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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

RULES CITED:

OTHER AUTHORITIES:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30343

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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

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[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