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

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Petition for Permission to Appeal was filed May 8, 2023

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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.

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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).

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/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:

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