No. A22-0468

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

v.

KRISTI DANNETTE MCNEILLY,

Appellant.

BRIEF OF AMICUS CURIAE TONY WEBSTER

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INTRODUCTION[1]

This case involves police executing a search warrant at a criminal defense attorney's home office while investigating that attorney for a suspected crime. During this search-and-seizure, law enforcement looked through the attorney's paper client files and then with a second search warrant forensically imaged her entire computer, performing broad keyword searches—like 'confidential', 'Ryan', 'informant', 'password', and 'Drug Task Force'—across what the attorney estimated to be 1,500 client files.

The search warrants imposed no restrictions or procedural safeguards to protect the attorney-client privilege or work product doctrine in the attorney's files, exposing confidential materials to the adverse eyes of the state. It is well recognized that client files belong to the client; therefore, the search violated the constitutional rights of the attorney's clients, including through the right against unreasonable searches and seizures and the right to effective assistance of counsel.

Four years after the search, it's unclear to this amicus what precautions are today being taken to protect these client files: are the files still sitting on a law enforcement server, commingled with other cases? Who is monitoring

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[1] Mr. Webster certifies pursuant to Minn. R. Civ. App. P. 129.03 that no person or entity other than Mr. Webster and his counsel of record authored or made monetary contributions to the preparation and submission of this brief.

access to these files? If there's a data breach, who will be told, and who will be responsible? We should know these answers; appellant's clients should know these answers.

When agents of the state seize an attorney's client files with the power of a court order, the attorney is stripped from the practical ability to comply with the Rules of Professional Conduct in safeguarding their client's confidential material. The Court of Appeals' ruling abdicated the Minnesota Judicial Branch's responsibilities by resting all these duties on police, thus surrendering its authority to regulate the practice of law in this state.

The Court should create a new rule for searches-and-seizures of attorney-client privileged material that mandates the highest security and segregation protocols in the capturing of evidence, prohibits law enforcement from looking through the attorney-client privileged documents, and that requires the appointment of a highly qualified, independent, and neutral special master who, under court supervision, shall act to protect the rights and privileges of the lawyer and their clients while undertaking a court's search warrant orders.

AMICUS CURIAE'S INTEREST

Amicus curiae Tony Webster is a published journalist who on occasion works with attorneys to represent him in upholding his First Amendment

rights as a journalist, resisting government demands for communications with sources, and in enforcing his rights to access public government data.

Mr. Webster has communicated with attorneys for the purposes of pre-publication attorney review of news stories, and in reviewing material subject to government demands. Mr. Webster has at various times had source relationships with police officers, prosecutors, criminal defense attorneys, judges, and victims of crime. If the search warrants at issue in this case occurred on a journalist's attorney's client files, it would risk exposing the identity of sources protected by news media shield laws like the Minnesota Free Flow of Information Act, thus harming the journalist's professional reputation while placing their sources in jeopardy.

ARGUMENT

I. THE EXCEPTIONAL ROLE OF ATTORNEYS IN OUR SOCIETY MANDATES A ROBUST ATTORNEY-CLIENT PRIVILEGE

The public policy purpose of maintaining a robust attorney-client privilege is clear. In criminal cases, the privilege serves the interests of defendants in maintaining their constitutional rights and in ensuring a fair trial. But the privilege is also critical to other Minnesota legal consumers, who entrust their attorneys with sensitive information on the gravest matters of their life: marital and child custody disputes, whistleblower actions, asylum and immigration matters, issues of state and national security, controversial

business dealings, regulatory compliance, tax disputes, campaign finance and political activities, and more. The news media also turns to attorneys to fulfill their First Amendment role in serving as a watchdog of powerful government interests, and to resist governmental censorship and demands for disclosure of sources. These interests must be fiercely protected from government intrusion.

The attorney-client relationship requires clients disclosing in confidence their most intimate, unpleasant, and embarrassing facts to receive informed and effective legal advocacy.[2] Informed and accurate legal advice—which is only possible through an open dialogue between attorney and client—assures society of general obedience of the law:[3] with the advice of an informed attorney, clients "will choose among lawful alternative courses of action advised by the lawyer," and through such privileged communication, a client's "[c]onduct will be channeled along law-abiding lines and the goals of the adversary system will be advanced by sound representation of all parties".[4]

"If one recognizes that [a lawyer's] professional responsibility requires that an advocate have full knowledge of every pertinent fact, it follows that he must seek the truth from his client, not shun it. This means that he will have

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[2] Roger C. Cramton & Lori P. Knowles. *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63 (1998).

[3] Avidan Y. Cover. *A rule unfit for all seasons: monitoring attorney-client communications violates privilege and the Sixth Amendment*, 87 CORNELL L. REV. 5 (2002).

[4] Cramton et al. at 102–103.

to dig and pry and cajole … the truth can be obtained only by persuading the client that it would be a violation of a sacred obligation for the lawyer ever to reveal a client's confidence".[5]

The attorney-client privilege also serves the efficiency interests of the court, as "litigation is avoided if all facts are unreservedly placed before the legal adviser, and it is increased if the client cautiously avoids any statement except that which he thinks will support his cause".[6]

II. THE COURT OF APPEALS' OPINION THREATENS THE FREEDOM OF THE PRESS

Journalists often rely on attorneys in fulfilling their First Amendment rights in reporting on government activity, including reporting on actions taken by law enforcement, prosecutors, judges, and defense counsel. The prospect of these privileged communications falling into the hands of law enforcement or prosecutors is not constitutionally tolerable.

One way the news media works with lawyers is pre-publication review, in which an attorney reviews an unpublished story and assesses any risks to the journalist and avenues for mitigation, particularly over concerns of libel. In these situations, the communication between the attorney and journalist

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[5] Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

[6] Max Radin, *The Privilege of Confidential Communication between Lawyer and Client*, 16 CALIF. L. REV. 6, pp. 487–497 (1928).

client is protected by the attorney-client privilege, and the unpublished reportorial material is privileged from disclosure by the Minnesota Free Flow of Information Act, Minn. Stat. § 595.021, *et seq*.

Attorneys also advocate for the interests of the press by assisting journalists with responding to subpoenas. In responding to a subpoena, an attorney might receive and review a journalist's documents to evaluate whether the documents must be produced, or are instead protected by the news media privileges of the First Amendment, common law, or the Minnesota Free Flow of Information Act. If police execute a search warrant at the attorney's home or office, documents identifying protected sources could thus fall into the hands of police and prosecutors. Journalists like Mr. Webster—who has counted police officers, prosecutors, criminal defense attorneys, judges, and victims of crime among his confidential sources in the course of his reporting—would face professionally devastating consequences in an improper disclosure, and it could expose the identities of a journalist's confidential sources to legal, professional, reputational, and physical harm.

Just last year, reporters from the *Star Tribune* and *Minnesota Reformer* received subpoenas for testimony and unpublished journalistic material from the City of Minneapolis.[7] These news organizations retained counsel to move

[7] J. Patrick Coolican, *Minnesota Reformer, Star Tribune fighting city subpoena*, MINNESOTA REFORMER, Apr. 13, 2022. https://

to quash, which surely involved privileged discussions, and possibly involved the exchange and review of material protected by news media privileges. These journalists' counsel argued that compelling their testimony through a subpoena "would jeopardize not only their ability to effectively do their jobs as reporters for *Star Tribune* and the *Minnesota Reformer*, but also their reputation among their readers and sources—all of whom place their trust in these journalists".[8] For these same reasons, a journalist's communications with their counsel falling in the hands of the government risks jeopardizing the independence of the press, journalists' professional reputations, and their sources.

III. THE RIGHTS OF AN ATTORNEY'S CLIENTS ARE VIOLATED WHEN LAW ENFORCEMENT FREELY SEARCHES AN ATTORNEY'S CLIENT FILES

An attorney's clients have many recognizable rights in and to their client files. *First*, attorneys are an extension of the client; acting with agency, attorneys have a duty of loyalty, an obligation to abide by their clients' decisions, and they must consult with their clients as to the means by which their goals should be pursued.[9] *Second*, Minnesota's Rules of Professional Conduct and ethics guidance confirm that an attorney's client files belong to

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minnesotareformer.com/2022/04/13/minnesota-reformer-star-tribune-fighting-city-subpoena/.

[8] *Tirado v. City of Minneapolis, et al.*, No. 20-cv-1338 (JRT/JFD), ECF No. 172 (Apr. 8, 2022).

[9] Minn. R. Prof. Cond. 1.2(a).

the client.[10] Indeed, one of the prosecution's witnesses in this case—a practicing criminal defense attorney—testified that "[t]he file always belongs to the client" (T. 458:21).[11] This includes documents provided to a lawyer by a client, court filings, executed instruments, correspondence connected to the representation, and discovery or evidentiary exhibits.[12] *And third,* clients of attorneys have a statutory right to documents in the possession of their attorneys, enforceable through the courts, and punishable by contempt.[13]

It thus follows that an attorney's client continues to enjoy all rights and privileges in the contents of their client files in the possession of their attorney as if those files were in their own home. This includes by way of the attorney-client privilege; work product doctrine; other privileges such as the marital communications privilege, physician-patient privilege, or news media

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[10] Minn. R. Prof. Cond. 1.15(c)(4) (requiring attorneys to deliver to the client their property upon request), 1.16(d) (requiring attorneys to return client papers and property upon termination of representation), 1.16(e)(2) (describing that client papers and property includes expert opinions and other materials with evidentiary value), and 1.16(g) (disallowing the conditioning of returning client papers and property on payment).

[11] "T" refers to the trial transcript.

[12] *Id.*, *and see* Martin Cole, *Client Files: The ABA Weighs In, Bench & Bar of Minnesota*, 2015, http://lprb.mncourts.gov/articles/Articles/Client%20Files%20the%20ABA%20 Weighs%20In.pdf; American Bar Association, Formal Opinion 471: *Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled*, 2015, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_471.authcheckdam.pdf.

[13] Minn. Stat. § 481.14.

privileges; but also necessarily includes constitutional rights against unreasonable searches and seizures and the right to assistance of counsel.

a. THE WARRANTS VIOLATED THE ATTORNEY-CLIENT PRIVILEGE

When police sought the first search warrant on February 26, 2019 (the "First Warrant," A39–A50), they made the Court aware in the application that the target of the search was a practicing criminal defense attorney (A40, A43). Even so, the Court authorized the search and seizure of all of the attorney's "[c]omputers such as laptops, desktops, and or towers," "electronic devices which could contain or access files held remotely," and her entire "[m]obile phone" (A46). While the affidavit in support of the application for the First Warrant expresses 'sensitivity' to the fact that appellant is an attorney, it merely stated that law enforcement "will not retain or disclose files not related to this investigation" (A43).

But first, police *did* retain files unrelated to the investigation. Their forensic examiner testified to making a "bit for bit copy of all the data on [appellant's] device, so [police would] have an exact copy" (H. 141).[14] *Second*, despite law enforcement's statements of intent in the affidavit supporting the application for the search warrant, the warrant itself failed to impose any limitations or procedures whatsoever (A46–A48). In fact, it fails to even

[14] Citations marked "H." refer to the June 26, 2020 motion and evidentiary hearing transcript.

acknowledge that the target of the search is an attorney. *Third*, even considering law enforcement's statement of intent, allowing police to look at attorney-client privileged material so long as they do not "disclose" it to others is insufficient to protect the privilege; the privilege is violated upon the exposure to a third-party, not upon that third-party's further dissemination.

When police sought the second search warrant on March 5, 2019 (the "Second Warrant," A51–A60), they again informed the Court the search was of a practicing criminal defense attorney's computer and that "other client records may be encountered" (A52, A55–A56). The detective applying for the warrant stated that "the Dakota County Electronics *[sic]* Crimes Unit *[sic]* personal *[sic]* only disclose files related to … documents pertaining to [the alleged victims]" (A56). But the Dakota County Electronic Crimes Task Force is organized under the sheriff's office, and according to their website they have "both licensed and civilian investigators" who "help[] with criminal investigations" to "solve crimes and assist in successful prosecutions," "analyz[ing] more than 400 cellphones and more than 70 computers every year".[15] There is a risk that the same investigator has or will come across one of appellant's 1,500 clients, and once privileged material is seen, it cannot be

[15] Dakota County Sheriff's Office, *Dakota County Electronic Crimes Task Force*, https://www.co.dakota.mn.us/Government/Sheriff/SpecialtyUnits/Pages/default.aspx.

unseen. But regardless of what police expressed they would do, this warrant, too, failed to impose any restrictions or procedures to protect the attorney-client privilege (A58–A59).

b. THE WARRANTS WERE UNCONSTITUTIONALLY OVERBROAD

The First Warrant sought computers, electronic devices, and a mobile phone without attenuation to any specific crime, along with a "Confidential Informant form" without specificity (A46). The Second Warrant, too, sought "Confidential Information form" without reference to any particular matter (A58). The warrants thus improperly provided the police with too much discretion to pilfer through constitutionally protected documents.

By failing to restrict the scope of the First Warrant, it's difficult to see how it wasn't a "general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (collecting cases). "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927).

Additionally, the First Search Warrant included "digital pictures prior to and during the search" (A46). This, in essence, seeks every photograph in appellant's home, which would include personal, family, or vacation images

without subject or time restriction, pictures belonging to appellant's children, and pictures which may be part of client case files and protected by various privileges. Nothing in the affidavit in support of the application for the First Warrant elucidates a basis for this request. Moreover, the First Warrant's inclusion of "digital pictures … during the search" seems highly targeted to provide police a pretext to manipulate and unplug appellant's indoor surveillance camera (H. 98; H. 100; H. 172), despite lacking any connection to any suspected crime.

c. THE WARRANTS VIOLATED THE RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES

As discussed *supra*, appellant's client files belong to the client. Each of those clients enjoy the right against unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution and Article I, Section 10 of the Minnesota Constitution.

"When an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' [the Supreme Court has] held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter v. United States*, 585 U.S. ___ (2018), quoting *Smith v. Maryland*, 442 U. S. 735 (1979).

Society would be likely to believe the attorney-client privilege should be recognized as one of the most reasonable and requisite expectations of privacy. Here, police lacked any probable cause to search through the vast majority of appellants' client files, but nevertheless seized it, searched through it, performed keyword searches against it, and manually reviewed documents incapable of searching by keyword, all of which was unreasonable.

d. THE WARRANTS VIOLATED THE RIGHT TO ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution is the "heartland of constitutional criminal procedure".[16] Along with Article I, Section Six of the Minnesota Constitution, they guarantee "not only the provision of counsel, but also actual assistance from counsel".[17] For these rights to be enjoyed, it is essential that the relationship between attorney and client be free from government interference and intrusion. Additionally, when an attorney's devices and client files are seized by the state, that attorney's efforts to provide effective assistance of counsel are jeopardized.

In *State v. Flowers*, No. A21-1523 (Mar. 15, 2023), this Court ruled that the "hallmark as to when [government] interference with the attorney-client relationship may amount to a violation of the right to counsel [is] the intrusion

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[16] Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles*, Yale University Press, 1997.

[17] *Cooper v. State*, 565 N.W.2d 27, 30 (Minn. App. 1997).

upon confidential and privileged attorney-client communications." In that action, the Court set a standard that a taint team was not necessary when a defendant, by choice, elected to communicate with their attorney via recorded jail telephone calls when an unrecorded option was available. It thus follows that precaution at least as rigorous as a taint team (though likely much more) must be required when a defendant does in fact have an expectation of confidence in their communications with counsel, which all of appellants' clients did.

e. LAW ENFORCEMENT EXCEEDED THE SCOPE OF THE WARRANTS

Even if the warrants were valid, law enforcement exceeded the authorized scope of them, and admitted doing so. A non-attorney forensic examiner searched appellant's computer for broad keywords like 'confidential,' 'CI,' 'cooperating individual,' 'password,' 'Ryan,' and 'Drug Task Force' (A62–A66). The forensic examiner's search for all documents containing the word 'confidential' resulted in 22,061 hits (A63). The examiner testified to reviewing, reading, and digesting material outside the scope of the warrants (A162–164).

f. THERE WAS A DISTINCT LACK OF SAFEGUARDS FOR THE PROTECTION OF THE SEIZED CLIENT FILES

The forensic examiner testified to saving a full copy of appellant's devices on a law enforcement server. There appears to be nothing in the record describing the security practices for this data; for example, we do not know if

the data was segregated from other cases with access controls and logging. If there was an intrusion upon this data, it's not clear law enforcement would know, nor that they would have any obligation to tell the Court.

Security breaches of government servers are quite common. This year both Minneapolis Public Schools and Rochester Public Schools suffered data breaches, with substantial amounts of highly confidential information on students and educators being posted online.[18] These breaches happen in law enforcement, too: a data breach at the Minnesota Bureau of Criminal Apprehension's vendor resulted in documents and personal information for thousands of Minnesota first responders and critical infrastructure personnel being published online;[19] and it was recently revealed that hackers breached U.S. Marshals Service systems, stealing data about investigative targets and agency employees.[20]

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[18] Kent Erdahl, *Rochester Public Schools confirm data breach; experts explain why it's happening more often*, KARE 11, Apr. 10, 2023. https://www.kare11.com/article/news/local/breaking-the-news/rochester-public-schools-confirm-data-breach-experts-explain-why-its-happening-more/89-07c32191-cd1c-47c8-80a8-a90af56bcf2f.

[19] Tony Webster, *Personal information of Minnesota law enforcement, critical infrastructure personnel published online after massive hack*, MINNESOTA REFORMER, July 10, 2020. https://minnesotareformer.com/2020/07/10/personal-information-of-minnesota-law-enforcement-critical-infrastructure-personnel-published-online-after-massive-hack/.

[20] Glenn Thrush & Chris Cameron, *Hackers Breach U.S. Marshals System With Sensitive Personal Data*, THE NEW YORK TIMES, Feb. 27, 2023. https://www.nytimes.com/2023/02/27/us/politics/us-marshals-ransomware-hack.html.

This lack of court supervision by entrusting this data with police, who owe no duties under the Rules of Professional Conduct, is insufficient to protect appellant's or her client's constitutional interests in the seized data.

g. THE COURT FAILED TO EXERCISE REASONABLE ALTERNATIVE MEANS TO OBTAIN EVIDENCE

A search warrant targeting all of appellant's client files is improper, as there were reasonable alternative means to obtain evidence in this case which would not violate appellant's clients' rights. For example, the court in Hennepin County, Washington County, or the Supreme Court all had the power under Minn. Stat. § 481.14 to "require the attorney to make delivery within a time specified, or show cause why the attorney should not be punished for contempt."

IV. LOOKING TO THE FUTURE

Resolving this case should involve a look at the current state of our society and seek to mitigate the risks that lawyers and judges face. This case started with a victim making a report to police. While police certainly took additional steps to verify aspects of the victim's report—such as obtaining records from Wells Fargo and T-Mobile—they ultimately didn't know, for a fact, that appellant committed any crime at the time they applied for a warrant; they were merely seeking to show probable cause. Indeed, the detective applying for the First Search Warrant said the "files, if located, could

be used to confirm *or contradict* [the victim's] assertion" (emphasis added) (A43).

Certainly, false reports of crimes can and do occur, and search warrants have been issued based on even less of a robust factual basis than is present in this case. Personal and business disputes on occasion have led to false reports to police, or worse. There has been an alarming trend in America of 'swatting,' where a caller falsely reports an active shooter to police, prompting a significant deployment of law enforcement resources, and which has resulted in death.[21] Last year, a 911 caller impersonated a federal judge while calling police to report that there was a violent situation unfolding at the judge's home; he was set to preside over a hearing in a prominent January 6th prosecution the following morning.[22] Police responded to the judge's home, and the U.S. Marshals Service emailed all federal judges in that district warning them to not make any sudden movements if they fall victim to a similar attack.[23]

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[21] Heather Hollingsworth, *How 'swatting' calls spread as schools face real threats*, THE ASSOCIATED PRESS, Mar. 30, 2023, https://apnews.com/article/hoax-school-shootings-explainer-swatting-439046152b9c3db45bfbfd8c10321c28.

[22] Zoe Tillman, *A Jan. 6 Judge Was Targeted in a SWAT Hoax. He Likely Won't Be the Last.,* BLOOMBERG NEWS, Oct. 1, 2022. https://www.bloomberg.com/news/articles/2022-10-01/jan-6-judge-targeted-in-swat-hoax-likely-won-t-be-the-last.

[23] *Id*.

Here in Minnesota, a lawyer was targeted by his neighbor, who hacked into his home Wi-Fi network before seeking to frame the lawyer for child pornography and sexual harassment before sending a threatening email to then-Vice President Joe Biden from his IP address, prompting the Secret Service to show up at his office.[24] In 2016, a criminal defendant shot and killed a law clerk at his defense attorney's Saint Paul office.[25] In 2022, a retired Wisconsin judge was murdered by a defendant in his former courtroom.[26] In recent years a disgruntled defendant and litigant launched a website accusing the Ramsey County judge who sentenced him of sexual improprieties and various crimes.[27] Within the past month, the Manhattan District Attorney received death threats and a letter containing suspicious powder after bringing charges against former President Trump.[28] In 2020, a litigant and lawyer who

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[24] David Kravetz, *Wi-Fi–Hacking Neighbor From Hell Sentenced to 18 Years*, WIRED, July 12, 2011. https://www.wired.com/2011/07/hacking-neighbor-from-hell/.

[25] Chao Xiong, St. Paul law clerk's killer admits to shooting, but in murder trial claims it wasn't planned, STAR TRIBUNE, Oct. 5, 2016. https://www.startribune.com/st-paul-law-clerk-s-killer-admits-to-shooting-but-in-murder-trial-claims-it-wasn-t-planned/396054801/.

[26] Tom Winter, et al., *Former Wisconsin judge killed in 'targeted' attack*, NBC NEWS, June 4, 2022. https://www.nbcnews.com/news/us-news/former-wisconsin-judge-killed-targeted-attack-suspect-hit-list-include-rcna31995.

[27] *Fredin v. Middlecamp*, No. 17-cv-3058 (D. Minn. Nov. 23, 2020).

[28] Aaron Katersky, *Manhattan DA receives new suspicious white powder envelope: Police sources*, ABC NEWS, Apr. 12, 2023. https://abcnews.go.com/US/manhattan-da-receives-new-suspicious-white-powder-envelope/story?id=98541479.

was before a New Jersey federal judge showed up to her home and killed her son.[29] Named in his memory, the Daniel Anderl Judicial Security and Privacy Act has now been used by over 1,000 federal judges to remove their addresses from the internet.[30]

Add in the wide availability of artificial intelligence and technologies which can make quite convincing 'deepfake' videos and voice impersonating others,[31] and the coming decades will present difficult evidentiary challenges for judicial systems around the world. Given these realities, it is not outside the realm of possibilities that in the future an aggrieved person may falsely report a crime involving an attorney, prosecutor, or judge in an effort for law enforcement to act against them, which could include the execution of a search warrant. Indeed, first-time citizen informants are deemed presumably reliable for establishing probable cause. *State v. Ross*, 676 N.W.2d 301 (Minn. App. 2004). Law enforcement is often necessarily involved in efforts to seek truth,

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[29] Good Morning America, *Judge Esther Salas fights to protect all judges after the death of her son*, ABC NEWS. https://www.youtube.com/watch?v=ltBIkcFXb7g.

[30] Dan Mangan, *1,000 federal judges seek to remove personal info from internet as threats skyrocket*, CNBC, Mar. 17, 2023. https://www.cnbc.com/2023/03/17/federal-judges-remove-personal-information-from-internet.html.

[31] Matt Reynolds, *Courts and lawyers struggle with growing prevalence of deepfakes*, AMERICAN BAR ASSOCIATION JOURNAL, June 9, 2020. https://www.abajournal.com/web/article/courts-and-lawyers-struggle-with-growing-prevalence-of-deepfakes.

but every effort should be taken to minimize unnecessary harm which may come from false reports, including by not subjecting all of an attorney's innocent clients to exposure of privileged and constitutionally protected materials based on mere probable cause.

V. THE COURT HAS A DUTY TO PROTECT THE CLIENTS OF ATTORNEYS SUBJECT TO SEARCH WARRANTS BY APPOINTING A SPECIAL MASTER AND MAINTAINING ONGOING SUPERVISION

Instead of the Court authorizing a non-attorney third-party to take control of an attorney's client files, the Court must assume the attorney's duties and obligations to safeguard those client files. When agents of the state—acting with authority of a court order—emerge through an attorney's door to take their client files, the attorney no longer has the legal or practical ability to comply with the Rules of Professional Conduct in safeguarding those client files. Certainly, police officers lack the duty to do so. Thus, the Court must assume those duties and obligations by appointing a special master who is a licensed attorney, and by ensuring ongoing court supervision until the client files are returned or destroyed.

Other courts faced with these types of privilege issues in criminal cases have authorized special masters. *See In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 181 (4th Cir. 2019) (collecting cases). The section of the United States Department of Justice's *Justice Manual* titled "Searches of Premises of Subject Attorneys" lists special masters as a method for reviewing

seized law-office records. *Justice Manual*, § 9-13.420(F). The Rules of Criminal Procedure are to be simple, fair, efficient, and flexible, Minn. R. Crim. P. 1.02; they do not forbid the use of special masters. *See generally* Minn. R. Crim. P. 9; *cf.* Minn. R. Civ. P. 53 (authorizing special masters in civil context); *accord United States v. Black*, No. 16-20032-JAR, 2016 WL 6967120, at *2-3 (D. Kan. Nov. 29, 2016) (noting the court's "authority to appoint a Special Master in this criminal case stemmed from Fed. R. Civ. P. 53 as well as its inherent authority to manage litigation").

Consider this: on the record before this Court, what is the current status of appellant's client files? It has been four years since the search warrants were executed. Are the hard drive images still sitting on a Dakota County law enforcement server? Who has access to this data? Have any logs been kept of when the data has been accessed? With 1,500 Minnesotans' most confidential and sensitive documents on the line, these questions are ones the Minnesota Supreme Court and appellant's clients should know the answer to. Instead, the district court abdicated its responsibilities by resting all these duties on police, thus surrendering its authority to regulate the practice of law in this state.

CONCLUSION

Mr. Webster respectfully suggests the Court set a standard for searches-and-seizures of client files of attorneys which mandates the highest security and segregation protocols in the capturing of evidence, prohibits law

enforcement from looking through attorney-client privileged files, and which requires appointment of a highly qualified, independent, and neutral special master who, under court supervision, shall act to protect the rights and privileges of the lawyer and their clients while undertaking a court's search warrant orders.

Date: April 20, 2023

TAFT STETTINIUS AND HOLLISTER LLP

By: */s/ Scott M. Flaherty*
Scott M. Flaherty

ATTORNEYS FOR AMICUS CURIAE TONY WEBSTER

CERTIFICATE OF DOCUMENT LENGTH

I certify that this document conforms to the requirements set forth at Minn. R. Civ. App. P. 132.01, subd. 3(c)(1) and that it does not exceed 7,000 words.

This document was prepared using Microsoft Word 16.72 with a 13-point proportional font, Century Schoolbook, and consists of 5,284 words including headings, footnotes, and quotations.

Date: April 20, 2023

TAFT STETTINIUS AND HOLLISTER LLP

By: */s/ Scott M. Flaherty*
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ATTORNEYS FOR AMICUS CURIAE TONY WEBSTER

CERTIFICATE OF SERVICE

I certify that on April 20, 2023, I served the Amicus Brief of Tony Webster upon the following recipients via the E-MACS filing system:

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