IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

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

STATE OF SOUTH DAKOTA
Plaintiff/Appellee/Respondent

vs.

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

and

E.H.

Petitioner/Appellant

DOCKET #30343

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

HONORABLE BRUCE V. ANDERSON
Presiding Circuit Judge

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

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PRELIMINARY STATEMENT

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

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

JURISDICTIONAL STATEMENT

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

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

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

STATEMENT OF THE LEGAL ISSUES

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

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

Relevant court cases:

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

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

Relevant statutes or authority:

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

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

Trial court holding: No.

Relevant court cases:

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

Relevant statutes or authority:

1. S.D. Const., Art., VI, §29
2. SDCL 23A-14-2
3. SDCL 23A-14-4

STATEMENT OF THE CASE

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

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

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

STATEMENT OF THE FACTS

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

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

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

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

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

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

ARGUMENT

A. Standard of Review.

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

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

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

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

B. Discussion of the Issues.

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

1. Jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

2. Constitutional Basis for Intermediate Appeal.

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

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

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

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

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

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

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

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

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

1. Right of Privacy.

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

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

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

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

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

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

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

2. Waiver.

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

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

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

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

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

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

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

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

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

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

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

3. Misapplication of *Nixon/Milstead*.

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

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

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

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

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

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

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

CONCLUSION

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

REQUEST FOR ORAL ARGUMENT: Waldners hereby request oral argument.

Dated this 28th day of November, 2023.

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CERTIFICATE OF COMPLIANCE

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

Dated this 28th day of November, 2023.

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