

IN THE SUPREME COURT OF MISSOURI

SC 92716

DAVID CLOHESSY,

Relator,

vs.

THE HONORABLE ANN MESLE,

Respondent.

**APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
DIVISION NO. 16**

**BRIEF OF AMICUS CURIAE - INDIVIDUAL PROSECUTORS
IN SUPPORT OF APPELLANT**

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**BRIEF OF AMICUS CURIAE IN SUPPORT OF RELATOR'S
PETITION FOR WRIT OF PROHIBITION**

I. IDENTITY AND INTEREST OF AMICUS

Amici are current and former law enforcement officials dedicated to protecting the rights of victims, protecting the freedom of the press, and protecting the freedom of speech, association, and privacy rights of victim's advocacy groups and their members, volunteers, and clientele.

Amici are as follows: Cooper County Prosecuting Attorney; City of St. Louis Prosecuting Attorney; Jerome O'Neill, former United States Attorney, Vermont; Victor Vieth, Executive Director of the National Child Protection Training Center; Tim Kosnoff, former prosecutor San Juan County, Washington; and Jeff Jenson, former United States Attorney, Eastern District of Missouri.

II. CONSENT OF THE PARTIES

Amici, consisting of individual prosecuting attorneys from various jurisdictions, have received direct verbal consent from counsel for Relator, David Clohessy, to file this brief. This amicus brief is submitted by prior written consent by plaintiff John Doe, B.P.; defendant Father Tierney; defendant, the Diocese of Kansas City / St. Joseph.

III. JURISDICTIONAL STATEMENT

Amici hereby adopt the Jurisdictional Statement of the Relator.

IV. STATEMENT OF FACTS

Amici hereby adopt the Statement of Facts of the Relator.

V. ARGUMENT AND AUTHORITY

Amici submit the following suggestions in support of John Doe B.P. and David Clohessy's Writs of Prohibition. Amici endorse and incorporate the facts as outlined by David Clohessy in his Writ of Prohibition and Suggestions in Support. The issue presented is whether Missouri courts may permit discovery of confidential communications, and constitutionally protected materials of a non-party, The Survivors Network of those Abused by Priests ("SNAP"). SNAP is a 23-year-old national nonprofit organization that offers support to sexual abuse victims, and advocates on their behalf. David Clohessy is the Executive Director of SNAP.

SNAP is a rape crisis center and has a similar function to other rape crisis centers and should therefore be statutorily construed as a rape crisis center.

There are several important constitutional, legal, and policy principles that preclude a deposition of David Clohessy, Executive Director of SNAP, and the extensive document requests approved by the Circuit Court. Notably, this discovery is a violation of the anonymity and confidentiality of SNAP members and volunteers and violates SNAP's and third parties' constitutional rights to freedom of speech, association, and privacy. The deposition order, as it now stands, would require SNAP to provide its members' private information, which is plainly unconstitutional. *NAACP v. Alabama*, 357 U.S. 449 (1958).

If this court permits the circuit court's discovery order, sex abuse victims and the organizations that support them will suffer irreparable harm. The primary effort of support groups for sex abuse victims will be significantly undermined due to the subsequent loss of confidentiality. If survivors of sex abuse know their private communications may become public record in litigation they are not involved in, these survivors may

choose not to seek any support at all from SNAP or other rape treatment organizations.

Despite the privileged nature of the constitutionally and statutorily protected information sought, Judge Mesle has ruled that a pedophile may force David Clohessy and SNAP to release confidential information about the victims to whom they provide support. SNAP and Clohessy are not parties to the pending lawsuit, and neither are the thousands of victims who go to them for confidential support.

We write today to advocate for B.P. and the thousands of anonymous rape victims who will be affected by the Court's ruling in this case. We urge this Court to prevent a victimizer from stripping not only his accuser's sense of security, but the security of countless other victims who have sought the confidential safety provided by rape crisis center employees.

Allowing pedophiles and rapists to access the confidential information of victims who are not a party to the pending lawsuit creates a chilling effect on victims. Victims will no longer disclose their abuse and contact information for fear that their abuser will learn confidential information about them without their consent. The disclosure itself would allow their former abuser demographic information, potentially promoting future victimization and witness intimidation.

If Judge Mesle's ruling is upheld, society will be harmed. Sexual abuse perpetrated upon minors is already significantly underreported. Criminal prosecutions will be hindered as people who are already hesitant to call police and/or cooperate with prosecutors become even more frightened. If Judge Mesle's ruling stands, victims will be chilled from disclosure and cooperation once they know that decades later, in an unrelated civil lawsuit between parties, their privacy may be invaded and their confidential communications may be disclosed. Worse, they may even be embroiled or deposed in such a suit, based on even a single disclosure they may have

made decades earlier to a rape crisis center. As abusers learn that victims are increasingly unlikely to report their abuse, child abuse rates may increase.

In addition to the public safety concerns, Judge Mesle's ruling is unlawful. It allows for depositions and discovery that is prohibited as beyond the scope of discovery pursuant to Missouri Rule of Civil Procedure 56.01. The information sought has so little relevance to the pending lawsuit, its limited relevance is outweighed by the substantial privacy interests of unrelated rape victims. In addition, the information is statutorily and judicially privileged, and is unlikely to lead to admissible evidence.

Section 455.003 of the Missouri Revised Statutes illustrates the Missouri Legislature's goal of supporting victims of sex crimes in that it provides a conclusive bar to Judge Mesle's ruling in this case. Clohessy is an employee of a "rape crisis center," as it is defined in this statute. As such, he is bound by law to keep victim information confidential and is "incompetent to testify" regarding such confidential information. §455.003 RSMo.

Moreover, notwithstanding the statutory bar to the discovery ordered in this case, public policy and the right to privacy of sex abuse victims dictate that these requests should be denied. The Court may "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Mo.R.Civ.Pro 56.01(c)(7).

Additionally, each victim of a crime has a constitutional right which guarantees reasonable protection, which this order violates. Article I, Section 32, Paragraph (6) of the Missouri Constitution states "crime victims have the right of reasonable protection from the defendant or any person acting on behalf of the defendant." In this matter, it is wholly likely that if

the circuit court's ruling is allowed to stand, not only may communications regarding the perpetrator and demographic information of the victim be disclosed to the specific perpetrator of the crime for which the victim would seek protection, but victims would not be informed of the disclosure. Such disclosure violates a basic tenant of crime victim's rights in Missouri – their reasonable physical safety from their perpetrator.

Allowing the ruling to stand allows the perpetrator the ability to engage in “unadulterated harassment and attempted intimidation” of non-party victims. *State of Missouri , ex. rel., Anheuser v. Honorable Nolan*, 692 S.W.2d. 325, 328 (Mo.App.E.D. 1985). The parties to this Amicus seek to prevent this.

Amici respectfully offer these suggestions in support of John Doe B.P. and David Clohessy's Writs of Prohibition concerning the orders to depose Clohessy/SNAP, a non party in the pending case.

VI. LEGAL ANALYSIS

B.P. and Clohessy seek to prevent Tierney from having access to the information requested based on the grounds that any information that SNAP (and any organization like it) has is privileged and confidential. Victims who speak to employees of victims' rights groups, are entitled to a guarantee of confidentiality. Their information is statutorily privileged under section 455.003 of the Missouri Revised Statutes and they are protected under the Missouri Constitution Article I, Section 32. Moreover, there is a strong public policy interest in protecting the rights to privacy of rape victims.

1. The Rape Crisis Center Statute Protects All Information Sought From SNAP

Even if information that Clohessy and SNAP possess regarding Plaintiff by third parties may be technically relevant, such matters are statutorily

privileged. This is because the Missouri Legislature has already recognized the gravity of this situation.

Section 455.003 of the Missouri Revised Statutes:

1. A rape crisis center shall:

(1) Require persons employed by or volunteering services to the rape crisis center to maintain confidentiality of any information that would identify individuals served by the center and any information or records that are directly related to the advocacy services provided to such individuals; and

(2) Prior to providing any advocacy services, inform individuals served by the rape crisis center of the nature and scope of the confidentiality requirements of subdivision (1) of this subsection.

2. Any person employed by or volunteering services to a rape crisis center for victims of sexual assault shall be incompetent to testify concerning any confidential information in subsection 1 of this section, unless the confidentiality requirements are waived in writing by the individual served by the center.

The definition of a rape crisis center as enumerated by that statute, "shall mean any public or private agency that offers assistance to victims of sexual assault, as the term sexual assault is defined in section 455.010, who are adults, as defined by section 455.010, or qualified minors, as defined by section 431.056." § 455.003 RSMo.

Under this statutory definition, SNAP is operating as a rape crisis center. As stated above, SNAP is an organization that exists to provide assistance to rape victims. SNAP employees counsel rape victims daily. From the plain language of the statute, the legislature intends that SNAP be protected from the disclosure of confidential information. Clohessy (and all of the other rape crisis center workers) is, statutorily, a person employed by a rape crisis center for victims of sexual assault and is therefore incompetent to testify concerning any confidential information. §455.003 RSMo.

This protection is statutorily given and cannot be pierced for even good cause. The privilege functions as a matter of law; it is not an exercise of judicial discretion. See *Chase Resorts v. Campbell*, 913 S.W.2d 832 (Mo.App.E.D. 1995) (In determining whether a party can seek information protected by attorney-client privilege, the Missouri Court of Appeals, Eastern District stated “Absent a waiver, privileged materials are immune from discovery...Application of the attorney-client privilege is a matter of law, not of judicial discretion, and is properly a matter for prohibition.”) The rape crisis center statute is clear on its face, and its application has not been challenged in Missouri Courts.

Indiana has a similar privilege statute which that Court refused to pierce even in the face of a criminal defendant’s Sixth Amendment right to confront witnesses. *Crisis Connection v. Fromme*, 949 N.E.2d 789 (Ind. 2011). A similar statute in Illinois was interpreted such that “a victim has a right to rely upon her statutory privilege.” *People v. Foggy*, 121 Il.2d 337, 349 (Il. 1988).

2. B.P. Did Not Waive his Privilege under the Rape Crisis Center Statute

The rape crisis statutory privilege is waivable. §455.003(2). A waiver must be done in writing by the individual served by the rape crisis center. Id. The rape crisis center statute does not burden victims with a requirement to affirmatively assert a privilege, but rather states that victims must specifically waive it in writing. §455.003. B.P. and the other countless victims who have spoken to SNAP and organizations like it have never waived their privilege in writing and most likely don’t even know that their privacy is in danger here.

Abusers may argue that SNAP and organizations like it cannot be rape crisis centers that are entitled to protection because they participate in advocacy for victims rights through press releases, writings and speeches.

However, this does not change the definition of a rape crisis center under the definition in the statute, and does not waive any victim's rights.

3. The Information Sought is protected by Other Privileges

Even if it were not statutorily privileged, the relevance of any information provided by Clohessy would be strongly outweighed by the right to privacy of SNAP's confidential victims. The information sought is protected by judicially created privileges.

Some privileges against discovery are judicially created by Missouri Courts in order to serve the interests of the public and to prevent harassment and attempted intimidation. These privileges are left to judicial discretion in application.

For example, Missouri does not have a statutory reporter privilege. However, there is a long history of protecting news reporters' sources such that there is a judicially recognized privilege. *State ex. rel Danbury v. The Honorable Ely*, 954 S.W.2d 650 (Mo.App.W.D. 1997). A court can recognize a non-enumerated privilege to protect something valuable – in this case the First Amendment. *Id.* In assessing when this privilege applies, Courts look at whether the seeking party has exhausted other sources, the importance of protecting confidentiality, and whether the information sought is crucial to the case. *Id.* The reporter's shield exists because of a reporter's need to promise confidentiality to sources. *Id.*

In the present case, the public need and constitutional protections which protect victims of sexual abuse and their right to speak confidentially is at least as strong as a reporter's source's need for confidentiality. It is essential that when a SNAP employee like Clohessy speaks with a victim, he is able to ensure confidentiality.

Similarly, although SNAP is a rape crisis center which speaks confidentially to victims, it is also an advocacy group that regularly publishes information to the public about sex abuse. In this regard, the

victims reporting to SNAP's employees and volunteers are sources just like the ones who speak with reporters. Therefore the same overriding First Amendment protections that apply to reporters apply to SNAP and other rape crisis center employees.

Missouri also has a policy of protecting trade secrets and confidential information. *State ex. rel. Wright v. Campbell*, 938 S.W.2d 640 (Mo.App.E.D. 1997). This privilege is enumerated in Rule 56.01 of the Missouri Rules of Civil Procedure, but is left to courts to use judicial discretion in its application. *Id.* Missouri Courts have generally held that if undue harm will result from the disclosure of confidential information, it will be protected. See generally, *Id.*

Missouri Courts have held that despite its relevance, some information will be protected from discovery because of its nature as private and otherwise confidential. See *State ex. rel. Madlock v. The Honorable John R. O'Malley*, 8 S.W.3d 890 (Mo. banc 1999) (Personal injury plaintiff not required to turn over detailed employment records because it unreasonably invaded plaintiff's privacy); *State ex. rel. Wohl v. Sprague*, 711 S.W.2d 583 (Mo.App.E.D. 1986) (Discovery request for tax documents denied as overly intrusive and protected from unnecessary prying.) Here, the matters at issue are discussions of sexual assault. These are deeply personal, sensitive, psychologically private matters. Seeking such information is overly intrusive and should be protected from unnecessary prying.

Courts must weigh the conflicting interests of the interrogator and the respondent in determining the appropriate boundaries of discovery. *Id.* Judges must consider whether matters are privileged, relevant, and tend to lead to admissible evidence. *Id.* If the information sought is relevant, judges must also consider "the extent of an invasion of privacy, particularly the privacy of a non-party." *Id.*

When privacy is at issue, especially the privacy of non-parties, often even a protective order is insufficient to protect from the disclosure of information that may be “irrelevant but embarrassing, or even harmful,” and the appropriate remedy is prohibition. *State ex. rel. Madlock v. The Honorable John R. O’Malley*, 8 S.W.3d 890, 890 (Mo.banc 1999). The privacy interests of a person (or group) that is a non-party weigh more heavily in favor of the respondent as opposed to the interrogator (party seeking the discovery). *Anheuser*, 692 S.W.2d at 327; *State ex. rel. Blue Cross v. The Honorable David P. Anderson*, 897 S.W.2d 167, 170 (Mo.App.S.D, 1995). Thus, when a respondent is able to show that the information is confidential and that a specific potential harm could come from disclosure, the burden shifts to the seeking party to establish that the discovery is “relevant and necessary to the action.” *Blue Cross*, 897 S.W.2d at 170. The party seeking the discovery of confidential information must establish that they have a specific need for the information in order to prepare for trial. *Id.* Tierney is unable to meet his burden; he is able to address the claims in the petition without this sensitive information.

VII. PUBLIC POLICY ANALYSIS

If the information sought in this case is not protected, there will be a chilling effect on victims of sexual abuse as they come to fear that their most private information will be exposed. As this becomes publicly known, B.P. and other victims will refrain from seeking further necessary support and counseling from SNAP and its members. Rape victims will stop going to other rape crisis centers. Without necessary support, rape victims will potentially be chilled from assisting law enforcement in identifying their abusers. The public needs the scrutiny of this court, and its sound discretion in righting a substantial public health risk.

In enacting a rape crisis center statute, the Missouri legislature has recognized the societal value of protecting relationships between rape

victims and those who counsel or advocate for them. See generally, *In re. Subpoena to Crisis Connection v. Fromme*, 949 N.E.2d 789 (Ind. 2011). If the information sought in this case were subject to disclosure, or even an in camera review, “confidential conversations would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.” *Jaffe v. Redmond*, 518 U.S. 1, 11-12 (1996). The participants in the conversation must be able to predict with “some degree of certainty whether particular discussions will be protected.” *Id.* at 18.

1. FIRST AMENDMENT RIGHTS

The deposition and subpoena of documents requested by Tierney seek to invade the highly personal and private relationship that a victim has with a support group. The support groups’ employees, volunteers, and members constitute an expressive association, formed for the purpose of counseling, supporting, and advocating for sexual abuse survivors. Victims choose to associate with such support groups and that decision and its attendant actions are protected by the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

The right to associate with others in pursuit of common goals, such as information, counseling, and support for sexual abuse survivors, is protected by the First Amendment. See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). The U.S. Supreme Court has held that, “[a]n individual’s freedom to speak . . . could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.” *Roberts*, 468 U.S. at 622.

A victim’s freedom to associate with SNAP is predicated upon the right to communicate and act confidentially. See *NAACP v. State of Alabama*, 357 US. 449, 466 (1958) (“immunity from state scrutiny of membership

lists . . . is here so related to the rights of the members to pursue their lawful private interests privately and to associate freely with others in so doing.”). There is an essential relationship between a victim’s freedom to associate with SNAP and privacy in conducting that association. See *Id.* at 452 (“vital relationship between freedom to associate and privacy in one’s associations”). If discovery is allowed, Plaintiff victims of sexual abuse will no longer feel comfortable seeking much-needed support and counseling from SNAP or other groups. See *Id.* at 462 (noting that public identification of NAACP expose members to reprisal, job loss, threat of physical coercion, and other public hostility). Accordingly, this Court must protect crime victims and hold their right to freely associate under the First Amendment inviolate by issuing the Writ of Prohibition.

2. PROSECUTION EFFECTS

It is irrefutable that public policy favors identifying and prosecuting sex offenders. Stifling any speech that assists with potential prosecutions is harmful to society as a whole. It allows abusers to continue abusing and promotes suffering by new victims.

Often, it is a support group, like SNAP, that helps a frightened victim, weakened by an abuser, to gain the courage and support to disclose their abuse and identity of their abuser. Other times, it is the advocacy efforts of a group like SNAP who are able to pierce societal norms and hold out authority based abusers such that other rape victims may be assured of their physical and psychological safety even while naming their abuser. The Missouri Constitution, Article I, Section 32 enshrines vital safety concerns and psychological protections for crime victims. None of the crime victims who sought counseling and support from SNAP should be stripped of their constitutional protections for the limited evidentiary benefits in this discovery order.

Without victim confidentiality, rape support organizations will lose the sources of the information that enable them to support and advocate; in short, they will disappear. These privately funded victim treatment organizations are an essential component of public safety. They operate largely without public financing, and provide an essential support and advocacy role, but they require confidentiality to function.

Crime victims are particularly fragile and isolated by the very nature of their victimization. The destruction of their confidentiality and potential disclosure of their demographic information will further stifle their cooperation with law enforcement. This will raise additional hurdles in prosecuting abusers. Prosecutors depend upon the victim to come forward and tell their story. Our system of laws requires confrontation by the victim. This court has the duty to further enhance our system of laws by protecting the safety of crime victims and thereby promoting the justice sought by our criminal legal system.

3. EQUITABLE TREATMENT UNDER THE LAW

Crime victims are people who have suffered a blow to their sense of security. Rape victims, particularly childhood rape victims, often feel isolated, abandoned, and unsupported.

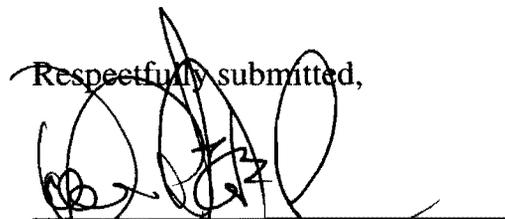
Whether or not victims choose to disclose their abuse to police, a hotline, in a support group, or one-on-one to another victim, this is their own choice. That choice requires individual freedom lest the victims feel they have been abused again by an invasion of their privacy. If Tierney, and others like him, are allowed to force SNAP to disclose information about the victims who have communicated with SNAP, these victims will suffer another blow to their psychological and physical health. Judge Mesle's discovery order sets a dangerous precedent for the future of rape counseling.

VII. CONCLUSION

Sexual abuse survivors who have the courage to stand up for themselves, and the organizations that support these survivors, are natural enemies of abusers and abuse enablers everywhere. The discovery requests at issue here are made to intimidate, harass, and silence victims of sexual abuse and their advocates. These discovery requests are contrary to public policy, statute, and the constitutional rights of victims. This is exactly the “unadulterated harassment and attempted intimidation” that the Eastern District of the Missouri Court of Appeals, asks judges to protect against, *State ex. rel Anheuser v. Nolan*, 692 S.W.2d 325 (Mo.App.E.D. 1985), and is exactly why the Missouri legislature created the rape crisis statute.

Amici urge this Court to grant Plaintiff B.P.’s and David Clohessy’s Writs of Prohibition and cease discovery of confidential information of countless non-parties to this litigation, the vast majority of whom are survivors of childhood sexual abuse. These non-parties will be further psychologically harmed and victimized by the disclosure of information they appropriately believe to be confidential.

As prosecutors, we urge this court to reverse Judge Mesle’s ruling, and protect the public health, individual safety, and constitutional rights of crime victims so that all of us, together, may continue to promote justice.

Respectfully submitted,


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CERTIFICATE OF COMPLIANCE

As required by Missouri Supreme Court Rule 84.06, I hereby certify that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and states the number of words in the brief, as follows:

This brief is prepared using Microsoft Word, is proportionally spaced, and contains 3,907 words. Also, pursuant to Missouri Supreme Court Rule 84.06, this brief is filed electronically with the Missouri Supreme Court containing a full copy of the text of this brief.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Douglas Abele, # 24636

CERTIFICATE OF SERVICE

I certify that on the 24th day of July, 2012, a true copy of the above and foregoing was sent via U.S. Mail, postage prepaid, to:

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