Odyssey System on the 28th day of April, 2023, at Lake Andes, South Dakota.

TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
Attorney for Defendant Michael Waldner, Jr.
whalawtim@cme.coop

APPENDIX 2

STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF BRULE)		FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	FILE NO. 07CRI21-159 07CRI21-160 07CRI21-161
vs.	)	
	)	FINDINGS OF FACT AND CONCLUSIONS
MARK WALDNER, MICHAEL M. WALDNER, JR., AND MICHAEL M. WALDNER, SR., Defendants.	)	OF LAW ON JOURNALS

The above entitled matter having come on before the Honorable Bruce V. Anderson, Circuit Court Judge, First Judicial Circuit, State of South Dakota, on the 8th day of November, 2022, and on the 28th day of March, 2023, pursuant to the motions filed by the alleged victim in the above matter; and the Plaintiff appearing by and through Amanda Miller an Assistant Attorney General and the alleged victim not appearing in person, but by and through her attorney of record, Julie Dvorak of Siegel, Barnett & Schutz, LLP at both hearings; Defendant Michael M. Waldner, Sr., appeared at the November 8, 2022, hearing with his attorney Brad Schreiber, but both Defendant Michael M. Waldner, Sr., and counsel were excused from appearing at the March 28, 2023, hearing; and the Defendants Mark Waldner and Michael M. Waldner, Jr., appearing in person and with their attorneys of record, Timothy R. Whalen and Kent Lehr, at both hearings; and the Court having read and considered the motions and responses thereto; and the Court having considered the evidence and heard and considered the arguments of counsel; and the Court having been fully advised in the premises and good cause

appearing therefor, the Court now enters its

FINDINGS OF FACT

1. As part of the Defendants' pretrial discovery, the Defendants moved the Court for an order requiring the State to obtain and produce the diaries/journals (hereinafter referred to as journals) kept by the alleged victim in this case, E.H.

2. The Court granted the Defendants' motion and entered its Order Granting Motions for Further Discovery (Order) on June 30, 2022, and ordered that the State obtain and produce E.H.'s journals for an *in camera* inspection by the Court subject to certain protective conditions.

3. Subsequent to the entry of the Order, the Defendant Michael M. Waldner, Jr., issued a Subpoena Duces Tecum to E.H. for her journals.

4. E.H. moved to quash the subpoena duces tecum, but before the motion could be heard, the Defendant Michael M. Waldner, Jr., withdrew the subpoena duces tecum.

5. E.H. then moved to vacate the Order as to the requirement that E.H.'s journals were to be produced.

6. The Court held a hearing on E.H.'s motion to vacate the Order on November 8, 2022, and granted the motion and vacated the portion of its Order relative to E.H.'s journals without prejudice to the Defendants if they elected to re-issue a subpoena duces tecum for the journals.

7. Defendant Michael M. Waldner, Jr., issued another subpoena duces tecum on November 8, 2022, and on November 9, 2022, E.H. moved to quash the subpoena duces tecum.

8. The South Dakota Division of Criminal Investigation (DCI) investigated the allegations against the Defendants.

9. As part of the DCI investigation, agents interviewed E.H. as well as Adam Hofer (Adam) and Levi Hofer (Levi).

10. During the investigation, DCI agents obtained one of E.H.'s journals from her.

11. During the interviews of E.H., Adam, and Levi, it was revealed that E.H. had other journals. E.H., Adam, and Levi all offered to obtain the journals and produce same to the DCI agents. The DCI agents declined the offer for the additional journals.

12. The one journal obtained from E.H. was disclosed to the Defendants in the course of discovery.

13. In the excerpt of the one journal produced, E.H. makes reference to a "purple" journal as well as other journals.

14. It is apparent that the one journal produced discloses events which are relevant to the allegations against the Defendants as E.H. describes the criminal conduct perpetrated against her in the journal excerpt disclosed.

15. The journal excerpt disclosed also reveals certain matters which are relevant to E.H.'s mental health.

APPENDIX 5

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16. E.H. appears to suffer from mental health conditions which may have an impact on her general credibility.

17. The Defendants have secured the services of a mental health professional as an expert witness and that professional has indicated to the Defendants that E.H.'s journals will be important to her evaluation of the evidence and other issues associated with the alleged rape and E.H.'s actions relative thereto.

18. The Court recognizes that the State, E.H., and the Defendants have competing interests in this evidentiary issue.

19. The State has a prosecutorial interest, E.H. has a privacy interest, and the Defendants have a constitutional right to obtain evidence in order to defend themselves against the criminal charges. All these rights are protected by constitutional and statutory provisions and the applicable case law from the South Dakota Supreme Court.

20. The Court must balance these rights in an effort to preserve each right and to ultimately ensure that the Defendants have a fair trial on the charges against them.

21. It appears that the bulk of the State's case rests on the shoulders of E.H. and her testimony. There is no physical evidence of the alleged crimes because of the lapse in time of reporting. Moreover, other than E.H., there is very little evidence that ties any

Defendant to the commission of the crimes. E.H.'s credibility is central to the State's case and the Defendants' defense.

22. The evidence of E.H.'s mental condition is relevant to this evidentiary issue, as the evidence produced thus far shows that E.H. suffers from a variety of conditions which impact her ability to testify in this case. Specifically, the medical records produced to the Court thus far indicate that E.H. has been diagnosed with bipolar disorder and is prone to fantasies, hallucinations, blunt affect and/or irritable behavior.

23. E.H. has also made incriminating statements about other persons who have perpetrated sexual crimes against her.

24. E.H. has been evaluated by the professionals at Child's Voice in an effort to gather evidence related to the charges the Defendants face.

25. The State intends to call expert witnesses in support of its allegations against the Defendants to explain certain issues and matters relative to rape victims, their disclosure and reporting of the rape, and other related matters.

26. The non-disclosure of E.H.'s journals could result in a grave injustice to the Defendants in this case.

APPENDIX 7

27. It appears that the journals may shed light on E.H.'s general credibility and the search for the truth in this prosecution. The evidence in the journals may also produce inculpatory as well as exculpatory evidence.

28. The Court believes that it can review E.H.'s journals *in camera* and protect her right to privacy, preserve the State's interests in this matter, and afford the Defendants adequate opportunity to prepare a defense to the charges against them.

NOW, THEREFORE, in light of the above and foregoing Findings of Fact, the Court hereby enters the following:

CONCLUSIONS OF LAW

1. The Court has subject matter and personal jurisdiction over the parties since this is a criminal case which involves a crime against the person of E.H.

2. E.H. has certain constitutional and statutory rights as an alleged victim in this case. *SDCL Chap. 23A-28C-1, S.D. Const. Art. VI, §29.*

3. E.H.'s rights are clear under the law, but such rights are not absolute. *State v. Karlen*, 1999 S.D. 12, 589 N.W.2d 594.

4. The Defendants have certain statutory and constitutional rights in this criminal prosecution. *Karlen*, 199 S.D. at 12.

5. The State has a competing interest in the prosecution and

enforcement of the laws in criminal matters.

6. A person may waive any statutory or constitutional right they may have and such a waiver may be made either orally, in writing, or by the person's actions and conduct. *Kleinsasser v. Weber*, 2016 S.D. 16, 924 N.W.2d 455.

7. Disclosure of evidence which may be private or confidential can be made under circumstances where the privacy or confidential right may be protected. *Karlen*, 1999 S.D. at 12.

8. In this case the Defendants have met the burden placed upon them to show that the evidence they seek exists and that there is a need for access to E.H.'s journal.

9. The right to access information that may be beneficial to the defense of a defendant in a criminal case is of paramount importance and, in certain circumstances, supecedes the rights of an alleged victim. *Karlen*, 1999 S.D. at 12; *State v. Sprik*, 520 N.W.2d 595 (SD 1994); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 S.Ct. 989, 94 L.Ed.2d 40 (1987); and *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1005, 39 L.Ed.2d 347 (1974).

9. After balancing the competing interests of the parties, the Court concludes that the Defendants' constitutional rights outweigh the privacy rights of E.H. in this instance, as to the journals, and it is appropriate to compel E.H. to comply with the subpoena duces tecum and

produce all journals she has in her possession, or which she can obtain, and disclose the journals to the Court for an *in camera* inspection and later disclosure subject to an appropriate protective order.

10. The motion to quash the subpoena duces tecum to E.H. should be denied.

LET THE ORDER BE ENTERED ACCORDINGLY.

4/25/2023 6:36:52 PM

BY THE COURT:

Attest:
Miller, Charlene
Clerk/Deputy

BRUCE V. ANDERSON - CIRCUIT COURT JUDGE

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF BRULE	)	FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	FILE NO. 07CRI21-159 07CRI21-160 07CRI21-161
vs.	)	
	)	ORDER DENYING MOTION TO QUASH
MARK WALDNER, MICHAEL M. WALDNER, JR., AND MICHAEL M. WALDNER, SR., Defendants.	)	

The above entitled matter having come on before the Honorable Bruce V. Anderson, Circuit Court Judge, First Judicial Circuit, state of South Dakota, on the 8th day of November, 2022, and on the 28th day of March, 2023, pursuant to the motions filed by the alleged victim in the above matter; and the Plaintiff appeared by and through Amanda Miiller an Assistant Attorney General and the alleged victim not appearing in person, but by and through her attorney of record, Julie Dvorak of Siegel, Barnett & Schutz, LLP at both hearings; Defendant Michael M. Waldner, Sr., appeared at the November 8, 2022, hearing with his attorney Brad Schreiber, but both Defendant Michael M. Waldner, Sr., and counsel were excused from appearing at the March 28, 2023, hearing; and the Defendants Mark Waldner and Michael M. Waldner, Jr., appearing in person and with their attorneys of record, Timothy R. Whalen and Kent Lehr at both hearings; and the Court having read and considered the motions and responses thereto; and the Court having considered the evidence and heard and considered the arguments of counsel; and the Court having entered its Findings of Fact and Conclusions of Law; and

the Court having been fully advised in the premises and good cause appearing therefor, it is hereby

ORDERED that E.H.'s Motion to Quash Subpoena Duces Tecum be and the same is hereby denied in its entirety; and it is further

ORDERED that E.H. shall comply with the Subpoena Duces Tecum and produce all diaries and/or journals (hereinafter collectively referred to as "journals") that she has authored or written, regardless of where said journals are stored or kept and regardless of who has possession thereof, to the Brule County State's Attorney at her office in Chamberlain, South Dakota, within ten (10) days from the entry of this order; and it is further

ORDERED that once the journals are received by the Brule County State's Attorney, said journals shall be separated into two packages which consist of journals that have been produced and journals that are being produced pursuant to this order; and it is further

ORDERED that the Brule County State's Attorney or the Attorneys General prosecuting the above cases, shall forthwith deliver the journals to the Court so that it may conduct an *in camera* inspection of the journals; and it is further

ORDERED that in the event the Court determines that any portions of the journals are to be disclosed, it shall notify the parties of the nature and extent of such disclosure and the conditions associated with such disclosure; and it is further

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ORDERED that if any disclosure of the journals is authorized by the Court, such disclosure shall be limited and restricted to the attorneys and no further disclosure of the journals shall be made to any Defendant, other persons, or any entity by any attorney without the order of the Court; and it is further

ORDERED that, in the event any party desires to utilize any portion of the journals at any hearing or at trial, they shall move the Court for a hearing out of the presence of the jury so that the further disclosure of the journals may be controlled by the Court.

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BY THE COURT:

Attest:
Miller, Charlene
Clerk/Deputy

BRUCE V. ANDERSON - CIRCUIT COURT JUDGE

Filed: 4/28/2023 11:14 AM CST Brule County, South Dakota 07CRI21-000160

STATE OF SOUTH DAKOTA COUNTY OF BRULE	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. MARK WALDNER, MICHAEL M. WALDNER, JR., and MICHAEL WALDNER, SR. Defendants.	07CRI21-159 07CRI21-160 07CRI21-161 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN REGARD TO THE MOTION TO QUASH THE SUBPOENA DUCES TECUM SERVED UPON THE VICTIM E.H.

FINDINGS OF FACT

1. Defendants initially issued a Subpoena Duces Tecum to the victim E.H. in June 2022.

2. Defendants also filed a Motion for Further Discovery requesting that the Court order the prosecution to obtain all the diaries or journals made by E.H. and disclose them to the Court for an in-camera inspection. The Court ordered that the State must prepare and submit with the diaries a *Vaughn* index. The Court also ordered that the State must submit a Brief setting forth the State's position as to the issues relative to the disclosure of the diaries and/or journals under South Dakota's Marsy's Law.

3. Independent counsel for E.H. filed a Notice of Appearance in July 2022, and filed a Motion to Quash the Subpoena Duces Tecum. Defense counsel withdrew its Subpoena in regard to E.H.

4. Counsel for E.H. then filed a Motion to Vacate in part the Order Granting Motions for Further Discovery, particularly the matter regarding diaries or journals.

5. The Court heard the arguments and issued an Order Granting the Motion to Vacate in November 2022.

6. A new Subpoena Duces Tecum was served on E.H., pursuant to SDCL 23A-14-5, commanding her to produce:

> [T]he following described books, papers, or documents in your possession or under your control: Any and all statements, notes, video tapes, recordings, photographs, emails, text messages, computer maintained records, electronic records, social media records or recordings, diaries, journals, or other documents of any

nature which you have in your possession or under your control or which you may be able to obtain from your records for the time period of January 1, 2010, through the present.

7. Counsel for E.H. again filed a Motion to Quash the Subpoena Duces Tecum, which is the subject of these Findings of Fact and Conclusions of Law.

8. During the course of the investigation, E.H. and others were interviewed by DCI Agent Brian Larson.

9. During an interview with Agent Larson, another individual told the DCI Agent that E.H. "kept journals and wrote a lot of stuff." *See* filings dated October 25, 2022.

10. This other individual asked E.H. if she wanted to share those notebooks with Agent Larson. *Id.*

11. E.H. answered "if you have the time to read them." *Id.*

12. When Agent Larson asked if it was information about these [incidents of alleged sexual assault], the other individual answered "not really." E.H. then offered that there was a "poem about [John Doe, not one of the Defendants], but that otherwise they were more about her feelings and stuff." *Id.*

13. A firearm was involved in this case and when asked by Agent Larson whether she could draw what the gun looked like, E.H. answered she "did at home in my journal." *Id.*

14. Agent Larson asked if it would be okay if other individuals took a picture of it and sent it to him. E.H. answered that the drawing may be inappropriate. Agent Larson answered she did not have to share that if she did not want to. She had not shown the picture to other individuals. *Id.*

15. Agent Larson asked her if she wrote down her feelings and things that have happened to her in the journals. Another individual indicated it was a high stack of journals. Agent Larson noted "lots of journals, that's good. I am sure it helps you. That's okay." *Id.*

16. Defendants have not established a factual predicate showing that it is reasonably likely that the requested documents will bear information both relevant and material to their defense. In addition to this requirement, the Defendants must somehow overcome the victim's constitutionally protected right to refuse the discovery request by Defendants.

17. At least one Defendant has already contacted third parties known to the victim and the victim's family, as well as the Defendants, revealing discovery information which could discredit, embarrass, and harass the victim and her family. *See* Exhibit filed under seal.

18. Defendants' Subpoena fails to provide adequate specificity. It is overly broad and seeks "any and all" documents, including videotapes, recordings, etc., including diaries and journals that cover a time period of over thirteen years, starting from the victim's sixth birthday.

19. E.H. has not waived her constitutional right to refuse discovery requests.

CONCLUSIONS OF LAW

1. The courts have a duty to protect E.H.'s rights as vigorously as Defendants' rights. SDCL 23A-28C-3.

2. E.H. has a constitutional right to assert and seek enforcement of the rights enumerated in the Constitution or any other right afforded to her by the law in any trial or appellate court. South Dakota Constitution, Article VI.

3. This trial court and any appellate court must act promptly on such a request and ensure that E.H.'s rights and interests are protected in a manner no less vigorous than the protections afforded to criminal defendants. South Dakota Constitution, Article VI.

4. E.H. has the right to prevent disclosure of information to Defendants or anyone acting on behalf of the Defendants that could be used to harass her or her family. South Dakota Constitution, Article VI, § 29(5).

5. E.H. has a constitutional right to due process and to be treated with fairness and with respect for her dignity. South Dakota Constitution, Article VI, § 29(1).

6. E.H. has the right to be free from intimidation, harassment, and abuse. South Dakota Constitution, Article VI, § 29(2).

7. E.H. has the right to prevent the disclosure to the public or Defendants, or anyone acting on behalf of Defendants, information or records which could contain confidential or privileged information about the victim. South Dakota Constitution, Article VI, § 29(5).

8. E.H. has the constitutional right to privacy which specifically includes the right to refuse a discovery request and to set reasonable conditions on the conduct of any such interaction to which she consents. South Dakota Constitution, Article VI, § 29(6). This constitutional right and privilege is not conditional. Rather, it is absolute.

9. Unlike Victims' Bill of Rights (VBR) in other states, victims in South Dakota have an unconditional constitutional right to refuse discovery requests. Compare South Dakota's constitutional language regarding that right with Ohio wherein it states:

> To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused: . . . *(6) except as authorized by section 10 of Article I of this constitution* [defense right to meet the witness's face to face, compulsory attendance to procure attendance of witnesses, speedy trial, etc.], to refuse an

> interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused . . .[1]

Ohio Constitution Article I, § 10a.

10. SDCL 19-19-501 provides:

> Except as otherwise provided by constitution or statute or by this chapter or other rules promulgated by the Supreme Court of this state, no person has a privilege to:
>
> (1) Refuse to be a witness;
> (2) Refuse to disclose any matter;
> (3) Refuse to produce any object or writing; or
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

11. SDCL Chapter 19-19 regarding privileges sets forth various privileges such as the lawyer/client privilege, the physician and psychotherapist-patient privilege, the spousal privilege, college or university counselor and student, etc. These statutory privileges have various conditions or exceptions. No such conditions or exceptions apply to the constitutional right and privilege of E.H. to privacy, which includes the right to refuse a discovery request.

12. The provision of one of E.H.'s diaries to law enforcement does not waive E.H.'s privacy rights granted to her by the South Dakota Constitution, which includes a specific, unequivocal right to refuse a discovery request.

13. E.H. has the right to be heard in any proceeding during which a right of hers is implicated. South Dakota Constitution, Article VI, § 29(9).

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[1] *See also* Oregon's Constitution/Victims' Bill of Rights (VBR) wherein it states:

> . . . the following rights are hereby granted to victims in all prosecutions for crimes and in juvenile court delinquency proceedings
>
> . . .
>
> (c) The right to refuse an interview, deposition or other discovery request by the criminal defendant or other person acting on behalf of the criminal defendant provided, *however, that nothing in this paragraph shall restrict any other constitutional right of the defendant to discovery against the state*; . . .

14. Even before the enactment of Marsy's Law and the Victim's Bill of Rights in the South Dakota Constitution, the Defendants' subpoena for E.H.'s diaries would not be allowed under the law as it would be unreasonable and oppressive under SDCL 23A-14-5.

15. This Court's enforcement of Defendants' Subpoena after she filed a Motion to Quash would violate E.H.'s constitutional rights.

16. A limitation of the Subpoena enforcement to just diaries for an in-camera review will still violate E.H.'s constitutional rights to privacy and to refuse a discovery request.

17. Should any Finding of Fact be more accurately called a Conclusion of Law or should a Conclusion of Law be more accurately called a Findings of Fact, then the Court hereby holds that any Finding of Fact can be a Conclusion of Law and any Conclusion of Law can be a Finding of Fact.

BY THE COURT:

_____

Circuit Court Judge

STATE OF SOUTH DAKOTA COUNTY OF BRULE	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. MARK WALDNER, MICHAEL M. WALDNER, JR., and MICHAEL WALDNER, SR. Defendants.	07CRI21-159 07CRI21-160 07CRI21-161 OBJECTION TO DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON JOURNALS

E.H. hereby objects to Defendants' Proposed Findings of Fact and Conclusions of Law on Journals.

E.H. specifically objects to the following Proposed Findings of Fact:

2. To the extent that it indicates the Court's Order was entered on June 30. The correct date should be June 29.

3. To the extent that it indicates "subsequent" to the entry of the Court's Order Granting Motions for Further Discovery that a Subpoena Duces Tecum was issued regarding E.H. That Subpoena was issued prior to the entry of the Court's Order granting Motions for Further Discovery.

10-28. E.H. objects to all of these facts, some of which may be more accurately called Conclusions of Law, as either not supported by the record, inaccurate, or irrelevant to the issues before the Court. Law enforcement did obtain one of E.H.'s journals and there was discussion regarding providing other journals to law enforcement, but the discussion of the additional journals did not establish they would contain any material evidence nor did E.H. waive her right to refuse

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a discovery request. The journal obtained by law enforcement was disclosed to Defendants in the course of discovery, and the excerpt in evidence regarding that one journal does reference a purple journal. Her privilege is not just the confidentiality of her diaries but her unequivocal constitutionally protected right to refuse a discovery request. While defendants may think the journal now in their possession contains relevant evidence, there is no evidence to establish that the other diaries or journals likely contain such relevant evidence. Again, it is not just the confidential nature of diaries but her right to refuse a discovery request that is at issue in this case.

E.H. objects to the following Proposed Conclusions of Law:

3. This proposed Conclusion indicates that E.H.'s rights are clear under the law, but such rights are not absolute. The Defendants cite to *State v. Karlen*, 589 N.W.2d 594 (S.D. 1999), in support of this Conclusion of Law. Notably, *Karlen* was decided before E.H.'s constitutional rights under Article VI, § 29 came into being.

Karlen involved a statutory privilege regarding communications between college students and their institution-provided counselors. The *Karlen* court specifically noted that "it is a basic provision of American jurisprudence that a statutory provision never be allowed to trump a constitutional right." *State v. Karlen*, at ¶ 39.

In contrast to *Karlen*, E.H. has a constitutional right 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;" South Dakota Constitution, Article VI, § 29(6). The constitutional rights provided under this section of the constitution did not become effective until 2016, more than seven years after the *Karlen* decision. Notably, nowhere in the Constitution does it indicate that these rights of victims can be limited or infringed upon.

Importantly, the statutory privilege in *Karlen* was waived. *Id.* at ¶ 32. Waiver paved the way for an in-camera review. In this case, E.H. has not waived her privilege/constitutional right to privacy, *i.e.* her right to refuse a discovery request.

In addition, *State v. Karlen* clearly indicates that a defendant's rights under the Sixth Amendment to the Constitution, specifically the confrontation clause, are not absolute. *State v. Karlen,* at ¶ 38.

> The so-called Confrontation Clause provides two specific protections for criminal defendants. The first is being the right to face his accusers and the second is the right to cross-examine those who testify against him.
>
> It is well settled that the right to cross-examine is not absolute. The ability to cross-examine witnesses does not include the power to compel production of all information that *may* be useful to the defense. 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. at ¶¶ 37-38.

5. We object to Conclusion of Law No. 5 in regard to any relevancy to the issues at hand.

6. While this Conclusion of Law is technically correct indicating that a person may waive any statutory or constitutional right, the case cited by Defendants, *Kleinsasser v. Weber*, 2016 SD 16, 877 N.W.2d 86, dealt with a criminal defendant's rights and those that he gives up or waives by entering a guilty plea. The *Kleinsasser* court noted "'it is critical not only that a defendant be advised of his rights . . . but also that the defendant intentionally relinquish or abandon' these rights and that the record affirmatively establish the waiver." *Kleinsasser v. Weber*, at ¶ 38.

E.H.'s constitutional right to privacy, which includes the right to refuse an interview, deposition, or discovery request also provides that she may "set reasonable conditions on the conduct of any such interaction to which [she] consents." South Dakota Constitution, Article VI, § 29(6). Thus, if Defendants are making an argument that the disclosure of one diary to law enforcement waived her ability to refuse discovery requests from Defendants, such an argument is not supported by the law. While one diary may have been disclosed to law enforcement, she has clearly refused the Defendants' discovery request, as is her right, for any other diaries.

7. Defendants' Conclusion states disclosure of evidence which may be private or confidential can be made under circumstances where the privacy or confidential right may be protected. Defendants cite to the *Karlen* decision in support of their conclusion. They appear to be citing to the in-camera review allowed of a college student's counseling records. *Id.* at ¶ 45. Again, this case does not deal with a statutory right of privileged communications with a counselor, *which had been waived,* but rather a specific constitutional right of the victim to refuse an interview, deposition, or discovery request, *which has not been waived.* South Dakota Constitution, Article VI, § 29(6).

8. E.H. objects to Conclusion of Law No. 8 to the extent that it asserts there is a need for access to E.H.'s journals. Defendants have not established a reasonable probability that material evidence exists in the diaries they seek. Even if they could establish that probability, they have not established any need that is superior to E.H.'s constitutional right to privacy, which includes the right to refuse a discovery request.

9. (Defendants have listed two Conclusions of Law numbered 9.) E.H. objects to the first Conclusion of Law No. 9 to the extent it indicates that a right to access information that may be beneficial to the defense in a criminal case is of paramount importance and, in certain

circumstances, supersedes the right of an alleged victim. Defendants cite to the *Karlen* case, *State v. Sprik*, 520 N.W.2d 595 (S.D. 1994), *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), and *Davis v. Alaska*, 415 U.S. 308 (1974), for this proposition.

Again, the *Karlen* case cannot stand for the proposition that a right to access information may supersede a right of an alleged victim. It was decided prior to the constitutional amendment granting a right to privacy, including the specific and unconditional right to refuse discovery requests. South Dakota Constitution, Article VI, § 29(6).

Notably, the *Karlen* case as well as *Sprik*, *Ritchie*, and *Davis* all have to do with defense attempts to seek discovery from someone other than the victim. Thus, a victim's right to refuse discovery requests were not an issue. *Karlen* concerned counseling records; *Ritchie* concerned an alleged rapist's request to have access to the child protection services file; *Davis* and *Sprik* concerned juvenile adjudicatory status history in regard to delinquencies, etc.

Defendants' rights in this case cannot supersede E.H.'s constitutionally guaranteed right to privacy, which includes a specific unconditional right to refuse discovery requests.

9. E.H. objects to the second Conclusion of Law No. 9 as it indicates Defendants' constitutional rights outweigh the privacy rights of E.H. and that it is appropriate to compel E.H. to comply with the subpoena as it relates to her diaries/journals for an in-camera review.

10. E.H. objects to Conclusion of Law No. 10 as it indicates the Motion to Quash the Subpoena should be denied.

E.H. will be submitting her own Proposed Findings of Fact and Conclusions of Law.

Dated this 21st day of April 2023.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Julie Dvorak

Julie Dvorak
Attorneys for E.H.
415 S. Main Street, Suite 400
PO Box 490
Aberdeen, SD 57402-0490
Telephone No. (605) 225-5420
Facsimile No. (605) 226-1911
jdvorak@sbslaw.net

CERTIFICATE OF SERVICE

The undersigned, attorneys for E.H., hereby certifies that on the 21st day of April 2023, a true and correct copy of the foregoing OBJECTION TO DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON JOURNALS was served via Odyssey File and Serve on the following:

Amanda J. Miiller
South Dakota Attorney General's Office
1302 East Highway 14, #1
Pierre, SD 57501
amanda.miiller@state.sd

Kelly Marnette
Assistant Attorney General
SD Attorney General's Office
22 Court Street, Suite 1
Aberdeen, SD 57401
Email: Kelly.Marnette@state.sd.us
atgservice@state.sd.us

Timothy R. Whalen
Whalen Law Office, P.C.
PO Box 127
Lake Andes, SD 57356
whalawtim@cme.coop

Kent Lehr
PO BOX 307
Scotland, SD 57059
lehrlaw@gwtc.net

Brad Schreiber
1110 E. Sioux Ave
Pierre, SD 57501
Brad@xtremejustice.com

Dated this 21st day of April 2023.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Julie Dvorak

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

* *

STATE OF SOUTH DAKOTA, Plaintiff,	07CRI21-000159 07CRI21-000160 07CRI21-000161
-vs-	
	TRANSCRIPT OF
MARK WALDNER, MICHAEL M. WALDNER, JUNIOR, and MICHAEL J. WALDNER, SENIOR, Defendants.	**MOTIONS HEARING**

* *

B-E-F-O-R-E

The Honorable Bruce V. Anderson,
Circuit Court Judge,
at Armour, South Dakota,
on October 17, 2022.

A-P-P-E-A-R-A-N-C-E-S

For the Plaintiff: Amanda J. Miiller
Assistant Attorney General
Pierre, South Dakota

For the Defendant Mark Waldner:
Kent Lehr
Attorney at Law
Scotland, South Dakota

For the Defendant Michael Waldner Junior:
Timothy R. Whalen
Attorney at Law
Lake Andes, South Dakota

For the Defendant Michael Waldner Senior:
Brad Schreiber
Attorney at Law
Pierre, South Dakota

For E.H.: Julie Dvorak
Attorney at Law
Aberdeen, South Dakota
(Ms. Dvorak only present during motion to quash portion)

those thoughts out of her mind that she's chosen to write down, I think that's a violation of her privacy rights.

And if that disclosure of the initial journal was any type of waiver, she has the, she has the right under the Constitution to set forth conditions on how she, ah, responds to those discovery requests, that she actually consents to, and she certainly has, um -- any waiver was certainly rescinded. Because when they filed the mow -- the subpoena, we were hired and we filed the motion to quash.

When -- and I also sent a letter to the prosecutor, and I copied the defense counsel. You know, she objects to this and we're going to, and we're not turning over anything.

The other thing, I do want to say that the these sort of unsupported factual assertions that, that other diaries exist and that at some point she made an alle -- an offer to turn those over, I don't, I don't believe anything like that is in the record. I can't find anything like that in the record. And I certainly don't have access to the record the same way that, ah, the prosecution does or defense counsel does, but I can't find anything.

THE COURT: And I look at the case through a peephole (indicating), and the peephole is whatever they allow me to see that they've filed in Odyssey, so I can't, I can't say

If we, if we, ah --

THE COURT: I want to interrupt you just a moment.

MR. WHALEN: Okay.

THE COURT: Now, Ms. Dvorak says she's done some research on it, and she can find no case where an alleged rape victim had to turn over a diary. Have you done any research on that?

MR. WHALEN: No. I haven't. And the reason that I haven't is because I don't think it's a relevant inquiry from the status and facts of this case.

If there was no disclosure of a diary, if we hadn't gotten one, and we didn't know about those, I don't think it's fair for the defendant to say, "hey, we think there might be diaries, give them to us." We don't know. So, I mean, I think that's a fishing expedition, so I agree, that's inappropriate.

The reason that I didn't address many of the arguments in E.H.'s motion is because they're not relevant questions for this, for this Court today. The reason being is that under these circumstances, we have a diary. It's clear from reading that diary that there are other diaries. There were comments made by E, by E.H. and by Adam and by Levi about other diaries, so I know there's other diaries. It's reasonable then to, to -- on that basis, to say those diaries may be consistent with information from the one

was to respond to that brief.

Um, so it's not like it's a carte blanche, unfettered disclosure here, Judge. Give the defendant everything so that we can see the most personal thoughts of E.H. That's not what we're doing here. We're taking reasonable steps that were dictated by Karlen, taking reasonable steps under the circumstances. We may never see those diaries.

This isn't unusual to the Court. You've done it on a number of different cases when we've come into sensitive information, particularly medical records, counseling records. The Court looks at them. Many times there's no disclosure ordered. Sometimes there's a partial disclosure. Sometimes there's full disclosure.

But before you're even able to get to that point, I think consistent with the order, and consistent with the law, somebody needs to look at these diaries. And we know they exist. I think to, to argue that they don't exist, I think, is disingenuous.

And then, Your Honor, when we get to, ah, the issues associated with, with, ah, confrontation clause and, and, again, back to Brady and back and forth, I think that's a red herring argument.

This, none of this comes to light if E.H. hadn't produced the diary. I mean, that's, that's the waiver that Karlen addresses. That's the exact circumstance. It says,

"if you're going to do this, then you suffer the consequence." And that, and that was produced after E.H. made the complaint, it was produced after DCI became involved in the investigation, and not immediately without any thought. It came up after, like, like argued by counsel, after the charges, I think, or after the initial contact, but, and it was a diary that was made after all those circumstances had occurred. Whether it was a diary made because DCI requested it or whether it was a diary that was made because E.H. decided to do it, it doesn't matter. That's why I'm not wasting time arguing about all the cases that are cited by counsel in the motion to vacate. It doesn't mean anything. It's a -- I'm sorry, but it's a so what. It doesn't matter.

And as far as Marsy's Law, that is not created to prohibit a fair trial. And that is not created so that these men (indicating) can be sent to the penitentiary without having a fair chance to defend themselves.

That's an order that there be protections for a victim. But it doesn't mean that the victim has carte blanche on hiding evidence and failing to produce it because it's, quote, unquote, protected by Marsy's Law. That's not the intent of Marsy's Law.

That's why we have the Judge, that's why we have a chambers, that's why we have the production in chambers, so

this case. And when -- if a subpoena, the proper procedure is used, then we, and under the law that applies, that this Court has to apply and that we all live under, and under that law if it says that she doesn't have to turn those over, then she doesn't have to turn that over.

THE COURT: And you include that even for the Court to look them in camera?

MS. DVORAK: Yes, Your Honor.

THE COURT: So I'll tell you the last time I had this, boy, them lawyers knocked my door down, trying to get the records. I never disclosed them. I refused to disclose them. I found that they did not contain Brady material or anything bearing on credibility or other relevant evidence. I just never let them have them. In other cases I found there is some information in there that's Brady material and it's disclosed, according to Karlen.

So, but you're saying I can't even go through that process?

MS. DVORAK: Correct. I don't believe Karlen applies. And I, we've set forth the reasons why we don't think Karlen apprise -- applies in this case. The con -- you know.

With the subpoena that --

THE COURT: Not necessarily Karlen, but the concept that if there is a potential relevant evidence out there that would bear on guilt or innocence, and there's some kind of a

privilege or protection, whether it's a, you know, an actual recognized privilege by statute or if it's a overall right to privacy, you know, something constitutional, applicable through Marsy's Law now, either way, the Court still has that option in exercising its discretion to do an in-camera review first.

That protects your client's rights. It protects the defendants' rights. It's, it's to have the Court take a look and see what we're actually talking about.

MS. DVORAK: And --

THE COURT: And you're saying I can't even do that.

MS. DVORAK: Correct, Your Honor. If my client came to me and said, look, here, this is all about nothing. Here they are, go ahead and let the judge look through them, you'll see there's nothing in there, I would do that. My client is saying she wants to protect her rights. She has not provided me with anything and I'm in here to argue her, her position, and I think she has that right under the Constitution, as I read it, or I would not have made the argument.

I think we go through the proper procedure, the subpoena, and I file my motion to quash, and we see --

THE COURT: We have this same hearing.

MS. DVORAK: Well, and we see what the Court says about it. I mean, we see what this Court says about it, and because

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

* *

STATE OF SOUTH DAKOTA, Plaintiff, * 07CRI21-000159 07CRI21-000160 07CRI21-000161

-vs-

MARK WALDNER, MICHAEL M. WALDNER, JUNIOR, and MICHAEL J. WALDNER, SENIOR, Defendants.

TRANSCRIPT OF MOTION HEARING

* *

B-E-F-O-R-E

The Honorable Bruce V. Anderson,
Circuit Court Judge,
at Chamberlain, South Dakota,
on March 28, 2023.

A-P-P-E-A-R-A-N-C-E-S

For the Plaintiff: Amanda Miiller
Assistant Attorney General
Pierre, South Dakota

For the Defendant Mark Waldner:
Kent Lehr
Attorney at Law
Scotland, South Dakota

For the Defendant Michael Waldner, Junior:
Timothy R. Whalen
Attorney at Law
Lake Andes, South Dakota

For E.H.: Julie Dvorak
Attorney at Law
Aberdeen, South Dakota

P-R-O-C-E-E-D-I-N-G-S

The following proceedings commenced on the 28th day of March, 2023, at 10:36 a.m. in the courtroom of the Brule County Courthouse, Chamberlain, South Dakota.

to a grave injustice.

And so, the defendants have an obvious right to a fair trial. A right to due process. Under both the South Dakota Constitution and through the United States Constitution as applied to the states through the 14th Amendment.

And so, and there is a requirement that these interests be balanced. And they have those rights that are derived from Brady and its progeny. And so when I balance it, I've determined that today the motion to quash is denied.

I am modifying the disclosure requirements, and I am ordering that all journals or diaries be delivered to the Court for an in-camera inspection within ten days.

I will then review them. And what, when I mean "all," I mean all that exist that have not been disclosed, along with everything that has been disclosed. And then I want it delineated in the disclosure.

I want them in two packages actually. One that's been disclosed, and then the others that have not been disclosed.

And then I'll make a decision whether or not at that time any of that, if any of that information is relevant. And then, after that, whether or not it's protected from disclosure by the application of any privilege.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

BRIEF OF APPELLEES/RESPONDENTS MARK WALDNER AND MICHAEL M. WALDNER, JR.

STATE OF SOUTH DAKOTA
Plaintiff/Appellee/Respondent

vs.

MARK WALDNER, MICHAEL M. WALDNER, JR., and MICHAEL WALNER, SR.
Defendants/Appellees/Respondents.

and

E.H.

Petitioner/Appellant

DOCKET #30343

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

HONORABLE BRUCE V. ANDERSON
Presiding Circuit Judge

Timothy R. Whalen, Esq.
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: (605)487-7645
whalawtim@cme.coop
Attorney for Defendant/Appellee/Respondent
Michael M. Waldner, Jr.

Kent Lehr
Lehr Law Office
P.O. Box 307
Scotland, SD 57059
lehrlaw@gwtc.net
Attorney for Defendant/Appellee/Respondent
Mark Waldner

Filed: 11/28/2023 6:29 PM CST Supreme Court, State of South Dakota #30343

Julie Dvorak/Jeremy Lund
Siegel, Barnett & Schutz, L.L.P.
P.O. Box 490
Aberdeen, SD 57402
jdvorak@sbslaw.net
jlund@sbslaw.net
Attorneys for E.H. Petitioner/Appellant

Marty J. Jackley/Chelsea Wenzel
South Dakota Attorney General's Office
1302 E. Highway 14, Ste. 1
Pierre, SD 57501
atgservic@state.sd.us
Attorneys for Plaintiff/Appellee/Respondent

Keith Goehring
Goehring Law Office
P.O. Box 851
Parkston, SD 57366
Kgoehrng@santel.net
Attorney for Defendant/Appellee/Respondent
Michael Waldner, Sr.

ORDER GRANTING PETITION FOR ALLOWANCE OF APPEAL FROM INTERMEDIATE ORDER FILED JUNE 16, 2023

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PRELIMINARY STATEMENT

The Defendants/Appellees/Respondents Michael M. Waldner, Jr. and Mark Waldner herein shall be referred to as the "Waldners" and individually by their first names, where necessary. The Plaintiff/Respondent/Appellee shall be referred to herein as "State." The Petitioner/Appellant shall be referred to by her initials "E.H." References to the Register of Actions shall be by "RA" followed by the title of the document and the page number thereof. The trial of this case has yet to occur so there will not be any references to a trial transcript. Several motion hearings have been held in this matter and references to the motion hearings shall be by "MH" followed by the date of the hearing and the page number of the transcript. References to any exhibits from the motion hearings shall be by "MH" followed by the date of the hearing and "Exh" followed by the exhibit number or letter.

Michael Waldner, Sr., is a named defendant in this case, but during the pendency of these proceedings he died. Counsel for Michael Waldner, Sr., has moved to dismiss the case against him as a result of his death, but no order has been officially entered on that motion.

JURISDICTIONAL STATEMENT

Waldners challenge the Supreme Court's jurisdiction in this appeal. For purposes of this appeal and briefing, a Jurisdictional Statement is made, but jurisdiction in this Court is not conceded.

The Waldners were charged by Indictment with several felony crimes stemming from allegations that they sexually assaulted E.H. *RA, p. 1.* During the criminal discovery process, the Waldners made a Motion for Further Discovery, joined by all Defendants, so as to obtain disclosure of E.H.'s diaries and/or journals (hereinafter referred to as "diaries"). *RA, p. 203.* Waldners' motion for discovery of the diaries was

granted and the trial court entered its Order Granting Motions for Further Discovery. *RA, p. 245.* E.H. moved to vacate the trial court's order on the diaries and that motion was granted without prejudice to the Waldners to seek production of the diaries by subpoena duces tecum. *RA, p. 324.* Michael served a subpoena duces tecum on E.H. and she filed a Motion to Quash Subpoena Duces Tecum. *RA, pp. 321, 322.* E.H.'s motion to quash was denied and the Order Denying Motion to Quash was entered. *RA, p. 677.* The trial court entered its Findings of Fact and Conclusions of Law on Journals and its Order Denying Motion to Quash on April 25, 2023. *RA, pp. 669, 677.* Notice of Entry of Findings of Fact and Conclusions of Law and Order was filed and served on April 28, 2023, by Michael and on May 1, 2023, by Mark. *RA, p. 685.* E.H. filed and served the Petition for Permission to Appeal on May 8, 2023. The Waldners timely filed their joint Response to Petition for Intermediate Appeal on May 15, 2023. The State did not file a petition for permission to take intermediate appeal, but filed a Response to Petition for Permission to take Discretionary Appeal on May 16, 2023, and joined in E.H.'s petition. The State's response was filed after the statutory time period for the State to seek an intermediate appeal had expired. Jurisdiction for this Court is claimed by E.H. to be pursuant to SDCL 23A-32-12, 15-26A-13, and 15-26A-17.

STATEMENT OF THE LEGAL ISSUES

ISSUE 1: WHETHER THIS COURT HAS JURISDICTION TO HEAR AN APPEAL FROM AN INTERLOCUTORY ORDER BROUGHT BY A NON-PARTY IN A CRMINAL CASE OR OTHERWISE CURRENTLY HAS JURISDICTION TO DETERMINE THE ISSUE IN THIS APPEAL.

Trial court holding: This issue was not addressed by the trial court.

Relevant court cases:

1. *State v. Mulligan*, 2005 S.D. 50, 696 N.W.2d 167
2. *State v. Schwaller*, 2006 S.D. 30, 712 N.W.2d 869

3. *In re Issuance of Summons Compelling Essential Witness Testify in Minnesota,* 2018 S.D. 16, 908 N.W.2d 160
4. *Milstead v. Johnson*, 2016 S.D. 56, 883 N.W.2d 725

Relevant statutes or authority:

1. SDCL 23A-32-12
2. SDCL 15-26A-13
3. SDCL 15-26A-14
4. SDCL 15-26A-15

ISSUE 2: WHETHER THE TRIAL COURT ERRED IN ORDERING AN *IN CAMERA* REVIEW OF E.H.'S DIARIES OR JOURNALS IN LIGHT OF E.H.'S CONSTITUTIONAL RIGHT TO PRIVACY, INCLUDING HER RIGHT TO REFUSE A DISCOVERY REQUEST; AND WHETHER IT FURTHER ERRED IN ORDERING AN *IN CAMERA* REVIEW WITHOUT FIRST FINDING E.H. WAIVED HER CONSTUTITONAL RIGHTS AND WITHOUT HOLDLING DEFENDANTS TO THEIR BURDEN UNDER THE APPLICABLE LAW.

Trial court holding: No.

Relevant court cases:

1. *In re Issuance of Summons Compelling Essential Witness Testify in Minnesota,* 2018 S.D. 16, 908 N.W.2d 160
2. *In re Janklow*, 1999 S.D. 27, 589 N.W.2d 624
3. *Action Mechanical, Inc. v. Deadwood Historic Preservation Com'n*, 2002 S.D. 121, 652 N.W.2d 742
4. *State v. Karlen*, 1999 S.D. 12, 589 N.W.2d 594

Relevant statutes or authority:

1. S.D. Const., Art., VI, §29
2. SDCL 23A-14-2
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STATEMENT OF THE CASE

The Waldners were initially charged with felony and misdemeanor offenses by separate Indictments, but the Indictments and cases were joined by the agreement of the parties. *MH, March 28, 2023, pp. 5-6.* The State at a motion hearing, represented to the trial court that there was an order joining the cases, but the Register of Action does not reflect that any such order was entered. *Id.* The Waldners, however, do not dispute the joinder of the Indictments nor cases for pretrial, trial, and appellate proceedings.

The Waldners were charged with several felony offenses. *RA, p. 1.* Michael was arrested and charged by Indictment with the following crimes: Count 1: Rape in the 1st Degree (Class 1 felony), Count 2: Aggravated Assault (Class 3 felony), Count 3: Rape in the 4th Degree (Class 3 felony), Count 4: Rape in the 4th Degree (Class 3 felony); Count 5: Sexual Contact with a Child Under Sixteen Years of Age (Class 3 felony), and Count 6: Simple Assault (Class 1 misdemeanor). *RA, p. 1.* Mark was arrested and charged by Indictment with the crimes of Count 1: Rape in the 2nd Degree (Class 1 felony), Count 2: Rape in the 4th Degree (Class 3 felony), Count 3: Rape in the 4th Degree (Class 3 felony), and Count 4: Sexual Contact with a Child Under Sixteen Years of Age (Class 3 felony). *Id.* During the course of discovery, the Waldners moved for the production and disclosure of certain diaries made by E.H. *RA, p. 203.* The trial court granted the Waldners' motion regarding the diaries and entered its Order Granting Motions for Further Discovery accordingly. *RA, p. 245.* E.H. and the State, by joinder, contested the trial court's order for further discovery as to E.H.'s diaries and the order was vacated by entry of the trial court Order Granting Motion to Vacate (in part) Order Granting Motions for Further Discovery. *RA, p. 324.* The order vacating the discovery order was entered without prejudice to the Waldners to issue a subpoena duces tecum to secure the disclosure of the diaries from E.H. *Id.* The Waldners subpoenaed E.H.'s diaries and she, with the State's joinder, filed a Motion to Quash Subpoena Duces Tecum. *RA, p. 322.* The trial court denied the motion to quash and entered its Order Denying Motion to Quash accordingly. *RA, p. 677.* The order denying the motion to quash the subpoena to E.H. to produce her diaries required the production of the diaries for an *in camera* inspection by the trial court. *Id.* The trial court entered its Findings of Fact and Conclusions of Law on Journals and its Order Denying Motion to Quash on April 25, 2023. *RA, pp. 669, 677.* Notice of Entry of Findings of Fact and Conclusions of Law

and Order were filed and served on April 28, 2023, by Michael and on May 1, 2023, by Mark. *RA, p. 685*. E.H. filed and served the Petition for Permission to Appeal on May 8, 2023. The State did not file a petition for permission to take intermediate appeal, but joined in the petition filed by E.H.; however, the State's joinder was after the time for seeking intermediate appellate review had expired. The Waldners timely responded to E.H.'s Petition for Permission to Appeal.

STATEMENT OF THE FACTS

As part of the Defendants' pretrial discovery, the Defendants moved the Court for an order requiring the State to obtain and produce the diaries kept by the alleged victim in this case, E.H. *RA, p. 203*. The trial court granted the Defendants' motion and entered its Order Granting Motions for Further Discovery (Order) on June 30, 2022, and ordered that the State obtain and produce E.H.'s journals for an *in camera* inspection by the Court subject to certain protective conditions. *RA, p. 245*. Subsequent to the entry of the Order, Michael issued a Subpoena Duces Tecum, on behalf of all Defendants, to E.H. for her diaries. *RA, p. 243*. E.H. moved to quash the subpoena duces tecum, but before the motion could be heard, Michael withdrew the subpoena duces tecum. *RA, p. 261*. E.H. then moved to vacate the Order as to the requirement that she produce her diaries. *RA, p. 263*. The trial court held a hearing on E.H.'s motion to vacate the Order on November 8, 2022, and granted the motion and vacated the portion of its Order relative to E.H.'s diaries without prejudice to the Defendants if they elected to re-issue a subpoena duces tecum for the diaries. *RA, p. 324; MH, November 8, 2022, pp. 7-9*. Michael then issued another subpoena duces tecum, on behalf of all Defendants, on November 8, 2022, and on November 9, 2022, E.H. moved to quash the subpoena duces tecum. *RA, pp. 321-322*.

The Waldners' interest in E.H.'s diaries and the reason for the discovery pleadings and subpoena duces tecum to E.H. was because part of the investigation by the

South Dakota Division of Criminal Investigation (DCI) included special agents interviewing E.H. as well as Adam Wipf (Adam) and Levi Wipf (Levi). *MH, June 7, 2022, pp. 31-38; MH, October 17, 2022, pp. 135-144, 149, 157, 206-207.* The relevant DCI report and the excerpt from E.H.'s diary were the subject of the Waldners' Motion to Supplement Record filed in the court below. Upon the entry of the appropriate order the record will be supplemented with the June 9, 2021, report of DCI agent Brian L. Larson and the excerpt from E.H.'s diary disclosed to the trial court. Both Adam and Levi accompanied E.H. to her interviews with DCI. *MH, June 7, 2022, pp. 34-35.* During the investigation, DCI agents obtained one of E.H.'s diaries from her and that diary was disclosed to the Waldners in the course of discovery. *Id.; RA, p. 280 (Response to Motion to Vacate), p. 669 (Findings of Fact and Conclusions of Law on Journals).* During the interviews of E.H., Adam, and Levi, it was revealed that E.H. had other diaries. *Id.; MH, June 7, 2022, pp. 31-38; MH, October 17, 2022, pp. 135-144, 149, 157.* E.H., Adam, and Levi all offered to obtain the diaries and produce same to the DCI agents. *Id.* The DCI agents declined the offer for the additional diaries. *Id.* In the excerpt of the one diary produced to the Waldners, E.H. makes reference to a "purple notebook" as well as other diaries. *RA, p. 669 (Findings of Fact and Conclusions of Law on Journals.* It is apparent from a review of the one diary produced that this diary contains material and facts that are relevant to the allegations against the Waldners, as E.H. describes, in part, the criminal conduct perpetrated against her. *Id.* Neither E.H., nor the State has asserted any privilege relative to the diaries. *MH, October 17, 2022, pp. 126, 132; MH, June 7, 2022, pp. 35-36, 46.*

E.H.'s mental health is relevant and at issue in these criminal proceedings. *RA, p. 669 (Findings of Fact and Conclusions of Law on Journals).* E.H.'s attending psychiatrist, Dr. William Gammeter, testified at a motion hearing on an evidentiary issue

associated with the case at bar. *MH, October 17, 2022, pp. 161-163, 185-192.* The diary excerpt disclosed also reveals certain matters which are relevant to E.H.'s mental health. *RA, p. 669 (Findings of Fact and Conclusions of Law on Journals).* E.H.'s medical records have been disclosed in discovery and it is clear from same that E.H. suffers from mental health conditions which may have an impact on her general credibility. *MH, October 17, 2022, pp. 185-193; RA, p. 624 (Second Motion for Psychological or Psychiatric Expert), p. 669 (Findings of Fact and Conclusions of Law on Journals).* Moreover, E.H.'s medical records, mental conditions, and psychiatric admissions were addressed by Dr. Gammeter and revealed that E.H. has been diagnosed with bipolar disorder, post traumatic stress disorder, depression and is prone to fantasies, hallucinations, blunted effect and/or irritable behavior. *Id.*

The Waldners are not the only suspects that E.H. has identified as perpetrators of sexual assaults against her, as she also made incriminating statements about other persons who have allegedly perpetrated sexual assaults against her. *RA, p. 669 (Findings of Fact and Conclusions of Law on Journals).* E.H. has also been evaluated by the professionals at Child's Voice in an effort to gather evidence related to the charges the Waldners face. *Id.* Additionally, the State intends to call expert witnesses in support of its allegations against the Waldners to explain certain issues and matters relative to rape victims, their disclosure and reporting of the rape, and other related matters. *Id.*; *MH, October 17, 2022, pp. 206-216.* The Waldners have secured the services of a mental health professional to render assistance in their defense and the availability of E.H.'s diaries is essential to said professional's evaluation of E.H. *RA, p. 669 (Findings of Fact and Conclusions of Law on Journals).*

ARGUMENT

A. Standard of Review.

The standard of review for a jurisdictional issue is de novo. *State v. Anders*, 2009 S.D. 15, ¶5, 763 N.W.2d 547. Moreover, jurisdictional issues can be raised at any time in criminal proceedings. *Id.*, at ¶5. Likewise, the Supreme Court reviews questions concerning "... constitutional rights under the de novo standard of review." *State v. Rus*, 2021 S.D. 14, ¶20, 956 N.W.2d 455. The rules of construction for a constitutional provision are that

> ... [f]irst and foremost, the object of construing a constitution is to give effect to the intent of the framers of the organic law and of the people adopting it. ... The Supreme Court has the right to construe a constitutional provision in accordance with what it perceives to be its plain meaning. ... When words in a constitutional provision are clear and unambiguous, they are to be given their natural, usual meaning and are to be understood in the sense in which they are popularly employed. ... If the meaning of a term is unclear, the Court may look to the intent of the drafting body. ...

In re Janklow, 1999 S.D. 27, ¶5, 589 N.W.2d 624. Moreover, a "... constitutional provision, like a statute, must be read giving full effect to all of its parts." *In re Issuance of Summons Compelling Essential Witness Testify in Minnesota,* 2018 S.D. 16, ¶14, 908 N.W.2d 160.

The standard of review for discovery issues is a bifurcated standard. *Milstead v. Johnson*, 2016 S.D. 56, ¶7, 883 N.W.2d 725. Discovery issues are reviewed under the abuse of discretion standard. *Id.*, at ¶7. If the discovery issues involve the interpretation of a statutory provision, then the de novo standard of review is also applicable. *Id.*, at ¶7.

B. Discussion of the Issues.

ISSUE 1: WHETHER THIS COURT HAS JURISDICTION TO HEAR AN APPEAL FROM AN INTERLOCUTORY ORDER BROUGHT BY A NON-PARTY IN A CRMINAL CASE OR OTHERWISE CURRENTLY HAS JURISDICTION TO DETERMINE THE ISSUE IN THIS APPEAL.

1. Jurisdiction.

Jurisdiction in this Court on intermediate appeals is established by SDCL 23A-32-12 which provides as follows:

> As to any intermediate order made before trial, as to which an appeal is not allowed as a matter of right, either the state or the defendant may be permitted to appeal to the Supreme Court, not as a matter of right, but of sound judicial discretion, such appeal to be allowed by the Supreme Court only when the court considers that the ends of justice will be served by the determination of the questions involved without awaiting the final determination of the action. The procedure as to the taking of such appeal, petition for allowance thereof, and allowance thereof, shall be as set forth in §§15-26A-13 to 15-26A-17, inclusive, so far as the same are applicable.

SDCL 23A-32-12. Under SDCL 15-26A-13 a party permitted to seek an intermediate appeal must do so by filing a petition with the Clerk of the Supreme Court within ten days from the date of the notice of entry of the order. *SDCL 15-26A-13.* The contents of the petition for intermediate appeal are also governed by statute. *SDCL 15-26A-14.* Further, the petition must have attached to it copies of the order, findings of fact and conclusions of law, and the notice of entry of the order and findings. *Id.; SDCL 15-26A-15.* Failure to comply with the filing and other statutory requirements may be grounds for dismissal of the appeal. *State v. Mulligan*, 2005 S.D. 50, 696 N.W.2d 167.

The above statute clearly vests the right to petition and seek an intermediate appeal in either the State or the Waldners and not E.H. as an alleged victim rather than an actual party to the litigation. There is no question in this case that E.H. is not a party to the action, but is an alleged victim. E.H. timely filed a petition for intermediate appeal, but the State did not. The State filed a Response to Petition for Permission to Take Discretionary Appeal on May 16, 2023, and joined in E.H.'s petition, but this pleading was untimely under SDCL 15-26A-13 and does not constitute the petition contemplated by SDCL 15-26A-13. Failure to timely file a petition for intermediate appeal under the

above statutory scheme is fatal to the appeal. *Mulligan*, 2005 S.D. at 50, ¶¶4-7. In *Mulligan*, this Court specifically held that

> ... [t]he appellate jurisdiction of this Court will not be presumed but must affirmatively appear from the record. ... To determine whether the statutory grant of appellate jurisdiction has been met, the rules of statutory interpretation apply." ... SDCL 15-26A-13 provides that a petition for intermediate appeal "may be sought by filing a petition for permission to appeal ... with the clerk of the Supreme Court *within ten days after notice of entry of such order.*" SDCL 15-26A-13 (emphasis in the original). ...

Mulligan, 2005 S.D. at 50, ¶4. The *Mulligan* Court further held that

> ... we acquire jurisdiction to the extent necessary to act upon Plaintiff's request for permission to appeal when notice of appeal is served *within the statutory time* (emphasis in the original) ...

Mulligan, 2005 S.D. at 50, ¶5. Although this Court has allowed appeals to proceed when the necessary accompanying documents are not attached "... it is settled law that the failure to timely file a notice of appeal is a jurisdictional defect." *Id.*, at ¶5. In *Mulligan* the Court dismissed an intermediate appeal when the appellant failed to file a petition for intermediate appeal within the statutory time frame finding that such action deprived the Court of appellate jurisdiction. *Id.*, at ¶5. This was particularly so since the time frame specified in SDCL 15-26A-13 "... is mandatory and there is no exception provided in the appellate rules ..." *Id.*, at ¶5. This Court also concluded that while dismissal is a harsh remedy, it is entirely consistent "... with the approach of the federal courts which uniformly treat the intermediate appeal time limit found in 28 U.S.C.A. § 1292(b) as a jurisdictional requirement." *Mulligan*, 2005 S.D. at 50, ¶6. The logic behind the strict application of the timeliness rule is because time-of-filing-rules are

> ... not arbitrary but functional ... [and] ... [i]t helps to preserve the respect due trial judges by minimizing appellate-court interference. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals and it hence is crucial to the efficient administration of justice."

Id., at ¶6. Moreover, it is well settled law that the Supreme Court only has "... such appellate jurisdiction as may be provided by the legislature ... [and] ... [t]he right to appeal is statutory and therefore does not exist in the absence of a statute permitting it." *State v. Schwaller*, 2006 S.D. 30, ¶5, 712 N.W.2d 869. Consequently, this Court cannot increase the time for filing appeals, but must operate within the confines of the statutory provisions governing appeals. *Id.*, at ¶5.

E.H. argues that this Court has the authority to enlarge the time for filing a petition for intermediate appeal based upon SDCL 15-26A-92. This argument not only ignores the governing case law, but also ignores the final phase of the statute cited which provides that "...the Supreme Court may not enlarge the time for filing or serving a notice of appeal." *SDCL 15-26A-92.* E.H. further argues that the provisions of South Dakota law governing discretionary appeals are not jurisdictional, but are a "claims processing rule" and not subject to the jurisdictional limitations established by clear and undoubted precedent. *Supra.* E.H. argues the *Hamer v. Neighborhood Housing Services of Chicago* case in support of her position. 583 U.S. 17, 138 S.Ct. 13, 199 L.Ed.2d 249(2017). E.H. misapprehends *Hamer* and her reliance on that case is sorely misplaced. *Hamer* dealt with a court made rule as opposed to a statutory mandate created by the legislature. *Id.*, at 19-22. *Hamer* clarified that rules of procedure that provide for extensions of time are not jurisdictional, but procedural based. *Id.*, at 19-22. Here, the time frame for a petition for an intermediate appeal is a created by the legislature and is statutorily based, not rule based, and there is no statute, rule, or law that allows for any court to extend the time to file either a notice of appeal, or a petition for an intermediate appeal. *Mulligan*, 2005 S.D. at 50, ¶¶4-5.

2. Constitutional Basis for Intermediate Appeal.

E.H. argues a constitutional basis for allowing her appeal. E.H. misconstrues the impact of the constitutional basis for her victim's rights. The South Dakota Constitution does not create a right in a victim to pursue an intermediate appeal. If this were true, the well settled law governing intermediate appeals would be up-ended. See, *Mulligan*, 2005 S.D. at 50, ¶6. The opportunity for an intermediate appeal is not a right, but discretionary under the law. *SDCL 23A-32-12.* Since E.H. does not have a right to an intermediate appeal and is not a permissible party designated in the statute governing discretionary appeals, she may only appeal if her petition is filed in conjunction with a party authorized under the governing statute, i.e., the State. Cf., *Milstead,* 2016 S.D. at 56 (petition for intermediate appeal filed in conjunction with the State). If E.H. wanted to pursue the intermediate appeal, she was required under the law to piggy-back with the State, not advance the claim and hope the State was on board. E.H. argues that it is unreasonable or unconscionable to require her to be in "lock-step" with the prosecution so as to pursue permission for an intermediate appeal. This argument, however, ignores the constitutional language E.H. relies upon to make her arguments herein and this Court's interpretation of that language. A close reading of Marsy's Law and the rights created thereby clearly shows that the "... predominant purpose of Marsy's Law is to ensure that crime victims are kept informed and allowed to meaningfully participate in the criminal justice system throughout the time a crime is prosecuted and punished." *In re Essential Witness,* 2018 S.D. at 16, ¶15. The purpose of Marsy's law was not to create an intermediate appellate right, but to make sure E.H. was informed and allowed to participate in the prosecution of this case. Marsy's Law did not put victims in the driver's seat on criminal prosecutions, as that duty remains with the State. It is wholly consistent with the law that E.H., as well as other alleged victims, must be in "lock-step"

with the State on intermediate appeals in order to permit effective prosecutions and still afford victims their rights under Marsy's Law. The constitutional rights afforded to alleged victims do not trump the tasks of prosecutors in pursuing criminal cases nor do they trump the rights afforded to criminal defendants.

Furthermore, E.H. is not deprived of a constitutional right established by Marsy's Law by being required to adhere to the rules of practice and law governing intermediate appeals. *S.D. Const., Art. VI, §29.* The plain and simple fact of the matter is that SDCL 23A-32-12 does not permit E.H. to make an intermediate appeal, but requires that either the State or Waldners make the appropriate petition for an intermediate appeal. The appeal is not a matter of right, but discretionary. Consequently, there are no constitutional implications by not allowing the intermediate appeal for E.H. due to the error by the State and E.H. in perfecting the request for an intermediate appeal. Moreover, E.H. is not deprived of any constitutional right to be afforded due process of law by not being allowed to make this intermediate appeal. E.H. was and is represented by independent counsel. E.H.'s attorney participated at all stages of the proceedings involving E.H. and filed and argued motions and advanced E.H.'s cause at every turn. The fact that E.H. and the State did not properly file for a discretionary appeal is not a denial of due process nor a constitutional right, but an error by her counsel and the State which cannot simply be over-looked by this Court. Appeals of right rest in the constitution; discretionary appeals are established by statute. If E.H. wants alleged victims to have the opportunity to independently be able to pursue an intermediate appeal that allowance needs to be created by the legislature and not this Court. *State v. Orr*, 2015 S.D. 89, ¶ 8, 871 N.W.2d 834. This court falls under the judicial branch of the government and not the legislative branch. *Id.; S.D. Const., Art., II; Art., V, §1.* It is for

the legislature to identify and include parties other than the State and Defendants in the intermediate appellate review statute.

E.H. argues that she may have another remedy under the law. The fact that E.H. believes she may have another remedy at law is clearly contradictory to her arguments as a whole on the jurisdictional issue. Moreover, the fact that another right may exist further supports this Court dismissing the intermediate appeal, without prejudice to E.H. to pursue her other remedy.

The bottom line on the jurisdictional issue is that this Court should not adopt E.H.'s arguments, as to do so will be tantamount to this Court engaging in action indirectly that it cannot do directly under the law. The law is clear, neither E.H. nor the State has perfected the jurisdictional loop of this intermediate appeal and the appeal should be dismissed.

ISSUE 2: WHETHER THE TRIAL COURT ERRED IN ORDERING AN *IN CAMERA* REVIEW OF E.H.'S DIARIES OR JOURNALS IN LIGHT OF E.H.'S CONSTITUTIONAL RIGHT TO PRIVACY, INCLUDING HER RIGHT TO REFUSE A DISCOVERY REQUEST; AND WHETHER IT FURTHER ERRED IN ORDERING AN *IN CAMERA* REVIEW WITHOUT FIRST FINDING E.H. WAIVED HER CONSTUTITONAL RIGHTS AND WITHOUT HOLDLING DEFENDANTS TO THEIR BURDEN UNDER THE APPLICABLE LAW.

This issue requires the Court to balance the rights between E.H. as the alleged victim and the Waldners who are the accused in this criminal case. There are two competing rights at issue, but one of these rights must be superior to resolve this issue. E.H.'s rights are set forth in Marsy's Law under the South Dakota Constitution and are predominantly geared toward keeping victims informed of criminal prosecutions and making sure they are afforded the opportunity to meaningfully participate in the prosecution. *In re Essential Witness,* 2018 S.D. at 16, ¶15; *S.D. Const. Art., VI, §29.* E.H.'s rights are not associated with nor do they affect her freedoms or other criminal punishment in the form of fines, costs, and/or probation. Moreover, E.H.'s rights are

civil and not criminal in nature. The Waldners' rights stem from the constitution as well, but are the rights of a person accused of criminal conduct and subjected to punishment for their alleged actions so as to protect the citizens of South Dakota. The criminal bundle of constitutional rights are designed, primarily, to afford the accused a fair opportunity to defend themselves, confront their accusers, have the ability to prepare a defense to the accusations rendered against them, and obtain a fair trial by an impartial jury. *S.D. Const., Art. VI, §§6, 7, 9, and 10.* Furthermore, under the law every criminal defendant is presumed innocent until proven guilty by the State. *SDCL 23A-22-3; Taylor v. Kentucky,* 436 U.S. 478, 482, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). It is clear under the law, as recognized by the trial court, that the Waldners' constitutional rights are superior to E.H.'s rights on the issue regarding her diaries and the production of same in accordance with the subpoena duces tecum and the trial court's order is appropriate.

1. Right of Privacy.

E.H. argues that she has an absolute right of privacy which includes a right to refuse to comply with a lawfully issued subpoena duces tecum. E.H. misapprehends the law.

The constitutional provision that E.H. relies upon provides that E.H. has

> ... [t]he 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 ...

S.D. Const. Art., VI, §29(6). The above provision addresses discovery requests, not orders of the court. A subpoena duces tecum is not a discovery request, but a lawful order of the court issued by either the court or an attorney under the name of the court. *SDCL 23A-14-2 and 23A-14-4.* A subpoena is defined as "... [a] writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to

comply." *Black's Law Dictionary, Eighth Edition, p. 1467.* A writ is "... [a] court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act." *Id., at p. 1640.* A subpoena duces tecum requires not only the appearance of a person, but that said person produce documents as well. *Id., at p. 1467.* An attorney is permitted in South Dakota to issue subpoenas that constitute an order of the Court. Consequently, the subpoena duces tecum issued on E.H. is not a discovery request, but an order of the court which she can only disobey if the subpoena duces tecum is quashed. Given the legal status of the subpoena duces tecum, the issues associated therewith do not fall within the purview of Marsy's Law, but are governed by other specific statutes. *SDCL 23A-14-25 through 23A-14-28.* Once a motion to quash a subpoena is denied, E.H. is required to comply with the subpoena duces tecum and cannot assert her constitutional right of privacy to refuse to comply with the lawful order of the court. Any challenge to the order denying a motion to quash must be pursued through an intermediate appeal brought by the State, not E.H., under the governing statutes for intermediate appeals.

The above argument is consistent with the rules governing constitutional construction. Since there is no language in the above constitutional provision that make E.H.'s right of privacy superior to a lawful court order in the form of a subpoena duces tecum, E.H. cannot successfully argue that she has a right to refuse to comply with a subpoena duces tecum. In short, nowhere in the above provision, nor any other provision of Marsy's Law, does the right of privacy apply to subpoenas duces tecum, nor are the rights designated as absolute or unrestricted relative to subpoenas. Absent specific wording, the right to avoid a subpoena duces tecum is not absolute or unrestricted and is subject to the interpretation and governance of the courts. This is so because the rules of construction relative to statutes and constitutional provisions do not allow the courts to

strike out or insert words to effectuate a result or interpretation consistent with its desires. *State v. Franz*, 526 N.W.2d 718, 720-721 (S.D. 1995). Under the rules of construction for a constitutional provision, the Court is required "... give effect to the intent of the framers..." and "... construe a constitutional provision in accordance with what it perceives to be its plain meaning... ." *In re Janklow*, 1999 S.D. at 27, ¶5. Moreover, if the words are not ambiguous and are clear, then the Court is to give the words their "... natural, usual meaning and ...[the words] ... are to be understood in the sense in which they are popularly employed." *Id.*, at ¶5. The language in the above constitutional provision is not ambiguous and nothing in the above constitutional provision makes the rights afforded to E.H. absolute and unrestricted as to a subpoena duces tecum.

2. Waiver.

E.H. argues that she did not waive any of her constitutional rights under Marsy's Law. E.H. misconstrues the waiver issue and its application herein.

When the DCI began its investigation into the allegations against the Waldners it questioned E.H. and two elders with the Hutterite Colony where she was living, Adam and Levi. Neither Adam nor Levi had any relationship, professional or otherwise, with E.H. that would constitute a privilege. Moreover, neither E.H. nor the State are asserting that any privilege existed between E.H. and Adam or Levi. The DCI agents interviewed E.H. three times and on each occasion she was accompanied by Adam and Levi. E.H., Adam, and Levi discussed with the DCI agents the diaries kept by E.H., produced one diary, and offered to produce other diaries. Adam and Levi disclosed to DCI that the other diaries kept by E.H. contained information relative to the sexual assaults and the alleged actions engaged in by the Waldners. Clearly, Adam and Levi read some of E.H's other diaries. DCI declined the offer to produce other diaries. During discovery, the State disclosed to the Waldners the one diary. In the diary disclosed, E.H. made

numerous references to the facts associated with the sexual assaults allegedly perpetrated against her by the Waldners. E.H. also indicated in the disclosed diary that she had made reference to the factual matters associated with her claim in her other diaries. It is without question that E.H.'s diaries are relevant and contain information about the alleged sexual assault. Likewise, it is without question that E.H.'s disclosures breached any claim she would have had under the law to keep her diaries confidential.

E.H. does not assert any privilege in this matter and no privilege argument is made by her or the State in this case. In fact, the State admits that no privilege exists between E.H. and Adam and Levi. Consequently, privilege is not at issue herein. Moreover, the constitutional right asserted by E.H. in this matter is not a criminal constitutional right that requires the exacting analysis regarding a waiver. See, *Kleinsasser v. Weber*, 2016 S.D. 16, 924 N.W.2d 455. A waiver of a right may be shown by the actions and conduct of the person possessing the right. *State v. Larson*, 2022 S.D. 58, ¶27, 980 N.W.2d 922. Also, what suffices as a waiver depends upon the particular right at issue. *New York v. Hill*, 528 U.S. 110, 114, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000). It is well settled law that constitutional rights may be waived by the person possessing said right. *Kleinsasser*, 2016 S.D. at 16, ¶38. Since E.H.'s constitutional right to privacy is not a criminal right, the law governing a civil waiver is applicable. It is well settled law that

> ... [t]he doctrine of waiver is applicable where one in possession of any right, whether conferred by law or by contract, and with full knowledge of the material facts, does or forbears the doing of something inconsistent with the exercise of the right. To support the defense of waiver, there must be a showing of a clear, unequivocal and decisive act or acts showing an intention to relinquish the existing right. ...

Action Mechanical, Inc. v. Deadwood Historic Preservation Com'n, 2002 S.D. 121, ¶18, 652 N.W.2d 742. Here, E.H., who is the sole impetus of the criminal investigation,

identified the diaries, disclosed one diary to the DCI agent, disclosed the contents of the diaries to Adam and Levi and the DCI agent, and offered to provide the other diaries she kept to the DCI agent. Furthermore, the one diary disclosed was done so voluntarily by E.H. with the knowledge that the diary would be used in the criminal matter being investigated by DCI. Additionally, the diary disclosed identifies facts related to and associated with the sexual assault of which E.H. complained. Clearly, E.H. waived her right to maintain the private nature of her diaries by her words, actions, and conduct. Under the above circumstances, it was unnecessary for the trial court to consider whether or not E.H. waived her privileges and the findings made by the trial court relative to waiver are sufficient.

Additionally, E.H. misapprehends the impact of *Karlen* in this matter. *State v. Karlen*, 1999 S.D. 12, 589 N.W.2d 594. The privilege issue in *Karlen* is not relevant here because no privilege is argued nor asserted by the State or E.H. *Karlen* is persuasive in the sense that it establishes the *in camera* inspection process to preserve the sensitive nature of materials which are personal in nature from the public eye and to ensure that only case-relevant materials are disclosed. *Id.*, at ¶46. In fact, *Karlen* is consistent with what appears to be this Court's preference for an in camera inspection of documents to determine if discoverable information is contained therein. *State v. Horned Eagle*, 2016 S.D. 67, ¶21, 886 N.W.2d 332. *Karlen* further supports the general conclusion made by the trial court that the denial of the motion to quash the subpoena duces tecum was proper given the nature of the competing interests and rights involved in the matter. *Karlen*, 1999 S.D. at 12, ¶¶36-43. Additionally, *Karlen* supports the concept that once a person discloses information they deem personal or private, such action constitutes a waiver of any right to further maintain said information confidential in a criminal prosecution

setting. Moreover, in *Karlen* this Court recognized the competing interests in victims and defendants and held that the State of South Dakota has

> ... elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or the defense.... Whatever [the privileges'] origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

Karlen, 1999 S.D. at 12, ¶34, quoting *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The hinge pin of the above principle of law is that a defendant's rights are superior to a victim's rights when it comes to evidentiary matters. This is so because it is a well founded legal principle that "... [b]efore society can force a man to spend a good portion of his adult life in prison, 'it is not too much to ask that he be allowed access to relevant information with which to argue to society he is not guilty of that charge.'" *Karlen*, 1999 S.D. at 12, ¶34. In fact, the well settled law if for trial courts to error on the side of caution and review documents subject of discovery or which may be privileged

3. Misapplication of *Nixon/Milstead*.

E.H. further relies upon *Milstead I*, *Milstead II*, and *Nixon* to challenge the Waldners' ability to subpoena E.H.'s diaries. *Milstead v. Smith*, 2016 S.D. 55, 883 N.W.2d 711 (*Milstead I*); *Milstead II*, 2016 S.D. at 56; *Nixon*, 418 U.S. at 683. This reliance is misplaced. In each of the above cases, as in the *Karlen* case, the evidence sought was subject to a statutorily defined privilege. *Karlen*, 1999 S.D. at 12, ¶31; *Milstead I*, 2016 S.D. at 55, ¶10; *Milstead II*, 2016 S.D. at 56, ¶10; *Nixon*, 418 U.S. at

688. Although E.H. quotes from the *Milstead* cases that "journals and diaries" are subject to the *Nixon* test, a review of those cases shows that the quoted language is not correct, nor is that specific language contained anywhere in those cases. *E.H. brief, p. 18.* Moreover, none of the above cases dealt with journals or diaries, but the subject matter of all of those cases was legally recognized privileged material. The material sought from E.H. is not subject to any statutory privilege, is not claimed as a privilege, and is not protected by any specific law. E.H. claims the diaries are privileged based upon her right to privacy to refuse a discovery request as set forth in Marsy's Law. As argued *supra*, no such right exists under Marsy's Law and the right to refuse a subpoena duces tecum is a right E.H. has manufactured by inserting words into the constitutional provision. See, *S.D. Const., Art. VI, §29.* This distinguishes the case at bar from the above cases in all respects. Consequently, the privilege cases cited by E.H. are not persuasive or even applicable to the diary issue herein. E.H. further applies an over generalization of the rule of law from *Milstead I and II* and *Nixon* and concludes that ***all*** production of document requests are subject to the *Milstead* and *Nixon* test. This is simply not so. These cases do not require that the trial court engage in the *Nixon* test whenever any material is subpoenaed, but only when the material subpoenaed is subject to a statutory privilege or protected by a specific statute.

4. E.H.'s Mental Health and Credibility.

In addition to the above, E.H.'s mental status is relevant to the analysis of the issues herein. E.H.'s medical records have been disclosed in discovery and it is clear from same that E.H. suffers from mental health conditions which may have an impact on her general credibility. E.H.'s attending psychiatrist, Dr. William Gammeter, testified at a motion hearing and indicated that E.H.'s medical records, mental conditions, and psychiatric admissions revealed that E.H. has been diagnosed with bipolar disorder, post

traumatic stress disorder, depression and is prone to fantasies, hallucinations, blunted effect and/or irritable behavior. Moreover, the diary excerpt disclosed also reveals certain matters which are relevant to E.H.'s mental health. The Waldners have secured the services of a mental health professional to render assistance in their defense and the availability of E.H.'s diaries are essential to said professional's evaluation of E.H. Additionally, the diary excerpt discloses that the Waldners are not the only suspects that E.H. has identified as perpetrators of sexual assaults against her, as E.H. made incriminating statements about other persons who have perpetrated sexual crimes against her. E.H. has also been evaluated by the professionals at Child's Voice in an effort to gather evidence related to the charges the Waldners face. The State intends to call expert witnesses in support of its allegations against the Waldners to explain certain issues and matters relative to rape victims, their disclosure and reporting of the rape, and other related matters. The State's entire case rests on the shoulders of E.H., as there is no physical evidence, no eyewitnesses, and no documents that tie the Waldners to the rape and sexual assault allegedly perpetrated by them, nor is there any evidence to corroborate E.H.'s claims.

In light of the above, E.H.'s credibility is key to the State's case and the Waldners' defense. The trial court did not conclude that the disclosure of the diaries was appropriate because of a limited, general credibility issue as represented by E.H., but that there are specific and identifiable credibility issues that warranted the denial of E.H.'s motion to quash the subpoena duces tecum. See, *RA, p. 669 (Findings of Fact and Conclusions of Law on Journals), ¶¶15-17, 21-23.* E.H.'s arguments associated with the credibility issue are cherry picked, take the record out of context, and are specious in nature. Moreover, the trial court concluded that the Waldners met the burden imposed upon them to establish the disclosure of the diaries was appropriate under the

circumstances and that all applicable legal tests and criteria were met. It is clear from the Findings of Fact and Conclusions of Law on Journals entered by the Court that it considered all required criteria before it concluded that a disclosure of the diaries for an *in camera* inspection was appropriate. The access to E.H.'s diaries is not a fishing expedition, but is the result of the analysis of key evidence produced by the State in its prosecution. The facts which support the trial court's decision are clear and undisputed, although ignored by E.H. When this Court examines the totality of the evidence in support of the trial court's decision to deny the motion to quash the subpoena duces tecum, it is apparent that the trial court's decision was based on solid and appropriate legal basis. E.H. argues that her constitutional right to privacy trumps statutory provisions since the enactment of Marsy's Law. The basic legal principle cited by E.H. is correct, but her application of that legal tenet to this case is misplaced. E.H. cannot create rights that do not exist in Marsy's Law, nor can she expand those rights without proper legislative and judicial support.

CONCLUSION

In light of the above and foregoing, E.H.'s appeal should be dismissed or, in the alternative, the trial court's decision to deny E.H.'s motion to quash the subpoena duces tecum should be affirmed.

REQUEST FOR ORAL ARGUMENT: Waldners hereby request oral argument.

Dated this 28th day of November, 2023.

/S/TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
whalawtim@cme.coop
Attorney for the Appellant

/S/ KENT LEHR
Lehr Law Office
P.O. Box 307
Scotland, SD 57059
lehrlaw@gwtc.net
Attorney for Defendant/Appellee/Respondent
Mark Waldner

CERTIFICATE OF COMPLIANCE

Timothy R. Whalen, the attorney for the Appellant, hereby certifies that the Brief of Appellees/Respondents Mark Waldner and Michael M. Waldner, Jr. complies with the type volume limitations provided for in SDCL 15-26A-66(b)(4). The Brief of Appellees/Respondents Mark Waldner and Michael M. Waldner, Jr. contain 38,591 characters and 7,758 words. Further, the undersigned relied upon the word count of the word processing system used to prepare the Brief of Appellees/Respondents Mark Waldner and Michael M. Waldner, Jr.

Dated this 28th day of November, 2023.

/S/ TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
whalawtim@cme.coop
Attorney for the Defendant/Appellee/Respondent
Michael M. Waldner, Jr.

/S/ KENT LEHR
Lehr Law Office
P.O. Box 307
Scotland, SD 57059
lehrlaw@gwtc.net
Attorney for Defendant/Appellee/Respondent
Mark Waldner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the Brief of Appellees/Respondents Mark Waldner and Michael M. Waldner, Jr. on the attorneys for Petitioner E.H. and Respondent State at their e-mail addresses as follows:

Julie Dvorak/Jeremy Lund
Siegel, Barnett & Schutz, L.L.P.
P.O. Box 490
Aberdeen, SD 57402-0490
jdvorak@sbslaw.net
jlund@sbslaw.net
Attorneys for Petitioner E.H.

Kelly Marnette/Chelsea Wenzel/Marty Jackley
South Dakota Attorney General's Office
1302 E. Highway 14, Ste 1
Pierre, SD 57501-8501
atgservice@state.sd.us
Attorneys for the Appellee/Plaintiff/Respondent State of South Dakota

Theresa Maule Rossow
Brule County State's Attorney
300 S. Courtland Street #201
Chamberlain, SD 57325
sabrule@midstatesd.net
Attorney for the Appellee/Plaintiff/Respondent State of South Dakota

Keith Goehring
Goehring Law Office
P.O. Box 851
Parkston, SD 57366
kgoehrng@santel.net
Attorney for the Defendant/Appellee/Respondent Michael Waldner, Sr.

by the UJS Odyssey System on the 28th day of November, 2023, at Lake Andes, South Dakota. Further, the undersigned hereby certifies that the original of the above and foregoing Brief of Appellees/Respondents Mark Waldner and Michael M. Waldner, Jr. was mailed to Shirley Jameson-Fergel, Clerk of the Supreme Court, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070 on the 28th day of November, 2023.

/S/TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
whalawtim@cme.coop
Attorney for Defendant/Appellee/Respondent
Michael M. Waldner, Jr.

/S/ KENT LEHR
Lehr Law Office
P.O. Box 307
Scotland, SD 57059
lehrlaw@gwtc.net
Attorney for Defendant/Appellee/Respondent
Mark Waldner

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30343

STATE OF SOUTH DAKOTA,

Plaintiff,

v.

MARK WALDNER, MICHAEL M. WALDNER, JR., and MICHAEL WALDNER, SR.,

Defendants.

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

THE HONORABLE BRUCE V. ANDERSON
Circuit Court Judge

STATE'S BRIEF

Julie Dvorak
Jeremy Lund
Siegel, Barnett & Schutz, L.L.P.
415 South Main Street, Suite 400
PO Box 490
Aberdeen, SD 57402-0490
jdvorak@sbslaw.net
jlund@sbslaw.net

ATTORNEYS FOR VICTIM, E.H.

MARTY J. JACKLEY
ATTORNEY GENERAL

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

ATTORNEYS FOR STATE

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Kent Lehr
Lehr Law Office
PO Box 307
Scotland, SD 57059
Telephone: (605) 583-4100
lehrlaw@gwtc.net

ATTORNEY FOR DEFENDANT, MARK WALDNER

Keith Goehring
Goehring Law Office
PO Box 851
Parkston, SD 57366
Telephone: (605) 928-3356
kgoehrng@santel.net

ATTORNEY FOR DEFENDANT, MICHAEL WALDNER, SR.

Timothy R. Whalen
Whalen Law Office, P.C.
PO Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645
whalawtim@cme.coop

ATTORNEY FOR DEFENDANT, MICHAEL M. WALDNER, JR.

Order Granting Petition for Allowance of Appeal from Intermediate Order Filed on June 16, 2023.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30343

STATE OF SOUTH DAKOTA,

Plaintiff,

v.

MARK WALDNER, MICHAEL M. WALDNER, JR., and MICHAEL WALDNER, SR.,

Defendants.

PRELIMINARY STATEMENT

Of the three separate settled records provided for this appeal, the record related to *State of South Dakota v. Michael Waldner, Jr.*, was the most comprehensive and will be referred to as "SR," followed by the e-record pagination. The remaining settled records and transcripts will be cited as follows:

Mark Waldner Settled Record SR2

Michael Waldner, Sr. Settled Record SR3

Motions Hearing, June 7, 2022 ..... MH1

Motions Hearing, October 17, 2022 ..... MH2

Motions Hearing, July 19, 2022 ..... MH3

Motions Hearing, November 8, 2022 ..... MH4

Motions Hearing, March 28, 2023 ..... MH5

JURISDICTIONAL STATEMENT

On April 25, 2023, the Honorable Bruce V. Anderson, Circuit Court Judge, First Judicial Circuit, entered an Order Denying Motion to Quash in *State of South Dakota v. Mark Waldner, State of South Dakota v. Michael M. Waldner, Jr.*, and *State of South Dakota v. Michael Waldner, Sr.*, Brule County Criminal File Numbers 21-159, 21-160, and 21-161. SR:677. The Defendants filed Notices of Entry of the Orders on April 28, 2023. SR:685. E.H. filed a Petition for Permission to Appeal the Order on May 6, 2023, and the State filed a Response joining E.H.'s Petition on May 16, 2023. This Court granted the Petition on June 20, 2023. SR:705-06 This Court's jurisdiction is discussed in detail below.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL?

The trial court did not rule on this issue.

In re Issuance of Summons Compelling Essential Witness To Appear & Testify in State of Minnesota, 2018 S.D. 16, 908 N.W.2d 160

Matter of Abrams, 465 N.E.2d 1 (N.Y. 1984)

State v. Kieffer, 187 N.W. 164 (S.D. 1922)

S.D. Const. Art. VI, § 29

II. WHETHER THE TRIAL COURT WAS REQUIRED TO APPLY THE *NIXON* FACTORS TO THE DEFENDANTS' SUBPOENA DUCES TECUM?

The trial court did not apply the *Nixon* factors.

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

State v. Counts, 201 N.E.3d 942 (Ohio App. 2022)

State v. Fierro, 2014 S.D. 62, 853 N.W.2d 235

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

STATEMENT OF CASE AND FACTS

Mark Waldner, Michael Waldner, Jr., and Michael Waldner, Sr. ("the Defendants") were indicted on multiple counts of rape and assault relating to a single victim, E.H. SR:1-4. The Defendants lived on a Hutterite Colony in rural Brule County, where the alleged incidents occurred. E.H., a minor at the time, lived on the same colony with her parents. After E.H. reported the incidents, she was moved to a sister colony and put into the care of Adam and Levi, who were educators and leaders at the sister colony.

During the law enforcement investigation, Adam and Levi voluntarily provided one of E.H.'s personal journals to law enforcement. On August 17, 2021, approximately two weeks after the Defendants were indicted, the State provided discovery. SR:122-23. The discovery materials included, among other things, law enforcement reports, a Child's Voice interview with E.H., certain medical and mental health records pertaining to E.H., victim sensitive photographs of E.H., and E.H.'s journal that was provided to law enforcement. *Id.* All of these materials were in the possession of the State. After production to the Defendants, the State requested that a protective order be entered.

SR:40-47. The Defendants resisted. SR:49-56. On November 30, 2021, Michael Waldner, Sr. sent an email to several ministers and managers of multiple different Hutterite Colonies that divulged very personal and humiliating details about E.H. SR:277. The Defendants became aware of these details about E.H. through the discovery materials the State had provided to them. The court entered a protective order on December 8, 2021. SR:122-28.

Following the Defendants' disclosure of E.H.'s private information, in the spring of 2022, the Defendants made further discovery requests. Michael Waldner, Jr. requested all of E.H.'s disciplinary records from the Hutterite Colony; additional medical records regarding E.H.; all "records, notes, statements, diagrams, photographs, videos, recorded statements, or other documents or materials prepared by [Adam and Levi]" or any of the same items Levi or Adam "obtained, maintained, possessed, or [had] in their control regarding E.H. and the claims [she] made[;]" and all of E.H.'s "diaries and/or journals." SR:203-05. Mark Waldner requested all of E.H.'s disciplinary records from the Hutterite Colony, all of E.H.'s medical records, and all of E.H.'s mental health records from Avera Behavioral Health. SR2:201-02, 204-05. And Michael Waldner, Sr. requested all of E.H.'s disciplinary records from the Hutterite Colony, all of E.H.'s medical records and all of E.H.'s mental health records from Avera Behavioral Health. SR3:189-90, 210-11.

At the hearing on the motions for further discovery, the State argued that 1) the requested materials were not in the possession of the State; 2) the requested materials were not discoverable under SDCL ch. 23A-13; 3) the appropriate method for obtaining materials from a third-party is through subpoena; and 4) the Defendants failed to make the showing required by *Milstead v. Johnson*, 2016 S.D. 56, 883 N.W.2d 725. MH1:6-7, 10-13. Subsequent to this hearing, on June 25, 2022, Michael Waldner, Jr. filed a subpoena duces tecum commanding E.H. to produce all:

> [B]ooks, papers, or documents in your possession or under your control: Any [sic] and all statements, notes, video tapes, recordings, photographs, emails, text messages, computer maintained records, electronic records, social media records or recordings, diaries, journals, or other documents . . . for the time period of January 1, 2010, through present.

SR:243. Over the State's objections, on June 29, 2022, the court entered orders compelling all requested discovery, except for the disciplinary records. SR:245-46. Regarding E.H.'s journals, the court ordered the State to "obtain all diaries and/or journals made by E.H. and disclose the same to the Court for an in-camera inspection by the Court;" "prepare and submit with the diaries and/or journals a Vaughn index;" and "submit a brief setting forth the State's position as to issues relative to the disclosure of the diaries and/or journals under South Dakota law, particularly Marsy's Law[.]" *Id.*

Following this ruling, E.H. hired independent counsel to enforce her constitutional rights under Marsy's Law. SR:255. Initially, E.H.

filed a motion to quash the subpoena the Defendants had served on her in June. SR:256-60. Because Defendants had recently prevailed on the discovery request, they withdrew their subpoena. SR:261. Next, E.H. filed a motion to vacate the discovery order as it pertained to her journals. SR:263. E.H. argued that she was not a party to the proceeding, the court lacked personal jurisdiction to compel her to turn over materials, and her constitutional due process rights were violated because she was not given notice and an opportunity to be heard regarding the discovery motions and subsequent orders. SR:265-73. E.H. further asserted her constitutional right under Marsy's Law to prevent disclosure of information to Defendants and invoked privilege. *Id.* On November 11, 2022, the court entered an order vacating (in part) the prior order granting Defendants' motions for further discovery regarding E.H.'s diaries and journals. SR:324.

While E.H.'s motion to vacate was pending, the Defendants served another subpoena duces tecum on E.H. that contained the same broad sweeping language quoted above. SR:321. E.H. filed a motion to quash the subpoena on the grounds that it was unreasonable and oppressive, the Defendants failed to make the specialized showing required under *Milstead*, and the subpoena was a violation of E.H.'s constitutional rights under Marsy's Law. SR:322. Following a hearing on the matter, the court entered an order denying E.H.'s motion to quash. SR:677-79. In concluding that Defendants were entitled to discovery of E.H.'s

journals, the court relied solely upon *State v. Karlen*, 1999 S.D. 12, 589 N.W.2d 594. SR:669-76. According to the court, the "journals may shed light on E.H.'s general credibility and the search for the truth in this prosecution." *Id.* The court did not apply, nor make any findings or conclusions regarding this Court's holding in *Milstead*.

ARGUMENTS

I. THIS COURT HAS JURISDICTION TO CONSIDER THIS APPEAL.

The Supreme Court has only such jurisdiction as the State Constitution or the Legislature may provide. S.D. Const. Art. V, § 5, S.D. Const. Art. IV, § 6. "The appellate jurisdiction of this Court will not be presumed but must affirmatively appear from the record." *State v. Schwaller*, 2006 S.D. 30, ¶ 5, 712 N.W.2d 869, 871.

A. Article VI, Section 29 of the South Dakota Constitution Provides this Court with Jurisdiction to Hear this Appeal.

In 2016, South Dakota voters approved an amendment to the South Dakota Constitution known as "Marsy's Law," which granted nineteen enumerated rights to victims of crimes committed in South Dakota. *In re Issuance of Summons Compelling Essential Witness To Appear & Testify in State of Minnesota*, 2018 S.D. 16, ¶¶ 13-16, 908 N.W.2d 160, 166-67; S.D. Const. Art. VI, § 29. The provision allows the victim, the victim's retained attorney, or the attorney for the government, to "assert and seek enforcement of the rights enumerated in this section and any other right afforded to a victim by law in any

trial *or appellate court. . . as a matter of right.*" S.D. Const. Art. VI, § 29 (emphasis added). Then, the court "shall act promptly on such a request, affording a remedy by due course of law for the violation of any right and ensuring the victims' rights and interests are protected in a manner no less vigorous than the protections afforded to criminal defendants." S.D. Const. Art. VI, § 29.

Prior to Marsy's Law, the South Dakota Constitution limited the "Court's jurisdiction to two categories—appellate jurisdiction as provided by the Legislature and jurisdiction to hear an original or remedial writ." *State v. Robert*, 2012 S.D. 27, ¶ 5, 814 N.W.2d 122, 123 (citing S.D. Const. Art. V, § 5); *see also* S.D. Const. Art. IV, § 6 (granting to the Court "the original and exclusive jurisdiction to determine when a continuous absence from the state or disability has occurred."). With the enactment of Marsy's Law, the State Constitution expanded the Court's jurisdiction to hear, enforce, and provide a remedy for violations of the rights enumerated in Marsy's Law.

Before the trial court, E.H. asserted her Marsy's Law rights contained in paragraphs 1, 5, and 6 of the provision. SR:265-73. These rights grant E.H.:

> 1. The right to due process and to be treated with fairness and respect for the victim's dignity;
>
> 5. 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.

6. 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.

S.D. Const. Art. VI, § 29. These rights, along with the language that 1) grants E.H. the right to assert and seek enforcement of her rights in any trial or appellate court; and 2) requires the trial or appellate court to protect the victim's rights and afford her a remedy by due course of law, are self-executing and confer appellate jurisdiction on this Court.[1]

Self-Executing

"A constitutional provision may be said to be self-executing if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." *State v. Bradford*, 80 N.W. 143, 144 (S.D. 1899), on reh'g, 83 N.W. 47 (S.D. 1900). Stated another way, a constitutional provision is self-executing if no further legislation is required to give it effect. *Id.*; *Kneip*

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[1] Unlike other state constitutional provisions, South Dakota's provision does not expressly require the Legislature to provide for enforcement of the provision, nor does the language of the provision expressly preclude appellate review. *See State v. Skipwith*, 506, 123 A.3d 104, 107 (Conn. App. 2015), aff'd, 326 Conn. 512 (2017); *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 620 N.W.2d 763, 769 (Neb. 2001).

v. Herseth, 214 N.W.2d 93, 100 (S.D. 1974); *Wings as Eagles Ministries, Inc. v. Oglala Lakota County.*, 2021 S.D. 8, ¶ 9, 955 N.W.2d 398, 401; 16 Am. Jur. 2d Constitutional Law § 105 (2023). Additionally, when a provision is listed in a Constitution's Bill of Rights, or when it is addressed to the courts rather than the Legislature, it is presumed to be self-executing. *State ex rel. Richards v. Burkhart*, 183 N.W. 870, 871 (S.D. 1921); 16 Am. Jur. 2d Constitutional Law § 105 (2023); 16 C.J.S. Constitutional Law § 129 (2023).

The Marsy's Law provision at issue is located under the South Dakota Bill of Rights in Article VI of the South Dakota Constitution, and the provision expressly directs *trial and appellate courts* to protect the victim's enumerated rights and interests in a manner no less vigorous than the protection of a defendant rights. *Compare* S.D. Const. Art. VI, § 29 ("*The court. . . shall* act promptly on such a such a request. . .".) (emphasis added); *with* S.D. Const. Art. XI, § 6 ("T*he Legislature shall, by general law*, exempt from taxation" public property used for certain purposes) (emphasis added). Entitlement to the rights under Marsy's Law, and the enforcement of those rights, are mandatory and only conditioned on the person being a victim, as defined in the provision. S.D. Const. Art. VI, § 29 ("A victim *shall* have the following rights:. . . ") (emphasis added); *Petition of C M Corp.*, 334 N.W.2d 675, 676 (S.D. 1983). The *court* must also provide a legally recognized remedy if a violation of a victim's right occurs. *See Hallberg v. South Dakota Bd. of*

Regents, 2019 S.D. 67, ¶ 20, 937 N.W.2d 568, 575 (noting the promise for "a remedy by due course of law" in S.D. Const. Art. VI, § 20 means that a constitutionally guaranteed remedy must be legally cognizable).[2]

Marsy's Law does not expressly or impliedly require additional legislation to give it effect or the force of law. Instead, the provision gives the Legislature, or the people by initiative or referendum, the authority to enact laws to "*further* define, implement, preserve, and protect the rights guaranteed to victims" by the provision. S.D. Const. Art. VI, § 29 (emphasis added). Giving the Legislature the authority to *further* define the rights guaranteed by the section is a clear indication that the enumerated rights, enforcement mechanisms, and remedies referenced within the provision are self-executing. 16 Am. Jur. 2d Constitutional Law § 104. Marsy's Law provided the floor and the Legislature, or the people, may enact laws that are consistent with the provision or provide additional rights.[3] *Id.* (explaining that the Legislature may also enact laws to provide a convenient remedy for the protection of the right or facilitate enforcement of the right).

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[2] Black's Law Dictionary defines "cognizable" as "capable of being known or recognized. . . Capable of being judicially tried or examined before a designated tribunal; within the court's jurisdiction." Black's Law Dictionary (8th ed. 2004).

[3] The Legislature has enacted several laws related to Marsy's Law, which are codified in SDCL ch. 23A-28C. Most of the statutes relate to notification and are inapplicable to this case.

Grant of Appellate Jurisdiction

"A constitutional provision, like a statute, must be read giving full effect to all of its parts," and "where a constitutional provision is quite plain in its language, [this Court will] construe it according to its natural import." *In re Summons*, 2018 S.D. 16, ¶ 14, 908 N.W.2d at 166 (other citations omitted). The plain language of Marsy's law creates a method for E.H., as a victim, to assert and seek enforcement of her rights "in *any trial or appellate court*, or before any other authority with jurisdiction over the case, as a matter of right." S.D. Const. Art. VI, § 29. This language, which authorizes the victim to seek enforcement of her rights before an appellate court—i.e. this Court, as a matter of right; directs this Court to ensure her rights are protected no less vigorously than the defendants' rights; and authorizes this Court to afford the victim a remedy upon the violation of a right is indisputably a grant of appellate jurisdiction. *See State v. Gault*, 39 A.3d 1105, 1111 (Conn. 2012) (recognizing that the victim's rights provision in California's constitution expressly confers appellate jurisdiction using language substantially similar to South Dakota's provision); *People v. Gonzales*, No. A136902, 2014 WL 1378278, at *3 (Cal. Ct. App. Apr. 8, 2014).

Because there are no limits in the constitutional provision or in the statutes that limit the victim's right to appeal, the victim must be

afforded an opportunity to appeal, as a matter of right.[4] As argued in E.H.'s brief, any other interpretation of Marsy's Law would be in violation of the express language requiring the courts to ensure the "victims' rights and interests are protected in a manner no less vigorous than the protections afforded to criminal defendants." E.H. Brief at 11. However, the Legislature cannot go below the constitutional floor set by Marsy's Law by denying access to the trial and appellate courts to seek enforcement of the enumerated rights.

B. This Court has Jurisdiction to Hear this Appeal under SDCL 15-26A-3.

The proceedings at issue in this appeal arose under SDCL 23A-14-5, which allows for a motion to quash a subpoena duces tecum "if compliance would be unreasonable or oppressive." While the proceedings are ancillary to a criminal proceeding, motions to quash subpoenas are ordinarily deemed civil in nature. *In re Issuance of Summons*, 2018 S.D. 16, ¶ 10, 908 N.W. 2d at 165 (citing *Codey ex rel. State of New Jersey v. Capital Cities, American Broadcasting Corp.*, 626

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[4] Under SDCL 23A-28C-3, "[a] victim may seek a cause of action for injunctive relief to enforce the victim's rights under S.D. Const., Art. VI, § 29 or [SDCL ch. 23A-28C]." While the cause of action for a failure to comply with SDCL ch. 23A-28C is restricted to injunctive relief, the Legislature did not similarly restrict the causes of action available to a victim for the violation of a constitutional right under S.D. Const. Art. VI, § 29. SDCL 23A-28C-3. The Legislature also expressly restricted a defendant's right to appeal from a conviction based on a violation of SDCL 23A-28C-1 but did not similarly attempt to restrict the appeal rights of victims under the chapter or the Constitution. *Id.*

N.E.2d 636 (N.Y. 1993)). When determining whether a proceeding is civil or criminal in nature, it is important to look at the true nature of the proceeding and the relief sought. *Matter of Abrams*, 465 N.E.2d 1, 4 (N.Y. 1984). In *Abrams*, the Court of Appeals of New York compared a motion to compel the State to seek investigatory materials from federal authorities, noting the relief sought was "part and parcel" of an ongoing criminal investigation, with a motion to quash a subpoena filed by a third-party witness, which was considered civil in nature. *Id.* at 4-5 (noting the court had previously held that the denial of a motion to quash a subpoena issued in furtherance of a criminal investigation into drug abuse on a college campus was a "special proceeding" and civil in nature).

A similar comparison was made by this Court in *In re Summons*. Although the proceedings involving the out of state summons arose in the criminal procedure section, and were ancillary to other criminal proceedings, the proceedings themselves did not involve an arrest, charge, or punishment of an individual for a public offense. *In re Summons* at ¶ 11. Instead, in reviewing the summons, the circuit court was asked to determine whether the witnesses were material and necessary and whether the summons would cause undue hardship. *Id.*

The same is true in this case. The relief sought is not part and parcel of a criminal investigation—E.H is not a governmental entity that conducted a criminal investigation, she is a third-party that has

constitutional and statutory rights separate from those of the parties in the criminal case. The proceedings are ancillary to the criminal action, but they do not directly involve the arrest, charge, or punishment of an individual. Instead, similar to the question at issue with an out of state summons, the circuit court in this case was tasked with determining whether the third-party subpoena was "unreasonable and oppressive." *See* SDCL 23A-14-5.

The Legislature granted this Court jurisdiction to hear appeals from "[a]ny final order affecting a substantial right, made in special proceedings. . ." SDCL 15-26A-3(4). SDCL 15-1-1 defines an "action" as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement, determination, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. *Every other remedy is a special proceeding.*" (Emphasis added). Examples of "special proceedings" include mandamus proceedings, proceedings involving a search warrant, and, as discussed above, proceedings to determine whether an in-state witness must comply with an out of state summons. *See In Re Issuance of Summons*, 2018 S.D. 16, ¶¶ 10-11, 908 N.W. 2d at 165; *State v. Kieffer*, 187 N.W. 164, 165 (S.D. 1922); *Matter of Appeal by Implicated Individual*, 2021 S.D. 61, ¶ 10, n. 7, 966 N.W.2d 578, 582; *see also* SDCL ch. 15-6 Appendix A.

The courts in both *In re Summons* and *Abrams, supra*, found that the proceedings at issue were "special proceedings" and, thus, not restricted by the criminal appellate statutes. *In re Summons* at ¶ 11 (determining the court had jurisdiction under SDCL 15-26A-3(4)); *Abrams, supra* at 5. The similarities between the subpoena in this case and the proceedings in *In re Summons* and *Abrams* suggests that proceedings related to a motion to quash a subpoena issued to a third-party are also "special proceedings." Both courts also determined that the orders at issue were final, in so far as the special proceedings were concerned. *Id.*; *see also Implicated Individual* at ¶ 10, n. 7 (noting that the order was final because there was nothing left for the court to do).

In this case, the Defendants filed their motions for discovery and subpoenas in the criminal case, and E.H. responded the same. This procedural posturing seemingly sets the present case apart from separately filed subpoena actions, which clearly determine all of the issues between all of the parties and result in a final order. In this case, the trial court's order did not fully and finally resolve all of the issues in the case, as the criminal matter is still pending.

Nevertheless, to the extent this Court would determine that the proceedings involving the subpoena issued to E.H. were "special proceedings," even though the proceedings took place in the criminal action, the order denying E.H.'s motion to quash would be a final order and this Court would have jurisdiction to hear this appeal under SDCL

15-26A-3(4).[5] *See Kieffer,* 187 N.W. at 165-66 (concluding that search warrant proceedings are "special proceedings," even though they can be part of a criminal case and captioned under the same, because the proceeding is not against a person; rather, its purpose is to secure discovery and possession of personal property).

C. E.H. was Authorized to Seek a Direct Appeal, as a Matter of Right, under Marsy's Law and SDCL 23A-32-12.

Before the trial court, E.H. intervened in the criminal action, as a matter of right.[6] Because of the posture of the case, E.H. was required

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[5] Normally, appeals under SDCL 15-26A-3(4) are instituted via a notice of appeal. SDCL 15-26A-4. In this case, E.H.'s petition for permission to appeal acted as a notice of appeal and, indeed, included more information than commonly required in a notice of appeal. *Compare* SDCL 15-26A-4 *with* SDCL 15-26A-14. The Petition was timely filed and apprised the parties of the issues being appealed. Furthermore, to extent that this Court would determine that E.H. could not appeal, the State's response joining E.H.'s Petition, and requesting an appeal, could serve as the notice of appeal. Like E.H.'s Petition, the State's response included more information than that required in a notice of appeal and the response was filed and served on the parties within thirty days after written notice of entry was provided. SR:685; SDCL 15-26A-6; *City of Rapid City v. State*, 279 N.W.2d 165, 166 (S.D. 1979).

[6] E.H.'s actions before the trial court, and the mechanism for asserting and enforcing rights under Marsy's Law, are similar to intervention under SDCL 15-6-24(a)-(c). SDCL 15-6-24(a) permits a party to intervene as a matter of right "when a statute confers an unconditional right to intervene." When a statute confers the right, the intervenor must file an application to intervene with the trial court. In this case, the Constitution provided E.H. the right to intervene in the criminal proceeding, as a matter of right, without a formal application. To the extent this Court would require an application, the State asserts that E.H.'s motion and brief requesting the trial court reconsider and vacate its discovery order would be a sufficient application. *See In re Estate of Shipman*, 2013 S.D. 42, ¶¶ 11-13, 832 N.W.2d 335, 339.

to first intervene in the criminal proceedings to assert and seek enforcement of her right to due process with regard to the trial court's discovery. The trial court corrected course and vacated the part of its Order compelling the State to provide discovery of the journals in E.H.'s possession, but the trial court then re-issued the Defendants' subpoena duces tecum commanding E.H. to provide her journals. Had the trial court afforded E.H. her right to due process or properly denied the Defendant's request for discovery in the first instance, E.H. could have sought relief like the third-party in *Milstead*.

Nevertheless, as an intervenor, E.H. has the right to pursue an appeal before this Court. E.H.'s actions before the trial court, and the mechanism for asserting and enforcing rights under Marsy's Law, are similar to intervention under SDCL 15-6-24(a)-(c). While intervenors in the civil context do not have full party status, they do have the right to seek appellate review before this Court if an order of the trial court affects their rights—but "only to the extent of the interest that made it possible for the intervention." *In re B.C.*, 2010 S.D. 59, ¶ 8, 786 N.W.2d 350, 352 (citing Charles Alan Wright, Arthur R. Miller & Mary May Kane, 7C Federal Practice and Procedure, Civil § 1923, at 644 (3d ed. 2007)); *Citibank (South Dakota), N.A. v. State*, 1999 S.D. 124, ¶¶ 11-12, 599 N.W.2d 402, 405. Additionally, under the civil statutes, an intervenor must seek discretionary appeal of a pre-trial order, and obtain certification from the trial court, before appealing because any

pre-trial order would not be a final order. *See* SDCL 15-6-54(b). In this case, Marsy's Law grants E.H. the right to intervene in the criminal action and the right to seek review from this Court as a matter of right. However, as addressed above, E.H. filed a discretionary appeal, out of an abundance of caution, as would be required under the civil statutes if she was an intervenor, and as was required under SDCL 23A-32-12 for purposes of criminal actions.

Importantly, the State is not suggesting that a victim has an unfettered right to seek any appeal under Marsy's Law. For instance, Marsy's Law does not give victims right to prosecute or prevent the dismissal of criminal cases or to appeal any such action by the State. Nor would a victim have a right to appeal a sentence under Marsy's law because the victim disagrees with the sentence. However, because Marsy's Law is a constitutional provision, E.H. must be provided a right to appeal when the court action at issue implicates or violates her rights under Marsy's Law.

II. THE TRIAL COURT ERRED IN FAILING TO APPLY THE *NIXON* FACTORS ADOPTED IN *MILSTEAD* TO THE DEFENDANTS' SUBPOENA DUCES TECUM.

In granting E.H.'s motion to vacate, in part, the trial court's Order for Further Discovery, the court agreed that it did not have the authority to require the State to provide information that was not within the State's possession, custody, or control. MH4 at 7 (relying on SDCL ch. 23A-13 and FRCRP Rule 16). Instead, the trial court correctly

determined that the appropriate method for obtaining information from E.H. was through a subpoena, as provided in SDCL 23A-14-5 (Rule 17(c)). *Id.* at 8; MH5 at 6. However, the trial court erred in failing to apply the *Nixon* factors to the Defendants' subpoena duces tecum.

This Court "reviews the circuit court's rulings on discovery matters under an abuse of discretion standard." *Milstead v. Johnson*, 2016 S.D. 56, ¶ 7, 883 N.W.2d 725, 729 (citations omitted). "The [trial] court's findings of fact are reviewed under the clearly erroneous standard, but [this Court] give[s] no deference to the [trial] court's conclusions of law." *State v. Fierro*, 2014 S.D. 62, ¶ 12, 853 N.W.2d 235, 239.

A. The Nixon Test.

In this case, the trial court believed *State v. Karlen* provided the procedure for an *in camera* review of subpoenaed records. SR:674. 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 documents 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."[7] *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 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

---

[7] 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 with respect to privacy. S.D. Const. Art. VI, § 29.

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.' "); *United States v. Meintzschel*,

538 F.Supp.3d 571, 578-580 (E.D.N.C. 2021); *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, the Defendants' subpoena requested:

> [B]ooks, papers, or documents in your possession or under your control: Any and all statements, notes, video tapes, recordings, photographs, emails, text messages, computer maintained records, electronic records, social media records or recordings, diaries, journals, or other documents of any nature which you have in your possession or under your control or which you may be able to obtain from your records for the time period of January 1, 2010, through the present.

SR:321. The trial court's order narrowed the type of documents that were required to be produced, but still required E.H. to "comply with the subpoena duces tecum and produce all diaries and/or journals. . . that she has authored or written, regardless of where said journals are stored or kept and regardless of who has possession thereof." SR:678. The trial court did not limit the timeframe related to the journals or provide any analysis under the *Nixon* test, as required in *Milstead*. 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*)); *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 documents 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.

In this case, the Defendants claimed that they needed the other journals to determine if E.H. made inconsistent statements about the rape and to gather information about her mental condition, which the Defendants claim relates to her "general credibility" and ability to testify. The trial court echoed these claims about E.H.'s "general credibility" as basis for denying E.H.'s motion to quash. *See* SR:671-74 (Findings at ¶¶ 15, 16, 22, 27).

However, unlike in *Karlen*, the Defendants in this case have not presented any evidence of E.H.'s inconsistent statements, including in the journal that was already provided through discovery. *Milstead*, 2016 S.D. 56, ¶¶ 14-15, 25, 883 N.W.2d at 731-32, 735. The Court in *Karlen* held that evidence of the victim's inconsistent statements

elevated the importance of the subpoenaed items because it showed that the information 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. Thus, even under *Karlen*, the trial court's findings relying on E.H.'s "general credibility" as a basis for compelling production of the journals is insufficient.

Furthermore, the Defendants have not shown that the journals would produce relevant and material information related to E.H.'s mental health. At this point, the Defendants are in possession of E.H.'s counseling and mental health records, including those from inpatient treatment, aftercare, and past psychological examinations; the Child's Voice interview; and one of E.H.'s journals, and the Defendants have hired an expert to review the records. The Defendants have not and cannot explain what information E.H.'s journals would provide about her mental health or condition that could not be gleaned from E.H.'s mental health records or how any such information would be used as anything more than another credibility attack. The trial court's findings are similarly unavailing. *See* SR:671-73 (Findings at ¶¶ 15-17, 22).

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). The Defendants want access to *all* of E.H.'s journals based on their mere hope that E.H. changed her story or wrote something in her journals that would provide better evidence of her mental condition than her voluminous medical records. And the trial court's decision does nothing to limit the thirteen-year time frame included in the subpoena or specify the information sought within the journals. SR:271-72 (Findings at ¶¶ 15-17); *Milstead*, 2016 S.D. 56, ¶ 28, 883 N.W.2d at 736; *Meintzschel*, 538 F.Supp.3d at 578-580 (584-86) (approving a subpoena duces tecum that limited the requested iPad messages to the time frame immediately after the rape and noting the detailed information sought). Instead, the trial court ordered E.H. to produce "boxes and boxes" of her journals so the court could determine if anything was relevant. MH5 at 17, 23.

Admissibility

Regarding admissibility, the Defendants 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*). The Defendants have not shown that any information in the journals would be admissible. In fact, it is difficult for the State to explain the precise reasons why the journals would not be admissible because the information being sought by the Defendants is vague and largely unknown. Nevertheless, whether the

journals were written before, during, or after the rapes, the information within would constitute impermissible hearsay and could be precluded under SDCL 19-19-412, which strictly limits evidence related to the victim's other sexual behavior or sexual predisposition.

Furthermore, the Defendant will have an opportunity to cross-examine E.H. while she is on the witness stand at trial. Importantly, attacks on a witness's credibility based on general mental health matters are 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).

Finally, Defendant has not shown that any potential evidence would be used to show "biases, prejudges, or ulterior motives." *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 E.H.'s character based on her mental health. *Rough Surface*, 440 N.W.2d at 752 (citing *Davis v. Alaska*, 415 U.S. 308 (1974)).

In sum, the Defendants believe that they are entitled to examine *all* of E.H.'s journals, based entirely on the journals' existence, and

without making the required showing under *Karlen* or *Milstead*. *See* SR:675 (concluding that the defendant met their burden by simply showing that the evidence exists and there is a need for access); MH2 at 139.

B. Constitutional Considerations and Waiver.

In this case, the trial court determined that the Defendants' unspecified Constitutional rights and general need for impeachment evidence outweighed E.H.'s Constitutional right to privacy. SR:675. The court's conclusions also suggest that E.H. may have waived her constitutional right to privacy. *Id.* Both of these conclusions are incorrect.

Balancing of Rights

In its conclusions of law, the trial court explained that the Defendants have a right to access information "that may be beneficial to the defense" and that the right can "supersede" the rights of the victim. SR:675 (relying on *Karlen*, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) and *Davis v. Alaska*, 415 U.S. 308 (1974)). But, unlike the documents in *Milstead* and *Karlen*, which were protected by statutory privilege and confidentiality, E.H.'s journals are protected by both the South Dakota and United States Constitutions. Indeed, both Constitutions recognize a right to privacy and a person's right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and Marsy's Law specifically grants a victim the right to

privacy, including the right to refuse discovery requests. S.D. Const. Art. VI, §§ 11, 29; U.S. Const. amend. IV; *Riley v. California*, 573 U.S. 373, 400 (2014).

As explained above, the first step in analyzing a third-party subpoena is applying the three-part test under Rule 17(c). *See Nixon*, 418 U.S. at 713-14. Then, if the third-party to whom the subpoena is issued asserts a constitutional privilege, the party issuing the subpoena must provide additional justification. *Id.* (requiring the Special Prosecutor to demonstrate that the material was "essential to the justice of the pending case."). Similarly, when a victim's constitutional rights are implicated by a subpoena duces tecum, the party issuing the subpoena must provide additional justification and demonstrate that the requested material is *necessary* to vindicate a specific constitutional right. *State v. Counts*, 201 N.E.3d 942, 952-55 (Ohio App. 2022) (applying the standard to the defendant's request to inspect the victim's home).

Notably, in *Counts*, the Ohio Court of Appeals rejected the lower court's application of a balancing test that compared the maximum possible punishment the defendant faced to the "de minimis" intrusion into the victim's home and the "brief" invasion of privacy that would occur, for the heightened "demonstrated need" standard. *Id.* at 952-55 (noting that the heightened standard is also applicable to requests for protected documents). In evaluating the defendant's articulated

justifications, the court looked at the reasons why the requested access was necessary, especially in light of the discovery that was already provided; the type of constitutional rights the defendant asserted—i.e. trial rights vs. right to pre-trial discovery; and the rights of the victim that were implicated. *Id.* (citing *United States v. Bullcoming*, 22 F.4th 883, 889-90 (10th Cir. 2022) and noting that neither the Ohio nor United States Constitutions have been interpreted to require discovery from non-parties). The court explained the defendant's demonstrated "need," which only explained how inspection would be helpful, did not overcome the victim's right to refuse discovery under the State Constitution or the victim's right to privacy under the United States Constitution. *Id.* at 954-555.

In this case, where the Defendants have already been given the victim's mental health and counseling records (spanning a substantial period), the data from her psychological testing, almost 100 pages of the victim's journals, the Child Voice interview, and access to a mental health expert, they should not be able to further invade the victim's Constitutional right to privacy. Especially on the shaky premise that the journals *might* provide evidence of the victim's mental health condition or general credibility.

Waiver

Lastly, the trial court appeared to consider the Defendants' argument that the victim waived her constitutional rights. First,

"waiver" is "a knowing and intelligent relinquishment or abandonment of a known right or privilege." State v. *Ralios*, 2010 S.D. 43, ¶ 25, 783 N.W.2d 647, 655. In this case, there is no indication that E.H. was aware of her right to refuse discovery or her right to privacy when the journal was turned over. *Fierro*, 2014 S.D. 62, ¶ 19, 853 N.W.2d at 241 (explaining that whether someone knows of their rights is relevant to determining the voluntariness of the consent). And it was her guardians, not her, that gave her journal to law enforcement.

Second, assuming E.H. voluntarily turned over her journal, her willingness to cooperate does not constitute waiver of her right to refuse further discovery requests, nor does it diminish the importance of her Constitutional right to privacy. *Counts*, *supra*, at 954, n.7. Contrary to the Defendants' implication, reporting a crime is not a waiver of any Constitutional rights. MH2 at 136, 143. Nor is offering a limited amount of evidence to assist in the investigation of a reported crime. *In re B.H.*, 946 N.W.2d 860, 869 (Minn. 2020) (explaining that the victim's action in providing law enforcement with pictures and text messages from her phone did not constitute a voluntary and knowing waiver of her right to privacy in all other data on her phone); *United States v. Shrader*, 716 F.Supp.2d 464, 473 n. 4 (S.D.W. Va. 2010) (explaining that a victim does not have to choose between privacy and seeking the help of law enforcement). Indeed, just as a person may provide consent,

they can also withdraw it. *Fierro*, 2014 S.D. 62, ¶ 19, 853 N.W.2d at 241.

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests this Court reverse the trial court's Order denying E.H.'s motion to quash and remand with directions to apply the *Nixon* factors to the Defendants' subpoena duces tecum.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

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

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 7,443 words.

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

Dated this 28th day of November 2023.

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 28, 2023, a true and correct copy of the State's Brief in the matter of *State of South Dakota v. Mark Waldner, Michael M. Waldner, Jr., and Michael Waldner, Sr.* was served via Odyssey File and Serve upon:

- Defendants' counsels, Timothy Whalen at whalawtim@cme.coop; Kent Lehr at lehrlaw@gwtc.net; and Keith Goering at kgoehrng@santel.net.

- E.H.'s counsel, Julie Dvorak at jdvorak@sbslaw.net and Jeremy Lund at jlund@sbslaw.net.

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, Plaintiff and Respondent, vs. MARK WALDNER, MICHAEL M. WALDNER, JR., and MICHAEL WALDNER, SR., Defendants and Respondents.	Appeal No. 30343 Circuit Court Nos. 07CRI21-159 07CRI21-160 07CRI21-161

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

THE HONORABLE BRUCE V. ANDERSON
Circuit Court Judge

PETITIONER E.H.'S REPLY BRIEF

Attorneys for Petitioner E.H.
Jeremy Lund
Siegel, Barnett & Schutz, L.L.P.
415 South Main Street, Suite 400
PO Box 490
Aberdeen, SD 57402-0490
jlund@sbslaw.net

Attorneys for Respondent
State of South Dakota
Marty J. Jackley
Chelsea Wenzel
Assistant Attorney General
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501
atgservice@state.sd.us

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Attorney for Respondent Mark Waldner
Kent Lehr
Lehr Law Office
PO Box 307
Scotland, SD 57059
Telephone: (605) 583-4100
lehrlaw@gwtc.net

Attorney for Respondent
Michael M. Waldner, Jr.
Timothy R. Whalen
Whalen Law Office, P.C.
PO Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645
whalawtim@cme.coop

Attorney for Respondent
Michael J. Waldner, Sr.
Keith Goehring
Goehring Law Office
PO Box 851
Parkston, SD 57366
Telephone: (605) 928-3356
kgoehrng@santel.net

Petition for Permission to Appeal was filed May 8, 2023

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, Plaintiff and Respondent, vs. MARK WALDNER, MICHAEL M. WALDNER, JR., and MICHAEL WALDNER, SR., Defendants and Respondents.	Appeal No. 30343 Circuit Court Nos. 07CRI21-159 07CRI21-160 07CRI21-161

PETITIONER E.H.'S REPLY BRIEF

ARGUMENT

1. THIS COURT HAS JURISDICTION TO DETERMINE THE ISSUE RAISED IN THIS CASE

A. A PETITION FOR INTERMEDIATE APPEAL IS THE APPROPRIATE VEHICLE FOR NON-PARTIES TO APPEAL DISCOVERY ISSUES IN A CRIMINAL PROCEEDING

E.H.'s initial argument in her first brief was that a Petition for Intermediate Appeal is the appropriate vehicle for non-parties to appeal discovery issues, particularly the denial of a motion to quash, in a criminal proceeding. E.H. cited to both *Milstead* cases in her initial Brief as examples of this Court exercising jurisdiction in regard to petitions for intermediate appeal filed by interested parties. *Milstead v. Smith*, 2016 SD 55, 883 N.W.2d 711 (*Milstead I*); *Milstead v. Johnson*, 2016 SD 56, 883 N.W.2d 725 (*Milstead II*).

Defendants ignore this argument with the exception of a parenthetical on page 12 of their Brief where they indicate the *Milstead* Petitions were "filed in conjunction with

the State." Both *Milstead* cases indicate that Sheriff Milstead, as a non-party, not the State, filed petitions for intermediate appeal in January and February of 2015. *Milstead I* at ¶ 5; *Milstead II* at ¶ 5. This Court then granted those petitions for intermediate appeal in April 2015. *Id.* The State then filed a brief in support of Sheriff Milstead's position in both cases. *Id.* Likewise, in this case, E.H. filed a Petition for Intermediate Appeal in regard to the denial of a Motion to Quash. The State filed a Response to the Petition and joined in the same. This Court then granted the Petition for Intermediate Appeal and, although E.H. filed her own brief in support of her arguments on appeal, the State has also filed a brief in support of those issues.

Defendants also ignore E.H.'s reference to *Rapid City v. State*, 279 N.W.2d 165 (S.D. 1979). In that case, the appellant properly relied upon this Court's previous holdings in regard to how it should seek appellate review. Thus, this Court treated the filing in such a way as to determine the merits of the appeal and found its alteration of its previous holdings would be prospective only.[1]

Based on the initial argument in E.H.'s first Brief, the failure of Defendants to respond to the same, and the arguments noted above, this Court has jurisdiction in this matter, just as this Court had jurisdiction of Milstead's Petitions for Permission to Appeal. E.H. properly relied on previous cases and the procedure cited by this Court in those cases to seek appellate review. Should this Court decide that petitions for permission to appeal are not available to third parties such as Milstead and E.H., then it

[1] This Court chose to treat the notice of appeal as a petition for intermediate appeal, even though in future cases, such an issue would need to be filed as a petition for permission to appeal.

should make such holding prospective only as it did in *Rapid City v. State* and allow E.H. to have her appeal heard on the merits at this time.

B. THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL UNDER SDCL 23A-32-12

Defendants cite SDCL 23A-32-12 and argue that E.H. is not permitted to seek an intermediate appeal and that the State's joinder in E.H.'s Petition was untimely. Even if they are correct, this Court has the discretion to extend the State's time to file a petition and also the discretion to allow filing of such a petition after the time has expired. SDCL 15-26A-92.

Defendants disagree the Court has that discretion. Defendants assert that E.H. has ignored the final phrase of SDCL 15-26A-92, which states this Court "may not enlarge the time for filing or serving a notice of appeal." E.H. does not ignore this language but instead notes the distinction between a notice of appeal and a petition for permission to appeal. As pointed out later in this Brief, the absence of language in that statute prohibiting this Court from enlarging the time for filing a petition for permission to appeal is significant.

Defendants also argue that E.H. misrepresents *Hamer v. Neighborhood Housing Services of Chicago*, 583 U.S. 17 (2017). They argue that *Hamer* dealt with a court-made rule as opposed to a statutory mandate created by the legislature. Defendants state on page 11 of their Brief:

> Here, the time frame for a petition for an intermediate appeal is a [sic] created by the legislature and is statutorily based, not rule based, and there is no statute, rule, or law that allows for any court to extend the time to file either a notice of appeal, or a petition for an intermediate appeal.

They are wrong—twice. First, the timeframe to file a petition for an intermediate appeal is not created by the Legislature. *See* SDCL 23A-32-12 and its cross reference to 15-26A-13, which sets forth the ten-day timeframe. SDCL 15-26A-13 is a court-made rule. Below is South Dakota Supreme Court Rule 23-03, which clearly demonstrates that the ten-day provision in SDCL 15-26A-13 is a court made rule.[2] As such, if this Court is going to require that the State, not E.H., file a Petition for Permission to Appeal, then any alleged failure by the State to timely join in E.H.'s Petition is not a "fatal" jurisdictional defect.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
FEB 27 2023
Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE AMENDMENT OF SDCL 15-26A-13 | RULE 23-03

A hearing was held on February 16, 2023 at Pierre, South Dakota, relating to the amendment to SDCL 15-26A-13, and the Court having considered the proposed amendment and oral presentation relating thereto, now, therefore, it is

ORDERED that SDCL 15-26A-13 is amended to read in its entirety as follows:

SDCL 15-26A-13. Petition for permission to take discretionary appeal.

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. When a petition is forwarded to the clerk for filing by mail it shall be accompanied by an affidavit of mailing or certificate of service of mailing and shall be deemed to be filed as of the date of mailing.

The original and three copies of the petition shall be filed with the clerk of the Supreme Court, together with the required statutory filing fees unless exempt by law.

IT IS FURTHER ORDERED that this rule shall become effective April 1, 2023.

DATED at Pierre, South Dakota, this 27th day of February, 2023.

BY THE COURT:

Steven R. Jensen

ATTEST:

Clerk of the Supreme Court

STATE OF SOUTH DAKOTA
the Supreme Court

[2] *See also* Supreme Court Rule 11-02, effective July 1, 2011, most recently amended by Rule 23-03.

Second, Defendants are wrong when they indicate there is no statute, rule, or law that allows for a court to extend the time to file a petition for an intermediate appeal. SDCL 15-26A-92 allows this Court to do exactly that. It also allows the Court to permit it to be done after the expiration of such time.

In *Petersen v. South Dakota Board of Pardons and Paroles*, 2018 SD 39, ¶ 12, n.3, 912 N.W.2d 841, 844, this Court noted in relevant part:

> [T]he failure to comply with statutory prerequisites does not always deprive the court of *subject matter jurisdiction*, which is the power of the court to determine certain types of cases. . . . [S]ome failures may be waived or forfeited, which is not the case for true jurisdictional defects. Because a discussion of these differences is not necessary to resolve this appeal, we do not further address them here. We only caution careful use of the terms power, authority, and subject matter jurisdiction when discussing procedural requirements for appeals. This Court and others **are beginning to address and clarify** the distinctions when necessary to the outcome of the case.

Id., citing *Hamer v. Neighborhood Housing Services of Chicago*, (other citations omitted) (emphasis added).

In *Hamer*, the United States Supreme Court found that a provision limiting time to appeal qualifies as jurisdictional only if Congress sets the time, noting a distinction between court-promulgated rules and limits enacted by Congress. Thus, a time limit not prescribed by Congress ranks as a claims processing rule rather than a jurisdictional limitation. *Hamer*, 583 U.S. 17, 19 (2017). In this case, the time limit to file a petition for permission to take discretionary appeal is not prescribed by the South Dakota Legislature, and thus is a claims processing rule rather than a jurisdictional limitation.

This Court's indication in 2018 that it and other courts were beginning to address and clarify these distinctions, along with the United States Supreme Court's 2017

indication that it and other forums have sometimes overlooked the distinction and mischaracterized claims processing rules as jurisdictional limitations may explain why the distinction was not noted in *State v. Mulligan*, and why *Mulligan* is not controlling.

State v. Mulligan, 2005 SD 50, 696 N.W.2d 167, at first appears to be persuasive authority. However, a closer inspection of that case reveals it is not authoritative. The 2005 per curiam *Mulligan* decision stated, "[b]ecause the time requirement contained in SDCL 15-26A-13 is mandatory and there is no exception provided in the appellate rules, we conclude that the time limit contained in SDCL 15-26A-13 to petition for intermediate appeal is also a jurisdictional requirement." *Id.* at ¶ 5. "Accordingly, we hold that the failure to timely file a petition for intermediate appeal is a jurisdictional defect requiring the Court to dismiss the petition." *Id.* at ¶ 7. *Mulligan* noted its determination was consistent with federal courts which uniformly treat the intermediate appeal time limit as a jurisdictional requirement. *Id.* at ¶ 6 (citing *Carr Park, Inc. v. Tesfaye*, 229 F.3d 1192, 1195 (D.C. Cir. 2000)) (finding no exception to the time set forth for filing an untimely petition and noting that Fed. R. App. P.26(b)(1) expressly states a court may not extend time for the filing of a petition for permission to appeal).

State v. Mulligan is not authoritative for a number of reasons. First, there was no third party who had timely filed a petition for permission to appeal in that case. Second, it makes no mention of SDCL 15-26A-92. There is no evidence that statute was even considered in *Mulligan*.[3] Indeed, *Mulligan* is an example of the cases noted by the

[3] *Mulligan* involved a case where a criminal defendant filed an untimely petition for permission to appeal. In conjunction with the petition, she filed a motion to excuse the untimely filing. The undersigned counsel's review of that submission reveals no mention of SDCL 15-26A-92 was made in her motion to excuse the untimely filing. Instead, it relied on 15-26A-77, which only applies to a default of filing and serving a brief.

United States Supreme Court where a court "overlooked the distinction, mischaracterizing claims processing rules as jurisdictional." *Hamer* at 19-20. Third, *Mulligan's* reliance on consistent federal rulings is faulty. There is a distinct and important difference between the federal rule and South Dakota's rule.

Federal Rule of Appellate Procedure 26(b)(1) specifically states:

> For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
>
> (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal. . . .

(emphasis added). This federal rule is the counterpart to SDCL 15-26A-92, which states:

> The Supreme Court for good cause shown may upon motion enlarge or extend the time prescribed by this chapter for doing any act or may permit an act to be done after the expiration of such time; but the Supreme Court may not enlarge the time for filing or serving a notice of appeal.

Notably absent from South Dakota's rule is a prohibition on extending the time to file a Petition for Permission to Appeal. Thus, *Mulligan's* reliance on "consistent" federal holdings regarding this issue is faulty as those holdings rely on a federal rule and prohibition that does not exist in South Dakota. Based on the foregoing, the ruling in *Mulligan* should not be relied on in this case.

Based on all of the above, the Court has jurisdiction to hear this appeal under SDCL 23A-32-12 and its reference to SDCL 15-26A-13. E.H.'s Petition for Permission to Appeal was timely filed. The State joined in E.H.'s Petition asking this Court to grant the request for permission to appeal. While the State's submission was not filed within

the ten days, SDCL 15-26A-92 clearly allows this Court to enlarge that time or to allow for its filing after the expiration of ten days.

C. THE CONSTITUTION REQUIRES A VICTIM TO HAVE A RIGHT TO SEEK AN INTERMEDIATE APPEAL

Defendants indicate that the South Dakota Constitution does not create a right for a victim to pursue an intermediate appeal. While our Constitution does not specifically spell out such a right, it does provide such a right. It specifically lists a right to privacy, including a right to refuse a discovery request. It also includes a right to due process and mandates a victim's rights be protected in a manner no less vigorous than a defendant's rights. If the ruling by the trial court had been in favor of E.H., Defendants would have had a right to pursue an intermediate appeal. As such, under the Constitution, E.H. also has such a right.

On page 12 of their Brief, Defendants say that the purpose of Marsy's Law was not to create an intermediate appellate right, but to make sure E.H. was informed and allowed to participate in the prosecution of this case. They cite *In re Essential Witness*, 2018 SD 16, ¶ 15, 908 N.W.2d 160, 166 for this proposition. In that case, this Court did cite to the second to last paragraph of Article VI, § 29. The Court noted that language, along with the 19 other enumerated rights in Article VI, § 29, demonstrate "that the *predominant* purpose was to ensure crime victims are kept informed and are allowed to meaningfully participate in the criminal justice system throughout the time a crime is prosecuted and punished." *Id.* (emphasis added).

This Court also noted that Article VI, § 29 states a victim may assert and seek enforcement of her rights. *Id.* One of the rights E.H. has is to refuse a discovery request. Marsy's Law allows E.H. to *meaningfully participate* in the disposition of the subpoena

at issue. The trial court's ruling violates this particular right. She has the specified right to "seek enforcement of the right[ ] enumerated in the Constitution in any trial or appellate court." S.D. Const. art VI § 29.

In this case the State is in "lockstep" with E.H.'s position regarding the diaries. The State supported E.H. in the lower court and then joined in E.H.'s petition for intermediate appeal. According to the argument put forward by Defendants, if the State and the victim did not happen to be in lockstep on a particular issue, that would bar a victim from enforcing her rights at an appellate level. Such an outcome is inconsistent with the language in Marsy's Law that allows E.H. to hire her own counsel to assert and seek enforcement of her rights.

Contrary to what seems to be the assertion of Defendants, E.H. is not trying to be in the driver's seat in regard to the prosecution. She did not get to decide whether or not the State prosecuted Defendants or make other decisions in this case. However, she does have a right to refuse a discovery request and her due process rights demand she have an opportunity to seek appellate review when that right is violated by a trial court's ruling.

Defendants assert on page 13 of their Brief that E.H. and the State did not properly file permission for a discretionary appeal and that such failure is not a denial of due process nor a denial of constitutional right, but an error by her counsel and the State. They assert this Court cannot overlook such a mistake. If such an error was made, it can be corrected by this Court under SDCL 15-26A-92.

Defendants also indicate that if E.H. wants alleged victims to have the opportunity to independently be able to pursue an intermediate appeal, that allowance needs to be created by the Legislature and not this Court. While a clarification of SDCL 23A-32-12

may be desirable, it is not necessary. Defendants ignore the constitutional language that victims may "assert and seek enforcement of their rights enumerated in the constitution in any trial or appellate court, and that such court must act promptly on such a request, affording a remedy by due course of law for the violation of any rights, and ensuring that victims' rights and interests are protected in a manner no less vigorous than the protections afforded to criminal defendants." Statutes, such as SDCL 23A-32-12, must conform to the Constitution, not the other way around. *State v. Orr*, 2015 SD 89, ¶ 9, 871 N.W.2d 834, 837; *Milstead II* at ¶ 10.

Moreover, as set forth in E.H.'s initial Brief, the third parties in *Milstead I and II* were able to seek appellate review without changing the statute. This Court's exercise of its discretion under SDCL 15-26A-92 also means the statute does not have to be changed for E.H. to have her constitutional rights upheld. As outlined above, the Constitution requires a victim to have the right to seek an intermediate appeal.

D. A VICTIM'S ALTERNATIVES TO A DISCRETIONARY INTERMEDIATE APPEAL ARE CUMBERSOME AND UNDESIRABLE, BUT POSSIBLE

Defendants assert that E.H.'s argument that she may have another remedy under the law contradicts her arguments on jurisdiction. It does not. This Court has jurisdiction to hear this appeal. E.H. may have other remedies available[4] but, as noted in her original Brief, it would be cumbersome and unnecessary. Should she file some kind of injunctive action it would need to be an original action with this Court, because the circuit court itself would be a respondent to the injunction. This would simply place the merits of the

[4] *See* SDCL 23A-28C, which provides a potential for victims to seek injunctive relief.

issue before this Court in a different manner. An alternate remedy is unnecessary as this Court has jurisdiction to hear the merits of the issue at this time.

In summary, numerous arguments have been set forth as to this Court's jurisdiction to hear the merits of this appeal. The Court does not need to proceed past the first argument that, just as in *Milstead*, the proper vehicle for a third-party to appeal the denial of a motion to quash is a petition for intermediate appeal filed by the third-party itself. Alternatively, should this Court believe that the petition for intermediate appeal can only be filed by the State or a defendant, then the State's untimely joinder can be excused by this Court under SDCL 15-26A-92. Lastly, as succinctly and correctly noted by the State on page 8 of its Brief, the enactment of Marsy's Law has expanded this Court's jurisdiction to hear, enforce, and provide a remedy for violations of the rights enumerated in the Constitution.[5]

2. THE TRIAL COURT ERRED IN ORDERING AN IN CAMERA REVIEW OF E.H.'S DIARIES OR JOURNALS

Defendants assert this issue requires a balancing of the interests between the Defendants and E.H. Yet, Defendants fail to cite any authority for this premise. "[T]he failure to cite authority is fatal." *Schultz v. Scandrett*, 2015 SD 52, ¶ 30, 866 N.W.2d 128, 139. Nor do Defendants offer any real balancing. They merely walk into the courtroom and shout "constitution" and then expect to be able to have unfettered access to anything they want. Neither is correct. Rather, the resolution of this issue requires first a determination of whether E.H. has a privilege to not disclose any diaries or journals. If she does, the second

[5] E.H. agrees with the assertion by the State that these provisions in the Constitution are self-executing. The State's citation to *In re C M Corp.*, 334 N.W.2d 675, 676 (S.D. 1983) is particularly notable. That case mentions that certain provisions of the Constitution are self-executing even though they are also implemented by the Legislature through new statutes.

determination that needs to be made is whether that privilege was waived. If this Court determines that E.H. has the privilege and that she has not waived the same, the analysis can end, and the trial court should be reversed with instructions to quash the subpoena *duces tecum*. If this Court determines E.H. either does not have a privilege or has waived the privilege, then the *Nixon* Test needs to be addressed, which the trial court failed to do.

A. E.H'S CONSTITUTIONAL RIGHT TO PRIVACY, INCLUDING THE RIGHT TO REFUSE DISCOVERY, IS ABSOLUTE.

The right to refuse is the very essence of a privilege.

> Except as otherwise provided by constitution or statute or by this chapter or other rules promulgated by the Supreme Court of this state, no person has a privilege to:
> (1) Refuse to be a witness;
> (2) Refuse to disclose any matter;
> (3) Refuse to produce any object or writing; or
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

SDCL 19-19-501.

Marsy's Law includes a victim's right to refuse interviews, depositions, or any other discovery request. Rather than interpreting the Constitution, Defendants argue that E.H.'s right to privacy does not include the right to refuse a subpoena *duces tecum* because it is an order of the court, not a discovery request. However, this case does not turn on the definition of a subpoena. It turns on the definition of a discovery request in the context of Marsy's Law.

> Constitutional amendments are adopted for the purpose of making a change in the existing system and we are "under the duty to consider the old law, the mischief, and the remedy, and interpret the constitution broadly to accomplish the manifest purpose of the amendment." The object of constitutional construction is "to give effect to the intent of the framers of the organic law and the people adopting it." A constitutional provision, like a statute, must be read giving full effect to all of its parts. Where

> a constitutional provision is quite plain in its language, we construe it according to its natural import.

In re Issuance of a Summons Compelling an Essential Witness, 2018 SD 16, ¶ 14, 908 N.W.2d 160, 166 (citations omitted).

E.H. submits that the intent of the framers and the people adopting Marsy's Law was to prevent the very thing Defendants are attempting to accomplish, prying into the deepest and most private thoughts of a victim. When looking at Marsy's Law as a whole, and zeroing in on the right to privacy, a victim has the right not to be interviewed. This means E.H. can refuse to talk to law enforcement, attorneys, private investigators, or frankly, anyone.

A victim also has the right to refuse depositions. In a criminal case, depositions are exceedingly rare, and can only be done by order of the court. SDCL 23A-12-1. In order to compel a witness to a deposition, a subpoena must be issued from the county where the deposition is to take place. SDCL 23A-14-9. Therefore, in the context of depositions, a victim has the constitutional right to refuse *two* court orders.

A victim also has the right to refuse any other discovery request. For the first time, Defendants are now arguing that a subpoena is not a discovery request. "This Court will not address arguments that are raised for the first time on appeal." *State v. Stanley*, 2017 SD 32, ¶ 26, 896 N.W.2d 669, 678 (citing *Legrand v. Weber*, 2014 SD 71, ¶ 26, 855 N.W.2d 121, 129).

Subpoenas are tools of discovery. The subpoena *duces tecum* was issued because Defendants want to discover the content of all of E.H.'s writings. This Court routinely refers to issues surrounding subpoenas as discovery. *See In re Issuance of a Summons Compelling an Essential Witness*, 2018 SD 16, ¶ 21, 908 N.W.2d 160, 168. (referring to

an order on a motion to quash subpoena as a discovery order). *See also Eccleston v. State Farm Mutual Auto Insurance Company*, 1998 SD 116, ¶ 9, 587 N.W.2d 580, 581. ("Ten days before trial, Eccleston broadened the discovery request through a subpoena duces tecum to include nationwide information regarding. . . .") *See also State v. Chavez*, 2002 SD 84, ¶ 26, 649 N.W.2d 586, 595 (noting that if a defendant "finds that it is necessary to use portions of a law enforcement manual, he shall set forth the 'factual predicate' in his discovery request, and receive only that which is necessary; his request cannot be over-broad. If a subpoena duces tecum is over-broad, it may be quashed.") *Milstead II* at ¶ 3. ("In response to the discovery request, Sheriff Milstead argued that the subpoena, in addition to being unreasonable and oppressive was nothing more than a 'fishing expedition.'") (emphasis added).

In *Milstead II*, this Court repeatedly described the issue as whether the documents at issue were discoverable under SDCL 23A-14-5 (Rule 17(c)). While Rule 17 is not meant to give a right to discovery in the broadest terms and is not a generalized tool for discovery, it is still, practically speaking, a form of discovery. *Milstead II* at ¶ 17. In fact, the *Nixon* factors are meant to prevent potential abuse of Rule 17(c) subpoenas as broad discovery and investigative tools. *People v. Spykstra*, 234 P.3d 662, 669 (Colo. 2010) (a Colorado case invoking the *Nixon* Test in a case where there was no Marsy's Law or victim's bill of rights). In this case, the subpoena is unquestionably a discovery request as the first sentence of the Defendants' Statement of Facts admits the same. (Defendants' Brief, p. 5)

B. E.H.'S CONSTITUTIONAL RIGHT TO PRIVACY, INCLUDING THE RIGHT TO REFUSE DISCOVERY, WAS NEVER WAIVED.

Defendants' arguments on this issue are perplexing. They argue that E.H. did not assert a privilege, therefore it is not an issue before this Court. (Defendants' Brief pp. 18) E.H.'s opening brief uses the term "privilege" twenty-two times. In circuit court, E.H. argued privilege. (SR 245) Defendants' Response to Motion to Vacate acknowledges E.H.'s claim of privilege. (SR 254). The Motion to Quash Subpoena Duces Tecum incorporated E.H.'s briefs arguing privilege. (SR 283).

Next, Defendants appear to argue that there is a dichotomy in the doctrine of waiver between civil constitutional rights and criminal constitutional rights. Defendants again fail to cite any authority for this premise. They cite *Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, which has nothing to do with a constitutional right. 2002 SD 121, 652 N.W.2d 742. *Action Mech.* was about waiving contractual rights and obligations. Constitutional rights are more protected than contractual rights.

> Constitutional rights, including those in the Bill of Rights, may be waived by the defendant. However, the waiver must be made voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences. The waiver of a constitutional right must be positively established, and the burden is on the party alleging waiver, as courts closely scrutinize such allegations, indulging every reasonable presumption against waiver. When determining whether a constitutional right has been waived, this court looks to the totality of the circumstances.

State v. McCormick, 385 N.W.2d 121, 123-124 (SD 1986) (citations omitted).

Defendants have the burden to establish that E.H. waived her right to refuse to disclose her diaries and journals or other personal effects and they have failed to do so. They have not provided any facts demonstrating E.H. was aware of her rights and

privileges under Marsy's Law. And they have not provided any argument demonstrating E.H. voluntarily, knowingly, and intelligently waived her rights.

Defendants try to argue that because E.H.'s guardians read her diaries, she waived the privilege. First, it should be noted that the majority of the facts Defendants claim constitute a waiver are not in the record. Defendants repeatedly cite to the transcripts of the motions hearings held June 7, 2022 and October 17, 2022. However, neither of those hearings were evidentiary. The citations are merely to Defense counsel's own arguments, not evidence. Second, the diary excerpt and the DCI report, which have now been supplemented to the record, do not substantiate a claim of waiver.

Defendants are conflating the privilege at issue. The journal or diaries are not privileged communications in themselves. Rather, E.H. has the privilege of refusing to disclose them in these proceedings. The fact that E.H. allowed her guardians to give one journal to law enforcement is not a waiver of her right to refuse to produce any other writings.

The Minnesota Supreme Court has addressed a similar argument in *In re B.H.*, 946 N.W.2d 860 (Minn. 2020). In that case, the victim provided her phone to law enforcement for the purpose of providing documentary evidence of her allegations. *Id.* at 864. Law enforcement extracted a limited amount of data from the phone and gave the phone back to the victim the same day. *Id.* The defendant was provided with four days of cell phone data. *Id.* The defendant then subpoenaed the victim to produce her cell phone to a computer forensic expert. *Id.* at 863. The victim moved to quash the subpoena, which the trial court denied. On review, the defendant argued that by giving her phone to

law enforcement the victim waived her privacy interest, which the Minnesota Supreme Court quickly dismissed:

> Finally, Yildirim's argument that B.H. somehow waived her privacy interest in all of her cell phone data by voluntarily bringing her phone to the police fails. "Waiver is the voluntary relinquishment of a known right." *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). B.H. brought her phone to the police to assist in the investigation and to offer a limited amount of data directly related to the alleged assault, including photos of the watch and the blood on the bedsheets, and an electronic exchange with Yildirim right after the event. By doing so, she did not knowingly and voluntarily waive her right to privacy in all other data contained on all applications on her phone for other time periods. We agree, as B.H. argues, that a holding otherwise would have a chilling effect on the reporting of crimes, especially those involving sexual assault.

Id. at 869-870.

Moreover, Defendants' argument that E.H. waived her privilege flies in the face of the last portion of the privacy privilege in that the victim has the right to "set reasonable conditions on the conduct of any such interaction to which the victim consents." S.D. Const. art. VI § 29 (6). This language makes clear that the victim's consent is required, but it also indicates that a victim can choose which discovery she may consider participating in (and setting the conditions for her participation) without jeopardizing her other rights. For example, if a victim agrees to be interviewed by a private investigator, that does not mean she is giving up her right to not be deposed or refuse other discovery requests. But that is precisely what Defendants are arguing.

Defendants have the burden to show E.H. waived her privilege to refuse to provide discovery. They have failed to do so. Not only do they fail to cite authority for many of

their propositions, their arguments are contrary to established case law and the text of Marsy's Law.

C. DEFENDANTS FAILED TO SATISFY THE *NIXON* TEST

First and foremost, if this Court determines that E.H. has a privilege not to disclose her journals, and that she has not waived her privilege to do so, analysis of the *Nixon* Test is not appropriate or necessary. Not a single case cited by any of the parties stands for the proposition that the *Nixon* Test is a means to circumvent a constitutional privilege. *United States v. Nixon*, 418 U.S. 683, 706, 94 S. Ct. 3090, 3106-3107, 41 L.Ed.2d 1039 (1974). (Executive privilege inapplicable absent a need to protect military, diplomatic, or sensitive national security secrets). *State v. Karlen*, 1999 SD 12, 589 N.W.2d 594. (Statutory Psychotherapist Privilege waived by application of SDCL 19-13-26). *Milstead I,* and *Milstead II*, at ¶ 9-10. (Statutory exclusion of law enforcement personnel records from the State's public records laws). *Pennsylvania v. Richie*, 480 U.S. 39, 57-58, 107 S. Ct. 989, 94 L.Ed.2d 40. (Statute deeming CYS records confidential but permitting disclosure pursuant to court order did not create privilege).

Second, Defendants do not appear to argue that the *Nixon* Test was met. Rather, Defendants argue that the *Nixon* Test is inapplicable. To that end, E.H. joins in the State's argument on this issue, with the exception of the suggestion that the *Nixon* Test has anything to do with a privilege. (State's Brief pp. 29)

Third, Defendants lean on *Karlen* too much. It must be observed that *Karlen* was decided in 1999, prior to *Milstead I* in 2016, which adopted the *Nixon* Test. This Court discussed *Karlen* at length in *Milstead I* and acknowledged that the parameters of discovery of documents under the subpoena power of SDCL 23A-14-5 (FR 17(c)) were

not addressed in *Karlen*. *Milstead I* at ¶ 15. That is not to say *Karlen* has no part in this discussion, it is just very limited. The import of *Karlen* to this case is that if Defendants get anything from the journals or diaries it will only be after an *in camera* review.[6] As a result, *Karlen* addresses the how. The *Nixon* Test addresses the if.

The focus of the *Nixon* Test is the scope of discovery reachable by a criminal subpoena *duces tecum* under FR 17 (c). The *Milstead* cases adopted the *Nixon* Test and its application to SDCL 23A-14-5. Defendants mischaracterize E.H.'s position by asserting that E.H. is applying an over-generalization and concluding all production of document requests need to satisfy the *Nixon* Test. (Defendants' Brief pp. 21) Rather, E.H. submits that all pre-trial subpoenas *duces tecum* issued in criminal actions in South Dakota must comply with the *Nixon* Test because that is the scope of the subpoena power conferred by SDCL 23A-14-5.

Finally, page 21 of Defendants' Brief points out a mistake made by counsel for E.H. in regard to a quote from *Milstead*. Defendants are correct that the words "diaries and journals" did not appear in the *Milstead* cases. The quote was that defendants must "establish a factual predicate showing that it is reasonably likely that the [diaries and journals] will bear information both relevant and material to [their] defense." *Milstead I* and *II*, ¶ 25. E.H.'s counsel neglected to put brackets around the phrase [diaries and journals]. The term pulled out of the original quote was "requested file."

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[6] In the *Milstead* cases, E.H. submits this Court mischaracterized *Karlen* by suggesting that case stands for the proposition that this Court has "previously ordered the production of even statutorily privileged materials for in camera review when principles of due process so require." *Id.* at ¶ 15. Rather, *Karlen* should be characterized as ordering production of formerly privileged information after it was determined the privilege had been waived.

CONCLUSION

This court has the jurisdiction to hear this appeal because E.H. followed the procedure espoused in *Milstead* for a third-party appealing from a denial of a motion to quash. The trial court erred in ordering E.H. to produce her diaries and journals for in camera review because E.H. has the privilege to refuse discovery requests granted to her by the Constitutions. E.H did not waive her privilege. Finally, the subpoena *duces tecum* does not satisfy the *Nixon* Test. Following oral argument, this Court should reverse the trial court's decision and remand with instructions to quash the subpoena *duces tecum*.

Respectfully submitted this 8th day of January 2024.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Jeremy Lund

Jeremy Lund
Attorneys for Petitioner E.H.
415 S. Main Street, Suite 400
PO Box 490
Aberdeen, SD 57402-0490
Telephone No. (605) 225-5420
Facsimile No. (605) 226-1911
jlund@sbslaw.net

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this Brief, the body of the Brief contains 5,743 words and 28,617 characters (not including spaces).

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Jeremy Lund

CERTIFICATE OF SERVICE

The undersigned, attorneys for Petitioner E.H., hereby certifies that on the 8th day of January 2024, a true and correct copy of the foregoing PETITIONER E.H.'S REPLY BRIEF was served by electronic transmission on the following:

Kelly Marnette
Chelsea Wenzel
Marty Jackley
SD Attorney General's Office
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501
Kelly.Marnette@state.sd.us
atgservice@state.sd.us

Theresa Maule Rossow
Brule County State's Attorney's Office
300 S. Courtland Street #201
Chamberlain, SD 57325
sabrule@midstatesd.net

Timothy R. Whalen
Whalen Law Office, P.C.
PO Box 127
Lake Andes, SD 57356
whalawtim@cme.coop

Kent Lehr
Lehr Law Office
PO Box 307
Scotland, SD 57059
lehrlaw@gwtc.net

Keith Goehring
Goehring Law Office
PO Box 851
Parkston, SD 57366
kgoehrng@santel.net

Dated this 8th day of January 2024.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Jeremy Lund