STATE OF MINNESOTA

IN SUPREME COURT

A21-0880

Court of Appeals Hudson, J.

In re Hope Coalition, Petitioner.

State of Minnesota,

Respondent,

vs.

Filed: July 13, 2022
Office of Appellate Courts

Kevin Maynard Conrad,

Respondent,

Hope Coalition,

Appellant.

Rana S. Alexander, Standpoint, Saint Paul, Minnesota; and Katherine S. Barrett Wiik, Saul Ewing Arnstein & Lehr LLP, Minneapolis, Minnesota, for appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Kerrie Kelly, Wabasha County Attorney, Wabasha, Minnesota, for respondent State of Minnesota.

Jennifer M. Shabel and Paul H. Grinde, Grinde & Dicke Law Firm P.A., Rochester, Minnesota, for respondent Kevin Maynard Conrad.

Robert Small, Executive Director, and Kelly O'Neill Moller and Adam E. Petras, Assistant Hennepin County Attorneys, Minneapolis, Minnesota, for amicus curiae Minnesota County Attorneys Association.

Michael P. Boulette, O. Joseph Balthazor, Jr., and Abby N. Sunberg, Taft Stettinius & Hollister LLP, Minneapolis, Minnesota, for amici curiae Minnesota Coalition Against Sexual Assault, Violence Free Minnesota, the Battered Women's Justice Project, and the National Crime Victim Law Institute.

S Y L L A B U S

1. Statutory privileges do not always give way, in a criminal proceeding, to the defendant's interest in the privileged material.

2. The sexual-assault-counselor privilege in Minnesota Statutes section 595.02, subdivision 1(k) (2020), does not permit disclosure of privileged records in a criminal proceeding, even for *in camera* review, without the consent of the victim.

Reversed.

O P I N I O N

HUDSON, Justice.

This case concerns how sexual assault counselors' statutory privilege under Minnesota Statutes section 595.02, subdivision 1(k) (2020), interacts with a criminal defendant's interests in a fair trial. Although appellant Hope Coalition invoked the sexual-assault-counselor privilege under section 595.02, subdivision 1(k) to prevent respondent Kevin Maynard Conrad's motion in his criminal prosecution seeking disclosure of any records concerning the alleged victim's counseling, the district court never addressed the privilege. Nevertheless, the court concluded that compliance with the subpoena to produce records protected by that privilege for *in camera* review was reasonable, and it denied Hope Coalition's motion to quash the subpoena. The court of

appeals agreed and denied Hope Coalition's petition for a writ of prohibition. Hope Coalition asks this court for relief.

We conclude that the district court's actions were unreasonable because the plain language of Minnesota Statutes section 595.02, subdivision 1(k), creates a privilege for sexual assault counselors that cannot be pierced in a criminal proceeding without the victim's consent. Accordingly, the district court's denial of Hope Coalition's motion to quash the subpoena seeking records protected by that privilege was unreasonable even for the purpose of *in camera* review and, as a result, unauthorized by law. We therefore grant the writ of prohibition.

FACTS

Respondent Kevin Maynard Conrad ("Conrad") is charged with second-degree criminal sexual conduct. *See* Minn. Stat. § 609.343, subd. 1(b) (2020) (sexual conduct when the complainant is at least 13 but less than 16 years of age and the actor is more than 48 months older than the complainant and in a current or recent position of authority over the complainant). The alleged victim is currently 15 years old. In a July 2019 interview with a detective, she made a report of repeated sexual conduct by Conrad, her grandfather, beginning in 2014 when she was eight years old. The alleged victim's mother and a sexual assault counselor with appellant Hope Coalition, a nonprofit organization supporting survivors of sexual assault, were present at the interview. The criminal complaint was filed in Wabasha County District Court later in July 2019.

Conrad filed a Motion for *In Camera* Review of Confidential and Privileged Records pursuant to *State v. Paradee*, 403 N.W.2d 640 (Minn. 1987). He asked the court

to order Hope Coalition "to produce any and all notes, memoranda, records, reports, or any other documentation" about the victim since 2014 for *in camera* review by the district court.[1] Because a Hope Coalition counselor was present at the detective's interview in 2019, Conrad argued that the organization "likely has notes . . . or other documentation concerning" the victim's allegations, and that he should therefore be permitted to have the district court review the records *in camera* to determine whether "any of the records are material and relevant to his defense." Assuming without knowing that the victim had seen a therapist, Conrad also asked the court to order the State to disclose the name of the victim's therapist and to order the as-yet-unknown therapist to produce all "notes, memoranda, records, reports, or any documentation" about the victim since 2014.

The State replied that Conrad failed to meet his requisite burden of showing that the information sought was specific and may plausibly relate to his guilt or innocence, in accordance with *Paradee*. The State emphasized that Conrad provided no proof that the information even existed or, if it did, that it would be material to his case. Referring to the motion as a "fishing expedition," the State contended that Conrad offered "no reliable basis for [his] assertions."

In response, Conrad relied on language from Hope Coalition's website advising sexual assault victims to seek safety, guidance from an advocate, and medical attention, and to take means to preserve evidence (e.g., wait to shower until after an examination).

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[1] *In camera* review means a hearing or review in the courtroom, hearing room, or chambers for which the general public is not admitted. After *in camera* review, the content of evidence and statements by the judge and counsel are held in confidence, and transcripts are sealed.

Conrad argued that this general advice "suggest[s] that the Hope Coalition advocates encourage a discussion about the specific events of the alleged assault." He then argued that the victim had likely received the advice, then discussed the alleged assaults with Hope Coalition, and that Hope Coalition would have kept records from any discussions, which could contain statements made by the victim that "may include contextualized facts, impeachment evidence, or inconsistent statements" useful for his defense.

At the October 30, 2019 hearing where the motion was considered, Conrad reiterated that because the victim met with a Hope Coalition counselor and a therapist around the time she spoke to law enforcement, it was possible that their records contained statements about the sexual assault allegations. This possibility, he argued, fulfilled his burden to make a plausible showing that there is "material and relevant" information to his defense in the files.

The district court granted Conrad's motion on December 2, 2019, and ordered the victim's therapist and Hope Coalition to produce the records for *in camera* review by the district court within 30 days. The court agreed with Conrad's argument that Hope Coalition's presence at the victim's interview with law enforcement meant that it had likely already interacted with the victim. And the court found that the likely existence of records about those interactions amounted to a plausible showing that the alleged confidential statements could be material and favorable to the defense. The district court further found that the information sought from Hope Coalition and the therapist—all records, notes, and memoranda related to the victim since 2014—was reasonably specific.

In a letter to the court, Hope Coalition asked the court to reconsider the motion. It made several arguments in support of the motion. Most relevant here, Hope Coalition argued that, as a nonparty, it was denied an opportunity to argue against releasing the records. And the Coalition specifically asserted that it has "an absolute privilege" under Minnesota Statutes section 595.02, subdivision 1(k), protecting the victim's counseling records from disclosure of any type.

The district court denied Hope Coalition's request for reconsideration and maintained its order granting Conrad's motion for *in camera* review. After the court received no files from Hope Coalition in response to its order, Conrad filed an application for an Order to Show Cause for Hope Coalition's failure to produce the records and sought relief, including dismissal of the complaint. The court held a hearing to discuss the "fact that the Court has not received any records," except for the therapist's name from the State.[2] Hope Coalition wrote to the court before the hearing to confirm whether it needed to appear to support its position, noting that it had not received any directive to do so. The court did not respond to Hope Coalition before the hearing.

At the hearing, the State emphasized that it had complied with its obligation to produce the therapist's name and argued that the court should not dismiss the complaint based on Hope Coalition's failure to comply, which is beyond the State's control. Conrad contended that Hope Coalition "knowingly and willfully failed to comply with the Court's order," because "they disagree" with it, not because it is "burdensome" or "because there

[2] There was some debate at the hearing over whether the therapist had yet sent over the records. The therapy records were produced soon afterwards on February 26, 2020.

is some other adequate excuse under law." Hope Coalition, having received no response to its inquiry about whether it needed to appear, did not do so.

Shortly after the hearing, the district court ordered Hope Coalition to show cause why it was not in contempt for failing to produce the records. The court did not hold the show-cause hearing until December 2020. In the interim, the court of appeals released its opinion in *In re Program to Aid Victims of Sexual Assault*, 943 N.W.2d 673 (Minn. App. 2020), clarifying that a subpoena—after a motion for a court order—is the proper method, under the Minnesota Rules of Criminal Procedure, for a criminal defendant to obtain production of privileged or confidential records about a victim. At the Order to Show Cause hearing in this case, Hope Coalition argued that, under *Program to Aid Victims of Sexual Assault*, it could not be held in contempt of court without a subpoena. Conrad then moved the court to issue a subpoena, which the district court granted.

Shortly thereafter, Hope Coalition moved the district court to quash the subpoena or, in the alternative, to stay the court's decision to allow for further review. It reiterated that the subpoena is an "unwarranted interference with the privileged relationship between the advocate and sexual assault survivor." In response, Conrad argued that the "sexual-assault-counselor privilege . . . must give way to Mr. Conrad's right to obtain all relevant evidence that might help his defense." Conrad also contended that Hope Coalition provided no evidence that compliance with the subpoena would be unreasonable. Conrad further argued that Hope Coalition was attempting to relitigate the issue of whether the information sought met the requirements in *Paradee* (that it would be material and helpful

to the defense), although Conrad did acknowledge that Hope Coalition had been denied the opportunity to advocate on its behalf when the issue was initially litigated.

The district court held a hearing on the motion to quash. After applying the factors outlined in *In re B.H.*, 946 N.W.2d 860 (Minn. 2020), the court denied the motion.[3] It found, consistent with its previous findings, that the records sought were "likely to be relevant and material to the defense." It also found that Conrad needed the information to "determine what the victim has said about the occurrences that led to the charges." The court further found that the burden on Hope Coalition to produce the records is "minimal":

> It is a matter of checking their records and if they have any, delivering them to the Court. While the Court acknowledges the negative impact on the victim's privacy by having the records produced, the Court is satisfied that the *In Camera* review will provide a sufficient safeguard to protect potentially-sensitive victim information that may be contained in the records.

The court did not make any findings regarding the statutory privilege raised by Hope Coalition, nor did it otherwise address the privilege, although the court acknowledged that there would be a "negative impact on the victim's privacy."

In response, Hope Coalition filed a Petition for Writ of Prohibition with the court of appeals on July 14, 2021, seeking to prohibit the Wabasha County District Court from requiring it to disclose the records to the district court for *in camera* review. It asked the court of appeals to determine whether the district court "exceeded its authority by ordering

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[3] In *B.H.*, we held that district courts should determine whether compliance with the subpoena would be unreasonable based on a totality-of-the-circumstances test that considers factors including, but not limited to, the defendant's need for the records, whether the records are otherwise procurable, the admissibility and usefulness of the records, whether the request was made in good faith and is not a fishing expedition, and the burden on the producing party, including the victim's privacy interests. 946 N.W.2d at 868–69.

the release of a non-party's confidential and privileged documents for *in camera* review." Conrad responded, arguing that the district court did not abuse its discretion when it found that it was not unreasonable for Hope Coalition to comply with the subpoena.

The court of appeals issued an order denying the writ of prohibition on August 10, 2021. Because Hope Coalition undisputedly fulfilled two of the three requirements for issuing the writ of prohibition, the court of appeals concluded that the only open question was whether the district court's refusal to quash the subpoena was unauthorized by law. Accordingly, it evaluated whether it was unreasonable for Hope Coalition to comply with the "properly issued subpoena" (the standard of review for evaluating a motion to quash a subpoena). Without further explanation, the court of appeals concluded that Hope Coalition "has not identified any persuasive reason why it was unreasonable to require it to comply." Like the district court, the court of appeals did not address whether the information was privileged.

We granted Hope Coalition's petition for review.

ANALYSIS

We review the court of appeals' decision to deny a writ of prohibition de novo. *In re Leslie v. Emerson*, 889 N.W.2d 13, 14 (Minn. 2017). A writ of prohibition is a remedy of last resort. *See, e.g.*, *State v. Turner*, 550 N.W.2d 622, 626 (Minn. 1996) ("[The purpose of the writ is] to correct an error of law in the [district] court where no other adequate remedy is available to the appellant and enforcement of the trial court's order would result in irremediable harm."). Three elements must be met for the writ to issue: "(1) an inferior court or tribunal must be about to exercise judicial or quasi-judicial power; (2) the exercise

of such power must be unauthorized by law; and (3) the exercise of such power must result in injury for which there is no adequate remedy." *B.H.*, 946 N.W.2d at 866 (quoting *Minneapolis Star & Trib. Co. v. Schumacher*, 392 N.W.2d 197, 208 (Minn. 1986)). We also review questions of statutory interpretation de novo. *Mittelstaedt v. Henney*, 969 N.W.2d 634, 638 (Minn. 2022).

I.

This case concerns the interaction between the statutory sexual-assault-counselor privilege and the interests of criminal defendants. Hope Coalition argues that the statutory sexual-assault-counselor privilege protects its records from disclosure, notwithstanding our case law permitting disclosure of privileged records for *in camera* review under certain circumstances. Conrad, by contrast, contends that his motion for the sexual-assault-counselor records must be analyzed under the balancing test for *in camera* review that we established in *Paradee* by adopting the U.S. Supreme Court's approach in *Pennsylvania v. Ritchie*, 480 U.S. 39, 57–61 (1987); *see Paradee*, 403 N.W.2d at 642. He further argues that his due process rights require that the sexual-assault-counselor privilege must give way at least enough to allow him to seek *in camera* review of the privileged materials.

A.

Because the parties dispute the meaning of the statutory sexual-assault-counselor privilege in Minnesota Statutes section 595.02, subdivision 1(k), we begin with statutory interpretation. The purpose of statutory interpretation is to determine the Legislature's intention by reading the statute as a whole. *Christianson v. Henke*, 831 N.W.2d 532, 536–37 (Minn. 2013). We look first at the "plain and ordinary meaning" of the statute's

language to determine whether it is ambiguous. *Id.* If we conclude that "the statute is 'plain and unambiguous,' we will 'not engage in any further construction.' " *Mittelstaedt*, 969 N.W.2d at 639 (quoting *State v. Townsend*, 941 N.W.2d 108, 110 (Minn. 2020)).

The sexual-assault-counselor privilege in section 595.02, subdivision 1(k), reads in full:

> Sexual assault counselors *may not* be allowed to disclose any opinion or information received from or about the victim without the consent of the victim. However, a counselor may be compelled to identify or disclose information in investigations or proceedings related to neglect or termination of parental rights if the court determines good cause exists. In determining whether to compel disclosure, the court shall weigh the public interest and need for disclosure against the effect on the victim, the treatment relationship, and the treatment services if disclosure occurs. Nothing in this clause exempts sexual assault counselors from compliance with the provisions of sections 626.556 and 626.557.
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> "Sexual assault counselor" for the purpose of this section means a person who has undergone at least 40 hours of crisis counseling training and works under the direction of a supervisor in a crisis center, whose primary purpose is to render advice, counseling, or assistance to victims of sexual assault.

Minn. Stat. § 595.02, subd. 1(k) (emphasis added).[4] Hope Coalition and Conrad disagree over the plain meaning of "*may not* be allowed to disclose" in the first sentence. Hope Coalition argues that "may not" has a common and ordinary meaning of being disallowed or not permitted. In contrast, Conrad argues that because "may" is considered permissive (as opposed to "shall," which is mandatory), *see* Minn. Stat. § 645.44, subds. 15–16 (2020),

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[4] The "provisions of sections 626.556 and 626.557" referenced in subdivision 1(k) concern the reporting of maltreatment of minors and vulnerable adults, respectively, and do not bear on the issues in the context of this criminal proceeding.

"may not" shows that the Legislature intended that sexual assault counselors may be required to disclose in some situations.[5]

We agree with Hope Coalition's interpretation. If "may not" means that disclosure is permissive and *may* sometimes be required, as Conrad proposes, then "may not" essentially means the same thing as "may." Each would be permissive. "May" is indeed permissive, but "not" is "used as a function word to make negative a group of words or a word." *Not*, Merriam Webster's Collegiate Dictionary, 794 (10th ed. 1996). Other state legislatures have adopted this exact approach and defined "may not" as synonymous with "shall not," even after defining "may" as permissive and "shall" as mandatory. *E.g.*, Tex. Gov't Code Ann. § 311.016(5) (West 2021) (" 'May not' imposes a prohibition and is synonymous with 'shall not.' "); Md. Code Ann., General Provisions § 1-203 (West 2022) ("[T]he phrase 'may not' has a mandatory negative effect and establishes a prohibition."). In sum, "may" undoubtably signals permission, but in the context of Minnesota Statutes section 595.02, subdivision 1(k), the plain meaning of "may not" revokes or negates that permission.

The structure of the sexual assault counselors' privilege in the statute further shows that "may not" is prohibitive. Subdivision 1(k) begins with a broad grant of protection—sexual assault counselors "may not be allowed to disclose" records without the victim's consent. This broad grant is followed by a specific exception to the privilege for investigations and proceedings in cases involving neglect or termination of parental rights,

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[5] The Minnesota Legislature has defined "may" and "shall," but it has not defined "may not," "shall not," or "not." *See* Minn. Stat. § 645.44, subds. 15–16.

for which disclosure "may be compelled . . . if the court determines good cause exists." Elaborating on that narrow exception, the statute then specifies how the court should determine that good cause exists for the information to be disclosed. *Id.*

If the Legislature intended other exceptions to apply, the Legislature could have also listed them. Indeed, it carved out broader exceptions in other privileges within the same subdivision, including the immediately following privilege: "A domestic abuse advocate may not be compelled to disclose any opinion or information received from or about the victim without the consent of the victim *unless ordered by the court*." Minn. Stat. § 595.02, subd. 1(l) (2020) (emphasis added). And in the spousal privilege, the Legislature specifically stated that the privilege does not apply to certain criminal proceedings—showing, once again, that the Legislature contemplated allowing (and disallowing) disclosure in criminal contexts and wrote explicit exceptions to privileges accordingly. *See* Minn. Stat. § 595.02, subd. 1(a) (2020).

Accordingly, we hold that the plain meaning of section 595.02, subdivision 1(k), prohibits sexual abuse counselors from disclosing the privileged records unless the victim consents or the court finds good cause in matters involving neglect or termination of parental rights. Minn. Stat. § 595.02, subd. 1(k). Sexual assault counselors, therefore, are statutorily prohibited from disclosing privileged records in a criminal proceeding without the victim's consent. The district court may not order otherwise.[6]

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[6] Although the issue is not before us because this privilege cannot give way for *in camera* review, we are nevertheless concerned by the manner in which the district court applied the *Paradee* standard in this matter. The record shows that the defendant offered almost no support for his motion for *in camera* review of the records held by HOPE

B.

Despite the plain meaning of section 595.02, subdivision 1(k), Conrad argues that the privilege must nevertheless give way because of his due process rights to a fair trial. He further contends that concluding that the plain language of section 595.02, subdivision 1(k), removes the privilege from the scope of the balancing test for *in camera* review effectively overturns *Paradee*. We disagree.

In *Paradee*, we adopted the *Ritchie* balancing test for *in camera* review in a case when the defendant sought confidential (not privileged) records held by a state entity. *Paradee*, 403 N.W.2d at 641–42. In *Ritchie*, the U.S. Supreme Court addressed the interaction between victims' rights and privileges and criminal defendants' "interest . . . in ensuring a fair trial." *Ritchie*, 480 U.S. at 57–61. Its analysis began with statutory interpretation of the invoked privilege. *Id.* at 57. Reasoning that the Pennsylvania statute at issue explicitly contemplated "some use of [Child and Youth Services] records in judicial proceedings" in "certain circumstances . . . *by court order*," *id.* at 58 (emphasis added), the Court concluded that *in camera* review best balanced the victim's privacy interest and the defendant's interests. *Id.* at 60. It then established a test for district courts to determine under what circumstances they could order disclosure, which required the defendant to request "specific information" and "argue in favor of its materiality." *Id.*

Coalition and the victim's therapist. We reiterate that *Paradee* requires the defendant to make a plausible showing that the records will be material and *favorable* to the defense. *Paradee*, 403 N.W.2d at 641; *see also State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992). "Fishing expeditions" are never sufficient.

By establishing the test for *in camera* review, the Court recognized that the public interest in protecting the victim's confidential information—which was held by Pennsylvania's Child and Youth Services agency—did not override the defendant's interest in obtaining evidence material and favorable to their defense. *Id.* Notably, the Court even acknowledged that other privileges—such as Pennsylvania's sexual-assault-counselor privilege—would likely *not* be subject to the test for *in camera* review, as they did not include the same legislative carve-out for disclosure by court order in "certain circumstances":

> Although we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances. This is not a case where a state statute grants [Child and Youth Services] the absolute authority to shield its files from all eyes. *Cf.* 42 Pa.Cons.Stat. § 5945.1(b) (1982) (unqualified statutory privilege for communications between sexual assault counselors and victims). Rather, the Pennsylvania law provides that the information shall be disclosed in certain circumstances, including when [Child and Youth Services] is directed to do so by court order. Pa.Stat.Ann., Title 11, § 2215(a)(5) (Purdon Supp. 1986). Given that the Pennsylvania Legislature contemplated *some* use of [Child and Youth Services] records in judicial proceedings, we cannot conclude that the statute prevents all disclosure in criminal prosecutions. In the absence of any apparent state policy to the contrary, we therefore have no reason to believe that relevant information would not be disclosed when a court of competent jurisdiction determines that the information is "material" to the defense of the accused.

Id. at 57–58. By comparing the Child and Youth Services statute—which is not an "absolute authority"—to the sexual assault counselors' "unqualified statutory privilege," the Court recognized that legislatures can create qualified and unqualified privileges.

We adopted the *Ritchie* balancing test for *in camera* review in *Paradee*. But because *Paradee* involved confidential—but not privileged—records, we did not need to

engage in statutory interpretation, as the Court did in *Ritchie*. *See id.* at 58–60. After *Paradee*, we have since applied the balancing test to evaluate whether privileged medical records should be disclosed in *State v. Hummel*, 483 N.W.2d 68 (Minn. 1992), *State v. Reese*, 692 N.W.2d 736 (Minn. 2005), and *State v. Evans*, 756 N.W.2d 854 (Minn. 2008). Unlike the U.S. Supreme Court in *Ritchie*, we have never evaluated the language of a statutory privilege to determine whether the Minnesota Legislature contemplated disclosure.

Without analysis, however, we have reiterated in *dicta* a statement we made pre-*Ritchie*—that all privileges must sometimes give way to a criminal defendant's right to confront their accuser.[7] *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn. 1984); *see also Hummel*, 483 N.W.2d at 71. Conrad asserts that same proposition here. But we have never applied our "judicial mind" to whether this confrontation-right proposition is true after *Ritchie*. *See In re Krogstad*, 958 N.W.2d 331, 337 (Minn. 2021) (quoting *Fletcher v. Scott*, 277 N.W. 270, 272 (Minn. 1938)) ("[S]tare decisis applies only when 'the judicial mind has been applied to and passed upon the precise question.' ").

In *Ritchie*, the Supreme Court declined to hold that the defendant's right to confront his accuser under the U.S. Constitution's Confrontation Clause granted access to privileged records. And we have also held that the "core" of the defendant's confrontation right is

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[7] Our most recent *Paradee* case, *B.H.*, did not reiterate this proposition. In *B.H.*, we approved of using the *Paradee* test to evaluate disclosure of a victim's private but unprivileged records against the defendant's "interest" in them, which is exactly the scenario *Ritchie* and *Paradee* are intended to address. *B.H.*, 946 N.W.2d at 867–71. Our decision in *B.H.* provides no guidance, however, as to the role of statutory privileges in this context.

"the ability to cross-examine witnesses." *State v. Hawkinson*, 829 N.W.2d 367, 377 (Minn. 2013) (citing *Crawford v. Washington*, 541 U.S. 36, 50 (2004)). Neither we nor the U.S. Supreme Court, therefore, has ever held that the Confrontation Clause right—rooted in the ability to cross-examine witnesses—extends to a defendant's access to privileged information.

In fact, at no point have we or the Supreme Court ever held that a criminal defendant has *any* constitutional right to access privileged documents. Criminal defendants do not have a general constitutional right to discovery. *Hummel*, 483 N.W.2d at 71 (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)). Nor does the doctrine established by *Brady v. Maryland*, 373 U.S. 83 (1963), requiring the prosecution to turn over exculpatory evidence, articulated in Minnesota Rule of Criminal Procedure 9, require disclosure of privileged or confidential materials held by *third* parties. By contrast, *Brady* and Rule 9 apply only to evidence held by the *State*. *See B.H.*, 946 N.W.2d at 869 (holding that the prosecution's Rule 9 obligations are inapplicable because the dispute concerns third-party records arising under Rule 22.01).

Therefore, when a statutory privilege protects the records sought, the threshold inquiry must be whether that privilege may be pierced in that proceeding. Here, based on the plain-language interpretation of the sexual-assault-counselor privilege in section 595.02, subdivision 1(k), we conclude that the privilege cannot be pierced by *in camera* review in this criminal proceeding.

C.

Conrad argues that application of the statutory privilege here violates his constitutional right to confront his accuser and his due process right to present a complete defense. We disagree. We certainly recognize that even an unpierceable statutory privilege must yield to a defendant's constitutional rights if nondisclosure would violate those rights. For the following reasons, we conclude that Conrad's constitutional rights are not violated by nondisclosure of the privileged records at issue here.[8]

To determine whether nondisclosure based on a statutory privilege violates a criminal defendant's constitutional right, we weigh the state's interest in that privilege against the right. *See Ritchie*, 480 U.S. at 60 (weighing Pennsylvania's compelling interest in protecting the privileged information from disclosure against the defendant's due process rights). When the defendant's constitutional right does not outweigh a compelling interest of the state, the privilege remains unpierced. We therefore begin by examining the state's interest in the sexual-assault-counselor privilege.

A sexual assault counselors' primary purpose is to provide advice, support, and assistance to victims of sexual assault. Confidentiality is key to fulfilling this purpose. To seek a counselor's assistance, victims—who may face serious safety concerns and other vulnerabilities—must feel comfortable sharing personal information. Failure to ensure

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[8] We note that courts in other jurisdictions have reached the same conclusion when faced with similar claims. *See, e.g.*, *In re Crisis Connection, Inc.*, 949 N.E.2d 789, 802 (Ind. 2011) (holding that an analogous victim-counselor privilege was "absolute" and did not violate the defendant's constitutional rights); *Commonwealth v. Wilson*, 602 A.2d 1290, 1297 (Pa. 1992) (concluding that an analogous privilege preventing disclosure in a criminal proceeding did not violate the defendant's constitutional rights).

victim privacy and confidentiality could therefore result in a chilling effect on the willingness of victims to seek support. Even *in camera* review of sexual-assault-counselor records intrudes upon the victim's privacy and harms the vital confidentiality between the victim and counselor.

The State, therefore, clearly has a compelling interest in protecting the privacy of sexual assault victims. We further conclude that the sexual-assault-counselor privilege in section 595.02, subdivision 1(k), is narrowly tailored to achieve that compelling interest. By preventing counselors from disclosing privileged records unless the victim consents, except in specific circumstances pertaining to child welfare, the privilege effectively and narrowly protects victim privacy and confidentiality. *See* Minn. Stat. § 595.02, subd. 1(k).

Conrad nevertheless contends that his constitutional rights outweigh this compelling interest, invoking his right to confront his accuser and his due process right to present a complete defense. But, as we have already explained, the crux of the right to confront one's accuser secures the "*opportunity of cross-examination*," not limitless pretrial discovery. *Delaware v. Fensterer*, 474 U.S. 15, 19–20 (1985) (quoting *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974)). Here, the sexual-assault-counselor privilege does not prevent Conrad from cross-examining the victim or other state witnesses at trial; it only blocks access to certain records in pretrial discovery. Accordingly, Conrad's right to confrontation can be satisfied without disclosure of the privileged records.

Likewise, Conrad's due process right to present a complete defense does not grant him access to the privileged records. We are informed by the due process analysis in *Ritchie*, in which the Supreme Court concluded that the due process clause supported

in camera review of the privileged records for two reasons. *See Ritchie,* 480 U.S. at 56–58. First, because the record-holder was a state agency (Pennsylvania's Child and Youth Services), the Supreme Court grounded its analysis in *Brady*, which obligates the government to share material and favorable evidence with the defense under a due process theory. *Id.* at 57. Second, the *Ritchie* Court reasoned that because the statutory privilege at issue explicitly contemplated disclosure by court order, that statutory exception weakened the state's interest against nondisclosure. *Id.* at 57–58. The Court suggested, however, that a privilege that did not contemplate disclosure would weigh more heavily. *Id.*

Here, the sexual-counselor-counselor privilege is distinguishable from the privilege at issue in *Ritchie* in each respect. First, Hope Coalition, a private, nonprofit organization, holds the privileged records in this case—not a state agency, which could implicate *Brady* obligations. Second, unlike the privilege at issue in *Ritchie,* the plain language of the sexual-assault-counselor privilege *prohibits* disclosure. Accordingly, the State's interest in preventing disclosure weighs heavily against the defendant's due process right. We therefore conclude that Conrad's due process right is not violated by nondisclosure under the sexual-assault-counselor privilege.

In sum, the State has a compelling interest in protecting a victim's privacy through the sexual-assault-counselor privilege. Because that compelling interest is not outweighed by Conrad's constitutional rights, the privilege cannot be pierced.

II.

The only disputed element required for a writ of prohibition to issue here is whether the district court was unauthorized by law when it denied Hope Coalition's motion to quash the subpoena. Whether the district court's denial was unauthorized by law depends entirely on whether it was unreasonable for Hope Coalition to comply with the subpoena. *See B.H.*, 946 N.W.2d at 868 (establishing a "totality-of-the-circumstances test" to determine whether compliance with a subpoena to produce privileged or confidential information for *in camera* review would be unreasonable, such that a writ of prohibition should issue).

Because the sexual-assault-counselor privilege under section 595.02, subdivision 1(k), cannot be pierced in criminal proceedings, it was clearly unreasonable for Hope Coalition to comply with the subpoena to produce records that it was expressly forbidden by statute from disclosing. The district court was therefore unauthorized by law when it denied Hope Coalition's motion to quash the subpoena. Consequently, we hold that the writ of prohibition issues.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and issue the writ of prohibition.

Reversed.