#### IN THE SUPREME COURT STATE OF SOUTH DAKOTA

Case No. 28041

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#### STATE OF SOUTH DAKOTA, Plaintiff and Appellee,

V.

JOHN ERIC HEMMINGER, Defendant and Appellant.

\*\*\*\*

Appeal from the Circuit Court, Fifth Judicial Circuit, Brown County, South Dakota. The Hon. Scott P. Myren Judge presiding. The Notice of Appeal was filed on November 10, 2016

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#### STATEMENT OF THE LEGAL ISSUES

I. Should evidence related to the items taken from Hemminger at Avera St. Luke's Hospital have been introduced at trial? The trial court allowed the evidence related to Hemminger's clothing, cell phone, jacket, and DNA sample to be introduced at trial.

Relevant Cases:

State v. Castleberry, 2004 S.D. 95, 686 N.W.2d 384

State v. Fierro, 2014 .S.D. 62, 853 N.W.2d 235

Vaughn v. Baldwin, 950 F.2d 331 (6th. Cir. 1991)

State v. Medicine, 2015 S.D. 45, 865 N.W.2d 492

II. Should the evidence located at John Roach's residence have been introduced at trial?

The trial court allowed the evidence located at John Roach's to be introduced at trial.

Relevant Cases:

Minnesota v. Olson, 495 U.S. 91 (1990)

Katz v. United States, 389 U.S. 347 (1967

State v. Tullous, 2005 S.D. 5, 692 N.W.2d 790

State v. Hess, 2004 S.D. 60, 680 N.W.2d 314

III. Did the introduction of twenty-six autopsy photos prejudice the jury against Hemminger?

The trial court ruled the autopsy photos did not prejudice

Hemminger at trial.

Relevant Cases:

State v. Logue, 372 N.W.2d 151 (S.D. 1985)

State v. Fisher, 2011 S.D. 74, 805 N.W.2d 571

**Relevant Statutes:** 

S.D. Codified Laws § 19-19-401

S.D. Codified Laws § 19-19-402

S.D. Codified Laws § 19-19-403

IV. Should a new trial have been granted because the prosecutor engaged in improper burden shifting during closing arguments? The trial court ruled that a new trial was not necessary. Relevant Cases: Estelle v. Williams, 425 U.S. 501 (1976)

Lucier v. State, 189 So.3d 161 (Fla. 2016)

V. Was the evidence sufficient to support the jury's verdict?The trial court ruled the evidence was sufficient to support the jury's verdict.

Relevant Cases:

State v. Janklow, 2005 S.D. 25, 693 N.W.2d 685

State v. Running Bird, 2002 S.D. 86, 649 N.W.2d 609

VI. Did the cumulative effect of the trial court's errors deprive Hemminger of his constitutional right to a fair trial? Relevant Cases:
<u>State v. Davi</u>, 504 N.W.2d 844 (S.D. 1993)
State v. Smith, 477 N.W.2d 27 (S.D. 1991)

#### **STATEMENT OF THE CASE**

This is an appeal from a *judgment of conviction* entered on September 7, 2016 by the Hon. Scott P. Myren, Fifth Judicial Circuit, Brown County, South Dakota. On January 7, 2015, John E. Hemminger ("Hemminger") was arrested and charged with first degree murder. He was indicted on March 15, 2015.

Prior to trial, Hemminger sought and obtained a change of venue. A jury trial was held on August 22, 2016, in Fort Pierre, Hughes County, South Dakota. On August 31, 2016, Hemminger was found guilty of First Degree Murder. Hemminger filed a motion for a new trial on September 19, 2016. A hearing on this motion was held on October 18, 2016. A notice of entry of the order denying this motion was filed on October 27, 2016. On November 10, 2016, Hemminger timely filed notice of his appeal from the whole of the trial court's final judgment.

#### **STATEMENT OF THE FACTS**

On January 6, 2015, at approximately 11:30 p.m., Jessica Goebel ("Goebel") was stabbed multiple times at her residence located in Aberdeen, South Dakota. (TT28:9-10.) In the hours following the assault, Hemminger became law enforcement's prime suspect. (TT38:21-39:10.)

Hemminger and Goebel were involved in a lengthy but occasionally rocky relationship lasting approximately two years. They had two daughters together. They shared the residence at which Goebel was stabbed. (TT28:11-29:8.)

On the evening of the assault Hemminger was not staying at the residence due to a no-contact order in place between the couple. The no-contact order had been in place for approximately one month at the time. (PMRL4.) During this period Hemminger alternated between staying with his sister and with his friend John Roach ("Roach"). Hemminger and Roach worked construction together in Aberdeen. Roach's apartment was a short distance from Goebel's residence. There is no question that Hemminger often spent the night at Roach's apartment. (TT28:6-19.)

Although there was a no-contact order in place, Hemminger and Goebel interacted with each other often. They exchanged multiple text messages on nearly a daily basis throughout the month leading up to the assault. (TT177:9-178:18.) The couple met in person on several occasions as well.

Hours before the assault, at approximately 6:00 p.m., Goebel had several confusing interactions with emergency dispatch and law enforcement. First, she telephoned 911 and reported that Hemminger and another individual were fighting inside her residence. She then called back and stated that she could not identify the two individuals who were fighting. (TT60:19-66:13.) When law enforcement arrived, Goebel told them that she did not recognize either of the two men fighting, but gave them a description of what they were wearing.

Hemminger himself telephoned 911 at approximately 2:00 a.m. on January 7, 2015. On this call, Hemminger advised that he had been involved in an incident at Goebel's residence and that a man there had stabbed him. (TT140:4-15.) Hemminger's friend was transporting him to Avera St. Luke's Hospital in Aberdeen as this call took place. (MHA12:9-15.)

Within a short time after his arrival at the hospital, Hemminger was confronted by law enforcement. (TT274:8-275:7.) At the same time, officers were proceeding to Goebel's residence. Upon their arrival, officers discovered Goebel and the two daughters she shared with Hemminger. The girls were in the living room and Goebel was unconscious on the kitchen floor. Law enforcement cleared the house and then commenced attending to Goebel's injuries. Goebel was taken by ambulance to Avera St. Luke's and later flown to Avera McKennan Hospital in Sioux Falls.<sup>1</sup> (TT183:14-189:11.)

<sup>&</sup>lt;sup>1</sup> Goebel died in Sioux Falls on January 12, 2015. An autopsy revealed that she suffered 26 stab wounds and a crushed skull in addition to other injuries.

At the hospital, Hemminger was questioned about the source of the stab wounds on his hand. He was also told that there was a female at the residence who was badly hurt. Hemminger begged to know whether Goebel was the injured female. (TT226:20-227:2.)

Officer Kory Pickrel ("Officer Pickrel") was the first officer to speak

with Hemminger. During the conversation the following exchange took

place regarding the seizure of Hemminger's cell phone by law enforcement:

PICKREL: Ok, well right now John I'm gonna have to seize your phone, ok. Until we get all this ironed out because you know this is a real complex thing we got going on right now and until we can, you know, rule things out here and there I'm going to take your phone at this point as evidence, ok. Not saying that you're looked at as a suspect or anything.

HEMMINGER: No problem.

PICKREL: It is just all part of the process.

(MHB11:3-17.)

Thereafter, Officer Pickrel confiscated Hemminger's phone. He placed it on a counter where it was eventually retrieved by detectives. <u>Id</u>.

At approximately 4:00 a.m. on January 7, 2015, Detective Chris Gross ("Det. Gross") and Detective Arika Dingman ("Det. Dingman") entered Hemminger's room at the hospital to continue the interrogation. (TT277:3-5.) Before speaking with Hemminger, Det. Gross conferred with Officer Pickrel, who advised him that Hemminger's story "wasn't making sense." Although suspicious that Hemminger had stabbed Goebel, Det. Gross began the interview as though he was simply taking Hemminger's statement. (MHA31:16-33:1.) Det. Dingman largely stood by and observed the conversation between Det. Gross and Hemminger. At one point, Hemminger temporarily allowed Det. Dingman access to his previously-seized cell phone to view specific text messages sent between him and Goebel. (MHA44:13-20.)

Det. Gross ultimately deemed it necessary to seize Hemminger's

clothes and DNA. He told him:

GROSS: Okay. Okay. So what's the last - these are your clothes by the way right here. Is this your -- whose coat is that?

HEMMINGER: Mine.

GROSS: What we do on these, we're going to have to take -because we're still trying to piece together what all happened, we need to take your clothes. We'll give you other set of clothes of yours that they brought in, okay? We'll give you a ride and stuff like that, and you'll get your stuff back. It's just got to -- we got to work the case through.

HEMMINGER: Just like my phone.

GROSS: Huh?

HEMMINGER: Just like they take my phone.

GROSS: Yep, yep. You understand all that?

(TT272:6-291-23.)

A similar conversation took place regarding the seizure of Hemminger's

DNA via a buccal swab:

GROSS: We're just waiting. We're going to get 7 bags for this here. Where are you going to go from here?

HEMMINGER: Back to my sister's.

GROSS: Okay. I've got -- I did grab -- I just want to get a swab because we collect everybody's DNA from everybody basically when we have something like this. Where the hell did I put it now? Son of a bitch. You can put --

GROSS: You want to hang tight and I'll run out and grab that? I had one I thought. I'll be right back.

<u>Id</u>.

Eventually, officers collected Hemminger's clothes and other possessions. As Det. Dingmann was gathering Hemminger's coat, she located a knife handle in the pocket. (TT288:2-7.) At this point, Det. Gross decided to interrogate Hemminger further. This interview did not provide any new information.

Det. Gross then arrested Hemminger. He advised him of his Miranda rights for the first time. The time of arrest was approximately 6:29 a.m. By this time, Hemminger had been subjected to over five hours of on and off interrogation by various members of the Aberdeen Police Department.

Det. Gross never attempted to obtain a search warrant for the items seized from Hemminger at the hospital. (MHA33:5-8.) Ultimately, Detective Tom Tarnoswki ("Det. Tarnowski") obtained a search warrant for the cell phone in order to conduct a full analysis of its content. (MHA36:310.) Over 400 text messages were observed to have been exchanged between Hemminger and Goebel. (TT177:10-13.) Only forty-four of these were introduced during the jury trial. (TT160:1-20.)

In the days following Hemminger's arrest, law enforcement conducted an investigation designed to confirm its initial conclusion that Hemminger was responsible for Goebel's death. Upon learning that Hemminger lived part-time at Roach's residence, Det. Gross pulled Roach from his worksite in Aberdeen and drove him to the apartment. (TT478:15-479:2.) Frightened, Roach authorized a search. This search revealed a significant amount of evidence that was later used against Hemminger at the jury trial. These items included a jacket, boots, rag and bloody clothes. (TT354:6-366:14.) Like the items taken from Hemminger at the hospital, law enforcement never sought a search warrant prior to seizing the items taken from Roach's residence. Instead, they relied on Roach's consent.

On January 26, 2015, Hemminger withdrew any alleged consent he may have previously given for the seizure, search, and testing of his property seized by law enforcement at Avera St. Luke's Hospital by written correspondence to Brown County State's Attorney Larry Lovrien. Hemminger also copied the State Forensic Laboratory, among others. (MHC7:15-8:14.)

The revocation of consent letter requested that Brown County State's Attorney Larry Lovrien contact Hemminger's counsel to arrange for the return of his property and destruction of the biological evidence. Deputy State's Attorney Christopher White responded to the letter. He advised that the evidence would not be returned or destroyed. Hemminger had no choice but to file a motion seeking the return of his property.

Approximately eighteen months after his arrest, Hemminger was tried and convicted by a jury in Hughes County, South Dakota. The conviction for first degree murder carried with it a mandatory sentence of life imprisonment.

#### **ARGUMENT**

#### I. Evidence related to the items taken from Hemminger at Avera St. Luke's Hospital should not have been introduced at trial.

One of the more contentious issues prior to trial concerned law enforcement's seizure of certain items of personal property and a DNA sample from Hemminger while he was being interrogated at the hospital. During the interrogation, law enforcement took from Hemminger his clothes, cell phone and a knife handle found inside his coat pocket. It also obtained from Hemminger a DNA sample via a buccal swab.

Hemminger raised several pretrial motions pertaining to these items. The motions boil down to two primary issues: 1) whether Hemminger consented to the seizure of these items; and 2) if he did consent, what was the effect of his subsequent withdrawal of consent. If no consent was given, then the seizure was improper because there was no search warrant and no exigent circumstances existed to justify the seizure of the items without a search warrant. As an alternative argument, even if consent was given, that consent was unequivocally withdrawn approximately three weeks later. At that point, the prosecution had no choice but to either return the items or seek a search warrant. It did neither until directed to obtain a search warrant by the trial court.

Initially, the trial court ruled that the items seized need not be returned to Hemminger. As part of Hemminger's motion to reconsider, he argued two key points. First, that there had been no facts upon which the trial court could have found that Hemminger consented to the initial seizure of these items. In addition, there had been no facts upon which the trial court could have found that the prosecution had acted in good faith as suggested in the decision denying his motion to return property.

Thereafter, the trial court heard evidence on this issue over the course of several hearings. It then issued a second decision, again denying Hemminger's request to return the property.

The trial court's initial ruling was incorrect in that it denied Hemminger's request to return his property. On the motion to reconsider, the trial court heard evidence regarding the issue and determined that Hemminger had in fact consented. This too was in error. Moreover, the record is devoid of any *findings of fact and conclusions of law* in regards to

this issue. Therefore, this Court should remand if for no other reason than to allow the record to be supplemented with such information so that a proper appellate review may be conducted.

#### a. Hemminger never consented to the seizure of his clothing, cell phone, jacket and DNA sample while at Avera St. Luke's Hospital.

"The Fourth Amendment to the United States Constitution, as well as Article VI, § 11, of the South Dakota Constitution, protects the individual from 'unreasonable searches and seizures."" <u>State v. Medicine</u>, 2015 S.D. 45, ¶ 6, 865 N.W.2d 492, 495. Generally, this requires "the issuance of a warrant by a neutral judicial officer based on probable cause prior to the execution of a search or seizure of a person." <u>Id</u>. (citing <u>State v.</u> <u>Fierro</u>, 2014 .S.D. 62, ¶ 15, 853 N.W.2d 235, 240). In the absence of a search warrant, the State bears the burden of establishing that a search falls within one of the "well-delineated exceptions" to the warrant requirement. State v. Hess, 2004 S.D. 60, ¶ 23, 680 N.W.2d 314, 324.

One of the exceptions to the search warrant requirement is consent. The prosecution has the burden of proving by a preponderance of the evidence that a defendant's consent was free and voluntary. <u>Medicine</u>, 2015 S.D. 45, ¶ 6. In doing so, the prosecution must show that the totality of the circumstances surrounding the consent demonstrates that such consent was "free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied." <u>State v. Tapio</u>, 459 N.W.2d 406,

413 (S.D. 1990). Consideration of the following characteristics of the accused is necessary: 1) age; 2) maturity; 3) education; 4) intelligence; and 5) experience. State v. Castleberry, 2004 S.D. 95, ¶ 9, 686 N.W.2d 384. In addition, a reviewing court should also consider the conditions in which the consent was obtained, including the officer's conduct and the duration, location and time of the event. Id.

"Whether a valid consent to search exists is generally a question of fact for the trial court." <u>State v. Akuba</u>, 2004 S.D. 94, ¶ 25, 686 N.W.2d 406, 417. As such, the trial court's resolution of that question will be upheld unless it was clearly erroneous. <u>Id</u>. (citing <u>State v. Almond</u>, 511 N.W.2d 572, 573 (S.D. 1994). However, in cases where there is no dispute of fact, de novo review is appropriate. In <u>Akuba</u>, the Court concluded that de novo review was appropriate because the only testifying witness was the arresting officer and the only other evidence was a videotape of the events. <u>Akuba</u>, 2004 S.D. 94, ¶ 26. The same facts are present in Hemminger's case. Therefore, de novo is the appropriate standard of review.

A review of the facts in this case establish that no consent was given for the seizure of these items. Hemminger's phone was seized by Officer Pickrel after the officer advised Hemminger that the case was "complex" and therefore he was going to have to "seize" Hemminger's phone. He told Hemminger that it was "just all part of the process." After these statements

from Officer Pickrel, Hemminger had little choice but to allow his phone to be seized.

The exchange between Officer Pickrel and Hemminger was no different than one at issue in this Court's decision in <u>Fierro</u>. In <u>Fierro</u>, the defendant was told she had to submit to a warrantless blood draw "because state law says you have to." 2014 S.D. 62, ¶ 4. Whether the accused knows he possesses a right to refuse consent is relevant to the question of voluntariness. <u>Id</u>. at ¶ 19. Neither the defendant in <u>Fierro</u> nor Hemminger were made aware that refusal was an option. Submission to a claim of lawful authority does not establish voluntary consent. <u>Castleberry</u>, 2004 S.D. 95, ¶ 10. As such, the trial court was wrong to conclude that Hemminger voluntarily consented to the seizure of his phone.

Hemminger's clothes and DNA were also seized by officers while at the hospital. This time it was Det. Gross who was the chief antagonist, compelling Hemminger to provide a DNA sample via buccal swab and telling him that officers were going to collect his clothes.

Det. Gross' conversation was even more direct than Officer Pickrel's. He advised Hemminger that "we need to take your clothes." He also assured him that he would get the items back but that officers had to "work the case through." Hemminger's state of mind was obvious at the time. He asked Det. Gross if the reasons for law enforcement having to seize his clothes were the same as for having to seize his phone. Det. Gross

affirmed that belief without ever attempting to explain to Hemminger his right to refuse their requests.

Det. Gross had a similar conversation with Hemminger regarding the need to obtain his DNA, telling him:

GROSS: Okay. I've got -- I did grab -- I just want to get a swab because we collect everybody's DNA from everybody basically when we have something like this. Where the hell did I put it now? Son of a bitch. You can put –

(TT272:6-291-23.)

There is nothing in this statement (or the entire exchange related to the DNA) which would lead to any conclusion other than that Hemminger was compelled to provide the sample. The entire exchange is the definition of submission to authority.

As previously noted, this Court considers the totality of the circumstances when determining whether consent was freely given. <u>Castleberry</u>, 2004 S.D. 95, ¶ 9. Critical to this inquiry is the condition under which the consent was obtained, "including the officer's conduct and the duration, location, and time of event." <u>Id</u>. These factors weigh in favor of a finding that Hemminger did not consent to the seizure of his property and DNA while at Avera St. Luke's Hospital. Although not inexperienced in speaking with law enforcement, Hemminger's lack of education and maturity were obvious throughout his conversations with various individuals at the

hospital. In addition, the conditions surrounding his consent were fraught with police coercion. Hemminger arrived at the hospital at approximately 2:30 a.m. with a stab wound on his hand. Thereafter, for a period of over five hours, several law enforcement officers interrogated him to varying degrees about his story and about his involvement with Goebel. During this time, although law enforcement was attempting to persuade Hemminger that this was a friendly encounter, Hemminger had absolutely no ability to leave. At least three officers were stationed near him at all times. At no time was Hemminger left alone.

Importantly, both Officer Pickrel and Det. Gross did not deny the fact that they intended to, indeed, were required to, seize these items from Hemminger. How an officer phrases his or her words in obtaining consent is extremely relevant. <u>Medicine</u>, 2015 S.D. 45, ¶ 13. The consent-seeking statement must actually convey a request rather than be simply a command that must be obeyed. It was for this reason that the North Dakota Supreme Court held that an officer investigating a domestic dispute did not obtain consent when he told the defendant that he would accompany him into a home "for [his] safety." <u>State v. Mitzel</u>, 2004 N.D. 157, ¶ 16, 685 N.W.2d 120, 125. Rather than a request for consent, the Court deemed the statement to be a declaration of authority which the defendant had no ability to protest.

The Eighth Circuit Court of Appeals has examined an officer's comment which was strikingly consistent with that used by Det. Gross and Officer Pickrel. In <u>United States v. Pena-Saiz</u>, an officer stopped the defendant and, during the course of the interaction, told the defendant, "This is what we do. We talk to people, we search people's bags, we pat-search people. This is what we do every day." 161 F.3d 1175, 1178 (8th Cir. 1998). The appellate court concluded that such statements were insufficient to justify a conclusion of consent. <u>Id</u>. These words are eerily similar to those uttered by Officer Pickrel and Det. Gross.

The trial court mistakenly concluded that Hemminger consented to these seizures as part of a scheme to avoid detection. Thoughtful analysis leads to just the opposite conclusion. These facts all support a conclusion that Hemminger never voluntarily and freely consented to these seizures of his person and property. Therefore, this Court should reverse the decision of the trial court and remand for a new trial free from this evidence.

#### b. Even if Hemminger consented to the seizure of his clothing, cell phone and DNA sample, that consent was validly withdrawn and those items ought to have been returned.

As an alternative argument, any alleged consent given by Hemminger was validly withdrawn on January 26, 2015. On that date, Hemminger, through one of his attorneys, sent a letter to Brown County State's Attorney Larry Lovrien with copies to: 1) Deputy State's Attorney Christopher White; 2) Brown County Sheriff's Department; 3) Aberdeen Police Department; and 4) South Dakota Forensic Laboratory. The letter made clear that whatever consent Hemminger may have previously given was revoked. It also requested that the items be returned and that any biological evidence be destroyed. The request was not honored. Deputy State's Attorney Chris White advised Hemminger's counsel that a motion would need to be filed before the prosecution would comply.

Hemminger had little choice but to comply with the prosecution's directive. A motion was filed and served the next day. After a hearing at which no evidence was provided by the prosecution, the trial court suggested that the prosecution seek a search warrant as a means of rectifying the stalemate.

The prosecution was eventually able to discern the trial court's directive after initially dismissing the idea as unnecessary. It sought a "seizure warrant" as a means to continue holding onto the evidence. On November 10, 2015, the trial court issued an Order denying Hemminger's

motion to return the property. The trial court concluded that Hemminger's property was seized pursuant to his consent. The trial court also concluded that the prosecution had acted in good faith because it had stopped testing the items upon receipt of Hemminger's letter.

Hemminger filed objections to the prosecution's proposed *findings* of fact and conclusions of law. He also timely filed a motion for reconsideration, pointing out several flaws in the trial court's decision to deny the motion. Both his objections and the motion for reconsideration pointed out that the finding that Hemminger initially consented was not supported by any evidence nor was the trial court's finding that the prosecution had acted in good faith by stopping all testing upon receipt of Hemminger's motion to return the property.<sup>2</sup>

The trial court eventually granted the motion to reconsider and, over the course of several hearings, took evidence on the return of property issue. Ultimately, the trial court ruled that the prosecution's actions were appropriate.

#### i. The items should have been returned immediately when Hemminger's consent was withdrawn.

 $<sup>^2</sup>$  In fact, no evidence whatsoever was presented at the initial hearing. For its reliance on the finding that the prosecution stopped all testing, the trial court was apparently relying on a statement from Assistant Attorney General Robert Mayer, who worked on the case early on. It has never been clear to Hemminger what evidence the trial court utilized to determine that Hemminger initially consented. Nonetheless, as noted above ultimately the trial court granted the motion to reconsider and took evidence on both issues.

It is a well-established principle that a criminal defendant may revoke his or her consent at any time. LaFave, Wayne R., 4 Search & Seizure § 8.2(f) (5<sup>th</sup>. Ed. 2013) ( "[a] consent to search is not irrevocable, and thus if a person effectively revokes his prior consent prior to the time the search is completed, then the police may not thereafter search in reliance upon the earlier conduct."). This Court reiterated this principle in the recent <u>Fierro</u> decision. 2014 S.D. 62, ¶ 19. "Once given, consent to search may be withdrawn at any time prior to completion of the search." <u>Id</u>. Other decisions support this conclusion. <u>United States v. Sanders</u>, 424 F.3d 768, 774 (8th Cir. 2005); <u>United States v. Martel-Martines</u>, 988 F.2d 855, 858 (8th Cir. 1993). In order for a defendant's withdrawal of consent to be valid, he or she must make an unequivocal act or statement. <u>United</u> States v. Ross, 263 F.3d 844, 846 (8th Cir. 2001).

Hemminger's revocation of his alleged consent was unequivocal. One of his attorneys advised the prosecution via written correspondence. As such, the prosecution was obligated to discontinue any search as to these items. <u>Florida v. Jimeno</u>, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents."); <u>Martel-Martines</u>, 988 F.2d at 858 (consensual search may not exceed the scope of consent given). Nonetheless, the prosecution chose to ignore Hemminger's withdrawal of consent.

The trial court treaded the same path as the prosecution in refusing to recognize Hemminger's constitutional right to withdraw his alleged consent and return the property. In <u>Vaughn v. Baldwin</u>, the Sixth Circuit Court of Appeals addressed whether business records voluntary provided to the Internal Revenue Service ("IRS") in connection with a tax investigation must be returned after the owner demands their return. 950 F.2d 331, 332 (6th. Cir. 1991). The <u>Vaughn</u> Court made clear that when consent was withdrawn the items should have been returned. <u>Id</u>. at 334. The IRS's failure to do so constituted a violation of the Fourth Amendment. Similarly, in this case, immediately upon Hemminger's withdrawal of consent, the prosecution should have returned his property to him.

Both the prosecution and the trial court overlooked Fourth Amendment jurisprudence in not requiring immediate return of Hemminger's property when he withdrew his consent. Seeking and obtaining a search warrant would have been prudent. Without one, the items should have been returned and never have been introduced at trial.

### c. The case should be remanded because the trial court failed to enter *written findings of fact and conclusions of law* on the issue of consent.

If for no other reason, the Court should remand this case back to the trial court for the entry of appropriate *findings of fact and conclusions of law* on the issue of consent and the return of Hemminger's property. Trial

courts are strongly encouraged to make specific findings of fact and conclusions of law in order to allow for meaningful appellate review. "This Court has repeatedly stated its preference for, 'separate, appropriate, and specific findings of fact and conclusions of law in order to aid appellate review and 'insure against speculation and conjecture.'" <u>State v. Flegel</u>, 485 N.W.2d 210, 215 (S.D. 1992) (citing <u>State v. Albright</u>, 418 N.W.2d 292, 294 (S.D.1988)).

In this case, the trial court did not enter written *findings of fact and* conclusions of law on Hemminger's motion for reconsideration of the return of his property. In order for this issue to be reviewed on appeal it is necessary to remand so that specific findings of fact and conclusions of law can be entered. Among other deficiencies, the record does not sufficiently address the factors considered when determining whether or not free and voluntary consent has been given. It is also devoid of an accurate depiction of the conditions under which Hemminger's alleged consent was obtained. This Court has no way of ascertaining how many law enforcement officers were present during Hemminger's interrogation. Due to conflicting testimony it is unclear from reading the record if Hemminger was being treated as a suspect or a witness when consent was obtained. Det. Dingman and Officer Pickrel did not testify at all on the issue of consent. Without their testimony the record only reflects Det. Gross's recollections of that night as to the circumstances at the time consent was obtained. Finally, the

record is not clear as to whether or not Det. Gross read Hemminger his Miranda rights before the his property was seized.

The record as it presently stands simply does not allow for meaningful appellate review. As such, the case should be remanded so that the trial court can enter *findings of fact and conclusions of law* sufficient to provide meaningful review.

# II. The trial court incorrectly allowed evidence located at John Roach's residence to be introduced at trial.

In the days following Hemminger's arrest, law enforcement continued its tunnel-vision approach to investigating this case. Part of that investigation included obtaining Roach's consent to the search of his apartment residence in Aberdeen. At the residence, law enforcement found a bag containing various items allegedly belonging to Hemminger. These items included boots, a shirt and a jacket. Each of these items was bloodstained. Law enforcement seized the bag and, without a warrant, proceeded to test the items for DNA and other scientific evidence.

Leading up to trial, Hemminger filed a motion to suppress the evidence found at Roach's residence, arguing that he had a reasonable expectation of privacy in the residence. Therefore, because the items were seized without a warrant, or any exception to the rule requiring a warrant, the items found there should not be admitted at trial. The trial court denied the motion, ruling that because Hemminger did not have an expectation of

privacy in Roach's apartment, he did not have standing to object to the seizure of the items found there.

# a. Hemminger had a reasonable expectation of privacy in John Roach's apartment.

As noted herein, the Fourth Amendment to the United States Constitution, as well as Article VI, § 11 of the South Dakota Constitution, protects individuals from "unreasonable searches and seizures." <u>Medicine</u>, 2015 S.D. 45, ¶ 6. This protection "requires generally the issuance of a warrant prior to the execution of a search or seizure. .." <u>Fierro</u>, 2014 S.D. 62, ¶ 15. "If the State fails to obtain a warrant prior to conducting a search, 'it is the State's burden to prove the search falls within a well-delineated exception to the warrant requirement."" <u>Id</u>.

The test for whether Hemminger has standing to challenge the search and seizure of Roach's residence is whether he had a reasonable expectation of privacy in the location searched or the item seized. <u>State v.</u> <u>Tullous</u>, 2005 S.D. 5, ¶ 6, 692 N.W.2d 790, 792 (citing <u>Katz v. United</u> <u>States</u>, 389 U.S. 347, 355 (1967)). Expectation of privacy is no longer established by property interests, rather it centers on reasonableness and the person. <u>Id</u>. (citing <u>Katz</u>, 389 U.S. at 353). "Status as an overnight guest is alone enough to show that he had an expectation of privacy in the home

that society is prepared to recognize as reasonable." <u>Hess</u>, 2004 S.D. 60, ¶ 14. (quoting <u>Minnesota v. Olson</u>, 495 U.S. 91, 100 (1990)). This is based on the recognition that all citizens share the expectation that hosts will respect their guests' privacy interests even if the guests have no legal interest in the premises and no legal authority to determine who may or may not enter the household. <u>Olson</u>, 495 U.S. at 100.

When determining if a social guest has established a reasonable expectation of privacy in the place searched, the South Dakota Supreme Court has looked at many factors. The ones bearing the most weight include: 1) possessing a key that will allow the person access to the premises; 2) regularly spending the night; 3) leaving personal belongings behind; and 4) having the ability to exclude others from certain areas. <u>Tullous</u>, 2005 S.D. 5, ¶ 16; <u>Hess</u>, 2004 S.D. 60, ¶ 17.

The trial court ruled that Hemminger did not have a reasonable expectation of privacy at Roach's residence and therefore law enforcement did not need his consent to search. However, Hemminger's status as an overnight guest alone establishes that he has a reasonable expectation of privacy in Roach's residence. <u>Hess</u>, 2004 S.D. 60, ¶ 14. In light of this, the denial of his motion to suppress was in error and requires remand.

#### b. The case should be remanded because the trial court failed to enter written *findings of fact and conclusions of law* on this issue.

Similar to the issue of consent, the trial court did not enter *findings of fact and conclusions of law* as to the seizure and subsequent search of the items taken from Roach's residence. The record does not contain sufficient evidence for meaningful appellate review. Therefore, the case should be remanded.

### III. The introduction of twenty-six autopsy photos was unnecessary and prejudiced the jury against Hemminger.

There is no question that trial courts have broad discretion over the introduction of evidence. <u>State v. McNamara</u>, 325 N.W.2d 288, 291 (S.D. 1982). An abuse of discretion "refers to a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." <u>Gross</u> <u>v. Gross</u>, 355 N.W.2d 4, 7 (S.D. 1984). If an error is found, the defendant must demonstrate prejudice before this Court will overturn the ruling. <u>State v. Fisher</u>, 2011 S.D. 74, ¶ 32, 805 N.W.2d 571. Even under this deferential standard of review, the trial court's decision to allow twenty-six photographs of the autopsy photos was in error and warrants reversal.

### a. The autopsy photographs were not relevant to the issue of who killed Goebel.

Pursuant to SDCL 19-19-401 and 402, only relevant evidence should have been admitted as evidence in the case against Hemminger. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19-19-401.

No one contested whether or not Goebel had died. Similarly, there was no disagreement over the manner of her death. Therefore, the autopsy photographs had absolutely no relevance. They should have been excluded.

## b. The autopsy photographs unfairly prejudiced Hemminger and were cumulative.

Again, Goebel's death and how she died were never an issue at trial. However, even if the Court were inclined to deem some of the photographs were relevant to the trial, the sheer number of them and the prejudice to Hemminger of such graphic photographs outweighed any relevance that may have existed. Relevant evidence is properly excluded when its value is substantially outweighed by the considerations set forth in Rule 403. <u>State</u> <u>v. Logue</u>, 372 N.W.2d 151 (S.D. 1985).

Otherwise relevant evidence may be ruled inadmissible where its introduction will unfairly persuade the jury to reach a certain conclusion or where its introduction is deemed cumulative. SDCL § 19-19-403; <u>State v.</u> <u>Fisher</u>, 2011 S.D. 74, ¶ 33. In this case, the twenty-six photographs contained graphic depictions of the stab wounds inflicted upon Goebel. The stab wounds were not necessary to establish Hemminger's guilt. Their only purpose was to give the jury a view into the brutality of Goebel's

death as a means to prejudice Hemminger's defense. That is not a sufficient basis to introduce them.

The prosecution apparently believed that overwhelming the jury with explicit photographs from Goebel's autopsy was essential to obtaining a conviction. However, Rule 403 allows for cumulative evidence to be excluded. Introduction of twenty-six photographs depicting a deceased, naked woman with brutal stab wounds was not only prejudicial it was unnecessary. Therefore, the trial court was wrong to have allowed all of the photographs into evidence.

Adding to both the prejudicial and cumulative effect of the photographs, the prosecution had its pathologist testify in graphic nature as to the stab wounds. This testimony could have easily been introduced without the photographs themselves. Their only effect was to inflame the passion of the jury. The prosecution had already emphasized the attack in its opening statement and by law enforcement testimony. There was no need for additional evidence on this fact, especially when there was no dispute over the manner of death.

Whether prejudicial or cumulative, the prejudice to Hemminger caused by the autopsy photographs is obvious. Their only purpose was to incite the jury's emotions toward vengeance. The tactic worked, as the jury returned a guilty verdict. This Court must step in and remedy this error by remanding for a new trial.

### IV. A new trial should have been granted because the prosecutor engaged in improper burden shifting during closing arguments.

The granting of a new trial is within the discretion of a trial court. <u>State v. O'Connor</u>, 265 N.W.2d 709 (S.D. 1978). It is a basic principle of criminal law that a defendant is never required to prove his innocence. The presumption of innocence "is a basic component of a fair trial" in the criminal justice system. <u>Estelle v. Williams</u>, 425 U.S. 501, 503 (1976). Coincident with this idea is the fact that the prosecution bears the burden of proof at all states of the trial. In this case, the prosecution engaged in improper burden shifting, thereby violating Hemminger's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article VI, § 2 and 7 of the South Dakota Constitution. Therefore, trial court ought to have granted Hemminger's motion for a new trial.

#### a. The prosecutor's advisement to the jury that Hemminger could have supplied it with additional text messages was improper.

At closing, Hemminger's counsel argued that the prosecution had failed to provide the jury with the full picture of Hemminger and Goebel's relationship. Specifically, Hemminger's counsel noted that Det. Tarnowski testified that he located approximately 449 text messages but the prosecution only introduced forty-four of those text messages. (TT740:1-7.) In its rebuttal, the prosecutor told the jury that Hemminger certainly had the opportunity to provide those text messages to the jury. There is little question that commenting on the defendant's failure to produce evidence is improper. <u>Lucier v. State</u>, 189 So.3d 161, 167 (Fla. 2016). This is particularly true where the defendant "never assumes any responsibility for presenting evidence to the jury" as part of any defense. <u>Id</u>. (quoting <u>Hayes v. State</u>, 660 So.2d 257, 266 (Fla. 1995)). Like the defendant in <u>Lucier</u>, Hemminger's defense at trial did not consist of any affirmative defense. He simply argued that he was not Goebel's killer.

## b. Hemminger was prejudiced by the prosecution's improper burden shifting tactic.

When a prosecutor has made improper comments, the trial court must determine whether or not the defendant has been prejudiced by the comments. Prejudice is measured by "the cumulative effect of the misconduct, the strength of the properly admitted evidence and any curative actions taken. . ." <u>United States v. Montgomery</u>, 635 F.3d 1074, 1097 (8th Cir. 2011). As the Eighth Circuit has stated, the question is whether the prosecutor's comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." <u>United States v Mullins</u>, 446 F.3d 750, 757 (8th Cir. 2006).

There is no question Hemminger was prejudiced by the prosecutor's statement. Most notably, the comments came at a critical stage in the proceedings — during rebuttal argument when Hemminger had zero chance to respond. "The potential for prejudice is great during closing arguments,

especially when the defense has no opportunity for rebuttal." <u>United States</u> <u>v. Holmes</u>, 413 F.3d 770, 776 (8th Cir. 2005). Also, although the prosecutor followed up by acknowledging that he had the burden of proof, he did so only after the damaging statement was made. No curative jury instruction was provided. Put simply, the jury went into deliberations believing that Hemminger bore a burden of evidence production. This is a fundamental violation of Hemminger's constitutional rights. This Court should correct this injustice and grant Hemminger a new trial.

#### V. The evidence was insufficient to support the jury's verdict.

Hemminger's last contention is that the trial court improperly denied his motion for a judgment of acquittal. The standard of review for denial of a motion for judgment of acquittal is whether the "evidence was sufficient to sustain the convictions." <u>State v. Janklow</u>, 2005 S.D. 25, ¶ 16, 693 N.W.2d 685; <u>State v. Running Bird</u>, 2002 S.D. 86, ¶ 19, 649 N.W.2d 609. When reviewing the sufficiency of the evidence, this Court "considers the evidence in a light most favorable to the verdict." <u>Id</u>. This Court does not resolve conflicts in the evidence, rule on the credibility of the witnesses, inquire as to the plausibility of an explanation, or weigh the evidence. <u>Id</u>.

In this case, the evidence did not support a conviction for first degree murder. The prosecution called a total of fifteen witnesses. Of these, three (Richard Hanley, Donna Sam and Kathy Smith) had zero relevance to the question of whether or not Hemminger committed this murder. These individuals were presented to convince the jury that Richard Hanley had not committed the crime, something Hemminger did not contest at trial.

Of the remaining witnesses, one was a nurse who treated Hemminger at the hospital (Randy Pudwill) and another (Rick Olauson) testified about turning over children's clothing to law enforcement. Neither of these individuals offered any substantive testimony about Hemminger's guilt. Liza Wade testified about giving Hemminger a phone and finding it two days later. She did not have any additional information such as the phone number itself, just that she had lent it and then found it. She also testified about seeing Hemminger at Roach's (a fact not contested) and about an apparent fight between Hemminger and Richard Hanley (not at issue in trial). Tyler Gauer testified about speaking with Goebel by telephone on the night of the attack (neither an issue at trial nor a fact contested). Jaron Malsam testified for the prosecution but stated that he did not hear Hemminger's voice at the apartment on the night of the attack. Jayden Halsey testified about hearing a woman scream but could not identify the source of the scream and did not hear any other voices. The prosecution also introduced, Hemminger's 911 call and Goebel's emergency call through two other witnesses (Aaron Gasser and Jon Waller).

The rest of the prosecution's witnesses were law enforcement or were individuals who conducted the biological testing. Dr. Frans Maritz testified that the knife blade and the knife handle fit together. But he could not identify anything unique about the knife or anything that could convince the jury that they were an exact match. Ms. Kandy Smith testified about DNA testing conducted on many of the items which were exhibits at trial. However, her reports contained nothing conclusive in regards to the question of whether Hemminger killed Goebel. She told the jury that Hemminger's DNA was located on some items. That is, frankly, no surprise given that he lived in the home. She also could not account for the possibility that law enforcement may have transferred DNA at the scene. Even when viewed in the light most favorable to the jury's verdict, the DNA evidence was not conclusive beyond a reasonable doubt.

The jury also clearly overlooked several key pieces of evidence. Roach testified that Hemminger had a key to his apartment, and that it was a very unique key with a unique design. Roach also testified that he locked his door whenever he left or returned for the evening. During Hemminger's case-in-chief, his sister, Bobbie Olauson, testified about finding that key with Hemminger's belongings. Hemminger did not have a key to Roach's apartment on January 6, 2015. Therefore, he had no ability to open the locked door.

Other holes in the prosecution's case include the fact that Roach's dog, a Rottweiler, did not bark at all that evening. Roach testified that his dog always barked when someone came into the home. But on the evening of January 6, 2015, Roach did not hear his dog barking. Additionally, the prosecution attempted to match a phone found near Roach's apartment to an exhibit bearing a phone number purported to belong to Liza Thomas Wade. However, no evidence was submitted to the jury as to that phone number.

The evidence in this case was insufficient to justify the jury's verdict. This is true even when viewed in the light most favorable to the verdict. As such, this Court should reverse the verdict and remand with instructions to acquit Hemminger.

### VI. The cumulative effect of the trial court's errors deprived Hemminger of his constitutional right to a fair trial.

This Court has consistently held that "the cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial." <u>State v. Davi</u>, 504 N.W.2d 844, 857 (S.D. 1993); <u>McDowell v. Solem</u>, 447 N.W.2d 646, 651 (S.D. 1989). Although a defendant is not entitled to a perfect trial, he is entitled to a fair one. <u>State v. Smith</u>, 477 N.W.2d 27, 37 (S.D. 1991).

The errors cited herein meet the criteria previously laid out by this Court for retrial. U.S. Const. amend. VI, XIV; S.D. Const. Art. II, § 7. Trial courts are rightly granted considerable discretion regarding the introduction of evidence at trial. However, in Hemminger's case the trial court repeatedly ruled against him on critical issues related to the evidence and burden of proof. These errors denied Hemminger his right to a fair trial.

The prejudice which resulted from these errors is clear from the record. Several items of personal property were improperly admitted into evidence. These items included: 1) the items (including a DNA sample) taken from Hemminger at the hospital; 2) the clothes (and corresponding DNA results) and other items seized from Roach's residence in Aberdeen; and 3) the excessive number of gruesome autopsy photos. These items represented the bulk of the prosecution's case against Hemminger.

The trial court's failure to prevent or remedy the State's burdenshifting statement during closing arguments provides yet another example of the violation of Hemminger's fair trial rights. As outlined in Section IV herein, the prejudice which resulted from this incident cannot be understated.

Hemminger has a constitutional right to a fair trial. Even if the Court were to conclude that each of the errors identified herein were "harmless" in isolation, the cumulative effect of those errors deprived Hemminger of his right to a fair trial. Therefore, he is entitled to a new trial

### **RELIEF REQUESTED**

Hemminger requests that the conviction be reversed and a verdict of not guilty be entered by the Court. Alternatively Hemminger requests a new trial.

### **REQUEST FOR ORAL ARGUMENT**

Appellant requests oral argument.

Respectfully submitted March 27, 2017.

WILLIAM D. GERDES, P.C.

By: /s/ Jerald M. McNeary, Jr. Jerald M. McNeary, Jr. Attorney for Appellant 104 S. Lincoln – Suite 111 P.O. Box 1239 Aberdeen, SD 57402-1239 gerdes@dakotalaw.com

### **CERTIFICATE OF APPLIANCE WITH SDCL 15-26A-66**

Appellant's Brief complies with the type-volume limitation of SDCL

15-26A-66. Appellants' Brief contains a proportional-spaced typeface in 13

point Times New Roman font, and a WordPerfect Word count of 7,857.

Dated March 27, 2017

### WILLIAM D. GERDES, P.C.

By: /s/ Jerald M. McNeary, Jr. Jerald M. McNeary, Jr. Attorney for Appellant 104 S. Lincoln – Suite 111 P.O. Box 1239 Aberdeen, SD 57402-1239 gerdes@dakotalaw.com

### **CERTIFICATE OF SERVICE AND FILING**

On March 27, 2017, copies of the Appellant's Brief were served

electronically pursuant to Supreme Court rule 13-11 to the following:

The Honorable Marty J. Jackley Attorney General 1302 E. Highway 14, #1 Pierre, SD 57501-8501 Patricia Archer Assistant Attorney General 1302 E. Highway 14, #1 Pierre, SD 57501

Additionally, Appellant's Brief was filed with the Supreme Court at

scclerkbriefs@ujs.state.sd.us.

One Copy was provided to Appellant John E. Hemminger.

Dated March 27, 2017.

### WILLIAM D. GERDES, P.C.

By: /s/ Jerald M. McNeary, Jr. Jerald M. McNeary, Jr. Attorney for Appellant 104 S. Lincoln – Suite 111 P.O. Box 1239 Aberdeen, SD 57402-1239 gerdes@dakotalaw.com

### APPENDIX

Judgment of Conviction	App. 1
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## State v. John Hemminger

## Appendix

Judgment of Conviction Pag	ze l	L
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I



SEP 87 2016

STATE OF SOUTH DAKOTASOUTH DAKOTA UNTATED JUDICIAL SYSTEM 5TH CIRCUIT CLERK OF COURT)

COUNTY OF BROWN

STATE OF SOUTH DAKOTA Plaintiff,

CR15-0027 JUDGMENT OF CONVICTION

FIFTH JUDICIAL CIRCUIT

-vs-

JOHN ERIC HEMMINGER,

Defendant.

An Indictment was filed with this Court on January 22, 2015, charging the Defendant with the crime of First Degree Murder in violation of SDCL 22-16-4(1). A Superseding Indictment was filed with this Court on March 17, 2015. The Defendant was arraigned on said Superseding Indictment on May 28, 2015. The Defendant, the Defendant's attorneys William Gerdes and Tom Cogley and Christopher White, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the Defendant. The Defendant pled not guilty to the charge of First Degree Murder in violation of SDCL 22-16-4(1).

A Jury Trial commenced on this matter on August 22, 2016. Defendant was found guilty of First Degree Murder in violation of SDCL 22-16-4(1) on August 31, 2016.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense and that the Defendant was represented by competent counsel.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of First Degree Murder in violation of SDCL 22-16-4(1).

### **SENTENCE**

On September 7, 2016, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

ORDERED that the defendant be incarcerated in the South Dakota State Penitentiary for the rest of his life, without possibility of parole, and it is

FURTHER ORDERED that defendant promptly pay \$104.00 court costs, and it is

FURTHER ORDERED that defendant make restitution to the victims of his crime, in an amount to be determined, and it is

FURTHER ORDERED that defendant reimburse Brown County for all court appointed attorney fees and litigation expenses, in an amount to be determined.

Dated this 7th day of September, 2016. BY THE COURT: Court Judge Scott P. Myren Circuit ( OFSOUT ATTEST: Marla R/Zastrow, Clerk of Courts Deputy Page

### IN THE SUPREME COURT STATE OF SOUTH DAKOTA

No. 28041

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOHN ERIC HEMMINGER,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT FIFTH JUDICIAL CIRCUIT BROWN COUNTY, SOUTH DAKOTA

THE HONORABLE SCOTT P. MYREN Circuit Court Judge

### **APPELLEE'S BRIEF**

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ATTORNEYS FOR PLAINTIFF AND APPELLEE

Notice of Appeal filed November 10, 2016

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### IN THE SUPREME COURT STATE OF SOUTH DAKOTA

No. 28041

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOHN ERIC HEMMINGER,

Defendant and Appellant.

### PRELIMINARY STATEMENT

Throughout this brief, Plaintiff and Appellee, State of South Dakota, is referred to as "State." Defendant and Appellant, John Eric Hemminger, is referred to as "Defendant." This brief contains these designations:

Settled record below, Brown County Crim. No. 15-27 SR
Jury trial transcriptJT
Jury trial exhibitsJT:EX
Motion hearing transcripts (with date of hearing) MH(/)
Motion hearing exhibits (with date of hearing) MH(/) Exh
Appendix to this briefAPP

### JURISDICTIONAL STATEMENT

A final Judgment and Sentence was filed by the Hon. Scott Myren, Circuit Court Judge, Fifth Judicial Circuit, on September 7, 2016. After Defendant filed a motion for new trial, the court entered an order denying the motion on October 24, 2016. Defendant timely filed a Notice of Appeal on November 10, 2016. This Court has jurisdiction pursuant to SDCL 23A-32-2.

### STATEMENT OF LEGAL ISSUES AND AUTHORITIES

Ι

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM HIM AT THE HOSPITAL?

The trial court denied Defendant's motion to suppress.

Fernandez v. California, \_\_U.S.\_\_, 134 S.Ct. 1126 (2014)

State v. Castleberry, 2004 S.D. 95, 686 N.W.2d 384

State v. Koedatich, 548 A.2d 939 (N.J. 1988)

State v. Sheehy, 2001 S.D. 130, 636 N.W.2d 451

SDCL 23A-37-2

SDCL 23A-37-8(2)

S.D. Const. art. VI

U.S. Const. amend. IV

WHETHER EVIDENCE SEIZED FROM JOHN ROACH'S APARTMENT AFTER HE GAVE VALID CONSENT TO

# SEARCH WAS PROPERLY ADMITTED AGAINST DEFENDANT AT TRIAL?

The trial court denied Defendant's motion to suppress.

Fernandez v. California, \_\_U.S.\_\_, 134 S.Ct. 1126 (2014)

State v. Benallie, 1997 S.D. 118, 570 N.W.2d 236

State v. Fountain, 534 N.W.2d 859 (S.D. 1995)

State v. Guthrie, 2001 S.D. 61, 627 N.W.2d 401

S.D. Const. art. VI

U.S. Const. amend. IV

### III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE STATE TO INTRODUCE AUTOPSY PHOTOGRAPHS OF THE VICTIM?

The trial court allowed the introduction of the autopsy photographs.

State v. Hart, 1998 S.D. 93, 584 N.W.2d 863

State v. Herrmann, 2004 S.D. 53, 679 N.W.2d 503

State v. Owens, 2002 S.D. 42, 643 N.W.2d 735

State v. Torres, 2012 S.D. 23, 813 N.W.2d 148

### IV

# WHETHER THE STATE'S COMMENTS DURING REBUTTAL CLOSING ARGUMENT WERE PROPER?

The trial court overruled Defendant's objections to the photographs and later denied motion for new trial.

State v. Brown, 132 N.W.2d 840 (S.D. 1965)

State v. Rosales, 302 N.W.2d 804 (S.D. 1981)

State v. Stanley, 2017 S.D. 32, \_\_N.W.2d\_\_

Waff v. Solem, 427 N.W.2d 118 (S.D. 1988)

#### V

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT OF FIRST-DEGREE MURDER?

The trial court denied Defendant's motion for acquittal.

State v. Wright, 2009 S.D. 51, 768 N.W.2d 512

SDCL 22-16-4(1)

SDCL 22-16-5

#### VI

# WHETHER THERE WAS CUMULATIVE ERROR THAT DEPRIVED DEFENDANT OF A FAIR TRIAL?

The trial court did not rule on this issue.

State v. Owens, 2002 S.D. 42, 643 N.W.2d 735

State v. Stanley, 2017 S.D. 32, \_\_N.W.2d\_\_

State v. Wright, 2009 S.D. 51, 768 N.W.2d 512

#### STATEMENT OF THE CASE

The State concurs with the Statement of the Case presented in Defendant's brief, with the following exceptions. Defendant was initially charged by complaint with attempted first degree murder. After the victim died, Defendant was indicted on January 22, 2015, and charged with first-degree premeditated murder (SDCL 22-16-4(1)) and felony murder (SDCL 22-16-4(2)). SR:27. A superseding indictment was filed March 13, 2015, alleging the same counts. SR:286. The proceedings below contained numerous motions and other filings. They will be addressed below along with additional procedural history, as pertinent to each issue.

### STATEMENT OF FACTS

During the late night hours of January 6, 2015, in front of their two young children, Defendant repeatedly stabbed and slashed the throat of his ex-girlfriend, Jessica Goebel, and left her lying in a pool of blood in their Aberdeen home. It was a tragic ending to a troubled history marked with episodes of Defendant's violence against her. SR:1890-1911.

The most recent episode was in mid-December 2014, when Goebel obtained a domestic violence protection order against Defendant. JT:57. As a result of the no-contact order, Defendant moved out of the home and went to live with his sister. MH(4/6/16) 42-43. But the two continued to have contact via telephone calls and texts. JT:146-63; JT:EX. 85-86. The communications demonstrated an on-again, off-again relationship, and Defendant's frustration and anger over the fact Goebel had broken up with him and was seeing another man, Richard Hanley. *Id.*; JT:71, 177-78.

The communications continued up to and throughout the day of January 6, 2015. JT:146-63; JT:EX. 85-86. Several were threatening in nature, including one on January 5, when Defendant threatened to

come to Goebel's house, kick in the door, and "kill that fucking dude you with now." JT:158.

On January 6, Defendant went to the apartment of his friend, John Roach, who lived only two houses away from Goebel. JT:462-64. The two men, who worked construction together, got off work and went to the apartment about 5:15 p.m. *Id.* While there, Defendant was talking on his phone with Goebel and Roach left the apartment. *Id.*; JT:162.

Approximately 6:00 p.m. Hanley went to Goebel's home. JT:72. While he and Goebel were upstairs in the bedroom, Defendant came to the house and pounded on the door. *Id.* Entering the home, he came upstairs looking for Hanley. The two men got into a physical fight and Defendant punched Hanley, cutting his eye. JT:74. Hanley was able to get away and ran out of the house. In the meantime, Goebel called 911 and told dispatch Defendant was at her home beating up her friend. JT:60-63; JT:EXS. 4-7.

Defendant retreated to Roach's apartment. Still agitated, he told Roach's girlfriend about the altercation with Hanley, saying he had "fucked him up and he was going to fuck them both up." JT:114.

Hanley went to his mother's house and she drove him to the Fort Yates, N.D., hospital where he receives free health services. JT:85. The drive took three hours and they arrived at approximately 10:00 p.m.

After leaving the hospital at 11:30 p.m., they stayed overnight at a hotel in Fort Yates until the next morning. JT:86.

Sometime that evening, Defendant went back over to Goebel's house. The last anyone else spoke to Goebel was approximately 9:30 p.m. when she talked to her friend on the phone. JT:125. At about 11:30 p.m., Goebel's duplex neighbor heard arguing and someone stumbling down the stairs. He also heard a female voice screaming loudly. JT:130-31. Another neighbor also heard the screams. JT:133.

What they didn't know was that Defendant was in Goebel's home stabbing her repeatedly and slashing her throat, inflicting at least 23 separate wounds. The knife penetrated her organs, including her chest wall, lungs, liver, and spleen, and severed the jugular vein in her neck. Defendant also stabbed her skull, penetrating the brain behind her ear. JT:624-42.

During Defendant's attack on Goebel he cut his own hand, causing it to bleed profusely. He wrapped it with gauze bandages. JT:EX. 40. Defendant changed out of his bloody clothes and into some clean ones. He also spent some time deleting some text messages off his phone. These were later recovered by law enforcement using data retrieval software. JT:149.

Defendant called his friend, Jarimey Halstead, to take him to the hospital ER. Defendant told him he had just got in a fight with Hanley and Hanley stabbed him. Defendant couldn't have known that Hanley

was in Fort Yates at the time. At 2:02 a.m., Defendant called 911 to report he was enroute to the hospital and said he'd just been stabbed in the hand by Richard Hanley. He said someone should go to Goebel's home to check on her and the children because Hanley was allegedly still in the house. JT:EX. 10. Officers went to the home and found Goebel lying on the kitchen floor in a pool of blood, barely alive and gasping for air. JT:186; JT:EX. 31 (Ofcr. Brad Wolf video). Blood was throughout the home. Goebel's 2 1/2 year-old daughter was walking around and her infant daughter lay alone on the sofa, apparently uninjured but both of them splattered with blood. JT:186, 235-38. Officers searched the house for Hanley, but no one was there. Goebel was rushed to the hospital and was later flown to Sioux Falls. She ultimately died of her injuries a few days later. JT:618.

Shortly thereafter, Sgt. Kory Pickrel arrived at the hospital and took Defendant's statement as ER personnel attended the serious cuts on his hand. Defendant told a story about going to Goebel's house earlier to retrieve clothing and she was gone. He claimed Hanley was there and attacked Defendant. According to Defendant, the two fought and Hanley pulled out a knife and threatened to kill Defendant. During the fight Hanley cut Defendant's hand. Defendant said he gauged Hanley's eye then took off running. JT:215; JT:EX. 11 (video).

Pickrel left the ER room and returned shortly after to talk to Defendant again.<sup>1</sup> During this brief interview Defendant provided more details. He said he had been talking with Goebel all day via phone calls and texts. Pickrel asked Defendant, "Do you mind if I look at your phone?" MH(3/8/16) Ex. 6 at 2:25. Defendant nodded toward his phone on the counter and replied, "Yes, go ahead." *Id.* at 2:27. Defendant took the phone and put in his password, then gave the phone back to Pickrel. As Pickrel scrolled through to read the messages, Defendant told him Goebel would appear as "Baby" and showed Pickrel how to see what time messages were sent. At no time did he object to Pickrel viewing the texts.

After further conversation, Pickrel told Defendant he wanted to seize the phone as evidence, and asked him "Okay?" *Id.* at 7:22. He told Defendant he was not being looked at as a suspect. Defendant responded "No problem," and acknowledged he understood it was part of the process. *Id.* at 7:44. Defendant again put in the passcode and provided the number to Pickrel so he would have it for later. The phone was left on the counter in the exam room. Defendant's friend, Halstead, was in the room during the interview and for some time thereafter.

<sup>&</sup>lt;sup>1</sup> Support for the following facts is found in Pickrel's testimony at MH(3/8/16) 5-20; *see also* MH(3/8/16) Exh. 6 (video).

Approximately 4:00 a.m., Detectives Chris Gross and Arika Dingmann arrived. With Dingmann in the exam room, Gross had five separate short interviews with Defendant.<sup>2</sup> Before beginning, Gross read the *Miranda* rights and Defendant agreed to talk to him. Gross later testified he did this simply as a precaution. JT:325. As Defendant explained what allegedly happened that night, they tried to establish a timeline. Defendant repeatedly referred to his cell phone, indicating there were text messages between him and Goebel. Dingmann picked up the phone from the counter and Defendant provided her the passcode so she could read the texts. He also showed her how to determine what time calls were made. At one point Defendant urged the officers to continue reading the texts, as he believed they demonstrated that he and Goebel were getting along fine. MH(2/9/16) 22.

The second time Detective Gross entered the room he asked Defendant about the clothes he was wearing that night. Gross explained they were going to need to take the clothes, but he would eventually get them back. Defendant asked if it was like the collection of his phone, and Gross answered in the affirmative, asking "You

<sup>&</sup>lt;sup>2</sup> Support for the following facts is found in Gross' testimony at MH(2/9/16) 10-41 and Dingmann's testimony at MH(3/8/16) 21-47. The two officers each had a recording device. Gross' recordings were introduced at the February 9 motion hearing as Exh. 3 and later introduced in substantially similar form at trial. JT:EXS. 40-44. Transcripts were prepared. *See* SR:3940-4015. Dingmann's recording was introduced at the March 8 motion hearing as Exh. 7.

understand all that?" Defendant replied, "Yeah. I've got no problem with that." MH(3/8/16) Exh. 7 at 1:03:15-1:04:13. Because Defendant's hand was injured, Gross assisted him in removing his clothing and provided him a change of clothes.

After asking Defendant where he would go when he left the hospital, Gross said he needed to obtain a buccal swab from Defendant because law enforcement collects them from everyone when something like this happens. Defendant said "Okay." JT:EX. 43 at 4:47-5:00. Gross left to retrieve a kit, then returned and swabbed the inside of Defendant's cheek. JT:EX. 44.

Around this same time, Dingmann was bagging Defendant's clothing. As she picked up his black jacket she heard loose change in the pocket. MH(3/8/16) 27-28. She looked in the pocket so she could determine the amount of Defendant's money, pursuant to the police department's evidence inventory policy. *Id.* at 29-33. In the pocket she saw a knife handle. *Id.* at 28. When asked, Defendant denied having a knife. Dingmann reached in the pocket and pulled out a bloody knife handle with no blade. *Id.* 

At this point, Gross' interview became stern and Defendant was clearly nervous. MH(2/9/16) 24. Defendant continued to deny knowing how the knife handle got there, and at one point suggested it may have fallen in his pocket. *Id.* at 25. There was no blade with the handle. Gross called officers at the scene in Goebel's house and told

them about the knife handle. A short time later, Gross was told officers found a knife blade in the sink at the house. Gross then arrested Defendant. *Id.* at 26. The knife blade was later determined to be a consistent match with the handle. JT:251. Roach identified the knife as his, and told officers it was missing from his apartment. JT:469.

Early in the investigation, law enforcement sought missing cell phones and the clothes Defendant wore the night of the murder. MH(4/6/16) 28. Defendant had told them he was at Roach's residence earlier that night. *Id.* at 32-33. On January 8, Gross approached Roach at work, told him what they were looking for, and asked for permission to search his residence. *Id.* at 29. Roach agreed and they went to his home. *Id.* Upon arrival, Roach secured his dogs, invited the officers in, and consented to their search. *Id.* 

Officers entered the apartment and saw three black garbage bags sitting in the entryway near the door. *Id.* at 18, 26. Two of the bags contained empty aluminum cans and had been left there by Roach until he could take them out. *Id.* at 18, 53.

When an officer opened the third garbage bag, he saw a work coat and a dishrag with blood on them. *Id.* at 18. He lifted up the coat and Roach identified it as Defendant's. *Id.* at 20, 37. Roach said he had never seen the third bag and didn't know how it got there. JT:371. Roach identified the work clothes as Defendant's; he later testified he

gave the coat to Defendant and recognized the boots as the type Defendant wore. MH(4/6/16) 20, 37; JT:470-72, 478.

Officers seized the third bag and its contents and took them to the police station for processing. They viewed the dishrag, work coat, clothing, and work boots, all of which had blood on them. JT:356-65; *see* SR:2414-24 (pictures of items from bag). Goebel's blood was on the work coat and boots. SR:2472-74, 2499; JT:540-42. A long-sleeved black shirt in the bag was identical to one Defendant is wearing in a photograph posted on his Facebook page. JT:364-65; *see* SR:2423, 2471. Defendant's pay stub was later found in the sleeve of the work coat. JT:507-8.

Forensic testing of the evidence later tied Defendant's DNA to the knife blade in the sink, Hanley's sweatshirt that had been left in the house, and other items. JT:530-72. Goebel's DNA (blood) was found, *inter alia*, on the knife blade and knife handle, Defendant's work coat and boots found in the garbage bag at Roach's apartment, the black coat Defendant wore to the hospital, and on some of the clothing the children were wearing that night. *Id.*; JT:235-242.

#### ARGUMENTS

Ι

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM HIM AT THE HOSPITAL.

A. Background and standard of review.

Defendant filed a motion to suppress the items seized at the hospital: his cellphone, clothing (including jacket in which the bloody knife handle was found), and buccal swab (DNA sample). SR:1258. The State argued the seizure was based on Defendant's consent. During motion hearings held February 9, 2016 and March 8, 2016, the trial court heard testimony of the officers; Defendant did not testify. The court also reviewed recordings of law enforcement's interviews with Defendant at the hospital.<sup>3</sup> In a written memorandum opinion issued April 29, 2016, the court denied the motion. SR:1881-83. The court found Defendant voluntarily consented to the seizure of his cellphone and clothing. Although the court found there was no valid consent to the taking of the buccal swab, it determined Defendant's DNA sample would have been inevitably discovered through other means and therefore suppression was not warranted. *Id*.

This Court reviews issues raising constitutional violations under a de novo. *State v. Castleberry*, 2004 S.D. 95, ¶ 11, 686 N.W.2d 384, 387 (citations omitted). "On the other hand, the voluntariness of consent search is a factual question, and as a reviewing court, we must

<sup>&</sup>lt;sup>3</sup> In its memorandum decision the trial court stated the Pickrel video/audio recording [MH(3/8/16) Exh. 6] in particular was "incredibly valuable" and "provides the context and flavor of the continuing interactions. This does not appear in a vanilla transcript of the conversations." The court emphasized that "Any person attempting to assess Mr. Hemminger's consent must watch this video." SR:1881. The State concurs. All the recordings provide invaluable insight as to the tone and actual nature of the interviews.

affirm the circuit court's factual findings unless we conclude that they were clearly erroneous." *Id.* 

### *B.* Standards governing consent searches.

The Fourth Amendment to the United States Constitution and Article VI of the South Dakota Constitution prohibit unreasonable searches and seizures. This means that generally, before law enforcement can search or seize an individual they must obtain a warrant based on probable cause. *State v. Medicine*, 2015 S.D. 45, ¶ 6, 865 N.W.2d 492, 495. However, Courts have recognized that "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006); *State v. Bowker*, 2008 S.D. 61, ¶ 18, 754 N.W.2d 56, 63. One of these is consent. "Consent to search satisfies the Fourth amendment, thereby removing the need for a warrant or even probable cause." *State v. Kline*, 2017 S.D. 6, ¶ 10, 891 N.W.2d 780, 784.

Consent searches have long been recognized as an exception to the warrant requirement, as they "'are part of the standard investigatory techniques of law enforcement agencies' and are 'a constitutionally permissible and wholly legitimate aspect of effective police activity." *Fernandez v. California*, \_U.S.\_, 134 S.Ct. 1126, 1132 (2014) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973)).

For consent to be valid, the State must prove by a preponderance of the evidence that it was freely and voluntarily given. *State v. Akuba*, 2004 S.D. 94, ¶ 13, 686 N.W.2d 406, 413. This Court has explained:

In determining whether the State has met this burden, we consider the totality of the circumstances. . . . "In viewing the totality of the circumstances, we consider the characteristics of the accused: age, maturity, education, intelligence, and experience. We also consider the conditions wherein the consent was obtained, including the officer's conduct and the duration, location, and time of the event."

*Medicine*, 2015 S.D. 45, ¶ 7, 865 N.W.2d at 495-96 (internal citations omitted). The State does not have to prove the subject knew he had the right to refuse consent. "Rather, the key inquiry rests upon 'whether in fact it was voluntary or coerced." *State v. Sheehy*, 2001 S.D. 130, ¶ 12 n.\*, 636 N.W.2d 451, 454.

C. Law enforcement seized Defendant's cellphone, clothing, and buccal swab pursuant to valid consent.

It is recognized that consent can be explicit, but it does not have to be in order to be valid. It may also be "inferred from words, gestures, and other conduct. . . . [T]he precise question is not whether [defendant] consented subjectively, but whether his conduct would have caused a reasonable person to believe that he consented." *Castleberry*, 2004 S.D. 95, ¶ 10, 686 N.W.2d at 387 (quotations omitted); *see United States v. Hardison*, \_F.3d\_, 2017 WL 2561103 (June 14, 2017). The standard for assessing Defendant's Fourth Amendment claim is objective reasonableness. Here, it was objectively reasonable for the officers to believe Defendant consented through his express words such as "go ahead," "okay," and "I've got no problem with that," as well as his conduct in actively cooperating with the officers and failing to object to the seizures. This Court has found valid consent to search in cases where the defendant failed to object to a search, and even actively cooperated with it. *See Castleberry*, 2004 S.D. 95, 686 N.W.2d 384; *Kline*, 2017 S.D. 6, 891 N.W.2d 780 (defendant voluntarily produced methamphetamine pipe from her purse); *Sheehy*, 2001 S.D. 130, 636 N.W.2d 451 (defendant led game warden to his coolers and when told they were to be inspected, did not object).

Of course, consent may not be valid if it is in response to a coercive show of authority by law enforcement. *Medicine*, 2015 S.D. 45, 865 N.W.2d 492. But that is certainly not what happened here. There was nothing coercive about the officers' investigation or interactions with Defendant. The circumstances in the hospital room were non-threatening and low-key, as officers tried to determine the facts surrounding Defendant's alleged assault and the other events that night. He clearly had received injuries from something or someone. While the timeline of his story wasn't necessarily adding up, the officers had not ruled him out as a victim and was treating him as one. MH(3/8/16) 17.

In a case with striking similarities to this one, the court in *State v. Koedatich*, 548 A.2d 939 (N.J. 1988) addressed this very issue. There, the defendant called police to report he was the victim of a stabbing, leading police to seize and later search his vehicle. Assuming the defendant was a victim, the officers took his clothes and vehicle so they could be examined for evidence connected to his alleged assailant. The officer told the defendant they were going to secure his vehicle as possible evidence, and he agreed. *Id.* at 956-57. A search of the vehicle yielded evidence connecting him to murders. The court rejected the defendant's claim that his consent was involuntary, citing a number of decisions involving cooperation by defendants. The court held:

Defendant requested police intervention. There was no subterfuge by the police. The police acted in a reasonably objective and routine manner in examining defendant's car. He gave the appearance of cooperating fully with the police, and he led them to believe they were all working together to catch his assailant. The defendant thus orchestrated the events that led to the discovery of crucial evidence in [the murder cases.] It is not the fault of the police nor is the Constitution "at all offended when a guilty man stubs his toe."

*Id.* at 958-59. The court ruled the police reasonably believed the defendant had given consent.

Like the defendant in *Koedatich*, Defendant orchestrated the events that brought him into contact with police when he called 911 and went to the hospital. He then chose to actively cooperate with law enforcement by consenting to the seizure of his cellphone, clothing, and buccal swab. This was not a case where the police exerted pressure causing Defendant to simply succumb to their authority. *Schneckloth*, 412 U.S. at 225. Rather, his cooperation most likely had more to do with his desire to convince the officers he was a victim himself, in an effort to divert suspicion from himself and ultimately try to pin the murder on Hanley. His behavior was purposeful and fit right in with his elaborate scheme. Indeed, as the trial court suggested, Defendant's conduct reflected a person who may have thought he had nothing to hide and no incriminating evidence would be found, since he had deleted several negative text messages and changed into clean clothing before coming to the hospital (unfortunately for him, he forgot to dispose of the bloody knife handle).

As evidenced in the recordings, Defendant was not naïve or unexperienced in dealing with law enforcement. Defendant was 33 years old, had obtained a GED, and had at least nine law enforcement contacts in his criminal history, including previously serving time in the penitentiary for aggravated assault. MH(3/8/16) 34. A defendant's prior experience with law enforcement officers and the courts is a proper factor to consider when determining the voluntariness of consent. *State* v. Smith, 1998 S.D. 6, ¶ 8, 573 N.W.2d 515, 517.

Based on the totality of the circumstances, the State met its burden of establishing Defendant voluntarily consented to law

enforcement's seizure of his property and the trial court's decision should be upheld.<sup>4</sup>

As to the buccal swab, the trial court held there was no valid consent but the State would have obtained Defendant's DNA sample through inevitable discovery. The State respectfully contends that Defendant voluntarily consented to the taking of the buccal swab, for the same reasons described above. As an alternative argument, however, the State asserts the trial court was correct in upholding the seizure based on inevitable discovery. *See State v. Boll*, 2002 S.D. 114, ¶ 21, 651 N.W.2d 710, 716.

Undoubtedly, as the investigation progressed Defendant's DNA sample would have been obtained through alternative means. It is typical for law enforcement to obtain DNA samples from everyone connected with a crime scene; this is necessary when forensic experts are identifying the source of biological evidence found. In fact, police ultimately obtained samples from Roach, Goebel and Hanley as well. SR:2498. The trial court correctly observed that "[a]ny reasonable officer involved in the investigation would have concluded a DNA sample from Hemminger was necessary." SR:1883. Had police not obtained the sample from Defendant at the hospital that night, it is

<sup>&</sup>lt;sup>4</sup> Although Defendant seeks remand for the entry of written findings, this is not necessary. The trial court's findings are included in its written memorandum opinion dated April 29, 2016. SR:1881-83.

likely law enforcement would have secured a search warrant and obtained the sample that way.

D. Under the facts of this case, Defendant's belated "withdrawal of consent" letter was of no legal consequence to the trial court's ultimate decision permitting introduction of the evidence.

Defendant contends he withdrew his consent and all the items seized from him at the hospital should have been returned and never introduced at trial. This argument is a red herring and does not undermine the trial court's decision to admit the evidence. This is because the purported withdrawal of consent was made too late and the State had a legal basis to refuse to return the property. And in any event, the State's continued retention of the property was pursuant to a valid warrant issued by a magistrate. There was no Fourth Amendment violation.

On January 26, 2015, Defendant's counsel sent the prosecutor, law enforcement, and the forensics laboratory a letter explaining that Defendant was withdrawing "any and all consents he may have previously given for the seizure, search, and testing of his property." SR:92. He demanded the property be returned and any biological evidence be destroyed. *Id.* This was three weeks after the seizure of the items at the hospital.

By that time, a search of the contents of Defendant's cellphone was already done. SR:194 (data extraction completed on January 11, 2015). That search was accomplished after law enforcement obtained a

warrant from a magistrate on January 10, 2015, in order to forensically search the contents of Defendant's phone and extract data. *See* Affidavit and Search Warrant in Brown County Search Warrant File No. 15-11 (judicial notice requested) (attached at APP. 1-25) and SR:1296 (Affidavit). *See also* MH(11/13/15) 92 (describing data extraction process).

As to the remaining items, after immediately putting a "hold" on further testing until they could review defense counsel's request further, prosecutors determined there was no legal basis to return the property and informed counsel they would not do so without a court order. SR:93. Defendant then filed a motion for return of property, leading the State to stop all testing of the evidence until the motion was resolved. SR:1372.

The court held a motion hearing and heard arguments of counsel. The State asserted there was no basis to return or destroy evidence properly seized or to stop testing. The court suggested the State simply go get a warrant. MH(2/18/15) 10-11. Within days the State did exactly that. On January 21, 2015, law enforcement presented an affidavit in support of a seizure warrant, seeking court authority to continue to retain the evidence, including Defendant's black jacket, the knife handle, and the buccal swab. The magistrate issued a warrant the same day. *See* Affidavit and Warrant in Brown County Search Warrant File No. 15-24 (attached at APP. 26-30) (judicial notice

requested; the trial court took judicial notice of this file as well). MH(3/8/16) 67. The trial court denied the motion to return property, issuing its bench ruling at a hearing held March 26, 2015. MH(3/26/15) 6. The court entered written findings and conclusions. SR:967. Additional proceedings were held after Defendant filed a motion to reconsider and the separate motion to suppress.

On appeal Defendant challenges the State's refusal to return the property. He does not challenge the validity of the seizure warrant the State did obtain. While the existence of that valid warrant should be the end of this inquiry, the State will address the underlying issue involving the prosecutor's denial to return the evidence when initially requested. The State submits that the request for return of the evidence may be an intriguing way for a criminal defendant facing serious felony charges to try to eliminate the State's evidence against him in his pending case. But there is no basis for it in the law.

First, the State properly relied on SDCL 23A-37-2 and 23A-37-8(2), which provide that seized property must be safely kept and may not be returned to its owner as long as it is required as evidence in a trial or other judicial proceeding, absent court order. Because the criminal case was still pending, there were no grounds to release the property to Defendant.

Second, defense counsel's letter did not constitute an effective, timely withdrawal of the valid consent Defendant gave at the hospital.

Defendant correctly notes that "once given, consent to search may be withdrawn at any time prior to completion of the search." *State v. Fierro*, 2014 S.D. 62, ¶ 19, 853 N.W.2d 235, 241. But here, the "search" was completed when the officers seized Defendant's belongings and took his buccal swab at the hospital. As discussed above, the additional, more intrusive warrant-based search of the contents of Defendant's cellphone was completed well before the withdrawal letter.

Defendant improperly equates the State's continuing retention and testing of the evidence as a search for which he could demand a halt and return at any time. But this Court has stated that the "[s]ubsequent examination of evidence to determine its evidentiary value does not constitute a search." *State v. Miller*, 429 N.W.2d 26, 34 (S.D. 1988) (citing *People v. Teale*, 450 P.2d 564 (1969)). Specifically, scientific examination of evidence is "neither a search nor a seizure within the meaning of the Fourth Amendment." *Teale*, 450 P.2d at 570. The protections in the Fourth Amendment focus on the manner in which the State intrudes into a person's reasonable expectation of privacy. But any legitimate expectation of privacy disappears once the property is validly seized (such as with consent or a warrant). *See Wilson v. State*, 752 A.2d 1250, 1272 (Md. Ct. Spec. App. 2000)

Finally, when it comes to returning property after probable cause is established, "the owner's revocation and request for return 'need not be complied with if there is then probable cause to retain [the property]

as evidence." *Lee v. City of Chicago*, 330 F.3d 456, 465 (7th Cir. 2003). Undoubtedly, probable cause existed with respect to all of this evidence. This is supported by the fact a neutral magistrate ultimately issued a warrant based on probable cause. This is particularly true of the bloody knife handle, whose connection to the crime was immediately apparent upon its discovery in Defendant's pocket.

For all the foregoing reasons, Defendant's written declaration that he was withdrawing his consent had no legal import. The State's refusal to immediately return or destroy the evidence was proper.

Π

### EVIDENCE SEIZED FROM JOHN ROACH'S APARTMENT AFTER HE GAVE VALID CONSENT TO SEARCH WAS PROPERLY ADMITTED AGAINST DEFENDANT AT TRIAL.

#### A. Background and standard of review.

When law enforcement approached John Roach and asked for consent to search his residence, he agreed. He accompanied them to the apartment and invited the officers inside. Law enforcement found Defendant's bloody clothes in a garbage bag. After Defendant moved to suppress the evidence, the trial court held an evidentiary hearing. *See* MH(4/6/16). Law enforcement officers Neil and Gross testified, as did Roach and Defendant's sister Krista Fast Horse. Defendant did not testify.

Testimony revealed that Roach lived in the basement apartment of a house. The door to the apartment opens into a small entryway

(mudroom) with few furnishings. *Id.* at 26-27, 52. The bag of clothing was found near this door. *Id.* at 18, 26. After passing through the entryway, one enters the kitchen area, Roach's bedroom, and a hallway leading to the living room. *Id.* at 53.

Roach told the officers that when Defendant stayed the night before the murder, he "crashed" on the couch in the living room. *Id.* at 31. Roach said Defendant occasionally stayed at the apartment and had a key because he was Roach's friend. Defendant did not keep clothing or personal effects there, and did not pay rent or buy food for the household. *Id.* at 50-52. At the time of the murder, Defendant lived with his sister Krista Fast Horse, having been required to move out of Goebel's home when the no-contact order was issued in December 2014. *Id.* at 42-43.

At the conclusion of the hearing, the court denied the motion and made several oral findings on the record. *Id.* at 57-59. The court found Roach freely and voluntarily consented to the search of his residence. It further found that Defendant had no reasonable expectation of privacy in the area where the evidence was discovered. This Court's review is governed by the same standard identified above in Issue I.

B. A warrantless search of a home is permitted, and the Fourth Amendment is satisfied, where consent is given by the resident who has authority over the premises.

While a warrant is generally required for a search of a home, an exception exists if the resident gives valid consent. A search pursuant to consent satisfies the Fourth Amendment, irrespective of the availability of a warrant. *Fernandez*, 134 S.Ct. at 1137; *State v. Fountain*, 534 N.W.2d 859, 863 (S.D. 1995). As the United States Supreme Court recognized,

It would be unreasonable—indeed, absurd—to require police officers to obtain a warrant when the sole owner or occupant of a house or apartment voluntarily consents to a search. The owner of a home has a right to allow others to enter and examine the premises, and there is no reason why the owner should not be permitted to extend this same privilege to police officers if that is the owner's choice.

Fernandez, 134 S.Ct. at 1132.

The right of a resident<sup>5</sup> to consent to a search of his own home is firmly established. *Id.* at 1129 (citing *United States v. Matlock*, 415 U.S. 164 (1974)); *State v. Benallie*, 1997 S.D. 118, ¶ 11, 570 N.W.2d 236, 238. The resident's consent is valid even as against an absent, nonconsenting individual who has a sufficient relationship to the premises, thus permitting the State to use evidence discovered in the search against the individual at trial. *Fernandez*, 134 S.Ct. at 1133 (citing *Matlock*, 415 U.S. at 170). Such "third-party consent" is a concept well recognized by this Court when upholding the validity of

<sup>&</sup>lt;sup>5</sup> As the Fernando Court explained, the terms "occupant," "resident," and "tenant" may be used interchangeably in this context to describe persons who have common authority over the premises. 134 S.Ct. at 1129 n.1.

residential searches as occurred here. *Fountain*, 534 N.W.2d at 863; *Benallie*, 1997 S.D. 118, 570 N.W.2d 236; *State v. Guthrie*, 2001 S.D. 61, 627 N.W.2d 401. In this type of scenario, the resident may validly give third-party consent to search the premises and personal property over which he has joint access and control, even if the property belongs to another. *Fountain*, 534 N.W.2d at 863.

In Fountain, an apartment tenant gave law enforcement consent to search her residence. The officer searched a jacket on the living room floor that they were told belonged to Fountain, who had just been taken to jail. Fountain was an overnight guest in the apartment. This Court upheld the search of the jacket, holding that "[a] defendant is not automatically entitled to expect that the contents of articles left behind at another's premises will remain private and, should he leave such articles behind, he assumes the risk that the other person may consent to a search of the articles." *Id.* at 866; accord *Guthrie*, 2001 S.D. 61, ¶ 57, 627 N.W.2d at 423; *Matlock*, 415 U.S. at 171, n.7.

On appeal, Defendant does not analyze the implications of the third-party consent given in this case. He does not challenge the trial court's determination that Roach freely and voluntarily consented. Nor does he contest Roach's authority to have consented to the search of his own apartment or the scope of that consent. Rather, Defendant argues only that, as an alleged "overnight guest," he had a reasonable

expectation of privacy in Roach's apartment.<sup>6</sup> He then leaps to the conclusion that suppression of the evidence was therefore warranted.

This is a critical omission. As demonstrated in the cases Defendant cites, whether or not he had an expectation of privacy in Roach's apartment may go to the issue of his *standing* to contest a search based on an alleged Fourth Amendment violation. But it does not by itself prove that a violation exists. *See State v. Hess*, 2004 S.D. 60, 680 N.W.2d 314 (defendant had standing to challenge warrantless entry and search, but did not ultimately prevail because search was permitted under warrant exceptions); *State v. Tullous*, 2005 S.D. 5, 692 N.W.2d 790 (defendant had standing to contest search warrant executed on friend's home, but search warrant's validity was judged on independent grounds). *See also Akuba*, 2004 S.D. 94, 686 N.W.2d 406 (even if vehicle's passenger had standing to challenge search, she could not prevail because driver's consent was valid).

This Court need not reach the issue of whether Defendant, as an alleged overnight guest, had a reasonable expectation of privacy in Roach's apartment.<sup>7</sup> Irrespective of that, Defendant cannot prevail

<sup>&</sup>lt;sup>6</sup> In the proceedings below Defendant did not challenge Roach's consent or claim an expectation of privacy in Roach's apartment. He asserted only that he had an expectation of privacy in his own personal property (clothing in the garbage bag). SR:1655 (motion); see MH(4/6/16) 54-55.

<sup>&</sup>lt;sup>7</sup> The trial court found Defendant was living with his sister and may have been Roach's overnight guest for, at best, one or two nights prior (continued . . . )

because the search was conducted pursuant to Roach's valid consent. *Akuba*, 2004 S.D. 94, ¶ 38, 686 N.W.2d at 422; *see State v. Runge*, 2006 S.D. 111, ¶ 24, 725 N.W.2d 589, 594. Defendant fails to demonstrate how the scope of Roach's consent did not (and could not) properly include permission to search the entryway area accessible by anyone going in or out of the apartment, as well as the garbage bag left near the door alongside other garbage bags destined to be taken outside.

The trial court properly denied the motion to suppress. While Defendant urges this Court to remand for written findings, this is not necessary. The record at the motion hearing and the trial court's oral findings provide a sufficient basis for this Court's review.

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED THE STATE TO INTRODUCE AUTOPSY PHOTOGRAPHS OF THE VICTIM.

A. Background and standard of review.

Prior to the testimony of the State's expert forensic pathologist,

Dr. Snell, Defendant sought to prohibit introduction of the 27 autopsy

photographs of Goebel, which were pre-marked as EXS. 145-172 (see

<sup>(...</sup> continued)

to the murder. MH(4/6/16) 58. The court also found there was nothing in the record to indicate: that Defendant had a reasonable expectation of privacy in the entryway area; that the area was solely his; or that he had the right to store his property there and exclude others, including Roach, from looking at it. Id. Defendant did not testify to the contrary.

SR:2519-45). JT:604-05. His counsel argued the sheer number of pictures would arouse the passion of the jury and was too prejudicial. Counsel suggested the State be required to limit the number of photographs, although he did not identify how many or which particular photographs would be unobjectionable. Id. The State argued the photographs were necessary as part of its burden of proof and were intended to aid the expert's testimony. For the most part, the photographs were not repetitive, but identified the 23 separate injuries inflicted upon Goebel. *Id.* at 605-9.

After reviewing the exhibits, the trial court ruled all were admissible, as the State was entitled to present evidence showing Goebel's injuries. The court determined the photographs were neutral, not cumulative, and not unduly prejudicial. *Id.* at 609-10. The exhibits were admitted during Dr. Snell's testimony, and he used them when testifying about Goebel's injuries. JT:623-43. This Court reviews the trial court's admission of photographic evidence under an abuse of discretion standard. *State v. Owens*, 2002 S.D. 42, ¶ 88, 643 N.W.2d 735, 756.

B. The autopsy photographs aided the expert in describing the nature, extent, and location of the injuries, and were relevant to the issues at trial.

As this Court held in Owens:

It is well settled that photographs are generally admissible where they accurately portray anything that a witness may describe in words. They are also admissible when they are helpful in clarifying a verbal description of objects and conditions. They must, however, be relevant to some material issue. . . . If relevant, photographs are not rendered inadmissible merely because they incidentally tend to arouse passion or prejudice. . . . Autopsy photographs fall within these rules. Although disturbing and cumulative, autopsy photographs may be admitted when they are necessary to aid in an expert's presentation of evidence.

Id. at ¶ 89, 643 N.W.2d at 756-57 (internal citations omitted)
(approving admission of homicide victim's autopsy photographs); see
State v. Herrmann, 2004 S.D. 53, ¶ 12, 679 N.W.2d 503, 508
(photographs of child rape victim's injuries); State v. Hart, 1998 S.D.
93, 584 N.W.2d 863, 867 (crime scene and autopsy photographs).

In this case, Dr. Snell believed the photographs would aid the jury in fully understanding his testimony. JT:626. He testified about each one of the wounds inflicted upon Goebel, including the type of wound, location on her body, severity, and whether it contributed to her death. JT:618-43. The photographs accurately portrayed what Dr. Snell was describing, and assisted him in explaining his findings as to the extent, location, and critical nature of Goebel's injuries. *Owens*, 2002 S.D. 42, ¶ 91, 643 N.W.2d at 757; *State v. Torres*, 2012 S.D. 23, ¶ 11, 813 N.W.2d 148, 150.

Defendant contends that the fact of Goebel's death and cause of death were not disputed, and therefore the photographs were irrelevant. Because Defendant pleaded not guilty, the State had the burden of proving every element beyond a reasonable doubt. To meet

this burden, the State was entitled "to present its case in any manner it sees fit so long as it stays within the evidentiary rules" and was not bound to accept any stipulation or admission by Defendant. *Herrmann*, 2004 S.D. 53, ¶ 12, 679 N.W.2d at 507.

Dr. Snell's testimony and the photographs were material not only to demonstrate cause of death, but the manner in which the stabbings occurred was relevant to show Defendant's intent and state of mind. The evidence went directly to the elements of first-degree murder (premeditated design to effect death). It also went to the elements of second-degree murder (evincing depraved mind) and firstdegree manslaughter (without design to effect death but in a cruel and unusual manner, or use of weapon in manner likely to inflict death or serious bodily harm). In addition, the evidence was relevant to refute the offense of second-degree manslaughter (reckless killing). *See* SR:2331-49 (jury instructions); SR:2360-61 (verdict form).

In *Owens*, a premediated murder case, the defendant admitted committing the acts but denied having criminal intent. Explaining that the photographs were inconsistent with Owens' claimed defense, this Court affirmed the admission of autopsy photographs depicting the kind and degree of force inflicted to cause the victims' injuries. 2002 S.D. 42, ¶ 92, 643 N.W.2d at 757.

In this case, because the photographs were relevant to material issues, it would have been improper to exclude them "merely because

they incidentally tend to arouse passion or prejudice." *Id.* at ¶ 89. While the photographs may be disturbing, that is an insufficient reason to keep them from the jury. *State v. Larson*, 1998 S.D. 80, ¶ 31, 582 N.W.2d 15, 21. The photographs depicted Goebel's injuries in a neutral and clinical manner, after she had been cleaned. Most show only close-ups of the injuries. They were not intentionally cumulative or repetitive. To the extent Defendant's claim of prejudice stems from the number of photographs presented, this is directly due to the fact he inflicted that many wounds upon Goebel. The State simply presented evidence of what he had done. Because the photographs were relevant and not unfairly prejudicial, the trial court did not abuse its discretion in admitting them.

#### IV

# THE STATE'S COMMENTS DURING REBUTTAL CLOSING ARGUMENT WERE PROPER.

#### A. Background and standard of review.

While cross-examining Det. Tarnowski, Defendant's counsel noted the detective had included in the spreadsheet presented to the jury only 44 of the approximately 449 retrieved text messages between Defendant and Jessica. JT:175-76; EX. 85. The detective testified he included the texts deemed relevant, and further explained that all 449 texts were provided to the defense prior to trial. JT:177-78.

During defense counsel's closing argument, he commented on the fact the State presented only 44 of the text messages and told the jury

it was not "given all of the information." JT:740. Counsel brought up this point twice more during his closing, urging the jury to take this into consideration and to question the State's evidence. JT:746-47, 749.

In the rebuttal closing, the prosecutor responded to these arguments by asking, "If those text messages were so important, why didn't they get them?" JT:761. Defendant's counsel objected and the trial court held an off-the-record bench conference, during which the defense made a mistrial motion. *Id.*; *see* JT:775-76 (post-verdict discussion memorializing what had transpired during the bench conference and the court's denial of mistrial motion). The court overruled the objection and thereafter the prosecutor told the jury: "[Defense counsel] is right when he told you it's not their job to present evidence. He was right. It's not. It's my burden. But I'm going to present to you what is relevant. . . . They could have presented those text messages." JT:761.

After trial, Defendant filed a Motion for New Trial, arguing the State's comments during rebuttal closing improperly shifted the burden of proof to Defendant. SR:2638-44. The trial court denied the motion. SR:2702.

This Court has held it "will not disturb the trial court's ruling on a motion for a new trial based on misconduct of counsel unless we are

convinced there has been a clear abuse of discretion." *State v. Shult*, 380 N.W.2d 352, 355 (S.D. 1986).

B. The prosecutor's comment on Defendant's ability to have presented the additional texts as evidence did not improperly shift the burden of proof and was a fair response to defense counsel's closing argument.

The State committed no error when it pointed out that Defendant could have presented the additional texts if he wanted the jury to see them. Such commentary did not improperly shift the burden of proof to Defendant, as this Court recently reaffirmed in State v. Stanley, 2017 S.D. 32, N.W.2d \_\_\_\_\_ Rejecting a similar argument, this Court held that "[w]e have consistently approved of statements alluding to the fact that the accused has failed to produce other witnesses or evidence." Id. at ¶ 32 (citing State v. Rosales, 302 N.W.2d 804, 806 (S.D. 1981)). These types of comments are permissible under South Dakota law. *Rosales*, 302 N.W.2d at 807; *Shult*, 380 N.W.2d at 355-56. This is particularly true in situations, like here, where the prosecutor's remarks are "merely a fair response to the assertions made by defense counsel" during the defense's closing argument. Waff v. Solem, 427 N.W.2d 118, 121 (S.D. 1988); see State v. Brown, 132 N.W.2d 840, 843 (S.D. 1965) (prosecutor's rebuttal comments were invited or provoked by defense counsel).

Here, the State made the comments only after Defendant's counsel repeatedly brought up the omitted texts and faulted the State

for not providing them to the jury. When making the comments, the prosecutor emphasized that the State maintained the burden of proof. JT:761. The court had properly instructed the jury on the State's burden. SR:2302, 2316, 2318. A reasonable, intelligent jury would not have understood the State's comments as having shifted that burden. *Rosales*, 302 N.W.2d at 806. The trial court did not abuse its discretion in rejecting Defendant's request for a new trial.

V

# THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT OF FIRST DEGREE MURDER.

After the State rested, Defendant moved for judgment of

acquittal, which the trial court denied. JT:649. On appeal he claims

the evidence was insufficient to sustain the verdict. It is well

established that:

In reviewing the sufficiency of the evidence, this Court considers "whether there is sufficient evidence in the record which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt; in making this determination, the Court will accept the evidence, and the most favorable inference fairly drawn therefrom, which will support the verdict." . . . Further, "this Court will not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence."

*State v. Wright*, 2009 S.D. 51, ¶ 59, 768 N.W.2d 512, 532 (internal citations omitted).

Defendant was convicted of first-degree premeditated murder

under SDCL 22-16-4(1), which required the State to prove a homicide

"with premeditated design to effect the death of the person killed."

Under SDCL 22-16-5,

The term, premeditated design to effect the death, means an intention, purpose, or determination to kill or take the life of the person killed, distinctly formed and existing in the mind of the perpetrator before committing the act resulting in the death of the person killed. A premeditated design to effect death sufficient to constitute murder may be formed instantly before committing the act.

In Wright this Court explained:

When determining if premeditation exists[,] we consider the following factors: 1) the use of a lethal weapon; 2) the manner and nature of the killing; 3) the defendant's actions before and after the murder; and 4) whether there was provocation." . . ."However, direct proof of deliberation and premeditation is not necessary. It may be inferred from the circumstances of the killing."

2009 S.D. 51, ¶ 60, 768 N.W.2d at 532 (internal citations omitted).

Defendant's claims seem to be that the State presented

numerous witnesses, but they simply testified as to uncontested facts

or otherwise did not provide "substantive testimony" about

Defendant's guilt. Defendant also contends the jury overlooked

important evidence and alleges there were "holes" in the State's case.

It would appear from these arguments that Defendant expected the State to have put on an eyewitness to the murder in order to prove its case. Unfortunately, the only surviving eyewitnesses were  $2 \ 1/2$ years old and not quite one year old at the time their father killed their mother. JT:49, 238. What the State did introduce was a significant amount of testimony by people who contributed in different ways to tie Defendant to the killing and establish his premeditation. These witnesses provided evidence establishing each of the elements of the crime, as well as every one of the factors for premeditation discussed in *Wright*. This evidence overwhelmingly proved Defendant's guilt. The additional arguments Defendant makes go to the weight of the evidence, or perhaps conflicts in the evidence. Those are matters for a jury, and they resolved them against Defendant. Viewing the evidence in a light most favorable to the jury's verdict, this Court should uphold Defendant's conviction.

#### VI

# THERE WAS NO CUMULATIVE ERROR IN THE TRIAL BELOW.

Defendant claims that even if the above issues, in isolation, do not independently provide grounds for relief, "the cumulative errors" of the trial court and the State deprived him of his constitutional right to a fair trial. The State submits that no error occurred below and therefore this issue is meritless. *Stanley*, 2017 S.D. 32, ¶ 33. Because Defendant fails to establish any prejudicial error, this Court should conclude there is no cumulative error and Defendant received a fair trial. *Wright*, 2009 S.D. 51, ¶ 69, 768 N.W.2d at 534; *Owens*, 2002 S.D. 42, ¶ 105, 643 N.W.2d at 759.

### CONCLUSION

Based on the foregoing arguments and authorities, the State

respectfully requests that the Court affirm the Judgment and Sentence

entered below.

Respectfully submitted,

## MARTY J. JACKLEY ATTORNEY GENERAL

<u>/s/ Patricia Archer</u> Patricia Archer Assistant Attorney General 1302 East Highway 14, Suite 1 Pierre, SD 57501-8501 Telephone: (605) 773-3215 E-mail: <u>atgservice@state.sd.us</u>

### **CERTIFICATE OF COMPLIANCE**

1. I certify that the Appellee's Brief uses Bookman Old Style typeface in 12 point type, and is within the word limitation provided for in SDCL 15-26A-66(b). Appellee's Brief contains 8608 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 17th day of July, 2017.

/s/ Patricia Archer

Patricia Archer Assistant Attorney General

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 17th day of July,

2017, a true and correct copy of Appellee's Brief in the matter of State

of South Dakota v. John Eric Hemminger was served via electronic mail

upon Appellant's counsel at: <a href="mailto:gerdes@dakotalaw.com">gerdes@dakotalaw.com</a>;

jerrymcneary@dakotalaw.com; and tom@ronaynecogley.com.

/s/ Patricia Archer

Patricia Archer Assistant Attorney General APPENDIX

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H		ED	
	JAN 28	2015	
STATE OF SOUTH DAKOT SOUTH	DAKOTA UNIFIEL		IN CIRCUIT COURT
BROWN COUNTY		<u>ss</u> 170	5TH JUDICIAL CIRCUIT
****	*****	****	:水雨 宋兴寒水 李水本 李净 齐净 水布 水水 李永 水水水 本本 水
STATE OF SOUTH DAKOTA,	)	*	
Plaintiff	)	* *	AFFIDAVIT IN SUPPORT OF
Vs.	)	*	REQUEST FOR
	)	*	SEARCH WARRANT
John Eric Hemminger	)	<b>•</b>	
Dob: 10-23-81	)	*	
Defendant	)	*	*

(In the matter of Attempted Murder / Aggravated Assault in Brown County)

The undersigned, being duly sworn upon oath, respectfully requests a Search Warrant to be issued for the following property:

## ITEMS TO BE SEARCHED FOR AND SEIZED:

- A. Electronic files that constitute evidence, instrumentalities, or fruits of violations of South Dakota Codified Law pertaining to Attempted Murder, Aggravated Assault; or any communications or documentation associated Attempted Murder or Aggravated Assault including, but not limited to:
  - 1. Contact Lists.
  - 2. Call Logs.
  - 3. Instant messages and/or text messages.
  - 4. Emails.
  - 5. Social media communications.
  - 6. Photos.
  - 7. Videos.

The undersigned respectfully requests that the Search Warrant be issued to permit a search at the following premises for the above-described property:

- One Samsung cell phone, (TracPhone) that had been seized from John Hemminger. (Note: The model, serial number, etc. for this phone was not displayed on the outside of the phone and would require removal of the battery cover or electronic manipulation of the phone to obtain.)
- One Samsung cell phone, SN: A00000402FBDFB, that had been found on a shelf in the west bedroom of the upper level of Jessica Goebel's residence.
- One Huawei TracPhone, SN: N5H9MC92C1008422, that was found in a shoebox in Jessica Goebel's residence.

The undersigned requests a Search Warrant to be issued because the above-described property is:

٢.,

## (PLACE INITIALS IN THE APPROPRIATE BLANK)

Property that constitutes evidence of the commission of a criminal offense;

Contraband, the fruits of a crime, or things otherwise criminally possessed;

Property designed or intended for use in, or which is or has been used as the means of, committing a criminal offense.

The undersigned further requests:

## (PLACE INITIALS IN THE APPROPRIATE BLANK)

Execution of Search Warrant at night pursuant to 23A-35-4;

That no notice be given prior to the execution of the Search Warrant pursuant to SDCL 23A-35-9;

Authorization to serve the Search Warrant on Sunday;

Execution of the Search Warrant during the daytime.

The facts in support of the issuance of a Search Warrant are as follows:

At all times material to; I am a certified law enforcement officer for the City of Aberdeen, South Dakota. I am, therefore, an officer of the Aberdeen Police Department, who is empowered to conduct investigations of, and to make arrests for, the offenses enumerated in the South Dakota Criminal Code. I have been employed as a law enforcement officer in the State of South Dakota since June of 1994.

I attended Alexandria Technical College and graduated in 1994 with an Associate Degree in Criminal Justice. In June of 1994 I was hired by the City of Aberdeen as a police officer. Subsequent to my employment as a police officer, I attended the eight-week Basic Standards and Training session in Pierre, S.D. and received certification as a law enforcement officer in South Dakota. In 2004 I was assigned to the Aberdeen Police Department Detective Division and have served there since that time as a police detective.

Since my assignment to the detective division I have attended numerous training sessions regarding the collection and examination of digital evidence to include devices such as computers, tablets, cell phones, and other digital devices. This training includes training from Guidance Software, Access Data, the High Tech Crime Institute, and Cellebrite. Much of my duties since I was assigned to the detective division have included the examination of digital devices pertaining to crimes.

As a detective with the Aberdeen Police Department, my duties have included investigating crimes involving Attempted Murder and Assault.

I am familiar with the facts and circumstances described herein and make this affidavit based upon personal knowledge derived from my participation in this investigation; conclusions I have reached based on my training and experience; and upon information I believe to be reliable from oral and written reports about this investigation.

#### CURRENT INVESTIGATION

- At about 1806 hours on 01-06-15, the Brown County Dispatch center received a call from a woman who requested officers be sent to 611 North 2<sup>nd</sup> Street for a fight. The woman later told the dispatcher and the responding officers she was Jessica Goebel. The dialog between Jessica and the dispatcher was as follows:

Initially upon connection of the first call, a woman's voice could be heard yelling, but it was difficult to initially understand what she was yelling. At one point she could be heard yelling, "Stop! John! (Unintelligible words).

Jessica: Hello.

'.

Dispatcher: Hello.

Jessica: (Unintelligible words) somebody here at 611 North 2<sup>nd</sup> Street please, hurry!

Dispatcher: 711 North 2<sup>nd</sup> Street?

Jessica: 611 North 2<sup>nd</sup> Street, please.

Dispatcher: What's going on there?

Jessica: There's a fight.

Dispatcher: Who's fighting?

Unknown: Unintelligible conversation that sounded like a woman and a young girl.

Dispatcher: Mam, who's fighting?

Jessica: John! (The tone of Jessica's voice sounded lout and anxious as if she was calling out to John instead of answering the dispatcher's question.

At this point the call ended

- At about 1807 hours the dispatcher called the number from which the woman called the dispatch center and spoke with Jessica again. The dialog between Jessica and the dispatcher was as follows:

Jessica: Hello.

Dispatcher: Hey, what's going on?

Jessica: Um, John Hemminger is not supposed to be at this address and he's here beating up one of my friends.

Dispatcher: Don? Who's Don?

Jessica: John Hemminger, he's not supposed to be here. Are there cops coming?

Dispatcher: Who's your friend? Who's he beating up?

Jessica: (Jessica's voice could be heard in the background, but was somewhat unintelligible. It sounded like she said, "John just quit." Shortly after this statement the call ended.)

At about 1809 hours Jessica called the dispatcher and the dialog between the dispatcher and the caller was as follows:

Dispatcher: City County Dispatch this is John.

Jessica: Hi, this is Jessica calling back, are you called.

Dispatcher: Ok, about the fight?

Jessica: Um, they already left.

essica

Dispatcher: Who are they? What's the, who's fighting with John?

Jessica: (A woman's voice yelled three times something that sounded like, "Stop" or Scott"; a small child could be heard in the background, along with unintelligible conversation and the call ended.)

At about 0611 Jessica called the dispatch center again and the following dialog took place between the dispatcher and the woman:

Dispatcher: City County Dispatch this is John.

Ok, this is Jessica again, I am so sorry. Anyways, they were fighting outside, there was two guys, they were both native, and they were on the front lawn and I got scared, and (unintelligible) but I was running and I told them I was calling the cops.

Dispatcher: Do you know who both of them were?

- Jessica: Well, I don't know anything about them I guess. But I mean me and my kids were just walking in from outside and they were fighting in the alley and I was like screaming at them because I have kids you know. It was like you guys need to leave here, I don't even know.
- Dispatcher: Do you know where they went? Jessica: No, they both started running; I don't know if they're still fighting or what? So I told em I was calling the cops and they took off running.
- Dispatcher: Do you know what they were wearing?
- Jessica: I don't know, I think one was in all black and the other one was in white.
- Dispatcher: Like a white shirt?
- Jessica: Like a white hoodie.
- Dispatcher: Did they have any weapons?
- Jessica: I don't think so. I didn't see any I guess.
- Dispatcher: Ok, do you know if they had been drinking?
- Jessica: Um, no. Like I said, I just like, just got home in the alley there and there was a big old fight. I was just trying to bring my kids inside.
- Dispatcher: Ok, did you know either of them?
- Jessica: No, but the cops are here now.
- Dispatcher: Ok, I'll let you talk to the officers then.
- Jessica: Ok.
- Dispatcher: Can I get your name first real quick?
- Jessica: Um, Jessica Goebel.
- Dispatcher: Ok, I'll let you go then, thank you.

- Aberdeen Police Officers Melissa Arnold and Eric Paul responded to 611 North 2<sup>nd</sup> Street and met with Jessica Goebel. Officer Arnold wrote a call entry pertaining to this call that read as follows;
  - 18:23:34 01/06/2015 Melissa Arnold
     Spoke with Jessica, she stated she was coming home from work and she stated she couldn't see who was fighting; she said they never said anything to her.
     Jessica stated one possibly was Rich(unknown last name) and she was not sure if John was there or not as she couldn't see. She stated one was wearing all black and one was wearing a white hoodie and dark pants. Unknown direction of travel.. individuals GOA. Searched the area and couldn't find anyone matching the description.. no rpt
- At about 0202 hours on 01-07-15 the Brown County Dispatch Center received a call from a man who identified himself as John Hemminger. The dialog between Hemminger and the dispatcher was as follows:

Dispatcher: 911 what's the address of your emergency?

Hemminger: The address is 611 North 2<sup>nd</sup> Street. I'm on my way to the hospital. I got stabbed. I need someone to go check out 611 North 2<sup>nd</sup> Street and check out my ex-girlfriend and kids cause the guy is, was still there when I left.

Dispatcher: Ok now, what happened sir?

Hemminger: I was, I got stabbed at 611 North 2<sup>nd</sup> Street. The guy was in there.

Dispatcher: Ok who did it, who was in the house?

Hemminger: Richard Hanley.

Dispatcher: Ok Richard?

Hemminger: Hanley.

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Dispatcher: How is that spelled?

Hemminger: I have no clue. I'm going to the emergency room right now. I called a friend and he picked me up.

Dispatcher: Ok, what was he wearing?

Hemminger: A, a white hoodie, a, I think a white undershirt, and blue jeans.

Dispatcher: How far are you away from the hospital?

Hemminger: I'm pulling up to the emergency room now at Avera.

Dispatcher: Ok, we're going to have officers there as soon as we can.

Hemminger: Can you send it, can you send them to the address please.

Dispatcher: As we speak, a, another worker here is sending somebody over there right now.

Hemminger: Thank you.

Dispatcher: And he was still in the house when you left?

Hemminger: Yes, yes he was.

Dispatcher: A, what is a, Richard driving?

Hemminger: I don't have no clue. I don't know how to get into the emergency room. How do I get into the emergency room?

Dispatcher: Ok, Um. Ok, are you getting into the emergency room now?

Hemminger: I can't get in, the door won't open.

Dispatcher: Ok, there should be a button there you need to push, a, to get in, somebody should be there right away.

Dispatcher: Ok, is there any more information you can give me about Richard?

Hemminger: No, I can't I just know he was still there, I just got stabbed in my hand.

Dispatcher: What lead to the incident sir?

Hemminger: Um, the doctor, the doctor is going to call you. (Note: People could be heard in the background at this point.)

Dispatcher: Ok, has he been, was he drinking or anything?

TICHTERTY I TIT DOLLY DIT & CHELY INCH ADDA. AATHER AAND FINNES	Hemminger:	I'm sorry sir	I can't hear you.	What was that?
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Dispatcher: And what was his name again? What's your name sir?

Hemminger: John Hemminger.

Dispatcher: John?

Hemminger: Hemminger.

Dispatcher: How is that spelled? H e m m i n g e r.

At this point a man who identified himself as Nursing Supervisor Randy Pudwill spoke with the dispatcher on the phone and said they would speak with the officers when they arrived; and the call was terminated.

- Aberdeen Police Officers responded to 611 North 2<sup>nd</sup> Street, Aberdeen and saw what appeared to be blood on surfaces inside the residence when they looked through windows and subsequently forced entry into the residence where they found Jessica Goebel who was unconscious and had received numerous stab wounds.
- Jessica Goebel was transported to the Avera St. Luke's Hospital for treatment where her injuries were determined to be life threatening and critical.
- On the morning of 01-07-15 Detective Sergeant Chris Gross and Detective Arika Dingmann responded to the St. Lukes Emergency Room.
- At about 0402 hours on the morning of 01-07-14, while at the St. Lukes Emergency Room, Detective Sergeant Gross interviewed Jarimey Halstead who told him information to include the following:
  - Hemminger called him at 0153 hours and told him, "I really need you man, I really, really need you man".
  - Hemminger told him, "Rich just stabbed me! I just got stabbed." Hemminger repeated this three or four more times and his voice was shaking.
  - Hemminger told him to just pick him up, that he (Hemminger) was on 6<sup>th</sup> Avenue on his way running to his (Halstead's) house.

- He asked Hemminger if he was ok and Hemminger told him, "He stabbed me twice in the hand.
- He asked Hemminger if he should bring a towel or something for bleeding and Hemminger told him, "No, I got it wrapped up."
- o He (Halstead) lives at 219 6th Avenue Northeast.
- He got dressed and was just going to walk out the door of his residence when Hemminger walked up to the residence.
- On the way to the hospital Hemminger asked him to call Jessica's number (Presumably Jessica Goebel) and Hemminger gave him Jessica's number.
- He dialed Jessica's number and it went straight to voice mail. (Halstead looked at his phone and told Detective Gross he called Jessica at 0203 hours.)
- His telephone number was 290-9905.
- At about 0426 hours on 01-07-15, Detective Sergeant Gross interviewed Hemminger. Prior to asking Hemminger any questions in reference to this incident, Sergeant Gross told the Miranda Warning to Hemminger. Hemminger told Sergeant Gross he understood his rights and was willing to talk to him. Hemminger told Sergeant Gross information to include the following:
  - o He lived with his sister Krista Hemminger.
  - There was a no contact order between him and Jessica that had been put into effect about a month ago.
  - He and Jessica had been talking to each other all day. They had been talking to each other recently on a regular basis. The texting between them "today" went until about 1715 or 1730 hours when he got off work.
  - The plan was Jessica was going to take a shower, cook supper. He was going to go to his sisters and take a shower, eat, give Jessica a call, and Jessica was going to come to his sister's house and spend the night with him, but he ended up going to the house of one of his friends, John Roach after work. (Note John Roach lived at 605 North 2<sup>nd</sup> Street, Aberdeen, SD).

- While he was at John Roach's house after work he got a call from Jessica and Jessica told him that "Rich" and someone else were fighting by her house.
- Jessica told him she was going to pack the kids up and get out of there, but no one was going to be there, the back door would be open, and he could come get his work pants. That was the last time they talked on the phone.
- He gave her about a half hour or 45-minutes and about the time he was going to go over to Jessica's residence, she sent him a text that said the cops were patrolling everywhere because of the fight and she wanted him to be careful. So he waited to go to Jessica's residence.
- Just before he went to Jessica's residence, John Roach went into his bedroom and told him he (Roach) was going to go to bed.
- o Roach's girlfriend, "Lisa" was present at the residence with Roach.
- When he decided to go to Jessica's residence, he walked from John Roach's residence to Jessica's residence and found the back door was open and there were no lights on (he believed it may have been after 2130 or 2200 hours when he went to Jessica's residence, but he didn't remember what time he went there.)
- He went inside Jessica's residence and went upstairs to find his work clothes which Jessica told him were in a pile of dirty laundry.
- He started digging through the pile of dirty laundry and the bedroom light came on and he saw Richard Hanley.
- Richard asked him, "What the fuck are you doing here? I'm the new man of the house."
- He told Richard he didn't want any problem, he was just there to pick up his work clothes.
- Richard came towards him and they ended up scuffling and they ended up in the bathroom.
- He gave Richard a "Haymaker" and he landed on the bed and started bleeding from the area around his nose or eye.
- o Richard stood up and took a pocket knife from his pocket

• He turned around and "took off". He missed the third step and fell. He ended up on his back.

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- Richard got on top of him and attempted to stab him and he blocked Richard with his hand and it cut his fingers. Richard tried to stab him again and it cut his thumb.
- He poked Richard in the eye with his thumb and Richard crawled back and started screaming, "My eye."
- He ran into the kitchen and slammed the door, then ran into the bathroom, grabbed gauze, and ran to the sink in the kitchen, because that's where his shoes were. He put his shoes on and took off out the door.
- He ran back over to John Roach's residence, but the door was locked.
- o He tried to get Roach to come to the door for maybe ten or fifteen minutes.
- o He called John Roach, but Roach didn't answer, so he left Roach a voice mail.
- He hung up after calling Roach and texted his brother-in-law and told him he just got stabbed.
- As he started running down 6<sup>th</sup> Avenue, he called Jarimey Halstead and he told Halstead what had happened and he asked Halstead to take him to the hospital.
- He ran all the way to Halstead's house before Halstead came out the door.
- When he saw Halstead, he felt a little bit safer and dialed 911.
- He was wearing pretty much the same things he had been wearing when he got off work. His pants were at his sisters.
- The only conversation he and Jessica had were text and phone calls. They planned on meeting each other after work. They never physically met.

It should be noted that during this interview Hemminger had made references to text messages on his phone and gave Sergeant Gross and Detective Dingmann the unlock code for his phone, "8060", so they could view the contents of the phone. It should be noted that neither Sergeant Gross nor Detective Dingmann asked Hemminger if they could "Search" the phone, but rather Hemminger told them there were messages on the phone and showed them how to find the time and date information pertaining to the calls and messages as they interviewed him. At no time did he object to them looking at the phone. Hemminger's phone was a black Samsung TracPhone that displayed no model number or serial number on the outside of its case. It should be noted there was a red substance on the outside of the phone that appeared to be blood.

It should be noted that in one of the text messages from Jessica that Detective Dingmann found on the phone, the contents of the message said, "I covered for your ads, the cops are searching the alleys" (Note: the word "ads" appeared to be misspelled on the message and appears in the prior sentence as it actually was on the message.)

When questioned about this message Hemminger said he had no clue.

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Detective Sergeant Gross continued to interview Hemminger in reference to this incident. Hemminger continued to deny getting in any altercation with Richard Hanley around 1800 hours on 01-06-15 and he denied doing anything to Jessica.

Detective Dingmann collected the clothes Hemminger's was wearing when he arrived at the St. Lukes Emergency Room. As she was doing so, she noticed the handle of a folding knife and the screw that should have secured the knife's blade to the handle inside the right coat pocket of Hemminger's coats. The handle of this knife had what appeared to be blood on it. When asked about how the knife handle got into his pocket, Hemminger said he didn't know it was there and didn't know how it got there.

Detective Dingmann told me she saw the following on Hemminger's Phone while they were interviewing Hemminger:

- Several phone calls between John Hemminger and Jessica Goebel around 1800 hours on 01-06-15.
- Numerous text messages between Hemminger and Jessica over the last few days. The contents of the text messages included the following:
  - Hemminger accused Jessica of cheating on him with "Rich".
  - Jessica accused Hemminger of cheating on her.
  - Jessica told Hemminger she was done with him.
  - Hemminger made a comment about "head hunting" for Rich.

- Hemminger repeatedly asked Jessica if he could come over.
- Hemminger commented how many days remained until the No Contact Order between him and Jessica was no longer in effect.
- Jessica threatened to contact the police.
- At about 0630 hours on 01-07-14, Detective Sergeant Gross Interviewed Jessica Goebel's Sister, Shannon Anderson. During this interview she told him information to include the following:
  - At about 1830 yesterday Jessica called her and told her John just broke into her house and beat some guy up.
  - Jessica told her John came into her home, went upstairs, and beat up the guy in her bedroom.
  - Jessica told her her bedroom looked like there was a bunch of blood everywhere.
  - o Jessica told her she called the police and they were out looking for John.
  - o Jessica told her John and the other man just left her residence after the fight.
  - She told Jessica she had to go to safe harbor because John had been beating her for the last three years.
  - She thought the other guy that had been at Jessica's residence was named, "Rich" but she didn't know.
  - She knew that Jessica was trying to see "this guy" (Presumably meaning Rich).
  - Jessica called her at about 2130 hours and told her boyfriend, Tyler Gauer, she was going to bed.
  - John went to prison for attempted murder, Jessica told her John stabbed some guy nine times and he was in jail for nine years.
  - Jessica told her last night that John called her from a restricted number last night and told her he was going to go to Rich's house and kill Rich and his mother.

- On the morning of 01-07-15, Detective Sergeant Gross interviewed Krista Hemminger. During this interview Krista told Sergeant Gross information to include the following:
  - At about 2146 on 01-05-15 Jessica texted her and asked her if John could bring her PS3 and my EBT card and said John was going to do drugs or something.
  - She didn't tell John about the text from Jessica because they were trying to stay out of their business.
  - Between about 2200 hours and 2300 hours on 01-05-15 John grabbed clothes and said he was going to spend the night at his friend's house.
  - o She didn't know who John left with.
  - She hadn't heard from John since he left on 01-05-15.
  - o John was left handed.
  - John and Jessica had been seeing each other despite a no contact order between them and they had been arguing recently a lot.
- At about 0718 hours on 01-07-15, Detective Sergeant Gross interviewed John Roach. During this interview Roach told Sergeant Gross information that included the following:
  - He thought Sergeant Gross wanted to talk to him about John and Richard getting into a fight.
  - o He hadn't seen Richard since New Year's.
  - John was mad at Richard because Richard was sleeping with his girlfriend Jessica.
  - John worked for him and came home with him at about 1715 yesterday (01-06-15).
  - When they arrived at his (Roach's) residence, John was wearing the same clothes he wore to work.
  - John talked to Jessica on the phone on the way home from work and also when they were at his house.

- He and his girlfriend, Liza Thomas, went out at about 1940 hours, and he left John at his (Roach's) residence.
- John had remained at his residence from the time they arrived at his residence after work until he (Roach) and Thomas left the residence at about 1940 hours.
- John had been on the phone with Jessica from the time they got off work until he (Roach) and Thomas left his residence at about 1940 hours.
- No one else was present at his residence when he and Thomas left at 1940 hours.
- When they left the residence John was wearing, "Levi's and his work stuff and boots, tan boots".
- He and Liza returned to his residence between about 2230 or 2300 hours and John wasn't there.
- o When they returned to his residence the door was locked and John was gone.
- At about 1339 hours on 01-07-15, Sergeant Gross interviewed Richard Hanley. During this interview Richard told Sergeant Gross information that included the following:
  - He had been seeing Jessica since about December fourth or fifth and he had been seeing Jessica on an off while John Hemminger and Jessica were together.
  - Jessica often told him how John Hemminger would beat her up all the time and she wanted to get away from all that.
  - o Jessica told him (Richard) was the only one that made her happy.
  - A couple of days ago when he was walking to Jessica's residence he saw one of Jessica's neighbors named "Breen" (Identified by Sergeant Gross as Breen Anis) take a "double take" at him and then get on her phone. He believed she was calling John Hemminger and telling him whenever he (Richard) went to Jessica's residence.
  - He thought John Roach would tell John Hemminger every time Roach saw him go to Jessica's residence.

• At about 1630 on 01-06-15, Jessica sent him a text message and told him she had gotten off work early and was at home then.

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- He sent a text message to Jessica asking her if she wanted him to come over and she said, of course.
- At about 1800 hours his mom gave him a ride and he went to McDonald's where he purchased Chicken McNuggets and French fries for the baby's, and one of the new Bacon Burgers.
- After going to McDonald's his mom and him drove past the intersection of "North 2<sup>ad</sup> and 7<sup>th</sup> Street" and he saw Brand Lindquist, John's foreman.
- He wanted his mom to turn right and drop him off on the corner so no one would see him go to Jessica's residence because he knew John was Psycho, but instead she turned left and dropped him off in the alley.
- He got off in the alley and went to Jessica's back door and found that the back door was open.
- o He walked into Jessica's residence, locked the deadbolt, and locked "the bottom".
- Jessica was inside changing the babies and one of them got sick and threw up on Jessica's pant leg.
- o John Hemminger kept calling Jessica and messaging her over and over.
- John Hemminger told Jessica he cried his eyes out to her, he wanted to be with her, but she still ignored him. John Hemminger told Jessica he knew somebody must be there.
- John Hemminger called again and ignored the call. Jessica asked him (Richard) if he thought she should call John back again so he didn't come over.
- Jessica called John Hemminger and put their oldest daughter, Kenna, on the phone.
- He and Jessica went upstairs and had sex.
- They heard the doorbell ringing and someone pounding on the door for about ten minutes straight.

- o Jessica brought the children to him and went downstairs and answered the door.
- When Jessica answered the door he heard someone say, "What?! Is he here?!", and he heard boom, boom, boom. He thought John Hemminger must have shoved Jessica over or something.
- o Jessica hollered, "No John! Get the fuck out of here! I don't want you here no more!"
- o John Hemminger came upstairs and said, "Hey, what's up motherfucker?!"
- o He sat the baby down and John Hemminger began hitting him.
- Jessica grabbed the baby and hollered, "John, not in front of the kids! These are your girls! Not in front of the girls!"
- He tried to fight back and did the best he could. John Hemminger got winded and couldn't breathe anymore, so he sidestepped John Hemminger, threw John Hemminger down on the bed, and tried to choke him out.
- o John Hemminger bit him in the arm.

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- o John Hemminger started gouging his eye out.
- o He jumped up off the bed, and shoved John Hemminger back down.
- o John Hemminger told him, "Leave my fucking girl alone, this is my girl.
- He told John Hemminger, "Alright, I'm leaving", and he bolted down the stairs as fast as he could and left the residence wearing only a white t-shirt, a pair of pants, and socks.
- He ran with no shoes on all the way back to his mom's house.
- The shoes he had been wearing were black Nike's with bright green and were size 10 ½.
- He left a white hooded sweatshirt, two t-shirts, and a grey extra-large zip up sweater at Jessica's residence as well.

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- He also left a black Verizon flip phone at the residence.
- o He ran out the front door of Jessica's residence and ran to his Aunt Josie's house.
- He walked in to the front door of his aunt's residence and hollered, "Auntie, I need help!"
- He was afraid the cops were going to come and take him away because he had a warrant.
- His mom came to pick him and his mom took him to the house of his cousin, Niki Duchencaux, at the Dakota Square Apartments, so he could clean up, then his mom took him
- He sent messages to Jessica. When they reached the reservation he got a text message on his mom's phone from Jessica's phone that said, "Hey is Rich with you?" So he messaged back when they got to the reservation, "Yea, I'm ok, how are you? Are you ok? Are the baby's ok?" But he didn't receive a response.
- He tried calling Jessica, but her phone was off.
- His mom took him to the hospital at Ft. Yates (Records from the Ft. Yates hospital showed Richard was admitted there at 2155 hours on 01-06-15 and he was released at about 2320 hours).
- After he was released from the hospital at Ft. Yates his mother brought him to the Prairie Knights Casino and they got a room there. They checked in under his mother's name, Donna Sam. (Footage from the security camera system showed Richard and his mother checking in at about 2356 hours on 01-06-15 and showed them leaving the room at about 0556 hours on 01-07-15.)
- His mom dropped him off at his dad's residence at about 0600 hours this morning.

Detective Gross took photographs of Richard's injuries. The injuries included:

- What appeared to be bruising of the area of both of Richard's eyes, with more significant bruising to Richards's right eye.
- The sclera of Richard's right eye appeared to be very red.

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- A cut on Richard's upper right cheek that had been stitched with what appeared to be five stitches.
- A mark on the upper portion of Richard's right forearm that appeared to be a bite mark.
- At about 0934 on 01-08-15, Detective Gross interviewed John roach for a second time. During this interview Roach told him information to include the following:
  - He and John Hemminger left work at about 1715 hours and arrived at his house at about 1736.
  - o His girlfriend (Liza Thomas) called him and wanted him to come to CK's Casino.
  - At about 1800 hours he went to CK's Casino and he and Liza went back to his residence at about 1830 hours.
  - John Hemminger told him he assaulted Richard, however, he didn't believe John beat Richard up then.
  - After he and Liza left his residence and returned as stated in his earlier interview he didn't see John Hemminger again. (The earlier interview stated they left at about 1940 hours and returned between about 2030 and 2200 hours on 01-06-15.)

Sergeant Gross asked Roach if he would consent to a search of his residence and Roach agreed to allow the search. Detective Gross transported Roach to his residence. Upon arrival at the residence, Roach opened the garage door and asked Sergeant Gross if he wanted to begin there. Sergeant Gross told him he wanted to speak with the land lord first and wanted to begin inside the residence. Roach went inside the residence and Sergeant Gross entered the residence along with him. Aberdeen Police Detectives Mike Bunke, Brad Jung, and Jeff Neal were on scene at the time Sergeant Gross and Richard arrived and they assisted in searching Roach's residence. While the detectives were searching Roach's residence, Sergeant Gross showed Roach a photo of the knife handle that had been removed from John Hemminger's pocket at the emergency room on the morning of 01-07-15 as stated earlier in this affidavit. Roach identified that knife handle as belonging to him (Roach). Roach told him that knife had been in a utility room at his residence. Roach showed Sergeant Gross the location where the knife had been and he told Sergeant Gross he didn't know the knife was missing.

Sergeant Gross asked Roach if John Hemminger could have gotten into his residence and Roach told him John Hemminger had a key to his residence.

During the search of Roach's residence, Detective Neal found a large plastic bag containing numerous men's clothing items on the initial room located at the bottom of the steps upon entry into Roach's basement apartment. The items included one jacket, three shirts, one pair of blue jeans, one pair of light brown boots, one pair of black socks, and one white towel. With the exception of the socks, the clothing items had a red substance on them that appeared to be blood and some of the clothing items had what appeared to be hair on them. Roach told Sergeant Gross those clothes were the clothes he had last seen John Hemminger wearing on the evening of 01-06-15.

- While processing Jessica Goebel's residence, 611 North 2<sup>nd</sup> Street, Aberdeen, SD. Detectives found two cell phones:
  - One Samsung cell phone, SN: A00000402FBDFB, that had been found on a shelf in the west bedroom of the upper level of Jessica Goebel's residence.
  - One Huawei TracPhone, SN: N5H9MC92C1008422, that was found in a shoebox in Jessica Goebel's residence.

Because of the information stated in this Affidavit, I believe probable cause exists to believe John Eric Hemminger committed the offenses of Attempted Murder and Aggravated Assault. I believe that the phones that were seized pursuant to this investigation and listed in this Affidavit will contain evidence pertaining to the commission of these crimes.

I respectfully request that a Search Warrant be issued allowing the search of the cell phones requested in this affidavit.

5 min 1 Am

day of January, 2015

Signature of Affiant Detective Tom Tarnowski Aberdeen Police Department

Subscribed to and before me, in my presence this  $10^{-7}$ 

(Megistente)(Circuit Court Judge)

(Notary)

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Notary: My commission expires

My Commission Expires 11-08-18

APP. 022

# FILED

STATE OF SOUTH DAKOTA

BROWN COUNTY

JAN 2 8 2015 IN CIRCUIT COURT

SOUTH DAKOTA UNSEED JUDICIAL SYSTEM

STATE OF SOUTH DAKOTA, Plaintiff

SWA 15-11

Vs. John Eric Hemminger Dob: 10-23-81

SEARCH WARRANT

(In the matter of Attempted Murder / Aggravated Assault in Brown County)

By,

TO ANY LAW ENFORCMENT OFFICER IN THE COUNTY OF BROWN

Proof by Affidavit (s) has been made before me by Detective Tom Tarnowski that there is probable cause to believe that the property described herein may be found at the location set forth herein and the property is:

(PLACE INITIALS IN APPROPRIATE BLANK)

Mag Property that constitutes evidence of the commission of a criminal offense;

Contraband, the fruits of crime, or things otherwise criminally possessed;

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Property designed or intended for use in, or which is or has been used as the means of committing a criminal offense.

#### YOU ARE THEREFORE commanded to search:

- One Samsung cell phone, (TracPhone) that had been seized from John Hemminger. (Note: The model, serial number, etc. for this phone was not displayed on the outside of the phone and would require removal of the battery cover or electronic manipulation of the phone to obtain.)
- One Samsung cell phone, SN: A00000402FBDFB, that had been found on a shelf in the west bedroom of the upper level of Jessica Goebel's residence.
- One Huawei TracPhone, SN: N5H9MC92C1008422, that was found in a shoebox in Jessica Goebel's residence.

for the following property (describe with particularity):

#### ITEMS TO BE SEARCHED FOR AND SEIZED:

A. Electronic files that constitute evidence, Instrumentalities, or fruits of violations of South Dakota Codified Law pertaining to Attempted Murder, Aggravated Assault; or any communications or documentation associated with Attempted Murder or Aggravated Assault including, but not limited to:

1. Contact Lists.

2. Cail Logs.

3. Instant messages and/or text messages.

4. Emails.

5. Social media communications.

6. Photos.

7. Videos.

IT IS FURTHER ORDERED, that this Search Warrant shall be executed within ten (10) days after the signing of this Warrant pursuant to SDCL 23A-35-4.

This warrant may be executed in accordance with my initials placed below:

# (YOU MUST INITIAL AT LEAST ONE BLANK)

You may serve this Warrant at any time of day or night because reasonable cause has been shown to authorize a night-time execution pursuant to SDCL 23A-35-4.

You may serve this Warrant only during the daytime. Night is that period from 8:00 p.m. to 8:00 a.m. local time.

You may execute this Warrant without notice of execution required by SDCL 23A-34-8 in that probable cause exists to demonstrate to me that if notice were given prior to execution (that the property sought may be easily and quickly destroyed or disposed of), (that danger to life or limb of the officer or another may result).

You may serve this Warrant on Sunday.

If the above described property be seized, it should be returned to me at the Courthouse of this Court.

, 2015, at Aberdeen, South Dakota Dated this 10H day of 1 (Circuit Judge)

# FILED

FEB 2 3 2015

SWAI5-24

STATE OF SOUTH DAKOTA

CR 15-0027

Plaintiff,

v.

AFFIDAVIT IN SUPPORT OF REQUEST FOR SEIZURE WARRANT (OR CONTINUING SEIZURE WARRANT)

Defendant

Hemminger, John Eric

DOB: 10/23/81

Christopher Gross, being sworn upon his oath, respectfully requests a Seizure Warrant (or Continuing Seizure Warrant) to be issued for the following property:

- One pair of black Fila tennis shoes;
- Blue t-shirt;
- Grey Joe Boxer sweatpants;
- Black Athletic Works pants;
- Blue Hanes boxer shorts;
- Black Ecko Function jacket;
- 3 lighters and a crumpled receipt (located in black Athletic Works pants);
- Black and silver colored knife handle and a screw to the knife handle (located in Black Ecko Function jacket);
- Loose change totaling \$1.12 (located in black Ecko Function jacket);
- · Kendall Stretch bandage package (located in black Ecko Function jacket); and
- Buccal swab of John Eric Hemminger (DOB: 10/23/1981).

Christopher Gross, being sworn upon his oath, states:

- 1. I am a certified police officer employed by the city of Aberdeen. I have been so employed for the past eighteen (18) years. My experience and training include the investigation of homicide.
- 2. In the early hours of January 7, 2015, I was called in to investigate a case in which a female by the name of Jessica Goebel was stabbed multiple times and had her throat slit. She was

currently at the Avera St. Luke's Hospital Emergency Room (305 South State Street, Aberdeen, Brown County, SD).

- 3. I was also advised that a male by the name of John Hemminger was currently in the Avera St. Luke's Hospital Emergency Room for knife cuts to his left hand.
- 4. I responded to the emergency room and met with Hemminger in an exam room. During my conversation with Hemminger I learned that he had been at his friend, John Roach's home, earlier in the night. Roach's home is within one block from the home in which Goebel was found with stab wounds.
- Hemminger claimed that Richard Hanley attacked him with a knife at Goebel's home. Hemminger provided a time frame in which this attack occurred sometime around 1:40 a.m. on January 7, 2015.
- 6. I have reviewed Hanley's medical records from Fort Yates Hospital in Fort Yates, North Dakota. The records indicate that Hanley was admitted into the hospital at 9:55 p.m. on January 6, 2015 and was discharged from the hospital at 11:20 p.m. on January 6, 2015.
- 7. Hemminger claimed the clothes he came to the hospital in were the clothes he was wearing when he was attacked by Hanley.
- 8. While seizing Hemminger's clothes, a knife was found in the right pocket of the jacket. The knife had blood on the handle and the blade to the knife was missing. Hemminger claimed he had never seen the knife handle before.
- 9. A knife blade was found in the kitchen sink at the home where Goebel was found with stab wounds. This blade has a flame pattern etched into the metal. This blade appears to match the knife handle found in Hemminger's jacket.
- 10. Roach identified the knife handle and blade to be his and informed me that the knife was missing from his home.
- 11. Hemminger claimed he was wearing the above-described clothing when he was allegedly attacked by Hanley.
- 12. All of the above items were taken from Hemminger while he was in the Avera St. Luke's Hospital Emergency Room and were placed into evidence at the Aberdeen Police Department.

- 13. I believe the above-described property is:
  - a. Property that constitutes evidence of the commission of a criminal offense;
  - b. Fruits of a crime;
  - c. Property which is or has been used as the means of, committing a criminal offense; and
  - d. Property that is needed in the criminal investigation and prosecution of CR 15-0027.

Signature of Affiant

Defective Sat, (Official Title)

Subscribe to and before me, in my presence this  $\partial/day$  of Feb , 2015.

(CIRCUIT COURT JUDGE) (NOTARY) MAO(STRATE)

FILED

STATE OF SOUTH DAKOTA COUNTY OF BROWN

FEB 2 3 2015 IN CIRCUIT COURT SOUTH DAKOTA UNIFIED JUDICIAL SYSTEMAGISTRATE DIVISION STH CIRCUIT CLERK OF COURT SEIFTH JUDICIAL CIRCUIT

\*\*\*\*\*

\*\*\*\*\*

STATE OF SOUTH DAKOTA

らいA15-24 CR 15-0027

Plaintiff,

### SEIZURE WARRANT (OR CONTINUING SEIZURE WARRANT)

Defendant

Hemminger, John Eric DOB: 10/23/81

\*\*\*\*\*\*\*\*\*\*\*\*

Proof by Affidavit has been made before me by Christopher Gross that there is probable cause to believe that the property described herein is:

- 1. Property that constitutes evidence of the commission of a criminal offense;
- 2. Fruits of a crime;
- 3. Property which is or has been used as the means of, committing a criminal offense; and
- 4. Property that is needed in the criminal investigation and prosecution of CR 15-0027.

YOU ARE THEREFORE commanded to seize or continue to seize the following property pursuant to SDCL 23A-37-8:

- One pair of black Fila tennis shoes;
- Blue t-shirt;
- Grey Joe Boxer sweatpants;
- Black Athletic Works pants;
- Blue Hanes boxer shorts;
- Black Ecko Function jacket;
- 3 lighters and a crumpled receipt (located in black Athletic Works pants);
- Black and silver colored knife handle and a screw to the knife handle (located in Black Ecko Function jacket);
- Loose change totaling \$1.12 (located in black Ecko Function jacket);
- Kendall Stretch bandage package (located in black Ecko Function jacket); and
- Buccal swab of John Eric Hemminger (DOB: 10/23/1981).

Dated this <u>240</u> day of <u>February</u>, 2015, at Aberdeen, South Dakota.

(CIRCUIT COURT JUDGE) (MAGISTRATE)

#### IN THE SUPREME COURT STATE OF SOUTH DAKOTA

Case No. 28041

\*\*\*\*

#### STATE OF SOUTH DAKOTA, Plaintiff and Appellee,

v.

JOHN ERIC HEMMINGER, Defendant and Appellant.

\*\*\*\*

Appeal from the Circuit Court, Fifth Judicial Circuit, Brown County, South Dakota. The Hon. Scott P. Myren Judge presiding. The Notice of Appeal was filed on November 10, 2016

#### **Appellant's Reply Brief**

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### PRELIMINARY STATEMENT

Hemminger is relying on the Statement of Case and Statement of

Facts found in the Appellant's Brief.

## ARGUMENT

## I. Evidence related to the items taken from Hemminger at Avera St. Luke's Hospital should not have been introduced at trial.

"The Fourth Amendment to the United States Constitution, as well

as Article VI, § 11, of the South Dakota Constitution, protects the

individual from 'unreasonable searches and seizures."" State v. Medicine,

2015 S.D. 45, ¶ 6, 865 N.W.2d 492, 495.

The right of the people to be secure in the persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

Generally, searches are allowed only after "the issuance of a warrant by a neutral judicial officer based on probable cause prior to the execution of a search or seizure of a person." <u>Id</u>. (citing <u>State v. Fierro</u>, 2014 S.D. 62, ¶ 15, 853 N.W.2d 235, 240). In the absence of a search warrant, the State bears the burden of establishing that a search falls within one of the "welldelineated exceptions" to the warrant requirement. <u>State v. Hess</u>, 2004 S.D. 60, ¶ 23, 680 N.W.2d 314, 324. "Consent to conduct a search satisfies the Fourth Amendment, thereby removing the need for a warrant or even probable cause." <u>Medicine</u>, 2015 S.D. 45, ¶ 7. Consent to search must be voluntary and free of coercion. To determine whether consent was voluntary, we consider the totality of the circumstances. <u>Id</u>. Specifically, we consider the accused's age, maturity, education, intelligence, and experience; "the conditions wherein the consent was obtained, including the officer's conduct and the duration, location, and time of the event"; as well as whether the defendant was aware of his or her right to consent. <u>Id</u>. When an officer asserts authority to search such that an individual feels they have no right to resist the search, the coercive effect of this show of authority may render the consent involuntary. <u>Bumper v. North Carolina</u>, 391 U.S. 543, 550 (1968).

Consent is one such exception to the search warrant requirement, but Hemminger did not consent to the seizure of his clothing, phone, a DNA sample obtained by a buccal swab, or a knife handle found inside of his coat pocket. The State contends there was nothing coercive about the actions of Det. Gross and Officer Pickrel when they seized Hemminger's belongings at the hospital. The State also argues that Hemminger himself was cooperating with the officers to convince them he was a victim. The State compares this case to the case of <u>State v. Koedatich</u>, 548 A.2d 939 (N.J. 1988). However, the officers in <u>Koedatich</u> had no reason to believe the defendant was a possible suspect at the time the officers seized his car

and honestly believed the defendant was a victim. <u>Koedatich</u>, 548 A.2d 939, 957.

In the present case, Det. Gross and Officer Pickrel were treating Hemminger as a possible suspect at the time they seized his belongings. Both officers believed Hemminger's timeline was not adding up and they quickly grew suspicious of Hemminger's story. (MHA31:16-24.) Det. Gross even admitted that he wanted to conduct further investigation because Hemminger's timeline made no sense. (MHA32:25-33:4.)

These officers, believing Hemminger was a possible suspect, used subtle coercion to illicit consent from Hemminger, but it was coercion nonetheless. The officers kept the conversation amicable, but at the same time did not make Hemminger aware that refusal was an option and both demanded Hemminger's property instead of asking for the property. Whether the accused knows he possesses a right to refuse consent is relevant to the question of voluntariness. Fierro, 2014 S.D. 62, ¶ 4. Furthermore, how an officer phrases his or her words in obtaining consent is extremely relevant. Medicine, 2015 S.D. 45, ¶ 13. It is also well established that "mere acquiescence to a show of lawful authority is insufficient to establish voluntary consent." State v. Leigh, 2008 S.D. 53, ¶ 19, 753 N.W.2d 398, 404 (quoting Bumper, 391 U.S. at 548-49).

Officer Pickrel was the first officer to speak with Hemminger.

During the conversation the following exchange took place regarding the

seizure of Hemminger's cell phone by law enforcement:

PICKREL: Ok, well right now John I'm gonna have to seize your phone, ok. Until we get all this ironed out because you know this is a real complex thing we got going on right now and until we can, you know, rule things out here and there I'm going to take your phone at this point as evidence, ok. Not saying that you're looked at as a suspect or anything.

HEMMINGER: No problem.

PICKREL: It is just all part of the process.

(MHB11:3-17.)

Thereafter, Officer Pickrel confiscated Hemminger's phone. He

placed it on a counter where it was eventually retrieved by detectives. Id.

At approximately 4:00 a.m. on January 7, 2015, Detective Chris

Gross and Detective Arika Dingman entered Hemminger's room at the

hospital to continue the interrogation. (TT277:3-5.) Det. Gross ultimately

deemed it necessary to seize Hemminger's clothes and DNA. He told

Hemminger:

GROSS: Okay. Okay. So what's the last these are your clothes by the way right here. Is this your -- whose coat is that?

### HEMMINGER: Mine.

GROSS: What we do on these, we're going to have to take because we're still trying to piece together what all happened, we need to take your clothes. We'll give you other set of clothes of yours that they brought in, okay? We'll give you a ride and stuff like that, and you'll get your stuff back. It's just got to we got to work the case through.

HEMMINGER: Just like my phone.

GROSS: Huh?

HEMMINGER: Just like they take my phone.

GROSS: Yep, yep. You understand all that?

(TT272:6-291:23.)

A similar conversation took place regarding the seizure of Hemminger's

DNA via a buccal swab:

GROSS: We're just waiting. We're going to get 7 bags for this here. Where are you going to go from here?

HEMMINGER: Back to my sister's.

GROSS: Okay. I've got -- I did grab -- I just want to get a swab because we collect everybody's DNA from everybody basically when we have something like this. Where the hell did I put it now? Son of a bitch. You can put

GROSS: You want to hang tight and I'll run out and grab that? I had one I thought. I'll be right back.

<u>Id</u>.

The State's argument is further undermined by the fact that Det.

Tarnowski knew it was necessary to search Hemminger's phone and in his

Affidavit in Support of Request for Search Warrant he stated that neither

Det. Gross nor Det. Dingman asked Hemminger if they could search his

phone. (MHA43:20-44:11.) Despite the State's effort to claim otherwise it

is evident from the transcript Hemminger's consent was not freely and

voluntarily given. Det. Gross and the State should have obtained a search

warrant Hemminger's property seized by law enforcement at Avera St. Luke's Hospital.

## II. Even if Hemminger consented to the seizure of his clothing, cell phone and DNA sample, that consent was validly withdrawn and those items ought to have been returned.

Any alleged consent given by Hemminger was validly withdrawn on January 26, 2015 when he requested his property be returned. The State did not honor this request. Instead the State sought and was granted a seizure warrant on February 23, 2015. It should be noted that in the Appellee's brief it states the seizure warrant was granted on January 21, 2015. It appears this was a factual error.

Continuing to retain property in light of an owner's demand for its return constitutes an unreasonable seizure in all circumstances. Furthermore, a person who has given valid consent to a seizure may withdraw that consent by requesting the article's return. <u>Florida v. Jimeno</u>, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents.") The State had an absolute obligation to return Hemminger's belongings when he withdrew his consent.

The State relies on <u>State v. Miller</u> to support its argument that the subsequent examination of evidence to determine its evidentiary value does not constitute a search. However, in <u>Miller</u> the defendant never withdrew his consent to the search. <u>State v. Miller</u>, 429 N.W.2d 26, 34 (S.D. 1988).

Furthermore, the State in <u>Miller</u> sought and was granted a valid search warrant. The State in the present case sought and was granted a seizure warrant after it was told by the presiding judge to obtain a seizure warrant. (MHC10:18-24.) The language in the Seizure Warrant (Or Continuing Seizure Warrant) (hereinafter "Seizure Warrant) filed on February 23, 2015 states the following, "You are therefore commanded to seize or continue to seize the following property pursuant to SDCL 23A-37-8."

The Seizure Warrant then lists Hemminger's clothes, the knife handle, and the buccal swab. The language of the Seizure Warrant and SDCL 23A-37-8 only allowed the State to retain Hemminger's property, but did not give the State any authority to do any further testing on the property.

It was also a mischaracterization by the State to claim an immediate hold was put on further testing until the State could review defense counsel's withdraw of consent. (<u>Appellee's Brief</u> at 22) For its reliance on the finding that the prosecution stopped all testing, the trial court was apparently relying on a statement from Assistant Attorney General Robert Mayer, who worked on the case early on. (MHC12:7-17.) This was the only argument presented that the State had in fact requested all testing be put on hold after the State had received the letter from defense counsel

withdrawing consent. An unproven statement from the prosecutor is not evidence.

Moreover, in the Stipulation that was received by the Court at a motions hearing on March 8, 2016, (MHD5:8-12.) the State agreed it did in fact direct the South Dakota Forensic Laboratory to continue testing the evidence after defense counsel withdrew Hemminger's consent and requested the return of his property. <u>Appendix</u>, at 1. It was only after defense counsel filed the motion with respect to withdrawing consent that the State requested all testing be stopped. Det. Gross also testified that he was told by, "the prosecution and powers to be," to continue testing the evidence after Hemminger withdrew his consent. (MHA38:20-39:20.)

# III. The trial court incorrectly allowed evidence located at John Roach's residence to be introduced at trial.

As noted herein, the Fourth Amendment to the United States Constitution, as well as Article VI, § 11 of the South Dakota Constitution, protects individuals from "unreasonable searches and seizures." Medicine, 2015 S.D. 45, ¶ 6. This protection "requires generally the issuance of a warrant prior to the execution of a search or seizure. . ." <u>Fierro</u>, 2014 S.D. 62, ¶ 15. "If the State fails to obtain a warrant prior to conducting a search, 'it is the State's burden to prove the search falls within a well-delineated exception to the warrant requirement." Id. The State argues that Roach gave valid third party consent to search the premises and personal property over which he has joint access and control, even if the property belongs to another. <u>State v. Fountain</u>, 534 N.W. 2d 859, 863 (S.D. 1995). The State relies heavily on <u>Fountain</u> to support the claim that Roach was able to give valid third party consent to search everything located in the house.

However, <u>Fountain</u> deals with third party consent as it relates to clothing and not closed containers, such as the trash bag that contained items of clothing in this case. The <u>Fountain</u> Court states, "Items which do not in and of themselves have a high degree of privacy, such as articles of clothing, are not entitled to the privacy accorded opaque, closed containers, such as a suitcase or overnight bag." <u>Fountain</u>, 534 N.W.2d at 866 (citing <u>United States v. Salinas</u>, 959 F.2d 861, 864 (10th Cir. 1992)).

It is clear that closed containers inherently invoke a greater expectation of privacy than pieces of clothing. In this case Hemminger did not leave his clothes lying on the floor of Roach's house, but instead placed the articles of clothing in a trash bag. Hemminger had an expectation of privacy in the trash bag he left at Roach's apartment and the trash bag should not fit within the scope of Roach's third party consent.

### IV. The introduction of twenty-six autopsy photos was unnecessary and prejudiced the jury against Hemminger.

The State argues the autopsy photographs aided Dr. Snell in his testimony and the photographs were material because they demonstrated cause of death and the manner in which the stabbings occurred.

The Sixth Amendment to the United States Constitution ensures that a defendant receives a fair trial by an impartial jury. U.S. CONST. amend. VI. The introduction of the photographs prejudiced the jury and prevented Hemminger of his Sixth Amendment Right to an impartial jury.

No one contested the manner in which Goebel died. Therefore, the autopsy photographs had absolutely no relevance and they should have been excluded. Moreover, the sheer number of photographs and the prejudice to Hemminger of such graphic photographs outweighed any relevance that may have existed. Relevant evidence is properly excluded when its value is substantially outweighed by the considerations set forth in Rule 403. <u>State v. Logue</u>, 372 N.W.2d 151 (S.D. 1985).

The prosecution had its pathologist testify in graphic nature as to the stab wounds. This testimony could have easily been introduced without the photographs themselves. Their only effect was to inflame the passion of the jury. The prosecution had already emphasized the attack in its opening statement and by law enforcement testimony and there was no need for additional evidence on this fact.

The prejudice to Hemminger caused by the autopsy photographs is obvious. This Court must step in and remedy this error by remanding for a new trial.

# V. A new trial should have been granted because the prosecutor engaged in improper burden shifting during closing arguments.

It is a basic principle of criminal law that a defendant is never required to prove his innocence. The presumption of innocence "is a basic component of a fair trial" in the criminal justice system. <u>Estelle v.</u> <u>Williams</u>, 425 U.S. 501, 503 (1976). At closing, Hemminger's counsel argued that the prosecution had failed to provide the jury with the full picture of Hemminger and Goebel's relationship. Specifically, Hemminger's counsel noted that Det. Tarnowski testified that he located approximately 449 text messages but the prosecution only introduced fortyfour of those text messages. (TT740:1-7.) In its rebuttal, the prosecutor told the jury that Hemminger certainly had the opportunity to provide those text messages to the jury. (TT761:2-9.)

There is little question that commenting on the defendant's failure to produce evidence is improper. <u>Lucier v. State</u>, 189 So.3d 161, 167 (Fla. 2016). Hemminger was prejudiced by the State's improper burden shifting tactic during rebuttal argument because Hemminger did not have a chance to respond. Also, there should have been a curative jury instruction after the damaging statement was made or at the very least the Court should have

given an oral curative instruction. Neither instruction was given. A new trial should have been granted due to the State engaging in improper burden shifting.

#### **VI.** The evidence was insufficient to support the jury's verdict.

Hemminger's last contention is that the trial court improperly denied his motion for a judgment of acquittal. In this case, the evidence did not support a conviction for first degree murder. The prosecution called a total of fifteen witnesses. The majority of these witnesses provided little substantive testimony or testified to uncontested facts.

The evidence in this case was insufficient to justify the jury's verdict. This is true even when viewed in the light most favorable to the verdict. As such, this Court should reverse the verdict and remand with instructions to acquit Hemminger.

## VII. The cumulative effect of the trial court's errors deprived Hemminger of his constitutional right to a fair trial.

Hemminger has a constitutional right to a fair trial. This Court has consistently held that "the cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial." <u>State v. Davi</u>, 504 N.W.2d 844, 857 (S.D. 1993); <u>McDowell v. Solem</u>, 447 N.W.2d 646, 651 (S.D. 1989).

In Hemminger's case the trial court repeatedly ruled against him on critical issues related to the evidence and burden of proof. Moreover, the trial court's failure to remedy the State's burden-shifting statement is another example of the violation of Hemminger's fair trial rights..

The cumulative effect of the errors listed above deprived Hemminger of his right to a fair trial. Therefore, he is entitled to a new trial

## **RELIEF REQUESTED**

Hemminger requests that the conviction be reversed and a verdict of not guilty be entered by the Court. Alternatively Hemminger requests a new trial.

#### **CERTIFICATE OF APPLIANCE WITH SDCL 15-26A-66**

Appellant's Reply Brief complies with the type-volume limitation of SDCL 15-26A-66. Appellants' Brief contains a proportional-spaced typeface in 13 point Times New Roman font, and a Word count of 2,842.

Dated August 1, 2017

WILLIAM D. GERDES, P.C.

By: /s/ Jerald M. McNeary, Jr. Jerald M. McNeary, Jr. Attorney for Appellant 104 S. Lincoln – Suite 111 P.O. Box 1239 Aberdeen, SD 57402-1239 jerrymcneary@dakotalaw.com

#### **CERTIFICATE OF SERVICE AND FILING**

On August 1, 2017, copies of the Appellant's Reply Brief were served electronically pursuant to Supreme Court rule 13-11 to the following:

The Honorable Marty J. Jackley Attorney General 1302 E. Highway 14, #1 Pierre, SD 57501-8501 Patricia Archer Assistant Attorney General 1302 E. Highway 14, #1 Pierre, SD 57501

Additionally, Appellant's Reply Brief was filed with the Supreme

Court at scclerkbriefs@ujs.state.sd.us.

One copy was provided to Appellant John E. Hemminger.

Dated August 1, 2017.

### WILLIAM D. GERDES, P.C.

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