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

Filed: 9/26/2023 4:45 PM CST Supreme Court, State of South Dakota #30343

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

TABLE OF CONTENTS

TABLE OF CASES AND STATUTES AND OTHER AUTHORITIES

Cases

Statutes

Other Authorities

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 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."

---

[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