A22-0468

STATE OF MINNESOTA

IN SUPREME COURT

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State of Minnesota,

Respondent,

vs.

Kristi Dannette McNeilly,

Appellant.

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**BRIEF OF AMICI CURIAE**
**MINNESOTA BOARD OF PUBLIC DEFENSE,**
**MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, and**
**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

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Kristi Dannette McNeilly,

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**JOINT BRIEF OF AMICI CURIAE MINNESOTA BOARD OF PUBLIC DEFENSE, MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, and NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

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## IDENTITY AND INTEREST OF THE AMICI CURIAE

The Minnesota Board of Public Defense (the Board), Minnesota Association of Criminal Defense Lawyers (MACDL), and National Association of Criminal Defense Lawyers (NACDL) respectfully submit this brief in support of appellant McNeilly.[1] The Board, MACDL, and NACDL have grave concerns about the constitutional violations and infringement on the protections of attorney-client privileged information and work product by law enforcement in searching the attorney's office and all of the attorney's client files pursuant to remarkably general and overbroad search warrants pertaining to only three people. Joint amici urge this Court to find these searches constitutionally unreasonable and require that a search of an attorney's office and client files must be

[1] Counsel for joint amici curiae authored this brief in whole. The cost of preparation of this brief has been borne by joint amici curiae as well.

done with the special care and protection in place to safeguard client confidentiality, attorney-client privilege, and work product of all the attorney's clients.

The Minnesota Board of Public Defense (the Board) coordinates and oversees the statewide public defender system in Minnesota to ensure that all indigent clients are treated fairly by the criminal justice system and are provided effective legal defense services. The vast majority of criminal cases in Minnesota are handled by public defenders. There are over 600 public defenders statewide, of which approximately one-third (35%) are part-time attorneys, most of whom also have a part-time private practice. In addition, the Board contracts with numerous private attorneys to fill specific needs such as temporary leaves and conflict cases. The result is a significant number of client files in every office. The Board's mission is to provide excellent criminal and juvenile legal defense services to indigent clients through an independent, responsible and efficient public defender system. Implicit in this mission is the protection of attorney-client privileged information and work product, and to ensure client confidence in their assigned attorney.

The Minnesota Association of Criminal Defense Lawyers (MACDL) is Minnesota's preeminent criminal defense bar with 300 members. The mission of the MACDL is to foster, maintain, and encourage the integrity, independence, and expertise of the defense lawyer in criminal cases; promote the proper administration of criminal justice, including the protection of individual rights; and advance the knowledge of law in the field of criminal defense by lecture, seminars, and publications.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL is the only nationwide professional bar association for both public defenders and private criminal-defense lawyers, and its members include not only lawyers serving in those roles, but also military defense counsel, law professors, and judges. Consistent with NACDL's mission of advancing the proper, efficient, and fair administration of justice, NACDL files numerous amicus briefs each in federal and state courts – all to the end of providing assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The issue presented in this case has nationwide implications regarding the issuance and execution of a search warrant for an attorney's office, be it a public defender's office or a private attorney's office - and the seizing of all client files. The actions in this case disregarded the holding and principles set forth in *O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979), and subsequent case law from other jurisdictions, and call into serious question the continuing vitality of the very nature of the attorney-client privilege and protections for attorney work-product, along with the most basic and central rights guaranteed by the state and federal constitutions.

Of particular concern is the lack of safeguards for the attorney's client files and the privacy rights of those that are not involved in any criminal investigation. Whether the attorney or named clients are the focus of an investigation, special care must be taken in the context of a law office because of the pervasiveness of privileged items in the office

and files. There was nothing done during the search process of the attorney's office to protect privileged files of innocent clients, nor was the search method of the attorney's computers and electronic devices reasonable or adequate to protect all the attorney's client files.

Because the attorney involved is a criminal defense attorney, the issue presented has significant implications regarding the constitutional right to counsel, attorney-client privilege and work product, and the rights against unreasonable searches and seizures of an attorney's office. The lower courts have ignored the fundamental need for protection of these rights and privileges. It is therefore incumbent on this Court to resolve the issue in favor of protecting the attorney-client relationship and privileged information and find the searches unconstitutional. Such a ruling will protect the integrity of the criminal justice system.

## LEGAL ISSUE PRESENTED

Was the search of appellant's law office and computers containing all her privileged client files constitutionally reasonable where the warrants lacked particularity and were overbroad, and where there were inadequate safeguards in place to protect the privileged information of all appellant's clients?

*Lower Courts' Rulings*: The district court held that the search warrants in this case were reasonable and denied appellant's motion to suppress. The Court of Appeals affirmed.

## ARGUMENT

### I. The Sanctity of the Attorney-Client Relationship.

It is undisputed that "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). As this Court has noted, this privilege is "indispensable to an attorney's professional relationship with his client." *Kahl v. Minnesota Wood Specialty, Inc.*, 277 N.W.2d 395, 398 (Minn. 1979). Aside from clergy, no other profession has had this type of privilege bestowed upon them for so many centuries, and in no other profession is the privilege itself so intertwined with the public perception of the profession. *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226 (1962).

Some legal scholars trace its origins all the way back to Roman law, suggesting that the privilege originated as part of the doctrine of *testimonium domesticum. See Clausen v. Nat'l Grange Mut. Ins. Co.*, 730 A.2d 133, 136 (Del. Super. Ct. 1997). Others, primarily John Henry Wigmore, trace its emergence back to the reign of Elizabeth I, where he found that the privilege already appeared as "unquestioned." 8 Wigmore, Evidence § 2290 (McNaughton rev. 1961). Under either origin story, "the ancient history and wide recognition of the attorney-client privilege" has become an inherent part of "the practice of law and our adversary system of administering justice." *Kahl,* 277 N.W.2d at 338.

Whether the client is a journalist discussing the legal risks in publishing a story, a young adult who has just come to terms with his childhood abuse, or a whistleblower

who believes she may be on the cusp of exposing government corruption, the skill and effectiveness of the attorney representing them "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). It is inappropriate to view the confidentiality rule which creates a trust between the attorney and the client "merely an exclusionary rule," because doing so diminishes the significance of the important role confidentiality plays in the profession. *Kahl*, 277 N.W.2d at 338.

If a lawyer cannot convince a client to share all the necessary information, free from the threat that someday these confidential communications will be shared, the lawyer's ability to serve the client will be hindered and the profession itself will be damaged. "Preserving the sanctity of confidentiality of a client's disclosures to his attorney will encourage an open atmosphere of trust, thus enabling the attorney to do the best job he can for the client." *Reardon v. Marlayne, Inc.*, 416 A.2d 852, 857 (N.J. 1980).

Therefore, while it is undisputed that the law requires that a search warrant be reviewed to protect the rights of the target of the criminal investigation, when that subject is an attorney the scope of the review cannot end there. There isn't some magical moment in between the time when law enforcement seeks to execute a search of an attorney's property and a judge's approval of that search where that attorney's clients are able to file for injunctive relief. Realistically, a client will almost certainly not know whether their attorney will soon be the subject of the execution of a search warrant. Thus, they cannot seek a court order to protect the work product in the hands of the targeted attorney prior to the search itself. This is why work product privilege also exists.

This additional privilege is necessary to "shelter the mental processes, conclusions, and legal theories of the attorney, providing a privileged area within which the lawyer can analyze and prepare his or her case." *In re Bexar Cty. Crim. Dist. Attorney's Office*, 224 S.W.3d 182, 186 (Tex. 2007) (citations omitted). "The work product privilege **is broader than the attorney-client privilege** because it includes all communications made in preparation for trial, including an attorney's interviews with parties and non-party witnesses." *In re Cook*, 597 S.W.3d 589, 602 (Tex. App. 2020) (emphasis added); *see also People v. Superior Court (Bauman & Rose)*, 44 Cal. Rptr. 2d 734 (1995) (attorney work product privilege is different than attorney-client privilege, and work product cannot be disclosed under crime-fraud exception to attorney-client privilege).

When considering the range of potential client disclosures that could be uncovered by investigators searching an attorney's home or office, the exclusionary rule is insufficient to protect the damage and harm to those clients by the revelation of their private information, a breach of trust to which there is no clear remedy. This is precisely why the United States Supreme Court has long understood that "it is indispensable for the purposes of private justice," *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826), that the apprehension of disclosure be minimized to the greatest extent possible.

The official comments to Rule 1.6 of the ABA's Model Rules of Professional Conduct make clear that trust "is the hallmark of the client-lawyer relationship" and that clients are "encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." This is a

plain acknowledgment of an obvious truth: that the information a client must share with an attorney to receive proper legal advice can be the source of profound reputational harm. The depth of this concern is captured by Cassio's lament, "Reputation, reputation, reputation! O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial."[2]

## II. The Search Warrants and Subsequent Searches of Appellant's Law Office and Client Files were Unreasonable.

Forty years ago, the Minnesota Supreme Court held that a warrant authorizing a search of an attorney's office is unreasonable. *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979). Specifically, the Court held that, where an attorney is not the suspect of a criminal investigation and there are no concerns that documents will be destroyed, a search warrant is *per se* invalid. *Id.* Instead, the prosecution should subpoena any documents they think are relevant to their investigation. *Id.* This is so because lawyers are obligated to preserve evidence and, as officers of the court, obey court orders. *Id.* Therefore, the attorney was trusted to comply with subpoenas while protecting attorney-client and work-product privileges.

Importantly, the *O'Connor* Court did not hold that where an attorney is a suspect in a criminal investigation, the police have free reign to search the attorney's office and seize all client files. Rather, the Court was very clear that, even if the search warrant was based on probable cause and supported by an affidavit, the Court had to decide whether the proposed search was reasonable, considering the attorney-client privilege, client

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[2] WILLIAM SHAKESPEARE, OTHELLO, act 2, scene 3.

confidentiality, the work product doctrine, and criminal defendants' constitutional right to counsel. *Id.* at 402. Addressing all these concerns, the Court concluded that, even though the warrant in *O'Connor* described the things to be seized with particularity and the location of the office in which they may be found, a search of that office for the items specified of necessity involves a general and exploratory search of all of the attorney's files. *Id.* at 404.

The Court's concerns in *O'Connor* are not only present in appellant's case but are exacerbated by the fact that all of the attorney's files are stored on electronic devices. The search warrant generally referred to all computers such as laptops, desktops, and or towers, electronic devices which could contain or access files held remotely, and any files, invoices, or documents associated with representation of M.W. and J.S. *See* Appellant's Addendum at A39 & A46. As we know from the United States Supreme Court's decision in *Riley v. California*, 573 U.S. 373 (2014), electronic devices differ in both quantitative and a qualitative sense from other objects. Such devices have an immense storage capacity and there is an unlimited amount of information that can be stored on a single electronic device, let alone multiple such devices. *See id.* at 393-395. A search of such items clearly involves a search of all client files. So not only is the search warrant remarkably general and vague, but it also ignores the Court's decision in *O'Connor* that such a general and exploratory search of all of the attorney's files is unreasonable. *Id.* at 405; *see also Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 962 (3d Cir. 1984).

In addition, whether the attorney is the subject of the investigation is irrelevant to the primary concern underlying *O'Connor*: the protection of **clients'** privileged information. A person's otherwise-private information should not be exposed to law enforcement, or anyone else, just because the person's **attorney** is suspected of doing something wrong. The attorney-client privilege exists because society has long recognized that clients need to be open and honest with their attorneys; in so doing, clients often reveal highly private information that they would never share with another person. That is particularly true in criminal cases, in which criminal defense attorneys need their clients to speak candidly about the case for the attorney to prepare an adequate defense or sentencing-mitigation arguments. The indispensable relationship of trust between client and attorney and the adequate functioning of our adversary system of justice can only be ensured when the client can completely disclose all the facts - favorable and unfavorable – without the fear that the attorney's files will be seized by police officers pursuant to a search warrant. *O'Connor*, 287 N.W.2d at 403. If people know that those conversations can be exposed to law enforcement not because of anything they did, but because of something their attorney supposedly did, people will be much less likely to be candid with their attorneys. This chill in attorney-client communication will hurt the accuracy of results in the criminal justice system, in which the truth is discovered by zealous advocacy on both sides.

Thus, whether or not the attorney is suspected of criminal wrongdoing, the principles and protections set out by this Court in *O'Connor* apply. This Court should

follow its decision in *O'Connor* and find that the searches in this case were unconstitutional as both overbroad and unreasonable.

## III. The Court should Implement Safeguards When an Attorney's Office is Searched.

### A. The warrant should describe with particularity the specific documents sought and the police should seize only those documents.

Under *O'Connor*, if an attorney is not a suspect in a criminal investigation, prosecutors must proceed in the least intrusive way, i.e. a subpoena. 287 N.W.2d at 405. If the Court determines that a different approach is necessary when an attorney is a suspect in a criminal investigation, to provide the best protection for confidentiality, attorney-client privilege, work product, and the constitutional right to counsel, the Court should require that both the search warrant and the subsequent execution of the warrant be specifically narrow in scope. The Constitution requires all warrants to be particular regarding the items sought. U.S. Const. amend. IV; Minn. Const. art. I, § 10. That particularity requirement is especially important in search of attorneys' offices because the search will expose privileged information to law enforcement and will harm innocent people not connected to the investigation.

Importantly, search warrants must be limited to matters relating to the suspected criminal activity. *Klitzman*, 744 F.2d at 960-61. In *Klitzman,* the court found the search warrant overbroad because it did not distinguish between documents that were necessary to an ongoing investigation and those that were unconnected. *Id.* The search warrant had essentially permitted the government to decide *ad hoc* which files to seize by allowing the search of *all* client files. *Id.* The warrant also allowed the government to seize all the

firm's records - financial records, appointment books, etc. *Id.* The court held that the warrant was overbroad because it did not distinguish between documents that were necessary to the grand jury's investigation and those that were not connected to the investigation. *Id.* "[The reviewing court should] scrutinize carefully the particularity and breadth of the warrant authorizing the search, the nature and scope of the search, and any resulting seizure." *Id.* at 959.[3]

In a special concurrence in *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Col. 1982), Judge Joseph R. Quinn addressed how particular a warrant should be:

> " The issuing judge should incorporate into the face of the warrant clearly worded directions governing the execution of the search itself ... the warrant should require the executing officer to seize and seal the papers . . . if the papers sought cannot be identified [without intrusion] the warrant should restrict the executing officer to such examination only as necessary to properly identify the papers as within the scope of the warrant and, when so identified, the warrant should require the officer to seize and seal the documents... [and] upon completion of the search a copy of the warrant and a copy of the inventory of property taken must be given to the attorney whose office was searched . . . The officer executing the warrant should also be required to deposit . . . all documents seized and sealed during the execution of the warrant ..."

*Id.* at 1227 (citing Model Code of Prearraignment Procedure § 220.5 (1975). Therefore, the warrant should distinguish the files sought from the unrelated client files and include protective provisions for how this will be determined.

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[3] *See also In re Impounded Case* (Law Firm), 840 F.2d 196 (3d Cir. 1988) (holding that the magistrate implemented the proper procedure to protect attorney-client privilege by requiring the government to get the court's leave before examining the documents where search warrant was overbroad).

Furthermore, a warrant authorizing the search or seizure of all an attorney's files, or all data on an attorney's electronic devices is not particular. *See United States v. Winn*, 79 F. Supp. 3d 904, 920 (S.D. Ill. 2015) (warrant was insufficiently particular where the warrant authorized police to search the defendant's cell phone for "any and all files"); *United States v. Otero*, 563 F.3d 1127, 1133 (10th Cir. 2009) (court found warrant to search "any and all information and/or data" stored on a computer lacked sufficient particularity).

The particularity of a search was also at issue in *People v. Hearty,* 644 P.2d 302, 312-13 (Col. 1982). There, a search warrant authorized the search and seizure of bookkeeping and financial records for three criminal suspects. *Id.* But the *Hearty* court focused on the scope of the *execution*, rather than the scope of the warrant, finding that the warrant did not authorize seizure of entire client files. *Id.* After condemning the government's execution of the search warrant, the court warned that "[a]nything less than a strict limitation of the search and seizure to those documents particularly described in the warrant could result in a wholesale incursion into privileged communications of a highly sensitive nature." *Id.*

On the flip-side, the particularity and execution of a warrant was praised by the First Circuit Court of Appeals in *U.S. v. Derman*, 211 F.3d 175 (1st Cir. App. 2000). In *Derman*, the warrant specifically listed the "Items to be Seized" and distinguished them from privileged materials. *Id.* at 181. In addition, a memorandum orchestrated the execution of the warrant - the memorandum directed all participants not to open or seize any files not connected with the particular client files sought. *Id.* A "privilege team" was

also present during the search "to answer any legal questions which may arise during the search… and determine whether any of the seized items contain any privileged information." *Id.*

And in *National City Trading Corp. v. United States*, the court found that the government's actions exemplified "special care" during the execution of the warrant:

> "That care was evidenced not only by Agent Mackey's memorandum of instructions and by the directions of the Assistant United States Attorney, but also by the fact that the agents did not search [the attorney's] office until he was present, they did not examine closed files, and they sealed the "legal" file seized. Such self-regulatory care is conduct highly becoming to the government…"

635 F.2d 1020 (2d Cir 1980).

Thus, *Klitzman* and *Hearty*, and the warrant in this case, are examples of bad warrants. *Derman*, and *National City Trading Corp.* are examples of good warrants and show that this constitutionally mandated requirement is not overly burdensome.

To provide further protection in the search of attorney's office, the search should be monitored by a neutral party to prevent a general and exploratory search of all the attorney's files. And in this electronic era of storing client files, any computers and electronic devices that are seized should be sealed and brought before a court to either review *in camera* or to appoint a neutral person, such as a "special master," to review which documents and files are protected by privilege, and which might be the proper subject of the warrant. *See* Cal. Penal Code § 1524 (c)(1), (2) (special master appointed at time warrant is issued to accompany person serving warrant and if claim of privilege, special master seals item and takes to court for a hearing); *see also Klitzman*, 744 F.2d at 962 (special master to be appointed to review *in camera* materials to determine whether

any seized documents were privileged); *In re Gartley*, 341 Pa. Super. 350, 367 (1982) (court directed establishment of procedures as in *Klitzman* to assure that law office searches conducted in a manner that minimizes intrusions on the legitimate privacy interests of attorneys and clients).

The United States Department of Justice, *Obtaining Evidence: Manual* provides reasonable guidance for the searches of suspect attorney's offices.[4] These guidelines emphasize the importance of close control of such searches and, to avoid impinging on valid attorney-client relationships, law enforcement is expected to take the least intrusive approach. DOJ Manual at 9-13.420. Before seeking a search warrant for an attorney's office, the prosecutor must get express approval from the U.S. Attorney or the pertinent Assistant Attorney General and must consult with the criminal division of the Office of Enforcement Operations, Policy and Statutory Enforcement Unit (PSEU). *Id.* Further, proper procedures and precautions for the search must be set forth to ensure the prosecution team is not tainted by any privileged material inadvertently seized during the search and to ensure materials are reviewed for privilege claims. *Id.*

The DOJ requires the search warrant be drawn as specifically as possible to minimize the need to search and review privileged materials to which no exception applies. *Id.* "A privilege team" should be designated, consisting of agents and lawyers not involved in the underlying investigation. *Id.* The affidavit supporting the application for the search warrant should set forth these procedures and safeguards to ensure the attorney-client privilege is not violated. *Id.* If computers and electronic devices are to be

[4] https://www.justice.gov/jm/jm-9-13000-obtaining-evidence

searched or seized, law enforcement follows the guidelines set out by the Computer Crime and Intellectual Property Section (CCIPS).[5] *Id.*

As set forth by appellant in Appellant's Brief, these safeguards were not implemented in the searches of appellant's office and computer files. Accordingly, Minnesota should follow *Klitzman* and the many other jurisdictions and require that a search warrant for a suspect attorney's office be exact in its scope and provide protections during the execution of the warrant. Additionally, the government should take special care during its execution to mitigate the invasion on an innocent client's privacy. A best practice would be for a special master or privilege team consisting of neutral agents and lawyers not involved in the investigation of the underlying investigation to oversee the search.

### B. Once property is seized that includes client files, a truly neutral special master or the court in camera, must review all items seized and can disclose items covered by the warrant or return those items found to be privileged.

Best practice would be for a special master or the court to review all seized materials *in camera* to determine what is privileged and what is proper to disclose. The seized documents must then be returned to the attorney or clients and suppressed if determined to be privileged. *National City Trading* Corp, 635 F.2d at 1026. It is essential that whoever reviews the client files be truly neutral. The police cannot police themselves to check seized items only for information covered by the warrant or relevant to the crime being investigated. As this Court noted in *O'Connor*, "[o]nce that information is revealed

[5] https://www.justice.gov/criminal-ccips/ccips-documents-and-reports

to the police, the privileges are lost, and the information cannot be erased from the minds of the police." 287 N.W.2d at 405 (*citing Brown v. St. Paul Ry. Co.*, 241 Minn. 15, 31, 62 N.W.2d 668, 699 (1954)). The state may argue that this practice would be unduly burdensome but surely any delay or burden inherent in this procedure is worthwhile when compared to the harms of breaching confidentiality.

In this case, law enforcement used a civilian forensic examiner employed by the Dakota County Electronic Crimes Task Force as its "filter team" to conduct the search of appellant's client files on her electronic devices. Although the use of "privilege teams" or "filter teams" have been approved in limited factual scenarios, the federal courts have generally taken a skeptical view of the Government's use of such teams as an appropriate method for determining whether seized or subpoenaed records are protected by the attorney-client privilege. *United States v. Gallego*, No. CR-18-01537-001, 2018 WL 4257967 (D. Ariz. Sept. 6, 2018) (citations omitted); *United States v. Ritchey*, 605 F.Supp. 3d 891, 9900 (S.D. Miss. 2022); *see also* DOJ Manual at 9-13.420 (suggesting neutral agents and lawyers should determine privilege, "to protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy"). There is no question that the use of walled-off "filter teams" undermines the appearance of fairness and justice. *See In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994). Accordingly, unlike what happened in this case with using an employee of the Dakota County Electronics Crime Task Force to search

appellant's client files,[6] the Court should require a third-party neutral: i.e. a special master or the reviewing court itself. Third-party neutrals, as well as the use of *in camera* reviews, are followed in several jurisdictions.

As noted previously, in *Klitzman*, after finding the search warrant overbroad, the court ordered all files to be returned to the firm and suggested for the appointment of a special master to review materials *in camera* to determine if any documents were privileged. "Such a procedure would vindicate both the interests of the government in investigating and prosecuting crimes and the confidential interests of the law firm." *Id.* at 962; *see also United States v. Abbell*, 914 F. Supp 519 (S.D. Fla. 1995) (holding that a court-appointed special master was necessary to examine the allegedly privileged materials that were seized from attorney's law office - based on the guidance of other jurisdictions and the use of special masters for situations implicating attorney-client and work-product privilege); *DeMassa v. Nunez*, 747 F.2d 1283 (9th Cir. 1984), on rehearing, 770 F.2d 1505 (9th Cir. 1985) (law office search facilitated by an appointed special master to preserve privileged documents); Cal. Penal Code § 1524 (c)(1); *accord United States v. Stewart*, No. 02-CR-395, 2002 WL 1300059 (S.D.N.Y. June 11, 2002) (court appointed special master to review seized materials for privilege and responsiveness where case presented exceptional circumstances that materials contained privileged

[6] Even if Dakota County's Electronic Crimes Task Force was "walled off" and not necessarily involved in the investigation of appellant's alleged wrongdoing, because appellant is a criminal defense attorney with 1,500-2,000 clients, there is the possibility that one or more of those clients were investigated by the electronic crime unit at some point.

information); *Gallego*, 2018 WL 4257967 (special master appointed by court over government's request for a "taint team")

Similarly, courts, including this Court, have found appropriate a trial court's review of documents by *in camera* review. *See O'Connor*, 287 N.W.2d 400; *In re Grand Jury Proceedings*, 33 F.3d 342 (4th Cir. 1994) (court affirmed the crime-fraud exception applied based on its *in camera* review of both the government's and the appellant's submissions of the contested documents); *see also Caldwell v. District Court of Denver*, 644 P.2d 26 (Col. 1982) (court can hold an *in camera* review of documents to determine whether they are privileged and if so, whether the crime-fraud exception applies); *Black v. United States*, 172 F.R.D. 511 (S.D.Fla. 1997).

The Department of Justice Manual and CCIPS guidelines for searching seized client files, computers, and electronic devices when privileged information is involved include three options for who should conduct the search: a privilege team, a judicial officer, or a special master. These guidelines specifically state that it should be a trustworthy third party who examines the computer to determine what is privileged and what is not. DOJ Manual at 9-13.420; *Searching and Seizing Computers*, CCIPS manual at 109. Given the importance of protecting privileged content, the DOJ's guidance requires that if a privilege team (or taint team) is to be used, it must include the equivalent of a special master or judicial officer.

Thus, a civilian forensic examiner employed by law enforcement, such as in appellant's case, is not sufficient. This person cannot reasonably discern what is protected under attorney-client privilege or attorney work product, particularly when the search was

so broad utilizing the names of the two clients, the detective involved, and other terms such as confidential informant, cooperating, confidential, and CI form. *See* Appellant's Addendum, A61-A66. And in fact, the forensic examiner did not discern what was privileged information, only what was relevant to the search terms. Regarding privileged or arguably privileged information, the DOJ guidelines provide that this information should be submitted to a special matter or judicial officer to make that determination. §9-13.420; CCIPS Manual at 109-110; *see also Ritchey*, 605 F.Supp. 3d at 902 (final determination of attorney-client privilege is reserved for the court). That certainly was not done in appellant's case, resulting in a violation of the attorney-client and work-product privileges.

Whether the Court determines that a special master is appointed or an *in camera* review be conducted by the court, it is essential that this Court direct that safeguards be put in place to protect privileged information when an attorney's office is searched and client files are seized.

## CONCLUSION

Given that the sanctity of the attorney-client privilege and work-product doctrine is the bedrock of our adversarial criminal justice system, the execution of search warrants on attorneys' client files, if necessary, requires significantly more protections than those employed in more traditional cases – and certainly more protections than what was done in appellant's case.

A healthy respect for the sanctity of the privilege requires a heightened particularity requirement for warrants purporting to authorize such searches. The warrant must have a specifically delineated scope and must mandate a careful and specific method of execution. Additionally, a neutral special master is required to ensure that even the most precisely worded and carefully executed warrant did not result in disclosure of privileged information. Anything less fails to afford the proper respect for the people protected by the attorney-client privilege. These safeguards will protect people who provide their attorneys with sensitive, personal information, under the more-than-reasonable assumption that no one other than their attorneys will ever see it.

The searches at issue here were unreasonable under the Fourth Amendment to the United States Constitution, under Article I, section 10 of the Minnesota Constitution, and under this Court's caselaw. Accordingly, amici curaie respectfully request that this Court rule in favor of appellant. In doing so, amici curiae respectfully request that the Court ensure that any future exceptional searches of this nature are governed by procedural

safeguards that will protect privileged information and innocent people who have done nothing more than consult with an attorney.

Dated: April 20, 2023

Respectfully submitted,

*ATTORNEYS FOR JOINTAMICI CURIAE*

**MINNESOTA BOARD OF PUBLIC DEFENSE**

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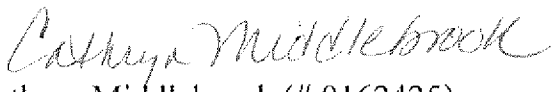

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A22-0468

STATE OF MINNESOTA

IN SUPREME COURT

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State of Minnesota,

Respondent,

vs.

**CERTIFICATE OF DOCUMENT LENGTH**

Kristi Dannette McNeilly,

Appellant,

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I hereby certify that this document conforms to the requirement of the applicable Rules, is produced with a Times New Roman, 13 pt. font, and the length of this document is 5,536 words. This document is prepared using Word Microsoft 365.

Dated: April 20, 2023

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