FILED
December 28, 2021
OFFICE OF APPELLATE COURTS

A21-0880

STATE OF MINNESOTA

IN SUPREME COURT

IN RE HOPE COALITION,

Appellant,

STATE OF MINNESOTA,

Respondent,

vs.

KEVIN MAYNARD CONRAD,

Respondent.

MINNESOTA COUNTY ATTORNEYS ASSOCIATION AMICUS CURIAE BRIEF

RANA S. ALEXANDER (333906)
Standpoint
2233 University Avenue W, Suite 150
Saint Paul, MN 55114
(612) 343-9842
rana@standpointmn.org

KATHERINE S. BARRETT WIIK (351155)
Best & Flanagan LLP
60 South Sixth Street, Suite 2700
Minneapolis, MN 55402
(612) 341-9710
kbarrettwik@bestlaw.com

ATTORNEYS FOR APPELLANT HOPE COALITION

MINNESOTA COUNTY ATTORNEYS ASSOCIATION

ROBERT SMALL
Executive Director
Minnesota County Attorneys Association

KELLY O'NIELL MOLLER (0284075)
ADAM E. PETRAS (0391470)
Assistant Hennepin County Attorneys

C-2000 Government Center
Minneapolis, MN 55487

ATTORNEYS FOR THE AMICUS MINNEOSTA COUNTY ATTORNEYS ASSOCIATION

PAUL H. GRINDE (15880X)
JENNIFER M. SHABEL (0397821)
Grinde & Dicke Law Firm P.A.
407 14th Street N.W.
P.O. Box 6667
Rochester, MN 55903-6667
(507) 282-8118
paul@grindelaw.com
jennifer@grindelaw.com

ATTORNEYS FOR RESPONDENT KEVIN MAYNARD CONRAD

KERRIE KELLY (0289334)
Wabasha County Attorney
848 17th Street East
Wabasha, MN 55981
(651) 565-3064
kkelly@co.wabasha.mn.us

ATTORNEY FOR THE RESPONDENT STATE OF MINNESOTA

MICHAEL P. BOULETTE (0390962)
O. JOSEPH BALTHAZOR, JR. (0399093)
80 South Eighth Street, Suite 2200
Minneapolis, MN 55402
(612) 977-8603
mboulette@taftlaw.com
jbalthazor@taftlaw.com

ATTORNEYS FOR THE AMICI MINNESOTA COALITION AGAINST SEXUALY ASSAULT, VIOLENCE FREE MINNESOTA, BATTERED WOMEN's JUSTICE PROJECT, AND NATIONAL CRIME VICTIM LAW INSTITUTE

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INTRODUCTION

The Minnesota County Attorneys Association ("MCAA") is an independent, voluntary organization comprised of all 87 of Minnesota's elected County Attorneys and their assistants. The MCAA is a nonprofit entity dedicated to improving the quality of justice in Minnesota by, among other activities, "developing consensus on legal and public policy issues of statewide significance to County Attorneys."[1]

This case presents multiple, related questions of statewide significance: (1) How must courts analyze a request for statutorily privileged information from nonparty, nongovernmental actors such as victims and the support/advocacy organizations victims receive services from? (2) Should *in camera* review ("ICR") by district-court judges and their staffs be the "default" rule when statutorily privileged information is sought? (3) Is the request for statutorily privileged information by Respondent Kevin Conrad ("Conrad") in this case reasonable under the totality-of the-circumstances standard this Court established in *In re B.H.,* 946 N.W.2d 860 (Minn. 2020)?

The MCAA supports Appellant HOPE Coalition ("HOPE"). The statutory privilege that the Legislature created for sexual-assault counselors and the victims they counsel – Minnesota Statues section 595.02, subdivision 1(k) – should not be violated based on Conrad's broad, unsupported request for privileged

[1] Counsel for amicus curiae were the sole authors of this brief. Except for the amicus curiae and its counsel, no person or entity made any monetary contribution to the preparation or submission of this brief.

communications. The district court's decision to violate that privilege in this case reflects a troubling trend in Minnesota that courts frequently, and routinely, disregard victims' privacy rights and statutory privileges without any legal basis to do so. This Court should reverse the court of appeals and grant HOPE's petition for a writ of prohibition.

ARGUMENT

Minnesota courts frequently default to ICR of sexual assault victims' privileged or confidential communications without regard to victims' right to privacy and protections afforded by statutory privileges.

The district court's failure in this case to consider the victim's privacy, as required by this Court in *B.H.*, is a common occurrence in Minnesota courts, and a failure for which there is no adequate remedy available. This Court should issue a writ of prohibition.

A. It is not uncommon for district courts in Minnesota to disregard the privileges and privacy interests afforded to victims of sexual assault.

In *B.H.*, this Court held that compliance with a subpoena was unreasonable where the district court had required a sexual assault victim to turn over her cell phone to a defense expert for data extraction. 946 N.W.2d at 870-71. This Court explained that when a motion to quash a subpoena is brought pursuant to Minn. R. Crim. P. 22.01, subd. 5, the district court must determine whether compliance with a subpoena is unreasonable under the totality of the circumstances. *Id.* at 868.

Describing the circumstances to be considered, this Court explained:

> The circumstances to be considered will depend on the case at hand and may include, but are not limited to: the relevance and materiality of the records sought; the specific need of the defendant for the records and whether they are otherwise procurable; the admissibility or usefulness of the records, including whether they can be used for impeachment of a material witness; whether the request is made in good faith and is not a fishing expedition; and the burden on the party producing the information, including the privacy interests of the victim.

Id. at 868-69.

This Court emphasized that it was "critical" to consider the victim's privacy interests. *Id.* at 869. This Court mentioned "privacy" 13 times and explicitly acknowledged a victim's "right to privacy." *Id.* at 865-71.[2] In rejecting the defendant's argument that the victim had waived her privacy interest in her cell-phone data by voluntarily bringing the phone to the police, this Court noted that a victim's waiver of a privacy right must be knowing and voluntary. *Id.* at 869-70.[3] Furthermore, this Court held that as part of the required reasonableness analysis, and in light of the privacy concerns associated with the cell-phone data sought, "we expect district courts to carefully examine subpoenas for such data, particularly those seeking data of an alleged *sexual assault victim*." *Id.* at 869 (emphasis added).

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[2] The constitutional right to privacy has been recognized by both the United States Supreme Court and this Court. *E.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *Women of State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995).

[3] This court cited *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009), which involved the defendant's waiver of the constitutional right to counsel. Thus, this Court equated the victim's waiver of the right to privacy with the defendant's waiver of the constitutional right to counsel. In this case, and contrary to *B.H.*, the district court and court of appeals seemed to suggest that the victim waived all privileged communications with her advocate because an advocate was present during one law-enforcement interview. Obviously, any communications the victim in this case had with the advocate in the presence of others was not privileged. *See State v. Rhodes*, 627 N.W.2d 74, 85 (Minn. 2001) (holding that the attorney-client privilege does not apply to communications made in the presence of third parties). But, just like the victim in *B.H.* who did not waive her right to privacy in the entire contents of her phone when she provided some phone data to police, the victim here did not waive her right to privacy of all her privileged communications with her advocate just because the advocate was present during an interview. Based on the lower courts' reasoning, if a defendant was interviewed by police while defense counsel was present, all private communication between the defendant and counsel would no longer be protected by the attorney-client privilege.

Both the district court and the court of appeals in this case failed to adequately consider the victim's strong privacy interest in her privileged communications with a sexual assault advocate. The only thing that the district court said about the victim's privacy interest is: "While the Court acknowledges the negative impact on the victim's privacy by having the records produced, the Court is satisfied that the [ICR] will provide a sufficient safeguard to protect potentially-sensitive victim information that may be contained in the records" (6/25/21 Order at ADD 30)[4] (stating "Minnesota law recognizes that the privacy interest of the alleged victim 'sometimes must give way' to the defendant's interest in obtaining all relevant evidence that might help his defense"). Astonishingly, the district court determined that this factor weighed in favor of the defendant (*Id.*).

In affirming the district court's decision, the court of appeals also did not consider the privilege statute at issue or the victim's right of privacy. The court merely concluded that "[ICR] will provide sufficient safeguards to protect the confidentiality of the alleged victim's information" (COA Order at ADD 36).

It is clear from these orders that the lower courts failed to follow this Court's directive in *B.H.* to consider the victim's privacy interest. They did not recognize the applicable privilege statute and the important purpose it serves.[5] Nor did they consider the victim's constitutional right to privacy nor follow this Court's requirement to "carefully" examine a subpoena seeking confidential data from a

[4] "ADD" refers to the Addendum of Appellant HOPE Coalition's Brief.
[5] HOPE's brief analyzes the purpose of privilege statutes (HOPE Brf. 19-23).

sexual assault victim. Instead, they seem to reflect the belief that ICR is not an intrusion into a victim's privacy.

Unfortunately, the lower courts' failure to consider the victim's privacy interest in her privileged communications is not uncommon, particularly in sexual assault cases. It is the experience of the MCAA that ICR requests for a victim's privileged or confidential communications occur most frequently in sexual assault cases. Indeed, a Westlaw search of appellate cases in Minnesota from 2015 to the present reveals that most cases discussing the disclosure of a victim's privileged or confidential records are sexual assault cases.[6] The records at issue commonly include the following categories: therapy/mental health, other medical, advocacy,

[6] There were 38 total cases that met the search criteria for this time period; 27 of these 38 were sexual assault cases. *See, e.g., B.H.*, 946 N.W.2d at 860; *In re Program to Aid Victims of Sexual Assault*, 943 N.W.2d 673 (Minn. Ct. App. 2020) (hereinafter "PAVSA"); *State v. Brown*, 937 N.W.2d 146, 159-60 (Minn. Ct. App. 2019); *State v. Carrillo*, No. A20-0695, 2021 WL 2407187 (Minn. Ct. App. June 14, 2021); *State v. Curtis*, No. A16-1858, 2017 WL 5559898 (Minn. Ct. App. Nov. 20, 2017); *State v. Murdock*, A20-0323, 2021 WL 560820 (Minn. Ct. App. Feb. 16, 2021); *State v. Pomavilla*, No. A20-0955, 2021 WL 2309896 (Minn. Ct. App. June 7, 2021); *State v. Popa*, No. A14-0408, 2015 WL 4507638 (Minn. Ct. App. July 27, 2015); *State v. Snoddy*, No. A15-1525, 2016 WL 6826232 (Minn. Ct. App. Nov. 21, 2016); *State v. Vetaw-Cage*, No. A19-0702, 2020 WL 3957263 (Minn. Ct. App. July 13, 2020). It is the experience of the MCAA that requests for ICR of privileged or confidential victim information also occurs in domestic violence cases. Several of the cases meeting the search criteria were either explicitly charged as domestic violence cases, *see, e.g., State v. LeCuyer*, No. A19-1862, 2020 WL 7134474 (Minn. Ct. App. Dec. 7, 2020) (involving domestic assault, false imprisonment, and stalking), or involved intimate partners or other family or household members, *see, e.g., State v. Adams*, No. A14-1891, 2015 WL 6631802 (Minn. Ct. App. Nov. 2, 2015) (involving kidnapping, second-degree assault, and terroristic threats of an intimate partner).

child protection/social services, or school records.[7] Many of these records are protected by statutory privileges. *See* Minn. Stat. § 595.02, subd. 1.

Typically, this issue arises on appeal in two circumstances: (1) when the district court denies ICR of some/all records, the defendant is convicted after a trial, and the defendant challenges the denial of ICR on appeal; or (2) when the district court grants ICR of the requested records, the defendant is convicted after a trial, and on appeal the defendant challenges the district court's lack of disclosure of records after ICR.[8]

Of course, these examples only reflect *a fraction* of those cases where ICR is granted. It is important to recognize that appellate courts do not typically see those

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[7] *See, e.g.*, *PAVSA*, 943 N.W.2d at 673 (advocacy); *Carrillo,* 2021 WL 2407187 (social services); *Snoddy*, 2016 WL 6826232 (medical); *Murdock*, 2021 WL 560820 (school, hospital, and child protection); *Pomavilla*, 2021 WL 2309896 (child protection, counselor, psychiatrist, and school); *Popa*, 2015 WL 4507638 (mental health and social services); *Curtis*, 2017 WL 5559898, at *1 (noting that defendant's teenage daughter was hospitalized after suicidal behavior and that she reported defendant's sexual assault of her when she was seven years old, and describing how the district court conducted an ICR of the victim's confidential county, facility, and school records).

[8] For an example of the first scenario, *see Brown*, 937 N.W.2d at 159-60. For an example of the second scenario, *see LeCuyer*, 2020 WL 7134474, *5 (involving ICR of victim's past medical records and an appeal challenging the district court's decision not to disclose any of those records to the defense); *Carrillo*, 2021 WL 2407187, at *4-5 (involving ICR of confidential social service records of 14-year-old sexual assault victim who was legally blind and had therapy for behavioral issues and an appeal challenging the district court's decision to only disclose some of those records). Defendants have also raised ineffective-assistance-of-counsel claims when defense attorneys have not requested ICR. *See, e.g.*, *State v. Schuety*, No. A19-1637, 2021 WL 772916, *8 (Minn. Ct. App. Mar. 1, 2021). The defendant in *Curtis*, 2017 WL 5559898, *2, argued that the judge who conducted ICR of the victim's confidential records should have recused herself from the bench trial.

cases where ICR was granted and there is no conviction, no appeal (i.e., a guilty plea case), or no issue raised by the defendant on appeal related to the ICR grant or subsequent disclosure. It is the experience of the MCAA that ICR grants are often made in sexual assault and domestic assault cases without adequate consideration for victims' undeniable privacy interest in privileged or confidential information.[9]

B. Challenging a district court's improper grant of ICR is difficult.

When ICR is improperly granted, there is not a straightforward way for that decision to be appealed. First, victims may not be aware that their privileged or confidential records are being disclosed for ICR. Defendants and district courts are supposed to follow the subpoena rule, Minn. R. Crim. P. 22.01, subd. 2(c) (stating that a subpoena requiring the production of privileged or confidential records about a victim may be served on a third party only by court order). *B.H.*, 946 N.W.2d at

[9] For example, the following five cases, involving a variety of sexual assault and domestic violence charges, occurred in four different judicial districts and included ICR grants: *State v. Cardenas*, 27-CR-17-17111 (involving three counts of criminal sexual conduct for 9-, 6-, and 5-year-old victims in Hennepin County and multiple sealed orders granting ICR, including of therapy records); *State v. Schneider*, 27-CR-20-26865 (involving a fifth-degree criminal sexual conduct charge for sexual assault of an adult victim in Hennepin County and ICR of the victim's therapy records); *State v. Wothe,* 10-CR-19-965 (involving two counts of third-degree criminal sexual conduct for a 13-year old victim in Carver County and ICR of school records); *State v. Stamps,* 62-CR-19-9674 (involving a third-degree criminal sexual conduct charge in Ramsey County for sexual assault of an ex-girlfriend and multiple sealed orders granting ICR of medical, mental health, and/or chemical dependency treatment records); *State v. Retzlaff*, 73-CR-16-4940 (involving a felony domestic assault charge in Stearns County and ICR of victim's mental health records). The fact that some district courts seal these orders, as in *Cardenas* and *Stamps*, decreases the transparency of those decisions, and makes scrutiny difficult.

868 ("Subdivision 2(c) is the first step a defendant must follow when seeking to access privileged or confidential records of a victim").

In spite of the existence of the rule, it is not uncommon for defendants to instead file a "*Paradee* motion" and for the district court to grant an order without regard to the subpoena rule.[10] Even if the subpoena rule is followed, notice to victims is only optional under subdivision 2(c) (stating that the court "may" require giving notice to the victim before entering the order so that the victim can move to quash or modify the subpoena or otherwise object). Thus, in either a *Paradee* order or a subpoena to a third-party record holder, the victim may be unaware of it.

Even if the victim is aware of and opposed to the ICR grant, it is difficult for the victim, who is not a party to the proceeding, to challenge it. If a victim wants legal representation, she will have to pay for counsel or hope she can find pro bono representation.[11] It is rather perplexing that someone who is an alleged victim of a crime would have the burden of hiring an attorney to make sure that their privileged or confidential information is not disclosed during the criminal proceedings to which they are not a party.

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[10] That is what happened in this case initially. This is not an uncommon practice. *See, e.g., PAVSA*, 943 N.W.2d at 673 (granting a writ of prohibition where the district court ordered ICR of advocacy records without following the subpoena rule); *Curtis*, 2017 WL 5559898, *1. Some of the cases cited in footnote 9 also appear to involve orders that did not follow the subpoena rule. *See, e.g., Cardenas*, 27-CR-17-17111, and *Stamps*, 62-CR-19-9674.

[11] *B.H.* was one of those rare cases where the victim had pro bono representation and challenged the subpoena order by filing a petition for a writ of prohibition.

There is similarly no clear path for review if the State seeks to challenge an improper ICR grant. As this Court has held, "The ability of the State to appeal is limited." *State v. Rourke,* 773 N.W.2d 913, 923 (Minn. 2009). A statute or rule must permit the appeal. *Id.* ("We strictly construe the rules governing appeals by the State in criminal cases because such appeals are not favored."). While pretrial appeals by the State are allowed pursuant to Minn. R. Crim. P. 28.04, the State must establish how the district court's error "will have a critical impact on the outcome of the trial." Minn. R. Crim. P. 28.04, subd. 2(2)(b); *State v. Underdahl,* 767 N.W.2d 677, 682 (Minn. 2009) (holding that the rule requires the State to establish critical impact in every pretrial appeal, including appeals from discovery orders). Establishing this "critical impact" is a barrier to the State in appealing an ICR grant.[12]

A challenge to a district court's improper ICR grant by the record holder is the only other remaining avenue to appeal. The record holder – who also is not a party in the case – incurs the time and expense of challenging the order in district court and then pursuing a petition for a writ of prohibition on appeal. While HOPE

[12] In *State v. Ellis,* No. A15-0098 (Minn. Ct. App. Mar. 3, 2015) (order opinion), the court of appeals determined that the State failed to establish critical impact in its appeal of a district court order requiring the State to review child protection records for potential *Brady* material. Even though the district court had indicated that the State's failure to comply with its discovery order would result in the State not being permitted to call the child witness to testify, the court of appeals ruled there was no critical impact because this was only a theoretical ruling. This decision reflects the difficulty the State has in establishing critical impact when the district court issues orders related to discovery.

Coalition in this case was represented by counsel and did challenge the review grant, this is rare.[13]

It is far more common for organizations, which are not parties in the criminal case, to turn over records when they receive an order or subpoena from the district court. In fact, that is exactly what happened with the victim's mental health records in this case. The district court ordered the State to obtain the name of the victim's therapist (11/15/19 Order at ADD 7). The district court then issued an order for the defendant to serve the *Paradee* order on the therapist for "all notes, memoranda, records, reports, or any other documentation concerning the alleged victim . . ., generated between 2014 and present" to be produced and delivered to the court for ICR (11/15/19 Order at ADD 12-14). Although this order did not follow the subpoena rule, the victim's therapist apparently turned over the records without

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[13] In *PAVSA*, the advocacy organization was represented by the same attorney from Standpoint as HOPE is represented by in this case. As the National Crime Victim Law Center has recognized:

> Increasingly, private records are subpoenaed directly from record holders without notice to victims. For sexual violence survivors who seek counseling, records are often held by rape crisis centers, domestic violence shelters, or other agencies who disproportionately serve poor and low-income victims. These victims, and the centers that serve them, have limited resources and typically lack expertise in confidentiality or the funds necessary to hire an attorney to challenge a subpoena. Often the result is disclosure of records despite laws prohibiting such disclosure. Once information is disclosed, it is often difficult to remedy.

Jessica E. Mindlin & Liani Jean Heh Reeves, *Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions* (A Project of The National Crime Victim Law Institute at Lewis & Clark Law School) 30 (2005) [hereinafter "*Toolkit*"].

raising any objections (*See* 6/25/21 Order at ADD 26). Some of those records were disclosed to the parties following ICR (6/25/21 Order at ADD 31).

Even in situations where a non-party victim or organization seeks a writ of prohibition, and expends their own time and resources to do so, the issuance of a writ is not a guarantee. In fact, "A writ of prohibition is an extraordinary remedy and only used in extraordinary cases." *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 710 (Minn. 2007). Once records are disclosed, even for ICR, the damage is done and there is no way to put the proverbial cat back in the bag.

As a result of the frequency with which ICR is granted in sexual assault cases, and the lack of a remedy when there is an improper grant of ICR, violations of the privilege statutes and of victims' right to privacy are barriers to justice for victims.

C. There are negative consequences to improper ICR grants.

Providing access to privileged or confidential victim information – even if *in camera* – has negative consequences to the victim and to public safety.

First, such ICR grants are contrary to the purpose of privilege statutes to encourage open and frank communications in protected relationships (HOPE Brf. at 19-23). A breach of the privilege negatively impacts that relationship. This is exemplified in this case by the victim's mental health records that the district court ordered be reviewed *in camera*; the victim's mother indicated that the victim would

feel betrayed by this disclosure because her therapist told her that what she said during therapy would remain confidential (11/26/19 Ltr. at ADD 46).[14]

Second, a breach of the privilege through ICR has the potential to be particularly damaging to victims of sexual assault based on the nature of the crime. These victims, who, through the nature of the crimes committed, have already experienced a loss of privacy and control. Efforts to further breach their privacy through review of privileged or confidential information further erodes victims' privacy and control over their lives.[15]

Third, the breach of the privilege can have a chilling effect on victims seeking help after suffering a sexual assault. *See* Viktoria Kristiansson, *Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic*

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[14] *See also Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981) ("But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all"); *Jaffee v. Redmond,* 518 U.S. 1, 10 (1996) ("Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment"). HOPE discusses the importance of the sexual-assault-advocate privilege in their brief (HOPE Brf. at 22-23), and it is anticipated that the other amici will also discuss it in theirs.

[15] *See Toolkit, supra* note 13, at 9 ("While all crime victims have rights and interests in confidentiality, sexual violence victims have pronounced interests in privacy. For example, for a victim of sexual violence, the need for autonomy and control over her body, the private details of her life, and the decisions that must be made relative to the assault (including whether and how to assist with a criminal prosecution and how to respond to STD and pregnancy exposure), are often essential to recovery.").

Violence and *Sexual Assault Prosecutions Part II*, Aequitas Strategies Newsletter, May 2013, at 7 ("Victim privacy laws are the pillars upon which the safe disclosure of abuse and the receipt of services have been built. If domestic violence and sexual assault victims do not feel that their private information will remain so under confidentiality and privilege laws, victims may be hesitant to reveal their trauma and get the services that they need to begin their physical and psychological healing processes").[16]

In addition to having a chilling effect on the utilization of services after a sexual assault, victims may be less inclined to report the crime in the first place if they know their privileged communications won't be protected. *See id.* at 4 ("Piercing the sanctity of the very professional relationship that has helped the patient heal may invade her privacy to such an extent that it has a chilling effect, thus preventing the victim and others from seeking the therapeutic services of these professionals or from disclosing violence out of fear that their mental health records will be accessible to others"). Sexual assault is already a vastly unreported crime,[17]

[16] Available at aequitasresource.org/resources/ (last visited December 23, 2021). HOPE also describes the chilling effect this has on sexual assault victims, the undue burden placed on victims to legally challenge the disclosure of their privileged records, and the negative impact disclosure has on the mission of advocacy organizations (HOPE Brf. at 46-47).

[17] "Only 310 out of every 1,000 sexual assaults are reported to police. That means more than 2 out of 3 go unreported." RAINN The Criminal Justice System: Statistics https://www.rainn.org/statistics/criminal-justice-system (last visited December 23, 2021) (citing information from several federal government reports from 2012 to 2019).

and anything that discourages victims from reporting sexual assault negatively impacts public safety.

Finally, breaches to victims' privacy and privileged communications can negatively impact litigation strategy. In sexual-assault prosecutions, the cooperation of the victim is vital to the State's ability to fairly prosecute the defendant. Without the victim's willingness to cooperate – most importantly by taking the witness stand and testifying about what happened – the State cannot present the facts in a case, regardless of what was originally reported and alleged. Put another way, without the victim's cooperation, a prosecution cannot continue.

No one wants their most personal, privileged conversations and information to be revealed. As referenced above, this is especially true of sexual assault victims. It is the experience of the MCAA that, when defendants in sexual assault cases seek privileged or confidential information from victims, those victims are significantly deterred from cooperating in the prosecution. Regardless of defendants' intent in seeking private information, victim intimidation is clearly its effect. Without the victim's cooperation, the State's ability to prosecute a criminal charge is greatly diminished, if not completely eviscerated. Thus, defense requests for a victim's privileged or confidential information often impact how the State must approach a prosecution.

B.H. is a frustrating example of this reality. After this Court issued the writ of prohibition in *B.H.* that prohibited the defense's subpoena of B.H.'s cell-phone data, the defendant filed a second request for a subpoena. This second request was

not as broad as the first request (which this Court held was unreasonable under the subpoena rule), but both the State and B.H. opposed it as still being unreasonable. The district court granted the defense's second subpoena request. B.H. still, understandably, did not want her private cell-phone data to be turned over to an investigator and then the district court for ICR. Thus, despite believing the defendant should be held accountable for what he had done, B.H. wanted the prosecution "to go away." Because of the district-court-ordered breach of B.H.'s privacy, the State extended a significantly reduced offer: the defendant, who was charged with felony third-degree criminal sexual conduct, pleaded guilty per an agreement to gross-misdemeanor fifth-degree criminal sexual conduct. *See, generally,* District Ct. Docket No. 27-CR-19-7125.

ICR does not placate how victims feel when their privileged communications are exposed. Even with ICR, someone else (a judge and court staff) is still reviewing conversations that the victim had every reason to believe were private. *B.H.* is sadly just one example. Defendants' request for victims' privileged or confidential information has a very real impact on the State's strategy, plea negotiations, and the overall outcome in a sexual assault prosecution.

D. Trying to understand why ICR in sexual assault cases is often the default rule in Minnesota.

Although victims have a constitutional right to privacy and statutory privilege protections, district courts in Minnesota too frequently default to ICR in sexual assault cases.

In this case, the district court deviated from precedent requiring that, to obtain ICR, a defendant "*must* make a *plausible* showing that the information sought *would* be both material and favorable to his defense." *B.H.*, 946 N.W.2d at 868 (citing *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992), and *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987)) (internal quotations omitted, emphasis added).[18] Conrad failed to meet this burden.

Conrad argued that the "HOPE Coalition advocate was present while [the victim] gave her statement to law enforcement. Common sense tells us that there had to be some prior communication between HOPE Coalition and [the victim] before that meeting," and "it is plausible" to believe that HOPE provided advice to the victim and documented this conversation (11/13/19 Defense Reply at 3, 4). Conrad then claimed that any statements made by the victim "*could* therefore be material and favorable to [the] defense, as her statements *may* include contextualized facts, impeachment evidence, or inconsistent statements" (*Id.*; emphases added).[19] The district court agreed (11/15/19 Order at ADD 9-10).

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[18] The MCAA agrees with HOPE that *Ritchie* and its progeny do not apply to the absolute-privileged records at issue (HOPE Brf. at 14-37). But even if the analysis in those cases applies to the records at issue, the lower courts improperly conducted it.

[19] Conrad made a similar argument in support of its request for review of the victim's therapy records, arguing that because the victim had seen a therapist, she *likely* discussed the alleged assault; the defense argued that ICR from 2014 to present was necessary to determine *if* any records were material and relevant to the defense (*Id.* at 2-6). The district court agreed, and the victim's mental health records were provided to the court for ICR and partial disclosure to the defense (6/25/21 Order at ADD 26, 31).

Furthermore, in its order denying HOPE's motion to quash, the district court determined: "The Defendant needs the information *in order to determine* what the victim has said," "the Court finds that it is *uncertain* whether the records will produce any admissible or useful information," and "There is *no indication in the record* as to what the records will say" and "the information has the *potential* to be useful" (6/25/21 Order at ADD 29). These statements exemplify a fishing expedition, not findings of materiality or that the records would be favorable to the defense. The court of appeals affirmed the district court's conclusions by denying the writ.

The lower courts' treatment of the victim's privileged information in this case is unfortunately not unique in Minnesota. Other district courts have similarly ordered ICR without regard to victims' rights and based on an inadequate showing by the defense.[20]

To appropriately address this problem, it is important to understand why it is occurring with such frequency. First, there is a mistaken belief that disclosure of privileged or confidential communications maintained by a third party are part of the Rule 9 discovery process. The district court in this case began its analysis by stating that the rules of criminal procedure are intended to give as complete discovery as possible under constitutional limits and that defendants have a broad right to discovery to prepare a defense (11/15/19 Order at ADD 8). The district

[20] Examples of other cases are cited in footnote 9.

court cited a case referencing an older comment to Rule 9, which now states: "Rule 9 with [other rules], provide a comprehensive method of discovery of the prosecution (Rule 9.01) and defense (Rule 9.02) cases. The rules are intended to give the parties complete discovery subject to constitutional limitations." Rule 9, cmt.

The district court erroneously relied on the discovery rules. Rule 9 does not apply in this situation because the privileged advocacy records are not in the control or possession of the State. Rule 9.01 applies to matters within the State's possession or control. *See State v. Lee,* 929 N.W.2d 432, 439-40 (Minn. 2019) (holding that under the plain language of Rule 9.01, subds. 1-1a, "the State cannot be required to allow the defense to inspect a location that is under the control of a third party"). This Court noted in *B.H.*, 946 N.W.2d at 869, that "[a]ny arguments about the State's obligation under Rule 9 do not apply because the dispute arises under Rule 22.01, subdivision 5, not Rule 9."

Furthermore, to the extent that district courts granting ICR emphasize Minnesota's broad discovery rules, this is not based on a constitutional right. "There is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846 (1977). In contrast, victims *have* a constitutional right to privacy and *have* statutory privilege protections.

Second, there appears to be a mistaken assumption that the constitutional right of confrontation requires ICR. The district court here repeated the frequently cited language that privileges "sometimes must give way to the defendant's right to

confront his accusers" (11/15/19 Order at ADD 8-9). As explained in HOPE's brief, this language predates *Ritchie,* which did *not* hold that the Confrontation Clause applies with respect to records maintained by third parties (HOPE Brf. at 27-32).[21] Unfortunately this language – even though the Supreme Court and this Court have never held that the Confrontation Clause applies in these circumstances – has repeatedly been cited in analyzing a request for ICR.[22]

Third, the lower courts in this case based their decisions on the mistaken belief that ICR adequately protects the victim's rights because it doesn't provide the defense with direct access to the privileged or confidential information. The district court determined that if it is unclear whether the record is discoverable or "if any information in the records might help the defense," the proper procedure is ICR (11/15/19 Order at ADD 9) (citations omitted). The court said it is to screen the confidential records *in camera* to balance the defendant's right to prepare a defense against the victim's right to privacy (*Id.*) (citations omitted).

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[21] The majority of the Supreme Court in *Ritchie* analyzed the defendant's request for direct access to social services records about the victim (subject to a qualified privilege) and held that ICR was a better approach to ensure a fair trial than direct access to the defense. *Ritchie,* 480 U.S. at 59-61. The court further held that the defendant must establish a basis for his claim that the file contains material evidence before requiring the trial court to review it. *Id.* at n.15.

[22] *See, e.g., State v. Paradee,* 403 N.W.2d 640, 642 (Minn. 1987); *State v. Evans*, 756 N.W.2d 854, 872 (Minn. 2008); *State v. Hummel,* 483 N.W.2d 68, 71 (Minn. 1992). MCAA is not requesting that this Court overturn its prior decisions, but instead encourages the Court to recognize the importance of privileges and victim privacy and the lack of any prior holdings based on confrontation grounds. *See* Argument E, below.

Similarly, the court of appeals concluded that "[t]he proper procedure to follow is for the district court to review the privileged records *in camera* to determine whether the privilege must give way" (COA Order at ADD 35) (citation and internal quotation omitted). The court of appeals continued, "This approach strikes a fairer balance between the interest of the privilege holder in having his confidences kept and the interest of the criminal defendant in obtaining all relevant evidence that might help in his defense." (*Id.*) (citations omitted).[23]

These comments reflect that the lower courts do not believe their review of the victim's records to be a violation of the statutory privilege or her constitutional right to privacy. Contrary to the court of appeals' determination, by reviewing the privileged records *in camera*, the lower courts have already pierced the privilege. Once the records are released to the court (and its staff, in addition to appellate court judges and staff), the confidential relationship between the victim and her advocate has been irreversibly breached.

Finally, this Court should consider that the requests for and grants of ICR happen most frequently in sexual assault cases. *See also Toolkit*, *supra* note 13, at 9 ("Unfortunately, most attacks perpetrated on victim confidentiality in the civil and

[23] While the citations to the cases relied upon are omitted here, the undersigned acknowledge that the lower courts here relied on precedential authority. As explained in HOPE's brief, however, the caselaw in Minnesota "is muddled when it comes to how to apply a privilege and under what theory of law" a privilege can be breached (HOPE Brf. at 30-33). As a result, victims' right to privacy and privilege protections are often disregarded by district courts defaulting to ICR.

criminal justice systems target victims of sex crimes"). One explanation for this is as follows:

> This is true, in part, because of the myths that surround rape and the historical mistreatment of this class of victims. Our nation's early rape laws viewed victims with suspicion, requiring unreasonable and incomparable standards of proof and corroboration. A sexual assault victim's sexual history was put on trial while the defendant hid behind the protections of the United States Constitution. This historical mistreatment of rape victims can be seen lingering today in the widespread disregard of sexual violence survivors' confidentiality.

Id.[24] The skepticism about victims who report sexual assault likely leads to the increased request for and granting of ICR of those victims' privileged or confidential communications.

Collectively, these four reasons – treatment of records held by third parties as a discovery request; outdated and inaccurate language on the defendant's confrontation right; mistaken belief that ICR doesn't violate privilege statutes or a victim's right to privacy; and myths held about sexual assault victims – are likely to

[24] This Court has acknowledged barriers sexual assault victims face in the criminal justice system. *See, e.g.*, *State v. Obeta*, 796 N.W.2d 282, 290-94 (Minn. 2011) (noting that research indicates that the public gives credence to rape myths, concluding that the mental and physical reactions of an adult victim may lie outside a juror's common understanding, and holding that when the defendant claims the sexual conduct was consensual, a district court has discretion in admitting expert evidence on delayed reporting, lack of physical juries, and submissive conduct by victims). In *State v. Khalil*, 956 N.W.2d 627, 630 n.1 (Minn. 2021), this Court expressed its concern that "nearly half of all women in the United States have been the victim of sexual violence in their lifetime . . ." and noted that legislatures in other jurisdictions enacted statutes that protected intoxicated victims, regardless of how the victim became intoxicated. This Court further traced the lack of protections in Minnesota law for voluntarily intoxicated sexual assault victims back to 1889. *See id.* at 636 n.8.

blame for lower courts defaulting to ICR of victims' privileged or confidential records.[25] As a result of this default review and the lack of appellate options for improper ICR grants, sexual assault victims' rights are being violated and damage is being done to the therapeutic relationships victims rely upon for healing.

E. The writ should issue and the law should be clarified.

The MCAA supports HOPE's argument that sexual assault advocacy records are absolutely privileged and not subject to ICR. But even if this Court does not adopt that view, the writ of prohibition should still issue because the lower courts' decision was unauthorized by law.

In order to adequately protect sexual assault victims' right to privacy and privileged communications, MCAA recommends the following:

- Recognize that privileges and privacy are essential to victims.
- Acknowledge that even ICR negatively impacts victims, especially sexual assault victims.
- Clarify that Rule 9 discovery rules do not control because these records are not in the possession or control of the prosecution.

[25] Some of these reasons were evident in decisions of district courts listed in footnote 9. *See, e.g., Schneider*, 27-CR-20-26865 (5/3/21 Order) (noting that the victim's privilege "sometimes must give way to a defendant's right to confront his accusers" and concluding that even though "the inaccuracies Defendant cites do not necessarily show the therapy records would be favorable and material to his defense, Defendant has made a showing that the Alleged Victim sought therapy three days after the alleged assault, the night before obtaining a sexual assault examination"); *Retzlaff*, 73-CR-16-4940 (11/15/16 Order) (noting that defendants have a constitutionally-protected right to obtain from the prosecution evidence material to guilt, that *Paradee* held that when defendant seeks discovery of privileged material and it's unclear if it's discoverable, the trial court should examine it *in camera*, and that ICR helps ensure victim confidentiality).

- Discourage the continued use of inaccurate language that suggests privileges must "give way" to a defendant based on the right of confrontation.

- Require district courts to thoroughly analyze victims' rights and interests when considering whether to grant ICR.

- Discourage the default grant of ICR by requiring defendants requesting a subpoena to make the necessary showing. Reiterate that fishing expeditions are not allowed and discourage review requests that are based on myths about sexual assault victims.

- Suggest the rules committee consider a change to Minn. R. Crim. P. 22.01, subd. 2(c) to *require* a court to give notice to the victim before an order is entered.

- Suggest the rules committee consider a change to Minn. R. Crim. P. 28.04, subd. 2 that permits the State to initiate a pretrial appeal, without establishing critical impact, when the district court has improperly ordered ICR.

In this case, both the district court and court of appeals completely ignored the sexual-assault-counselor-and-victim statutory privilege in their decisions. Regardless of whether this Court interprets this privilege as absolute or applies a heightened version of the standard from *B.H.*, it is clear that Conrad has not come anywhere close to providing a basis to violate or overcome that privilege.

DATED: December 28, 2021

Respectfully submitted,

ROBERT SMALL
Executive Director
Minnesota County Attorneys Association

/s/ Kelly O'Neill Moller
KELLY O'NEILL MOLLER
Assistant Hennepin County Attorney
Attorney Registration No. 0284075

/s/ Adam E. Petras
ADAM E. PETRAS
Assistant Hennepin County Attorney
Attorney Registration No. 0391470

C-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487
Phone: (612) 348-3434

ATTORNEYS FOR MINNESOTA COUNTY ATTORNEYS ASSOCIATION

A21-0880
STATE OF MINNESOTA
IN SUPREME COURT

In Re: Hope Coalition

State of Minnesota,
Respondent,

vs.

Kevin Maynard Conrad,
Appellant.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(c), for a brief produced with a proportional font. The length of this brief is 6,916 words. This brief was prepared using Microsoft Office 2016, Times New Roman font face size 13.

Dated: December 28, 2021

/s/ Kelly O'Neill Moller
KELLY O'NEILL MOLLER
Assistant Hennepin County Attorney
Attorney Registration No. 0284075

/s/ Adam E. Petras
ADAM E. PETRAS
Assistant Hennepin County Attorney
Attorney Registration No. 0391470

ATTORNEYS FOR MINNESOTA COUNTY ATTORNEYS ASSOCIATION