

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3002

IN RE GRAND JURY SUBPOENA

Appeal from the United States District Court
for the District of South Dakota
Southeastern Division
Hon. Lawrence L. Piersol, Chief Judge
United States District Court

AMICUS CURIAE BRIEF OF THE
NATIONAL NETWORK TO END DOMESTIC VIOLENCE;
NATIONAL NETWORK TO END DOMESTIC VIOLENCE FUND;
FAMILY VIOLENCE PREVENTION FUND; NATIONAL CLEARINGHOUSE
FOR THE DEFENSE OF BATTERED WOMEN; NATIONAL TRAINING
CENTER ON DOMESTIC AND SEXUAL VIOLENCE; AND
NATIONAL COALITION AGAINST DOMESTIC VIOLENCE
ON BEHALF OF APPELLANTS

AMICI SEEK REVERSAL OF THE DISTRICT COURT DECISION

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November 14, 2000

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AMICI CURIAE’S STATEMENT OF IDENTITY AND INTEREST

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, counsel for National Network to End Domestic Violence, National Network to End Domestic Violence Fund, Family Violence Prevention Fund, National Clearinghouse for the Defense of Battered Women, National Training Center on Domestic and Sexual Violence and National Coalition Against Domestic Violence submit this brief amicus curiae in support of Appellant.^{1/} Counsel for Amici certify as follows:

The National Network to End Domestic Violence, Inc. (“NNEDV”) is a non-profit organization of state domestic violence coalitions from around the country that collectively represent nearly 2,000 battered women’s shelters and programs. NNEDV is a leading domestic violence public policy organization, providing analysis, advocacy and education to end domestic violence. NNEDV was instrumental in passage of the landmark Violence Against Women Act, and is a leader in national discussions to address issues of domestic violence and confidentiality of communications between battered women and their service providers. NNEDV has filed briefs on this issue in numerous cases before federal and state courts.

^{1/} Amici take no position on the allegations underlying the Grand Jury investigation. The purpose of this brief is limited to the arguments made in support of a narrow privilege protecting information provided by battered women to domestic violence programs. Consistent with Rule 29 of the Federal Rules of Appellate Procedure, all parties have consented to the filing of this brief.

The National Network to End Domestic Violence Fund (the “NNEDV Fund”) is a non-profit organization founded in 1996 for the purposes of providing technical assistance, training and public education to advocates, professionals and individuals who encounter battered women in their work and communities. The NNEDV Fund has provided advice and expertise on domestic violence issues affecting battered women and their children to judges, attorneys, educators and state and local advocates, as well as child support, child welfare, justice system personnel, and others working to end domestic violence.

The Family Violence Prevention Fund (“FVVPF”) is a national, non-profit organization that provides education, technical assistance, and public policy leadership designed to enhance the safety of battered women, ensure their equal access to support services and institutions, and end violence throughout our multicultural society. Founded in 1980, the FVVPF is nationally recognized for its pioneering work in improving the justice, healthcare, and child welfare system’s response to domestic violence. The mission of the FVVPF is to stem the epidemic of domestic violence in our homes by development prevention and education strategies in the justice, child welfare, public education, and public health fields. Since 1987, the FVVPF has developed judicial education curricula and videotaped, interactive CD-ROM, and live education programs to teach judges about the dynamics of domestic violence and how better to handle cases to help ensure

victim safety and batterer accountability. Safety of battered women cannot be ensured unless records revealing their identity and location remain confidential. Without an assurance of confidentiality, battered women will not risk their safety by seeking help from domestic violence service providers or the justice system.

The National Clearinghouse For The Defense Of Battered Women (“National Clearinghouse”) is a nonprofit organization incorporated in the Commonwealth of Pennsylvania. Founded in 1987, the National Clearinghouse works to increase justice for battered women charged with crimes where the history of abuse is relevant to their legal claim or defense. The National Clearinghouse provides technical assistance and information to battered women defendants, defense attorneys, battered women’s advocates, expert witnesses, and other professionals and members of the community. There are many barriers that prevent or hinder battered women from seeking outside assistance. For some battered women, seeking services and assistance can actually increase the level of danger to her and her children if her abuser finds out that she has sought outside help. Given this reality, it is imperative that battered women’s service records remain completely confidential. The National Clearinghouse joins the other *amici curiae* in affirming the fundamental principle that battered women’s identities and service records must be kept confidential as a matter of law. Confidentiality for battered women is sound public policy, and will increase the safety of battered

women and their children.

The National Training Center on Domestic and Sexual Violence designs and provides innovative training and consultation, influences policy and promotes collaboration and diversity in working to end domestic and sexual violence.

The National Coalition Against Domestic Violence (“NCADV”) is a grassroots organization representing a national network of over 2,000 local programs and state coalitions that serve battered women and their children. Founded in 1978, NCADV serves as a national information and referral center for the general public, the media, battered women and their children, public and private agencies and organizations. NCADV provides information and technical assistance, and promotes the development of innovative model programs which address the special needs of battered women and battered women’s programs. NCADV is committed to ending misconceptions about violence against women and victim blaming, as well as promoting public awareness about the nature of these crimes. NCADV is also committed to privacy protection for domestic violence victims who seek support services, to ensure their safety and that of their children, as well as to minimize any chilling effect that disclosure of personal information may have on domestic violence victims seeking assistance.

SUMMARY OF THE ARGUMENT

Amici submit this brief in support of Appellant's argument that confidential information -- including names and any other personally identifiable information -- provided by battered women to domestic violence programs is privileged. Accordingly, none of that information should be produced to a Grand Jury pursuant to a subpoena duces tecum.

**** **** ****

This case presents the question whether to recognize a limited privilege that protects confidential communications provided by battered women -- including the names of the women themselves, as well as any other personally identifiable information -- to their domestic violence counselors. The reasons for such a privilege are particularly compelling because the relationship between battered women and their service providers is founded not only upon therapeutic confidence and privacy, but on the physical safety of the victim -- and often the safety of the children who accompany her out of an abusive relationship.

For millions of women and children, violent physical abuse and mental and emotional trauma are part of everyday life. While Congress, state legislatures, and the courts have begun to recognize and do something about this crisis, counseling and shelter programs have since the mid-1970s been providing the most effective, and often the only, services to victims of domestic violence. At the heart of these

programs is the relationship between battered women and their service providers, in which the promise of strict privacy is critical.

Under circumstances in which they fear for their own safety and the safety of their children, battered women are asked to share the most intimate details of their abuse in order to attain safety, obtain legal redress and reach financial independence. As they seek help and contemplate leaving an abusive relationship, the risk of violence -- and even death -- increases. The mere hint that any information provided by them could be revealed would jeopardize the program's ability to continue providing these vital services.

For these reasons, Federal statutory and common law requires that information about each woman who seeks these services be kept confidential. In the Victim Compensation and Assistance Act,^{2/} Congress imposed confidentiality requirements on domestic violence programs. Moreover, in Rule 501 of the Federal Rules of Evidence, Congress provided the courts with the means to recognize evidentiary privileges, considering "the principles of the common law . . . in the light of reason and experience."^{3/}

In light of the societal interest in ending domestic violence, the public and private interests supporting a privilege, and the "reason and experience" of State and Federal governments, information provided by battered women to domestic

^{2/} 42 U.S.C. §§10601, et. seq. (2000).

violence programs should be privileged. Because it is well-established that a Grand Jury may not use its authority to “violate a valid privilege, whether established by the Constitution, statutes, or the common law,”^{4/} the District Court’s denial of the Appellant’s motion to quash should be REVERSED.

I. THERE IS A STRONG PUBLIC INTEREST SUPPORTING DOMESTIC VIOLENCE PROGRAMS THAT PROVIDE ASSISTANCE TO BATTERED WOMEN AND THEIR CHILDREN

Congress and the States have recognized the importance of ensuring that domestic violence programs continue to provide effective assistance to battered women and their children. Ensuring confidentiality is critical to this mission.

A. Domestic violence is a national crisis with particularly deadly consequences for battered women seeking help

Violence against women is a problem of enormous magnitude throughout the United States.^{5/} Indeed, the United States Bureau of Justice Statistics estimates that three out of every four women will be the victim of a violent crime sometime

^{3/} Fed. R. Evid. 501.

^{4/} United States v. Calandra, 414 U.S. 338, 346 (1974).

^{5/} This brief focuses on violence against women because the victims of rape and domestic violence are nearly always women. Husbands, ex-husbands, boyfriends and ex-boyfriends murdered 30% of all women murdered in this country between 1993 and 1998, according to a recent study released by the Department of Justice. These “intimate partners” also assaulted -- to an aggravated degree -- 187,970 partners in 1998 alone, murdered 1,830 people and raped or sexually assaulted 63,490. Rennison and Welchans, Intimate Partner Violence, Bureau of Justice Statistics Special Report, May 2000, NCJ 178247, 1.

during their lives.^{6/} Some experts estimate that a woman has between a one in five and a one in eight chance of being raped in her lifetime.^{7/} Of these victims, almost thirty percent typically are raped by an intimate partner or ex-partner.^{8/} The sweeping effects of this pattern of intimate violence against women cannot be ignored.

Statistics only begin to reveal the extent of the devastation to America's families. Shattered bones, scratches, bruises, and burns are the most visible consequences, but the emotional and psychological harm can be equally severe. The children of battered women also suffer enormously. Children "learn several lessons in witnessing the abuse of one of their parents [including] that such behavior appears to be approved by their most important role models and that the violence toward a loved one is acceptable."^{9/}

Unfortunately, women who inquire about help frequently find their efforts bring on additional violence. It is common to hear stories with the chilling refrain, "If I try to leave him, he will kill me." Research shows this is often true. Not only

^{6/} Violence Against Women, A Majority Staff Report, Committee on the Judiciary, United States Senate, 102nd Cong. 3 (October 1992) (citing Bureau of Justice Statistics).

^{7/} Id. (citing research by Dr. Mary Koss).

^{8/} Ronet Bachman & Linda E. Saltzman, Violence Against Women, Bureau of Justice Statistics Special Report, 3, 6 (August 1995).

^{9/} Patricia Ann S. v. James Daniel S., 435 S.E.2d 6, 18 (W.Va. 1993) (Workman, C.J., dissenting).

does non-fatal violence escalate when help is sought,^{10/} but deadly violence increases as well. Women are most likely to be murdered when attempting to report abuse or to leave an abusive relationship.^{11/} At this particularly vulnerable time, battered women need to know their efforts will be treated with the utmost discretion and their identities and stories protected against all intrusion.

^{10/} See David Adams, Identifying the Assaultive Husband in Court: You be the Judge, 13 Response 13, 13 (1990)

^{11/} See, e. g., Tjaden and Thoennes, Extent, Nature, and Consequences of Intimate Partner Violence, Findings from the National Violence Against Women Survey, Research Report, July 2000, NCJ 181867, 37 (divorced and separated women report more violence than married women, and that interviews of men who murdered their wives stated the most often precipitating event was the threat of or actual separation initiated by their partner) (citing M.L. Bernard and J.L. Bernard, Violent Intimacy: The Family as a Model for Love Relationships, Family Relations 32 (1983) 283, 286; and M. Daly and M. Wilson, Evolutionary Social Psychology and Family Homicide, Science 242 (1988) 519-5240).

See, also, Evan Stark and Anne E. Flitcraft, Violence Among Intimates: An Epidemiological Review, Handbook of Family Violence, Ed. V.B. Von Hasselt, et al., Chapter 13, (New York: Plenum Press, 1988) (women seek medical attention for domestic-violence injuries significantly more often after separation than during cohabitation; and that about 75% of their visits to emergency rooms occur then); P.A. Langan and C. A. Innes, Preventing Domestic Violence Against Women, Bureau of Justice Statistics Report, U.S. Department of Justice, Washington, DC., 1986 (about 75% of domestic violence calls to law enforcement occur after separation from batterers); Spousal Homicide Risk and Estrangement, Violence and Victims, Vol. 8. No. 1, 4, 10 (Springer Publishing Company: 1993) (the fact that women who leave abusive husbands may be pursued and murdered is known to police, shelter workers and others who work with the victims, but separation violence is hard to pin-point statistically because there is not comparable data on separation duration for women in the population-at-large).

B. Domestic violence programs provide critical assistance to battered women at a particularly vulnerable time

For many battered women, it is not possible to escape a violent home alone.

In addition to any barriers preventing them from leaving abusive relationships, victims often face dramatic economic constraints that bind them to their abusers.

Many battered women do not have easy access to cash, checking accounts, or charge accounts. According to one study, “27% of battered women had no access to cash, 34% had no access to a checking account, 51% had no access to charge accounts, and 22% had no access to a car.”^{12/}

Counseling and shelter programs furnish a variety of services of value to battered women, including hotlines, individual and group counseling, housing, advocacy services, physical protection, emergency medical care, food, clothing, transportation, childcare, and outreach and education programs. The counseling function is an integral part of these programs in two ways. First, by encouraging battered women to confide in them, counselors are best able to evaluate the particular risks posed by perpetrators and to help identify the services and legal interventions that will enable the victims safely to escape the abuse. Second, a counselor can provide psychological counseling appropriate to feelings of despair,

^{12/} Martha F. Davis & Susan J. Kraham, Protecting Women's Welfare in the Face of Violence, 22 Fordham Urb. L.J. 1141, 1150 (1995).

depression and fear, which enable women to regain self-confidence and leave abusive relationships.^{13/}

C. Confidentiality is essential to guarantee the safety of battered women

In order for domestic violence programs to successfully assist battered women and their children safely to escape abusers, they must be allowed to protect the information they are given about each woman who seeks their help. There is no other way to say it: confidentiality is the cornerstone of all successful counseling and shelter programs. The District Court was entirely wrong to pay short shrift to this most critical issue.

Without confidentiality, few battered women would seek help for fear that their abusers would learn of their disclosures and retaliate against them. Without confidentiality, few battered women would be able to implement the safety plans they need to protect themselves and their children. The physical danger faced by battered women underscores the necessity for confidentiality in the relationship they have with their counselors.

^{13/} Counselors are very often former victims of domestic violence themselves who have succeeded in escaping abusive relationships. They are particularly qualified to assure battered women that their situation is not unique. They provide critical advice and strategies to help battered women affirm their integrity and reclaim their ability to resist violence and to act effectively to protect themselves and their children. Counselors function like psychotherapists, while also offering shared experience to reduce isolation and to rebuild self-esteem.

By seeking help, battered women often expose themselves to grievous harm.^{14/} When they leave their batterers, the risk of violent assault increases.^{15/} For this reason, domestic violence programs take every precaution to ensure the confidentiality necessary to protect battered women from their abusers.^{16/} Because safety is such a paramount concern, domestic violence programs promise battered women complete confidentiality -- extending even to protecting their names.

Such blanket protection is necessary because it is the most important guarantee provided by a domestic violence program to each and every woman who calls, emails, writes, or comes to its door. Women who have not yet left their abuser cannot risk even the slightest possibility that their names will be discovered and prematurely revealed. Women who are leaving their abuser cannot risk discovery any more, nor can they risk the possibility that their next moves will be tracked. The mere hint that such information might be disclosed -- regardless of

^{14/} Joan Zorza, Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women, 29 Fam. L. Q. 273, 294 (Summer 1995) (citing Lenore E. Walker, The Battered Woman Syndrome 25-26 (1984)); Mary Ann Dutton, Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women's Syndrome, 21 Hofstra L.Rev. 1191 (1993); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich L. Rev. 1, 5-6 (1991); Mary P. Koss, et al., No Safe Haven: Male Violence Against Women at Home, at Work and in the Community 98-99 (1994); J.M. Lawrence, Fleeing Abuse Is Often Deadly for Women, Boston Herald, Oct. 15, 1995, at 26.

^{15/} See supra, note 11 and accompanying text.

^{16/} Susan H. Rauch, Protecting Confidentiality of Victim-Counselor Communications 47 (1993)

the circumstances or the so-called “safeguards” -- sends a chilling message to women and severely curtails the efficacy of every domestic violence program. Confidentiality is not just a convenience to battered women -- it is a necessity.^{17/}

II. INFORMATION PROVIDED BY BATTERED WOMEN TO DOMESTIC VIOLENCE PROGRAMS IS PRIVILEGED UNDER FEDERAL LAW

A. Federal and State governments recognize the importance of ending domestic violence

Congress enacted several complementary statutory frameworks to provide assistance to domestic violence programs serving battered women. Through the Family Violence Prevention Services Act^{18/} and the Victims of Crime Act,^{19/} Congress provided funds to assist battered women and other victims of domestic violence. The Violence Against Women Act (“VAWA”)^{20/} provides grants to combat violent crimes against women, to reduce sexual assaults against women, to encourage arrest policies, to support battered women’s shelters, to gather stalking

^{17/} Fearing future retaliation and violence, battered women often make great efforts to preserve the confidentiality of their location once they leave the batterer. See Zorza, supra note 14 at 280 (quoting Catherine Kirkwood, Leaving Abusive Partners: From the Scars of Survival to the Wisdom for Change 103 (1993) (describing efforts, such as paying utility bills under aliases, to remove “any indication of existence”).

^{18/} See 42 U.S.C. §§ 10401-18 (2000).

^{19/} See 42 U.S.C. §§ 10601-07 (2000).

^{20/} Violence Against Women Act, Pub. L. No. 103-322 § 40221, 108 Stat. 1910 (1994).

data, and to fund a national domestic violence hotline to facilitate access to information and assistance for battered women.^{21/}

In addition, all fifty states and the District of Columbia have enacted civil protection order statutes that afford broad relief to adult and child victims of domestic violence.^{22/} The relief provided by state statutes includes injunctions against future violence, exclusion from the family domicile, support, custody, relinquishment of weapons, and payment of losses and attorneys' fees. Some states now require police departments to respond to domestic violence incidents in the same manner as they would respond to offenses involving strangers.^{23/} States likewise have passed mandatory arrest statutes that require police to arrest an abuser if they have probable cause to believe that an assault has occurred or that a

^{21/} 42 U.S.C. § 40211 (1994). Violence Against Women Act, Pub. L. No. 103-322, §§ 40121, 40151, 40211, 40241, 40602, 108 Stat. 1910, 1920, 1925, 1934, 1951 (1994).

^{22/} See, e.g., Ark. Code Ann. §§ 9-15-101, -205, -206 (Michie 1999); Iowa Code § 236.1 to .18 (1995); Minn. Stat. § 518B.01 (2000); Mo. Rev. Stat. §§ 455.010 to .538 (1999); Neb. Rev. Stat. § 42-905 (2000); N.D. Cent. Code §§ 14-07.1-01 to -18 (Supp. 1995); S.D. Codified Laws Ann. §§ 25-10-1 to -33 (2000).

^{23/} See, e.g., Mo. Rev. Stat. § 455.080 (1999). Of course, implicit in this requirement is the unfortunate fact that in the absence of legislation, many police officers regard domestic violence as less serious than other violent crimes even though the statistics show that women are far more likely to be assaulted or killed by their partners than by strangers. See Developments in the Law -- Legal Responses to Domestic Violence, 106 Harv. L. Rev. 1498, 1501 (1993) (noting that as many as 40% of calls to police involve domestic disturbances).

protective order has been violated.^{24/} More recently, almost all states and the District of Columbia have enacted “anti-stalking” laws, criminalizing harassment that threatens death or serious injury.^{25/} In addition, an increasing number of states are adopting laws requiring consideration of evidence of domestic abuse when making child custody decisions.^{26/}

B. State and Federal governments recognize that information provided by battered women to domestic violence programs must remain confidential

Widespread recognition of the importance of a comprehensive approach to domestic violence underscores society’s commitment to effective service delivery. Federal and state lawmakers have also recognized the importance of protecting the privacy of battered women and the confidentiality of their dealings with support services. The Family Violence Prevention and Services Act, for example, forbids grants to any program without “documentation that procedures have been developed . . . to assure the confidentiality of records pertaining to any individual

^{24/} See, e.g., Conn. Gen. Stat. Ann. § 46b-38b (1999); D.C. Code Ann. § 16-1031 (2000); Kan. Stat. Ann. § 22-2307 (1999); Nev. Rev. Stat. Ann. § 171.1225 (2000); N.J. Stat. Ann. § 2C 25-21 (2000); Or. Rev. Stat. § 133.055(2)(a) (1999).

^{25/} See, e.g., Ark. Code Ann. § 5-71-229 (1999); Iowa Code § 708.11 (1999); Minn. Stat. § 609.749 (2000); Mo. Rev. Stat. § 565.225 (1999); Neb. Rev. Stat. § 28-311.02 to .05 (2000); N.D. Cent. Code § 12.1-17-07.1 (2000); S.D. Codified Laws § 22-19A-1 to -19A-7 (2000).

^{26/} See, e.g., Colo. Rev. Stat. § 14-10-124 (2000); Fla. Stat. Ann. § 61.13(2)(b)2 (2000); Minn. Stat. § 518.17 (2000); N.J. Stat. Ann. § 9:2-4 (2000). See also In re Custody of Vaughn, 664 N.E.2d 434 (Mass. 1996) (creating a judicially crafted rule).

provided family violence prevention or treatment services”^{27/} In fact, the United States Postal Service was required to implement regulations “to secure the confidentiality of domestic violence shelters and abused persons’ addresses.”^{28/}

State legislatures have also acted specifically to protect the confidentiality of battered women by restricting access to information that would reveal their locations. For example, some states require, or at least allow, courts to keep addresses of battered women confidential.^{29/} Others permit a victim to remove her driver’s license and registration information from the public record.^{30/} Colorado allows a battered woman to make any public record confidential if she submits an affidavit stating that she believes she will be harassed or threatened with bodily harm.^{31/} New Jersey and Washington enable a battered woman to register to vote without disclosing her street address.^{32/}

^{27/} 42 U.S.C. § 10402(a)(2)(E) (2000). The Victims of Crime Act contains a similar provision. See 42 U.S.C. § 10604(a) (2000).

^{28/} 42 U.S.C. § 13951 (2000)

^{29/} See, e.g., Mass. Gen. Laws Ann. ch. 209A, § 8 (2000); N.J. Rev. Stat. Ann. § 2C:25-26 (2000); Tex. Fam. Code Ann. § 71.111 (2000); Wis. Stat. Ann. § 813.125 (2000), id. at § 5895.67 (2000).

^{30/} See, e.g., Ark. Code Ann. §§ 27-50-906 to -908 (1999); Cal. Veh. Code § 1808.21 (2000); Minn. Stat. § 171.12 (2000).

^{31/} See Colo. Rev. Stat. § 24-72-204 (2000).

^{32/} See N.J. Rev. Stat. Ann. §§ 2C:25-26, 19:31-3.2 (2000); Wash. Rev. Code Ann. §§ 40.24.010 to .070 (2000). The New Jersey legislature enacted its statute after a court held that a battered woman could register to vote without disclosing her street address. See D.C. v. Superintendent of Elections, 618 A.2d 931, 932 (N.J. Super. Ct. Law Div. 1992).

Many states have also enacted statutory privileges to guard the confidentiality of communications between a counselor and a crime victim. A number of states have enacted a counselor-battered woman privilege.^{33/} Additionally, many states have enacted a more general counselor-victim privilege.^{34/} The enactment of these privilege statutes has been a recent trend, with most statutes having been passed since 1980. Significantly, the Ogalala Sioux Tribal Council recently enacted Ordinance 00-26, the “Victim-Advocate Privilege Act” (the “Act”), which provides that communications or observations between battered women and their advocate shall be privileged and confidential.^{35/} In Section V of the Act, the law provides that “Advocates, shelter staff, or program staff will not substantiate, verify, or deny placement information or the whereabouts of any domestic violence victim, or any children involved, under the

^{33/} See, e.g., Alaska Stat. § 25.35.059, § 25.35.052(a) (2000). Cal. Evid. Code § 1037.2 (2000); Conn. Gen. Stat. Ann. § 52-146k (2000); 225 Ill. Comp. Stat. Ann. 107/75 (2000); La. Rev. Stat. Ann. § 46:2124.1 (2000); Mass. Gen. Laws. Ann. ch. 233, § 20J (2000); Mich. Comp. Laws Ann. § 600.2157a (2000); N.D. Cent Code § 14-07.1-18 (2000); N.H. Rev. Stat. Ann. §§ 173-C:1, 173-C:2 (2000); Pa. Cons. Stat. tit. 42, § 5945.1 (2000); Wyo. Stat. §§ 1-12-116 (2000) 14-3-210 (1994). More than half of the states have enacted statutes addressing the confidentiality of communications between counselors and sexual assault or domestic violence victims. Department of Justice, Report to Congress on the Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors, Findings and Model Legislation, (1995).

^{34/} See, e.g., Ala. Code §§ 15-23-40 to -45 (2000); Ind. Code §§ 35-37-6-1 to 11 (2000); Iowa Code § 236A.1 (2000); N.J. Stat. Ann. §§ 2A:84A-22.13 to -22.15; 84A-29 (2000); N.M. Stat. Ann §§ 31-25-1 to -6 (2000).

^{35/} Act, Section III (A).

victim-advocate privilege.”^{36/} Because of increasing societal awareness about the problem of domestic violence, it is highly likely that many more states will follow this trend and enact their own privilege statutes.

C. In light of the foregoing, a limited battered woman-counselor privilege would be consistent with “reason and experience” under Federal law

Congress has not instructed the courts to freeze the law of privileges; instead, it has instructed them to “continue [the law’s] evolutionary development.”^{37/} In enacting Rule 501 of the Federal Rules of Evidence, Congress committed the courts to consider “reason and experience” in developing the law of privilege without prescribing (or proscribing) any source of that wisdom.^{38/}

The Supreme Court recognized a social worker-patient privilege in Jaffee v. Redmond, but chose not to delineate its full contours.^{39/} In reaching its conclusion,

^{36/} Id., Section V (A).

^{37/} See Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quoting Trammel v. United States, 445 U.S. 40 at 47 (1980)).

^{38/} Fed. R. Evid. 501. See generally M.B. Bressman and F.R. Laguarda, Annual Survey of the United States Supreme Court and Federal Law: Article: Jaffee v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege, 30 Creighton L. Rev. 319, February, 1997.

^{39/} The Jaffee Court confirmed that Rule 501 of the Federal Rules of Evidence authorized “recognition of new privileges on a case-by-case basis.” Jaffee, 518 U.S. at 9 (quoting S.Rep. No. 93-1277 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7059). Thus, the courts should be careful not to close the door on the development of a counselor-battered woman privilege.

the Court used the test formulated by Dean Wigmore.^{40/} To determine whether a new privilege would make sense, that test asks: (1) whether the communication originated in a confidence that the information would not be disclosed; (2) whether the element of confidentiality is essential to the full satisfactory maintenance of the relationship between the parties; (3) whether the relationship between the parties is one which in the opinion of the community ought to be sedulously fostered; and (4) whether the injury to the relationship that would inure from the disclosure of the communication is be greater than the benefit that would be gained from correct disposal of the litigation.

As set forth above, all of these elements weigh in favor of recognizing a limited privilege protecting confidential information provided by battered women to their counselors. First, there is little question that a battered woman divulges personal information to a domestic violence program -- indeed, she calls for help -- with the full expectation that any disclosures will be kept confidential.^{41/} Women would not call or reveal their names to these programs if they believed their inquiry would create a record that was not entirely confidential.

^{40/} See, John H. Wigmore, Evidence 2285 (McNaughten rev. 1961).

^{41/} Indeed, it is highly likely given this trend that a battered woman would reasonably believe the contents of her conversation with a domestic violence counselor -- even her name -- to be confidential. See United States v. Moscony, 927 F.2d 742, 752 (3d Cir.), cert. denied, 501 U.S. 1211 (1991) (reasonable belief of the disclosing party is relevant to determining whether communications should be considered “confidential”).

Second, confidentiality is absolutely essential to maintaining the counselor-battered woman relationship. Effective safety planning and counseling requires each woman to reveal private, often intimate, details about herself. The mere suggestion that this information could be disclosed by the program would disrupt this critical relationship and force each woman to weigh on her own the benefits of revealing these details against the cost of their possible materialization down the road. This would materially undermine the program's ability to provide services.^{42/}

Moreover, the "public ends" served by such a privilege are also particularly clear. As evinced by the numerous Federal and State programs serving battered women and their children, society believes the privilege at issue should be "sedulously fostered." There is a significant interest in protecting women and children from physical and emotional abuse, and preserving the well-being of healthy families. Finally, the "reason and experience" of state law, as well as the many federal initiatives discussed above, support recognition of a limited privilege as well.

At least one federal district court has taken this approach. In United States v. Lowe,^{43/} the United States District Court for the District of Massachusetts confronted the question of whether to extend a limited privilege to rape counseling

^{42/} Indeed, given widespread recognition of the heavy burden shouldered by women in these circumstances, they should not be forced to make such determinations on their own.

records.^{44/} The court reasoned that Jaffee was not technically on point because the communications were made to “a rape crisis center employee or volunteer” and not a “licensed social worker or psychotherapist.”^{45/} Nevertheless, the court concluded that “the policies expressed in Jaffee” supported “some form of a federal privilege for communications with a rape crisis counselor”^{46/} The court reached this conclusion after noting that a majority of the states and the District of Columbia have enacted privileges for confidential communications between counselors and victims of sexual assault or domestic violence.^{47/}

It is clear, moreover, that such a privilege should cover the names and personally identifiable information provided by battered women. South Dakota provides a model for this. The state has recognized that a patient has a privilege to refuse to disclose and prevent others from disclosing confidential communications made for the purpose of treatment of physical, mental or emotional condition.^{48/} South Dakota has also specifically carved out a psychologist-patient privilege.^{49/}

^{43/} United States v. Lowe, 948 F. Supp. 92 (D. Mass. 1996).

^{44/} Id. at 99.

^{45/} Id.

^{46/} Id. at 99.

^{47/} Id. The court, however, decided that the rape victim in Lowe had waived her privilege. Id. at 100.

^{48/} S.D. Codified Laws, §19-13-7 (2000).

^{49/} The patient’s privilege to refuse to disclose and prevent any other person from disclosing confidential information for the purpose of diagnosis or treatment

The Supreme Court of South Dakota has determined that the psychologist-patient privilege covers the names of patients.^{50/} In doing so, the Court noted the need for confidentiality: “To compel discovery of a psychotherapy patient’s identity is to directly harm her privacy interest . . . If a patient knows that the privilege is fraught with exceptions, she is liable to withhold information or avoid therapy altogether.”^{51/} The same reasons apply with equal force to any privilege covering information provided by battered women to their counselors.

III. INFORMATION PROVIDED TO DOMESTIC VIOLENCE PROGRAMS IS PRIVILEGED UNDER FEDERAL STATUTE

Notwithstanding whether a limited evidentiary privilege under Rule 501 of the Federal Rules of Evidence applies, it is also clear that the information requested is privileged under the statutory scheme funding Appellant’s program.^{52/} A series of federal statutes require domestic violence programs to keep and maintain records, which the government here seeks.^{53/} However, the various statutes provide a clear and unambiguous directive that the information collected

applies to communications among himself, physician, or psychotherapist and person participating in the diagnosis or treatment under the direction of the physician or psychotherapist. Note this is a separate law than S.D. Codified Laws, §19-13-6, which creates a regular physician-patient privilege.

^{50/} Weisbeck v. Hess and Mountain Plains Counseling Center, 524 N.W.2d 363 (S.D. 1994).

^{51/} Id. at 365.

^{52/} See generally Family Violence Prevention and Services Act, Victim’s Assistance in Indian Country, and Victims’ of Crime Act, supra.

by domestic violence programs must be kept confidential.^{54/} Notwithstanding this clear directive, the District Court chose to focus on the requirements protecting “research or statistical information.”^{55/} The Court’s conclusion is wrong because it would render the entire statutory scheme a nullity.

To begin with, the directive of the statutory scheme is clear and unambiguous, rendering it unnecessary for the Court to turn to any agency definitions for guidance.^{56/} The protection for research and statistical data provided by the statute should be interpreted to cover information “in addition to” and not “instead of” any other information provided by battered women to such programs. In fact, that is the only reading that is consistent with the express purpose of the rules.^{57/}

Interpreting the statute to exclude information from protection unless specifically gathered for narrow “studies” or “research” purposes would render the statutory framework meaningless. Such a requirement would eviscerate the fundamental purpose underlying Federal funding for domestic violence

^{53/} See, e.g., 42 U.S.C. §§ 10604(b) and 10604(d).

^{54/} See 42 U.S.C. §§ 10402(a)(2)(E), 10413(2) & (3).

^{55/} In the Matter of the Grand Jury Subpoena Duces Tecum for the Records of Cangleska, Inc., GJS 2000-4, Memorandum Opinion and Order, 7 (S.D.S.D. Aug. 2, 2000).

^{56/} See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

^{57/} See 28 C.F.R. § 22.1(f).

programs.^{58/} Congress provided funding for shelters and domestic violence programs in light of an extensive record showing the important work they do saving the lives of women and children.^{59/} The District Court would interpret the

^{58/} Courts should avoid interpreting a provision in a way that is inconsistent with the policy of another provision, a necessary assumption of another provision, or the structure of the statute. See, e.g., United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988); Gade v. National Solid Wastes Management Association, 505 U.S. 88 (1992); Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661 (1990); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987).

^{59/} For example, passage of the VAWA in 1994 was preceded by four years of hearings. See, e.g., Domestic Violence: Terrorism in the Home, Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess. (1990) (S. Hearing 101-897); Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990); Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess. (1991) (S. Hearing 102-369); Violence Against Women, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 102d Cong., 2d Sess. (1992); Hearing on Domestic Violence, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103- 596); Violent Crimes Against Women, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103-726); Violence Against Women: Fighting the Fear, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103-878); Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess. (1993); Domestic Violence: Not Just a Family Matter, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 103d Cong., 2d Sess. (1994).

In addition, Congress set forth specific factual findings in eight separate reports over the long course leading to enactment of the legislation. See S.Rep. No. 101-545 (1990); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: The Increase of Rape in America, 102d Cong., 1st Sess. (Comm. Print 1991); S.Rep. No. 102-197 (1991); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: A Week in the Life of America, 102d

statute to protect information gathered to learn about battered women, but not to protect them when they are actually in danger. Such a reading is patently absurd.^{60/}

CONCLUSION

The District Court erred in failing to apply the plain meaning of the statutory provisions that protect the confidentiality of the information sought by the subpoena below. Moreover, Federal and State policies recognize the value of domestic violence programs and the importance of preserving confidentiality as these services are delivered. A substantial body of law provides further support for ensuring confidentiality in order to protect the lives and safety of battered women and their children. Accordingly, “reason and experience” counsel in favor of recognizing a limited privilege that preserves the confidentiality of information provided by battered women to domestic violence programs.

For these reasons, the denial of the Appellant’s motion to quash should be REVERSED.

Cong., 2d Sess. (Comm. Print 1992); S.Rep. No. 103-138 (1993); Majority Staff of Senate Committee on the Judiciary, *The Response to Rape: Detours on the Road to Equal Justice*, 103d Cong., 1st Sess. (Comm. Print 1993); H.R.Rep. No. 103- 395 (1993); H.R. Conf. Rep. No. 103-711 (1994).

^{60/} The Court also found material not privileged under 10604 because it must be revealed during an audit, and therefore is no longer confidential. The implementing regulations make clear, however, that identifiable materials may be revealed only on a “need-to-know” basis unless there is a written consent from the victim. The regulations go as far as to require physical destruction of all copies of the material, to preserve confidentiality. 28 C.F.R. § 22.25.

Respectfully submitted,

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The undersigned hereby certifies that on this 13th day of November, 2000, two copies of Amicus Curiae Brief, as well as a diskette containing a copy of the brief, in Microsoft Word '97, were served by Federal Express (*) or United States mail, postage prepaid on:

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