

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30588

**DREAU LESTER ROGERS,
Defendant/Appellant,**

v.

**STATE OF SOUTH DAKOTA,
Plaintiff/Appellee.**

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

HONORABLE MICHAEL DAY, PRESIDING JUDGE

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Defendant/Appellant, Dreau Rogers, will be referred to as “Rogers”; Plaintiff/Appellee will be referred to as “State”. References to pleadings and other documents in the underlying record, *State of South Dakota vs. Dreau Rogers*, Lawrence County Criminal File No. 40CRI22-000086, will be supported by a citation to the pertinent pleading or transcript. The November 27th, 2023, through December 7th, 2023, jury trial transcript, will be referred to as “JT” followed by page and line number(s). Admitted exhibits from the jury trial will be referred to as “Exhibit” followed by the assigned number or letter as designated in the trial.

JURISDICTIONAL STATEMENT

Rogers appeals from the Circuit Court’s *Judgment of Conviction* filed on January 3rd, 2024. Rogers was sentenced to life in prison without parole. Specifically, Rogers appeals the Circuit Court’s Oral Order denying his motion for judgment of acquittal as to Counts IA, II, IV, and V, entered by the trial court on December 6th, 2023. JT 1327:17-25; 1328:1-8. Rogers further appeals from the Circuit Court’s Oral Order denying his request for a spoliation jury instruction on December 6th, 2023. JT 1352-1361; *see also Defendant’s Brief in Support of Spoliation Instruction and in the Alternative State v. Zephier Instruction*. Finally, Rogers appeals from the Circuit Court’s November 30th, 2023, Oral Order denying his Motion to Dismiss. JT 575-579; *see also Defendant’s Brief in Support of Due Process Violation Dismissal – Brady Violation*. The Court has jurisdiction pursuant to SDCL §§ 23A-32-2; 23A-23-4; and ch. 15-26A.

STATEMENT OF LEGAL ISSUES

1. **Considering all the evidence presented to the fact finder, could a reasonable juror find Dreau Rogers guilty of Counts IA, II, IV, and V.**

The trial court improperly denied Roger's Rule 29A Motion for Judgment of Acquittal.

Most relevant cases and authority:

SDCL ch. 23A-23

State v. Tofani, 2006 SD 63

2. **Can law enforcement bad faith requisite for a spoliation instruction be established by contemporaneous law enforcement conduct, i.e. a judicial finding that law enforcement intentionally circumvented a Defendant's 6th Amendment Rights.**

The trial court found that the defense cannot show that the Spearfish Police Department, the State's Attorney's Office, or the Rapid City Police Department engaged in any bad faith when violating SDCL 23A-37-14.

Most relevant cases and authority:

SDCL 23A-37-14

State v. Zephier, 2020 SD 54

State v. Engesser, 2003 SD 47, ¶ 46

3. **Was Dreau Rogers denied due process under the 14th Amendment, constitutionally guaranteed access to evidence.**

The trial court found that material evidence was disposed of in a negligent fashion and that it is impossible to know its exculpatory or incriminatory value.

Most relevant cases and authority:

Arizona v. Youngblood, 488 US 51, 59-60 (1988)

California v. Trombetta, 467 US 479 (1984)

State v. Zephier, 2020 SD 54

STATEMENT OF THE CASE AND FACTS

Statement of the Case: Rogers was convicted by a jury of: Count IA: Murder in the Second Degree (SDCL 22-16-7); Count II: Possession of Firearm by Person with a Prior Felony Drug Related Conviction, .45 Caliber Pistol (SDCL 22-14-15.1); Count III: Possession of Firearm by Person with a Prior Felony Drug Related Conviction, .22 Caliber Pistol (SDCL 22-14-15.1); Count IV: Possession of Firearm with Altered Serial Number, .45 Caliber Pistol (SDCL 22-14-5); Count V: Commission of Felony While Armed with Firearm – Murder (SDCL 22-14-12); and Count X: Unauthorized Ingestion of Controlled Substance, Methamphetamine (SDCL 22-42-5.1). The jury trial commenced on November 27th, 2023, and was completed on December 7th, 2023.

In opening statements, the jury heard that the defense would prove five facts which prevent them from rendering a guilty verdict. Rogers contends that having proved these facts makes a finding of guilt unreasonable for any rational juror. The facts proven at trial by Rogers are: (a) the police broke the law during this investigation; (b) the police gave material evidence away; (c) the police contaminated important forensic evidence; (d) the third-party perpetrator's alibi is unquestionably weak; and (e) the omissions of material evidence. JT 288:6-25; 289:1-16; 466:2-25; 467:1-13. Beyond reasonable doubt of guilt cannot exist upon proof of these five facts.

Rogers challenges: (1) the denial of the Motion for Judgment of Acquittal to Counts IA, II, IV, and V; (2) the Court's refusal to instruct the jury on spoliation; and (3) the Court's denial of his Motion to Dismiss – Due Process Violation.

Statement of the Facts: In the early morning of January 22nd, 2022, 12:48 a.m., Dreau Rogers ("Rogers") called 9-1-1. *See Exhibit I*; JT 296:3-10; 298:12-15. Rogers

requested an ambulance to come fast. JT 293:24-25; 294:6-8. Rogers said, "that he would explain when they got there and that someone is injured bad". *Exhibit 1*. Rogers notified dispatch that his phone was dead and that it needed to be on the charger. *Exhibit 1*. Rogers explains that he needs to go into the other room. *Exhibit 1*. Rogers is overheard in the other room pleading to Destiny Rogers ("Destiny") to "stay with him." *Exhibit 1*. Two and a half minutes after making the call, law enforcement arrived. JT 295:1-4.

Officer Hunter Bradley (Bradley), Spearfish Police Department, was the first on-scene. JT 301:17-19. Bradley was met by Dreau Rogers who summoned Bradley inside. JT 301:10-18. Bradley's body camera was activated and depicts his involvement in this case. The footage was shown to the jury. *See Exhibits 2 and 3*; JT 314:1-21. Bradley immediately saw Destiny lying motionless on the living room floor. *Exhibit 2*, JT 301:19-25. Bradley applied an "AED" to Destiny's chest and started compressions. JT 303:16-19.

While rendering emergency aid, Bradley began asking what occurred. JT 304:8-14. Bradley's "AED" report proved Destiny had been shot around the time of the 9-1-1 call. JT 317:19-23. The blood on Destiny's arm was still wet and her body was warm. JT 319:2-3. Rogers stated that Donovan Derrek (Derrek) shot Destiny. JT 304:16-20.

Bradley noted that a .45 caliber shell casing was found in the home near Destiny's body. JT 308:18-20. Bradley stated that the shell casing was on the coffee table and fell to the ground during the emergency aid provided to Destiny. JT 308:21-25; 309:1-2. Destiny had a gunshot wound on her right shoulder. *Exhibit 43*; JT 309:13-17.

The second officer on-scene was Aaron Jurgensen (Jurgensen). JT 322: 19-25.

Jurgensen's body camera was activated and depicts his involvement in this case. The footage was shown to the jury. *See Exhibit 9*; JT 330:18-25. Rogers told Jurgensen that Derrek was the shooter. JT 337:5-14. Jurgensen agreed that Rogers was speaking with law enforcement while watching Destiny die. JT 338:1-20. Rogers told Jurgensen he set the shell casing on the table. JT 343:10-13. Rogers told Jurgensen his phone was dead. JT 343:16-19. Rogers was subsequently transported to the police station. JT 314:22-25. Rogers was allowed to retrieve his phone from the charger. JT 339: 18-25; 343:16-19.

Law enforcement began searching for Derrek. Law enforcement also began drafting Affidavits to search and seize evidence and acquire other potentially relevant information. Rogers's home was secured to enable evidence collection and forensic analysis. The South Dakota Department of Criminal Investigations primarily handled forensic evidence collection and documentation.

Rogers was interviewed at the Spearfish Police Department. All of his interviews were published to the jury. *Exhibits 13, 14, 16, 19*. Rogers never faltered in his representations that Derrek was the shooter. *Exhibits 2, 3, 8, 13, 14, 16, 19*.

Derrek was apprehended by the Rapid City SRT team. JT 433:16-18. Derrek was brought in for questioning at the Spearfish Police Department. JT 434:19-21. Every Derrek interview was published to the jury. *Exhibits 17, 21, 23*. Derrek informed law that he had an alibi. Derrek advised law enforcement he was engaged in sexual conduct with a man, Alan Reddy (Reddy). *Exhibits 17, 21, 23*; *see also* JT 440:22-25. Derrek expressly told law enforcement, "[my] phone will have my location for the night." JT 440:24-25.

Reddy was interviewed in effort to confirm Derrek's alibi. JT 445:19-25. Reddy

was questioned by law enforcement a total of two times. Every interview was published to the jury. *Exhibits 58, I*. In sum, Reddy advised law enforcement that at the time of the shooting, Derrek was at Reddy's residence. *See Exhibits 58, I*. Reddy's home is approximately a mile and a half from Roger's residence. JT 493:16-18. It is a less than five-minute drive. JT 493:19-20.

Rogers was confronted with Derrek's alibi during his last interview. In response Rogers said the following:

Rogers: Like I just explained it to you, and, obviously, it's not going to fucking check out. So you guys are going to pin – you're going to pin this mother fucker shooting my wife on me? Seriously?

Det. Fox: He wasn't there and an alibi –

Rogers: I'm telling you he was there. I promise you. His alibi is bullshit.

Det. Fox: We have another person that verifies it.

Rogers: Check it out harder. Bullshit. If I got a lawyer, then that's what I got to do, but that's bullshit. I'm telling you right now.

Exhibit 19.

Law enforcement searched both the Rogers and Derek residences. Items deemed to have significance were collected at both homes and some submitted for forensic testing. The mobile phones of Rogers, Derrek, Destiny, and Reddy were seized for submission to digital forensic analysis. Photographs, urinalysis tests, and gunshot residue tests were taken, administered, and performed on both Rogers and Derrek. Rogers was placed under arrest for murder on January 22nd, 2022. JT 459:17-20.

a. *Items of Evidentiary Significance and Relevant Forensic Testing Conclusions*

Destiny was shot one time in the upper right arm/shoulder. *Exhibit 43*. Dr. Habbe, forensic pathologist, performed an autopsy on Destiny. *Exhibit 43*. The autopsy

revealed that the cause of death was a gunshot wound. *Exhibit 43*. There were no other signs of trauma. *Exhibit 43*; JT 829:9-11. A bullet fragment was recovered from Destiny's body and submitted for forensic analysis. *Exhibits 32, 43*; JT 833:7-9. Dr. Habbe concluded that the gun was very close to Destiny when it was shot. JT 828:16-25.

Patrick Jones (Jones), forensic scientist, with the Kansas City Crime Laboratory, conducted analysis of the gunshot residue kits collected from Derrek and Rogers. *Exhibit 67*. Jones concluded that both Derrek and Rogers had gunshot residue on them. *Exhibits 56, 57, 67*.

The search of Rogers's residence yielded several items with evidentiary significance. Law enforcement located: a spent .45 caliber casing on the floor inside his home; a wooden box containing mixed makes and models of .45 caliber ammunition on the counter near the home's entrance; a .22 caliber revolver pistol and .22 caliber bullets both inside a hallway dresser; and a .45 caliber high point pistol with its magazine located outside the home under a walk-way wooden set of stairs leading to an alley. *See Exhibits 45, 46, 47, 48, 50, 52, 53 102, 103, 104, 105, 123, 131, 132*.

Forensic testing of significance was performed on the following items: (1) the .45 caliber high point pistol; (2) the spent .45 caliber cartridge; (3) .45 caliber ammunition located in the magazine of the .45 caliber high point pistol; (4) .45 caliber ammunition collected from the wooden box near the entrance; and (5) the bullet fragment recovered from Destinys' body. *Exhibits 77, 98, 99, 100, 101, 110*.

Adam Dolezal (Dolezal), forensic scientist, testified to his forensic findings. *Exhibit 77*. His findings were all inconclusive, meaning Mr. Dolezal was incapable of matching the expired .45 shell casing found on the floor as being fired by the .45 caliber

high point pistol. JT 1081:17-21. Mr. Dolezal's findings with respect to the bullet fragment retrieved from Destiny's body were also inconclusive. JT 1081:10-16. "All of the microscopic comparison results were inconclusive." 1081:25; 1082:1-2.

Kristi Walti (Walti), forensic scientist, testified to her forensic findings. *Exhibit 110*. Ms. Walti examined items of significance for fingerprints. Ms. Walti concluded that Rogers's latent fingerprint was located on the expired .45 caliber shell casing. JT 1095:9-12. Recall, Rogers told first responders he placed the shell casing on the coffee table. JT 343:10-13; JT 1099:9-13.

Ashley Bullock (Bullock), forensic scientist, testified to her forensic findings. *Exhibits 98, 99, 100, 101*. Bullock's DNA examinations revealed the following: (1) .45 shell casing had DNA with a mixture of three individuals (Rogers excluded as major contributor); (2) .45 ammunition in the box near residence entry had DNA from at least three individuals; (3) grip of the .45 high point pistol had a mixture of DNA from Dreau Rogers and Destiny Rogers detected; (4) trigger, trigger chamber, and sight of the .45 high point pistol had a mixture of DNA from three individuals; (5) barrel of the high point pistol had Destiny's DNA on it; (6) edges of holster for .45 high point pistol had DNA from three individuals and Rogers was specifically identified as one of the contributors; (7) .45 ammunition located inside magazine of .45 high point pistol had DNA of Rogers and Destiny; and (8) magazine of .45 high point pistol indicated DNA from three individuals – Rogers and Destiny could not be excluded. *Exhibit 99*.

Bullock testified that DNA evidence must be collected properly and that failure to properly collect it could lead to misleading results. JT 1025:12-25; 1026:1-10. Bullock testified that forensic evidence submitted for DNA testing needs to be handled with clean

gloves. JT 1028:4-6. Bullock agreed that it is a “well-known fact that DNA can transfer from surface to surface.” JT 1028:7-9. Bullock agreed to the material provisions of *Exhibit H*, including that “[a]ll suspected DNA evidence must be protected from possible cross-contamination.” JT 1028:20-23. Bullock agreed that evidence should never be set directly upon any surface without first putting down clean paper to protect against cross-contamination or surface to surface DNA transfer. JT 1029:2-5. Ms. Bullock agreed compliance with proper DNA evidence collection practices is necessary to “protect the integrity of the evidence.” JT 1029:9-11. Finally, Bullock testified that integrity of the evidence means ensuring that nothing additional is added or contaminated to a piece of evidence. JT 1029:12-18.

Detective Matthew Almeida (Almeida) performed digital forensic examinations of cell phones seized by law enforcement. Almeida forensically examined the mobile phones of Rogers, Reddy, and Destiny. JT 746:22-24; 747:2-4; 749:15-21. Derrek’s mobile phone was provided to Almeida for analysis, but he could not perform a forensic examination on the phone. JT 747:9-12. Almeida acknowledged that Derrek’s cell phone may have showed his exact location at the time of the shooting. JT 803:22-25; 804:1-25; 806:15-25; 807:1-19; 810:1-25.

Agent Sean Kennedy (Kennedy), FBI CAST analyst, testified with respect to Call Detail Records (CDR) he reviewed in this investigation. JT 631:14-25; 632:22-25. Kennedy performed his analysis for the purpose of attempting to locate the cell phone of Derrek at the time of the shooting. JT 634:7-12. Kennedy stated there was no CDR information by which to locate the Derrek phone between the hours of 10:47 PM, January 21st, 2022, through 1:45 AM, January 22nd, 2022. JT 655:22-25; 656:1-2, 17-23 (stating

“there’s no activity that I could map to give you an opinion about the location of [Derek’s] phone during the time frame”).

Kennedy acknowledged that Derrek’s mobile device examination may have provided data showing the exact location of his phone at the time of the shooting.

Derek testified he called Rogers at approximately 10:00 PM on January 21st, 2021. JT 1255:1-2. Shortly after the phone call, Derrek sent a text message to Rogers, “We need to meet face to face ASAP”. JT 1255:12-16. Derrek testified that he told his daughter, upon leaving his home around midnight, that he was going over to Rogers’s home. JT 1257:9-12.

STANDARD OF REVIEW

“The denial of a motion for judgment of acquittal presents a question of law, and thus our review is de novo.” *State v. Tofani*, 2006 SD 63, ¶ 24 (citing *United States v. Staula*, 80 F.3d 596, 604 (1st Cir. 1996)). In measuring sufficiency of the evidence, this reviewing Court asks, “whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Tofani*, 2006 SD 63, ¶ 24 (citing *Jackson v. Virginia*, 443 US 307, 319 (1979)).

The standard of review for requests to give proposed jury instructions is abuse of discretion. *State v. Engesser*, 2003 SD 47, ¶ 15 (citing *State v. Wright*, 1999 SD 50, ¶ 12)). With respect to due process, a constitutional question, the review is de novo. See *Steichen v. Weber*, 2009 SD 4, ¶ 7 (citing *Moeller v. Weber*, 2004 SD 100, ¶ 42 n. 3)).

ARGUMENT

1. The Court improperly denied Rogers’s Rule 29A Motion for Judgment of Acquittal

Rogers's argument is that reasonable doubt for Counts IA, II, IV, and V cannot exist upon his proof of the following five facts: (a) the police broke the law during this investigation; (b) the police gave material evidence away; (c) the police contaminated important forensic evidence; (d) the third-party perpetrator's alibi is unquestionably weak; and (e) the material omissions of evidence. JT 288:6-25; 289:1-16; 466:2-25; 467:1-13. Beyond a reasonable doubt of guilt cannot exist amidst proven facts (a) through (e). At the conclusion of the State's evidence, Rogers made Motion for Judgment of Acquittal. JT 1321:9-25; 1322:1-25; 1323:1-25; 1324:1-25; 1325:1-17; JT 1326:1-2.

(a) The Police Broke the Law During the Investigation

The South Dakota Legislature has enacted statutory standards governing law enforcement's obligation to preserve evidence. *State v. Zephier*, 2020 SD 54, ¶ 25; SDCL §§ 23A-37-14 and 23A-37-15. This Court has expressly stated that the statutes reflect the requirements of due process. *Id.*

The police seized Derrek's phone pursuant to the Destiny investigation. The lead detective agreed that South Dakota law imposes a duty on law enforcement to maintain evidence seized in conjunction with a criminal prosecution. JT 470:15-18. The lead detective agreed that Derrek's phone was seized evidence as evidence in this case. JT 470:19-25. The lead detective agreed that law enforcement had a legal duty not to return the phone without providing proper notice to the Defendant. JT 470:23-25; 471:1. The lead detective agreed that the defense proved that law enforcement broke the law. JT 471:9-14.

(b) The Police Gave Material Evidence Away

In *State v. Zephier*, 2020 SD 54, ¶ 28, the Court's analogical reasoning applies in concluding that the Derrek phone constitutes "lost or destroyed" evidence.

Law enforcement was provided representations by key witnesses in this case as to the phone's materiality. Rogers pleaded to law enforcement to look into the alibi closer. . *Exhibit 19. Exhibit 19.* Derrek advised law enforcement that his phone would prove his alibi. JT 480:7-11.

The lead detective agreed that information potentially providing the exact location of Derrek's phone at the time of the shooting was material. JT 470:3-10. The lead detective agreed that the destroyed evidence was material. JT 470:3-10. The lead detective agreed when a phone extraction attempt occurs that a report is generated detailing the results. JT 475:9-15. The lead detective agreed that he received a report, prior to destroying the evidence, explaining no forensic examination of Derrek's phone occurred. JT 481:2-7.

After law enforcement returned the mobile device to Derrek he disposed of the phone at a Wal-Mart kiosk for two dollars. JT 1266:3-9.

(c) The Police Contaminated Important Forensic Evidence

Bincy Thankachan (Thankachan) with the Rapid City Police Department testified regarding her education, training, experience, and understanding of forensic evidence collection. JT 839-841. She testified that she knows and understands the science associated with forensic evidence collection. JT 851:1-9.

Thankachan testified to the Rapid City Police Department Rules and Procedures Manual (RCPD R&P) for forensic evidence collection. JT 852:14-25; *Exhibits G, H.* Thankachan testified that if evidence is not collected properly there is exposure to contamination or cross-contamination of forensic evidence. JT 857:23-25; 858:1-7. Thankachan agreed that the RCPD R&P Manual for forensic evidence collection is

scientifically valid. JT 859:1-4.

Thankachan testified that law enforcement handling forensic evidence is responsible for preserving and protecting the evidence. JT 859:12-18. She testified that DNA shall be properly handled to prevent destruction or contamination. JT 860:12-15. Thankachan testified that DNA evidence must be handled with clean gloves. JT 864:17-25; 865:1-6. Thankachan testified that if forensic evidence is handled with dirty gloves, there is possible contamination, and the integrity of the evidence is sacrificed. JT 865:7-13. Thankachan testified law enforcement should never lay evidence directly upon any surface without first putting down a clean piece of paper. JT 865:14-25. Thankachan stated that failure to adhere to this procedure also results in contamination of forensic evidence. JT 865:14-25.

Thankachan's testimony was confirmed and supported by the testimony of Bullock. *See Appellant's Brief, Statement of Facts*, pg. 6. Bullock testified that DNA evidence must be collected properly and that failure to properly collect it could lead to misleading results. JT 1025:10-25.

Agent Brian Larson (Larson) testified that the majority of his involvement in the case was crime scene processing. JT 913:8-11. Larson testified that he photographed processing of the crime scene. JT 913:15-23; JT 914:6-13. Larson testified that he did not know if nitrile gloves can transfer DNA and that it is an important thing to know. JT 915:18-22. Larson agreed that forensic evidence not handled with clean gloves is "mishandled forensic evidence." JT 919:13-16.

Larson was confronted with *Exhibit E*, image 694. This photograph shows law

enforcement handling evidence with dirty gloves.¹ Larson testified that there were foreign substances on the glove. JT 918:13-20; 919:5-9 (acknowledging that the gloves have something foreign on them). This photograph shows noncompliance with *Exhibit G* and *Exhibit H*. It further shows, according to Thankachan's and Bullock's testimonies, that the forensic integrity of the evidence was sacrificed.

Next, Larson was confronted with *Exhibit E*, images 401 through 406. These photographs show law enforcement's acquisition process of the .45 caliber ammunition located in a wooden box near the entrance of Rogers's home. Larson could not testify that law enforcement changed gloves when manipulating all the photographed evidence. JT 923:12-14. These photographs document law enforcement's noncompliance with the requirement to lay forensic evidence on a clean piece of paper to prevent contact transfer.

Larson was confronted with *Exhibit E*, image 331. This photograph shows law enforcement handling evidence with dirty gloves.² Larson testified that the gloves were not clean. JT 924:3-17.

Larson was confronted with *Exhibit E*, image 681. This photograph shows a law enforcement officer with dirty gloves handling the .45 high point pistol.³ Further, this photograph documents noncompliance with the requirement to lay potential forensic evidence on a clean piece of paper.

Agent Eggers (Eggers) was the other DCI Agent that testified to crime scene processing. JT 971:2-5. Eggers agreed that clean gloves are necessary to protect forensic

¹ This is a very high-resolution image that was published to the jury. Dust and smudges can clearly be seen on the right-hand glove of the officer handling the evidence depicted in the photograph.

² This is a very high-resolution image that was published to the jury. Foreign substances can clearly be seen on the gloves handling the evidence depicted in the photograph.

³ This is a very high-resolution image that was published to the jury. Foreign substances can clearly be seen on the gloves handling the evidence depicted in the photograph.

evidence from cross-contamination. JT 965:5-7. Eggers agreed if defense counsel shows potential for cross-contamination that it is a big problem for the State's case. JT 965:10-15. Eggers testified that evidence should never be laid directly upon a surface without first laying down clean paper. JT 966:14-17.

Eggers was confronted with *Exhibit E*, image 680. This photograph shows the .45 caliber high point pistol, the gun's holster, and a bullet set directly on a piece of wood outside the Rogers's residence.⁴ Eggers testified that *Exhibit H* indicates that the forensic evidence documented in image 680 should have been set on a clean piece of paper and was not. JT 966:24-25; 967:1-7.

The State's argument in support of guilt, unsupported by any actual forensic testing, is that they contaminated material forensic evidence:

Q The presence of gunshot residue, if you know, on Donovan Derrek could indicate that he was around a gun that was shot or that he shot it; correct?

A That is one of the – I'm sorry – two of the three scenarios. That's correct.

Q Okay. If the Government argues – if – that Donovan Derrek's gunshot residue tests were transferred – or was the result of the third conclusion – are you still with me?

A Yes.

Q That would mean, during the collection, it was contaminated; correct?

A As far as coming in contact with another object or surface?

Q Correct.

A Yes. That would be a form of contamination that Donovan Derrek came in contact with a tabletop that had gunshot residue on it or he came in contact with a person that transferred gunshot residue to him.

Q Sure. And you would agree that it is law enforcement's responsibility to protect forensic evidence?

⁴ This is a very high-resolution image that was published to the jury. Forensic evidence is clearly set on a piece of wood outside the Rogers' residence in violation of the requirement that forensic evidence be placed on a clean piece of paper.

A They are one of the protectors of forensic evidence. Anyone responding to a scene.

Q And so if forensic evidence is contaminated, then the evidence prior to contamination is also lost forever; right?

A Yes. Once something is contaminated, there is very little that can be spoken towards its validity or legitimacy of results.

Q And that doesn't just apply to your field of science; correct?

A That's correct.

JT 624:10-25; 625:1-18.

The lead agent, on this topic, testified as follows:

Q Law enforcement's obligation is to secure the scene and secure the evidence; correct?

A Yes.

Q Gunshot residue is evidence; correct?

A Yes, it is.

Q Gunshot residue evidence and the appearance or lack thereof or existence or lack thereof on Mr. Derrek's hands is evidence in this case; correct?

A Yes.

Q Dreau Rogers had no ability to preserve that evidence, did he?

A No.

Q That was law enforcement's obligation; right?

A Yes.

JT 502:1-25; 503:1-25; 504:1-12.

The forensic evidence acquisition in this case was not conducted in a scientifically valid fashion or in compliance with relevant rules and procedures. The credibility/integrity of any forensic DNA testing in this case was destroyed. According to the State's own expert witnesses, law enforcement, and relevant exhibits, the forensic testimony was invalid and misleading due to improper evidence collection, i.e. contamination. No rational juror could draw any conclusions from the forensic DNA

testing based upon the evidence presented in this trial. Larson expressly agreed fact (c) was proven to the jury. JT 919:5-25; 920:1-10; 925:2-20

(d) The Third-Party Perpetrator's Alibi is Unquestionably Weak

Derrek's alibi, rests exclusively on the credibility of Derrek and Reddy. For the reasons articulated in (c) above, the forensic DNA analysis was proven invalid, because of improper evidence collection.

The lead agent was questioned about the strength of the alibi:

Q And so by virtue of that 1:23 a.m. picture, there is nothing that precludes Mr. Derrek, from a forensic perspective, from being at Dreau Rogers's at 12:48; right?

A The information we were going off of also was statements. Statements by Alan Reddy that he was at the residence with him.

Q Right. I appreciate you telling me that. Part of what this jury has to rely on in order to get to the state's alibi is reliance on Donovan Derrek and Alan Reddy. You gotta trust what they said; right?

A In part.

Q In part. But there is nothing forensically that shows Donovan Derrek was not here at that time; right?

A Again, the only thing that would be would be the location data off the phones, I believe, or from the phones.

Q There is no location data from Mr. Derrek's phone, because you guys gave it back to him without protecting that information?

A Well, I believe that was actually – I don't know if it was Google. But, again, that is going to be something that Lieutenant Smith – now Lieutenant Smith – will have to answer.

JT: 493:21-25; 494:1-17.

Lieutenant Smith (Smith) was subsequently asked about the phone data demonstrating the location of Derrek's phone. JT 600:3-8. Smith said he could not speak about the phone records and that topic should be discussed with Kennedy. JT 600:3-8. Recall, according to Kennedy, there was no CDR information by which to

locate Derrek's phone between the hours of 10:47 PM, January 21st, 2022, through 1:45 AM, January 22nd, 2022. JT 655:22-25; 656:1-2, 17-23. It is a fact that no forensic evidence proves Derrek's alibi.

Derrek is a convicted felon, sex-offender, and had multiple felonies pending at the time of his testimony. JT 1226:14-16; 1251:9-16. Derrek admitted that he would not pass a drug test and that he violated the conditions of his felony bond on multiple occasions and in multiple ways, including the commission of new felonies. JT 1261:3-8. For reasons beyond comprehension, Derrek's bond was not revoked, and according to the State, it nothing to do with plea deals for cooperating. JT 1227:25; 1228:1-25; 1229:1-19; 1251:19-22. Derrek is a diagnosed schizophrenic daily intravenous meth user, using half a gram of meth at a time, three or four times a day (easily more than a gram a day). JT 1245:17-21 1252:11-12.

The Derrek and Reddy testimony was inconsistent, conflicting, and unreliable. According to Derrek, his day started with a sexual encounter with Reddy. JT 1230:11-17. Derrek testified that he subsequently went to Rogers's home unannounced at 10:00 a.m., January 21st, 2022, "because I hadn't seen him in a while or heard from him." JT 1232:7-8. Derrek testified that while at Rogers's residence, he knocked on the door, and knocked on the windows. JT 1253:19-25; 1254:1-13. Upon leaving Rogers's home, Derrek went to his friend Ed's house and talked to him about Rogers. JT 1232:22-25. Derrek obtained Rogers's phone number from Ed. JT 1232:22-25; 1233:1-3. Derrek stated he borrowed twenty dollars from Reddy. JT 1233:9-14. Derrek testified that he went to Reddy's at 11:30 p.m. to 11:35 p.m., January 21st, 2022. JT 1236:6-11. Derrek testified that he left Reddy's at 1:20 a.m. to 1:30 a.m., January 22nd, 2022. JT 1236:18-

19. Derrek testified that the bruising on his body was all related to intravenous meth use. JT 1243:16-24.

Reddy testified that he had no contact with Derrek in the early morning hours of January 21st, 2022, or any time prior to the evening in question. JT 1277:1-12, 24-25; 1278:1, 16-25; 1279:1. Reddy testified that he was hanging out with friends in Rapid City and came back to Spearfish in the evening of January 21st, 2022. JT 1279:21-25. Reddy testified that Derrek came to his house sometime around midnight January 22nd, 2022, and that Derrek left around 1:30 a.m., January 22nd, 2022. JT 1283:3-6, 18-22. Reddy testified that he took a picture of Derrek's penis at 1:23 a.m., January 22nd, 2022. JT 1284:16-21. Reddy testified he indicated that Derrek advised Reddy he was in a non-physical argument with Rogers. JT 1292:12-19 ("there was no mention of any kind of physical altercation").

Derrek indicated that Reddy was wrong if he indicated they met a week before. JT 1253:16-18. Reddy testified that he told law enforcement they met a week before online. JT 1299:10-18. Reddy testified that he did not meet Derrek the morning the morning of January 21st, 2022, despite the message content. JT 1319:10-13. Upon being shown the message content between Reddy and Derrek, the following colloquy occurred:

Q Do you see that green bubble there?

A Yeah, the one telling him to drive down Evans?

Q Yeah. Who is telling him to drive down Evans?

A Me. I am telling him to drive down Evans. It will be on the left. Lantern Estates. Where I was living at the time.

Q What time was it?

A Looks like January 21st at 5:15 a.m.

- Q Does that refresh your recollection about whether or not you met up before the night of the 22nd?
- A (Peruses document.) It does not. Because – I mean, the biggest feeling I’m getting about this – the reason I’m not remembering. *A lot of our meetings ended up being talk. Never meeting in person.* This one, I told him where to go. I don’t recall if he came over on that day.

JT 1305:2-16 (Emphasis added).

- Q And there were messages that seemed to indicate there was a meet-up that you said didn’t happen; right?
- A Yes. **And, like I told you, there were times that we just talked about meeting, but we never did. Many, many times.**
- Q Sure. But the night of question, that couldn’t have happened; right?
- A Yeah. On the 21st, we did not meet up, because he didn’t end up showing up.

JT 1319:6-13 (Emphasis added).

According to the expert opinions of both Kennedy and Almeida, Derrek was at Reddy’s at the time of the shooting. These opinions were based upon the content of the messages between Reddy and Derrek. JT 668:13-16 (testifying “I don’t know exactly where it’s located. Based on the text message content, I would assume he’s with the person he was texting.”); JT 812:3-8 (testifying “[B]ased on the [content of] the text messages, would leave a person to believe that those two people were together.”). According to Reddy’s testimony, the message content between the two was not indicative of whether they met up.

Derrek testified that he “never” told Reddy that he was in a physical fight with Rogers. JT 1273:5-6. Reddy first testified that Donovan never said the dispute between Rogers and Donovan was physical. JT 1292:12-19. Reddy acknowledged he told law enforcement at least five times that Derrek advised him he was in a “physical” fight with Rogers. JT 1297-1299. Reddy acknowledged that he told law

enforcement, while the event was fresh in his mind, that Derrek arrived after midnight and left approximately a quarter to 1:00 a.m. JT 1300:13-18; 1302:8-11. Reddy told law enforcement he only had suspicions Donovan might be on drugs, despite being advised by Donovan that he intravenously shoots meth and providing him with money for drugs. JT 1309:10-25; 1310:1-4; 1312:6-15.

Finally, Reddy testified that the money he gave to Donovan was on a later date and that he thought “you guys” had grabbed those text messages as well. JT 1312:8-15. Reddy testified that those texts were acquired by the police. JT 1313:1-4. Reddy testified and disclosed that he spoke to the Government about continuing to meet up with Derrek and maintaining a sexual relationship with him while the Rogers’s prosecution was pending. JT 1313:1-21. None of this *Brady* information has ever been disclosed to the defense, i.e. the continuing sexual relationship between Derrek and Reddy, i.e. goes to motive and bias.⁵

If this same “quality” of alibi defense was proffered by a Defendant, it would not be sufficient to avoid prosecution nor convince a jury. Imagine a Defendant explaining that the forensic evidence to support the purported alibi was destroyed by his own, at best grossly negligent, conduct. The only “alibi evidence” acquired by the State rising to the level of “forensic proof” is the penis picture taken by Reddy’s phone at 1:23 a.m. JT 685:3-6. As this Court has stated multiple times, “A purported alibi that leaves it possible for the accused to be the guilty person is no alibi at all.” *State v. Goodroad*, 521 N.W.2d 433, 440 (S.D. 1994) (citing *State v. Floody*, 481 N.W.2d 242, 248 (S.D. 1992)). Based on the evidence submitted in trial, Derek’s alibi is

⁵ *State v. Lysterla*, 424 N.W.2d 908, “Impeachment evidence falls within the *Brady* rule.” (citing *State v. Hartley*, 326 N.W.2d 226 (S.D. 1982)).

unquestionably weak and reasonable minds could not differ as to that conclusion.

(e) Material Omissions of Evidence

There is abundant evidence in the trial record supporting Rogers's theory of the defense. Derrek was at his house and shot Destiny immediately before the 9-1-1 call. Pursuant to the rules of criminal procedure and criminal jurisprudence, the State's obligation was to disprove every reasonable doubt premised on the defense that Derrek was the shooter.

Forensic evidence ties Derrek to the scene of the crime, i.e. gunshot residue. Jones testified the presence of gunshot residue on Derrek could indicate that he shot the gun. JT 624:10-14. The presence of gunshot residue on Rogers could indicate that Rogers was near the gun that was shot. JT 622:19-25. *Exhibits 19, 67*. No reasonable juror could draw conclusions supporting guilt from these facts.

CDR data collected from Derrek's phone corroborates Rogers's defense. Derrek called Rogers at 10:00 pm, January 21st, 2022. JT 1255:1-16. Derrek texted Rogers hours before the shooting stating "they needed to meet face to face ... ASAP." JT 1255:1-16. Smith testified that he was unaware of the phone call and text message and that it was "relevant". JT 735:2-11. CDR data shows, an hour after the murder, Derrek was attempting to determine if his phone was being tracked by the Government, i.e. evidence evincing a guilty conscience. JT 1258:11-15.

Derrek testified that when he left his home, shortly before the shooting, Derrek told his daughter he was going to Rogers's residence. JT 1257:9-10; 1263:10-15. According to Reddy's law enforcement interview, Derrek explained that he was in a "physical fight" with Rogers prior to his arrival. JT 1297-1299. Agent Cody Lineberger

testified that the bruising on Derrek could be indicating of trauma from assault, i.e. physical altercation with Rogers. JT 1145:1-21; *Exhibit F*.

Derrek testified that he is addicted to meth, that meth use makes him paranoid and stay up for long periods of time, that he is schizophrenic, and that during the period in question he was up for a prolonged amount of time. JT 1245:14-19; 1252:11-12; 1258:11-15; 1271:6-11. Derrek acknowledged that he was accused in a police report of stealing a gun in a Grant Theft case pending against him at the time of the shooting. JT 1248:20-25.

Derrek testified that he gets his drugs from Rogers and that he could not get ahold of him. JT 1256:5-7. Derrek went to Rogers's home, unannounced, the morning before the murder and knocked on the door and windows. JT 1253:19-25; 1254:1-9. Then he went to Ed Moore's (Moore) house to obtain Rogers's phone number. JT 1254:14-23. Derrek called Rogers at 10:00 p.m., the evening of the shooting and followed it up with a text stating, "we need to meet face to face ... ASAP". JT 1255:1-16. Derrek testified he was looking for meth at the time he called and texted Rogers. JT 1255:9-21. An hour after the shooting, Derrek dials a code in his phone in effort to ascertain whether or not the Government was tracking him. JT 662:10-15; 1258:11-15.

Derrek testified that he successfully hid illegal contraband within his home when law enforcement executed the search warrant. JT 1259:23-25; 1260:1-13. Derrek refused to testify where he successfully concealed the illegal contraband. JT 1259:23-25; 1260:1-13. Derrek, convicted sex offender, testified that meth use makes him do things sexually that he would not normally do. JT 1259:17-19.

In *State v. Bolden*, 2024 SD 22, ¶ 39, this Court stated "[i]n measuring the

sufficiency of the evidence, we ask “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (quoting *State v. Brim*, 2010 SD 74, ¶ 6). It is a fact that law enforcement broke the law, it is a fact that law enforcement gave away material evidence, it is a fact that law enforcement contaminated important forensic evidence during its collection⁶, it is a fact that Derrek’s alibi is weak⁷, and it is a fact that Rogers’s theory of defense was never properly considered. The Motion for Judgement of Acquittal is properly granted.

2. Sufficient Bad Faith for the Spoliation Instruction can be Inferred from Contemporaneous Law Enforcement Action

South Dakota Criminal Pattern Jury Instruction 1-14-12, was proposed by the Defendant in this case. In *State v. Engesser*, 2003 SD 47, ¶ 46, this Court explained that:

An instruction on the inference that may be drawn from the spoliation of evidence is proper only when substantial evidence exists to support a conclusion that the evidence was in existence, that it was in the possession or under the control of the party against whom the inference may be drawn, that the evidence would been admissible at trial, and that the party responsible for destroying the evidence did so intentionally and in bad faith.

All elements except that of intentional bad faith are definitively presented. Derrek’s mobile phone and the data contained within it was in existence, it was under the control of law enforcement, law enforcement destroyed it when it gave it back to Derrek, law enforcement had a report authored by Almeida that the mobile examination had not occurred when the evidence was, nonetheless, destroyed. *See Godbe v. City of Rapid*

⁶ There is not a single State witness that testified in this entire trial that law enforcement properly collected the forensic evidence in this case. There is not mention in the record anywhere by any witness that the forensic evidence was properly collected and not contaminated. JT:1-1689.

⁷ The trial court specifically found, after the close of evidence, “[t]he proceeding thus far has not clearly identified where exactly Donovan Derrek was during the period in which it is alleged that Destiny Rogers was shot.” JT 1355:6-8. Based upon this finding and considering the weight of the evidence, the State failed to meet its burden.

City, 2022 SD 1, ¶ 49 (J. Kern dissent); *see also* JT 481:4-9.

The question presented in this section of the appeal is whether concurrent bad faith by law enforcement can be considered. On August 10th, 2022, the trial court entered *Findings of Fact and Conclusions of Law re: Motion to Suppress Statements and/or Video Teleconference with Donovan Derrek*. The law enforcement conduct which was judicially determined to be bad faith occurred on February 4th, 2022, the same time the evidence was destroyed. *See Findings of Fact and Conclusions of Law re: Motion to Suppress Statements and/or Video Teleconference with Donovan Derrek*, p. 4, ¶ 12.

Derrek's phones were returned to the Spearfish Police Department from Rapid City ICAC (Almeida) on February 1st, 2022. The Evidence Transfer Receipt indicating the same was published to the jury but not offered into evidence. JT 479:18-21. Detective Hofmann acknowledged that reports from Almeida indicated the Derrek phones were not examined and that it was his responsibility to look at them. JT 481:2-9. Derrek's mobile phones (material evidence) were given back to him, i.e. destroyed, on February 16th, 2022. The Spearfish Police Department Evidence Transfer Receipt bears Derrek's signature and is dated "2-16-22". Derrek signed the document when he was given the phones back by the Spearfish Police Department on February 16th, 2022.

Pursuant to a suppression motion, the trial court concluded that law enforcement acted with intentional bad faith. *See Findings of Fact and Conclusions of Law re: Motion to Suppress Statements and/or Video Teleconference with Donovan Derrek*, p. 10-11, ¶¶s 15-16

Law enforcement's knowing and intentional violation of Rogers's Sixth Amendment right to counsel is intentional bad conduct. The Court's Findings and

Conclusions indicate the same. As this Court opined in *State v. Mousseaux*, 2020 SD 35, ¶ 13, to trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it. (citing *Herring v. United States*, 555 US 135, 144 (2009)).

At the same time law enforcement acted in bad faith to violate Rogers's Sixth Amendment rights, law enforcement destroyed the material evidence at issue.

In denying the spoliation instruction, the Court concluded "the defense cannot show that the Spearfish Police Department, the State's Attorney's Office, or the Rapid City Police Department engaged in any bad faith." JT 1355:23-25. To the contrary, Rogers has shown that the Spearfish Police Department engaged in intentional bad faith and that it was occurring at the same time and with the same personnel as when the material evidence was destroyed in violation of law.

Substantial evidence exists in this case to support charging the jury as requested. The trial court failed to consider the other contemporaneous bad faith conduct of law enforcement.

3. Dreau Rogers was Denied Due Process, Constitutionally Guaranteed Access to Evidence

The Supreme Court has held that to safeguard a criminal defendant's right to present a complete defense, the Court has developed the area of constitutionally guaranteed access to evidence. *California v. Trombetta*, 467 US 479, 485 (1984); *Arizona v. Youngblood*, 488 US 51, 55 (1988); see generally *State v. Zephier*, 2020 SD 54. In analyzing this question, the Court will look to the guidance provided within *State v. Zephier*.

The Due Process Clause of the Fourteenth Amendment imposes upon states the

requirement to ensure that “criminal prosecutions ... comport with prevailing notions of fundamental fairness.” *State v. Zephier*, 2020 SD 54, ¶ 20 (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)). This is a case in which the exculpatory value of the undisclosed evidence is unknown, as it always is, when law enforcement destroys evidence. *State v. Zephier*, 2020 SD 54, ¶ 22.

As this Court stated, courts seeking to assess the materiality of the lost evidence face a practical complication:

Whenever potentially exculpatory evidence is permanently lost, the courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed. Moreover, fashioning remedies for the illegal destruction of evidence can pose troubling choices. In nondisclosure cases, a court can grant the defendant a new trial at which the previously suppressed evidence may be introduced. But when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing the State’s most probative evidence.

State v. Zephier, 2020 SD 54, ¶ 22 (citing *State v. Lyerla*, 424 N.W.2d 908, 910-11 (S.D. 1988)).

Further:

Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

State v. Zephier, 2020 SD 54, ¶ 23; *California v. Trombetta*, 467 US 485, 488-89 (1984).

The materiality test is where this case differs substantially from *State v. Zephier*, *California v. Trombetta*, and *Arizona v. Youngblood*.

In *Trombetta*, the Court concluded that respondents had alternative means of

demonstrating their innocence. *California v. Trombetta*, 467 U.S. 479, 490 (1984). As a result, the *Trombetta* Court concluded that the Due Process Clause of the Fourteenth Amendment did not require law enforcement to preserve breath samples in order to introduce the result at trial. *Id.* Rogers had no alternative means of demonstrating his innocence, law enforcement destroyed the only evidence. The analogical *Trombetta* Court reasoning stops here.

In *Youngblood*, the trial court instructed the jury on spoliation, despite the lack of bad faith. 488 US 51, 59-60 (1988) (J. Stevens Concurrence) (stating [m]ore significantly, the trial judge instructed the jury: “If you find that the State has... allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State’s interest”). Unlike *Youngblood*, Rogers was denied his request for a spoliation inference instruction. Moreover, a State’s failure to turn over (or preserve) potentially exculpatory evidence “must be evaluated in the context of the entire record.” *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 112 (1976)). Evaluating law enforcement’s failure in light of the entire record demonstrates justice requires different judicial action.

Also, unlike *Youngblood*, in this case there is sufficient suggestion of bad faith on the part of the police. See *Appellant’s Brief, Argument 2*. The following finding by the trial court is erroneous in denying the Motion:

However, the defense cannot show that the Spearfish Police Department, the State’s Attorney’s Office, or the Rapid City Police Department engaged in any bad faith.

Rather, the State, through the State’s Attorney’s Office, would have a reason to obtain the data off the phone to further their theory that Donovan Derrek was not the alleged murderer. But, instead, the opposite, which is the opposite of the Defendant’s argument.

JT 1355:23-25; 1356:1-5.

The subsequent actions of law enforcement do not support this finding. Only after the defense expressly requested the phone data in writing did the State and law enforcement attempt to reacquire the destroyed evidence. JT 468:14-22; *see also Motion to Compel Discovery Relating to Digital Evidence and Reports*, 12/27/2022 (stating “Defendant’s first informal request for much of this information dates back to June 21st, 2022”).⁸ Unlike *Youngblood*, Rogers is not arguing that the police had an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance. 488 US 51, 58 (1988). However, the police do have an absolute duty to preserve and retain evidence that they were expressly told has material evidentiary significance. *Exhibit 19* (Rogers pleading “check [the alibi] out harder”); *see also* JT 440:24-25 (Detective Hofmann testifying that Donovan Derrek told him “[my] phone will have my location for the night”; “It’s all going to be on my phone”) JT 440:24-25.

In *State v. Zephier*, law enforcement appropriately sought guidance from the local prosecutor before releasing the evidence in violation of law. Advice of counsel is a strong affirmative defense to many legal claims, both criminal and civil. That, of course, did not happen in this case.

The destroyed evidence in *Zephier* could not itself independently exonerate the

⁸ Steve Hofmann’s 6/28/22 report states in relevant:

On 6-27-22, Detective Smith and I had a meeting with Lawrence County State’s Attorney John Fitzgerald about a letter from Robbie Rohl that was dated 6-21-22. The letter was written to address discovery concerns that Attorney Rohl had. In the letter there was a total of 12 areas of concern. The first item mentioned was SPD Item #21 which was a Motorola cellphone in a black and green case. This was Donovan Derrek’s cellphone.

Defendant⁹. Derrek's phone location at the time of the shooting, potentially retrievable via the destroyed phone data, could have independently exonerated Rogers.

Unlike *Zephier*, the phone's materiality was immediately apparent due to statements made by both Rogers and Derrek. Of course, it will be argued that the phone did not possess "apparent exculpatory value," but certainly it possessed apparent material value.

Finally, the *Zephier* court stated:

Zephier's argument to the contrary simply focuses on the State's violation of the procedures outlined in SDCL 23A-37-15 without any additional showing that officers or the prosecutor were acting in bad faith. We can discern nothing from the decisions of the United States Supreme Court or our own cases that supports the view that due process requires such an inflexible per se bad faith rule.

State v. Zephier, 2020 SD 54, ¶ 32. Rogers is not arguing the destroyed evidence was "potentially useful." Rogers has shown that the destroyed evidence could have completely exonerated him from a conviction that resulted in a sentence of life in prison. The record contains ample evidence to suggest bad faith and there is a contemporaneous judicial finding that law enforcement engaged in intentional bad faith conduct at the exact same time. In addition to the contemporaneous bad faith, at best law enforcement's actions with regards to the destruction of the evidence were "willful and wanton misconduct", i.e. gross negligence.

"In South Dakota, the phrases gross negligence and willful or wanton misconduct mean the same thing." *Fischer v. City of Sioux Falls*, 2018 SD 71, ¶ 8 (citations omitted). Establishing willful or wanton misconduct requires proof of an element not present in a negligence claim, it entails a mental element." *Fischer v. City of Sioux Falls*, 2018 SD 71,

⁹ Lack of fingerprint forensic evidence would not itself exonerate a Defendant.

¶ 9. Detective Hofmann testified that he received a document advising him that the destroyed “material evidence” unambiguously explained that the data was not preserved. JT 480:23-25; 481:1-9. The document was published to the jury. Detective Hofmann advised it was his responsibility to read the document but he, apparently, chose not to read it. JT 481:8-9.

The second part of ¶ 32 is also distinguishable. Discernment from United States Supreme Court is expressly available based upon the record before the Court. In *Youngblood*, the Supreme Court stated, “In the present case, the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears to be greater than it was in *Trombetta*, but here, unlike in *Trombetta*, the State did not attempt to *make any use of the materials* in its own case in chief.” 488 US 51, 56 (1988) (Emphasis added). In this case, the State called two expert cellphone witnesses (Almeida and Kennedy) who were both credentialed to the jury as reliable experts. Both expressly testified that their expert opinions, based on cell phone information not destroyed by law enforcement, were that Derrek was at Reddy’s at the time of the shooting.

Not only did the prosecution attempt to make use of the materials, in Closing Argument they zeroed in on it:

ARGUMENT: “You heard from Detective Almeida from Rapid City who had a chance to go through all the downloads. He gave his opinion on where Donovan was during that fateful time. He was asked on the stand ‘Where was Donovan at 12:48’ Obvious. He was over at Alan’s house.” JT 1397:2-5; “Detective Almeida wasn’t even able to get to crack his phone. So, if he doesn’t have the technology to crack Donovan’s phone, what would be available?” JT 1397:25; 1398:1-3.

ARGUMENT: "FBI Officer Sean Kennedy testified that he took what information was available off Donovan's CDR – Donovan's call detail records – and he pinpointed that arc. He used the cell phone towers to determine where Donovan was during that time. Putting him nowhere near the Rogers's residence, but over by his house, over by Alan's house." JT 1397:8-14.

ARGUMENT: "It's interesting that defense in closing wants to say, 'Well, you know, Sean Kennedy – there's a gap there.' But remember what Sean Kennedy said. He said, 'I can't ignore the text messages. And in my opinion, the phone of Donovan Derrek was not at the crime scene at the time the murder was committed.'" JT 1450:9-14.

Based on the foregoing, the Defendant's Due Process rights were violated. "When evidence is destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing the State's most probative evidence." *State v. Lyerla*, 424 N.W.2d 908, 910-11 (S.D. 1988) (quotation omitted). The only remedy available is barring prosecution.

CONCLUSION

The State's obligation was to disprove every reasonable doubt premised on the defense that Donovan Derrek was the shooter. The defense proved the following facts: (a) the police broke the law during this investigation; (b) the police gave material evidence away; (c) the police contaminated important forensic evidence; (d) the third-party perpetrator's alibi is unquestionably weak; and (e) the material omissions of evidence. Proof beyond a reasonable doubt does not exist considering proven facts (a) through (e). The trial court improperly denied Defendant's Motion for Judgment of Acquittal with respect to Counts IA, II, IV, and V.

The trial court failed to consider evidence of bad faith. Contemporaneous intentional bad faith law enforcement conduct with willful and wanton conduct destruction of material evidence supports instructing the jury on spoliation. The Court abused its discretion in refusing to charge the jury as requested.

Rogers's Due Process Rights guaranteed and imposed on all the states by the Fourteenth Amendment were violated. The criminal prosecution did not comport with prevailing notions of fundamental fairness. The State breached its Constitutional duty when it destroyed evidence that was expected to play a significant role in Rogers's defense, certainly his trial. The materiality of the evidence was immediately apparent before it was destroyed, and the evidence was of such a nature that Rogers is unable to obtain comparable evidence by any other available means.

WHEREFORE, the Defendant, Dreau Rogers respectfully requests this Court to reverse his convictions for Count IA, Count II, Count IV, and Count V, on the grounds that his Motion for Judgment of Acquittal was improperly denied. Further, Dreau Rogers requests that his convictions for Count IA, Count II, Count IV, and Count V, be vacated with instructions that any future criminal prosecution for these charges is barred for violation of Due Process. In the alternative, Defendant Dreau Rogers requests this Court to reverse the Judgment of Conviction and remand the case for a new trial with specific instructions that the trial court charge the jury on the issue of Spoliation.

REQUEST FOR ORAL ARGUMENT

The Appellant-Defendant Dreau Rogers respectfully requests this Court to order oral argument.

Dated this 3rd day of June, 2024.

/s/ Robert J. Rohl

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL §15-26A-66(b), Robert J. Rohl, counsel for the Appellee does hereby submit the following:

The foregoing brief is 39 pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 30 pages, 9,023 words in the body of the brief.

Dated this 3rd day of June, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on June 3rd, 2024, I served a true and correct copy of the *Appellant's Brief* by electronic filing via Odyssey and via e-mail on the following individuals:

Brenda Harvey
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Robert Haivala
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Erin.Handke@state.sd.us

/s/ Robert J. Rohl
Robert J. Rohl, Trial Lawyer

APPELLANT BRIEF APPENDIX

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STATE OF SOUTH DAKOTA)
) SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
)
Plaintiff,)
)
vs.)
)
DREAU LESTER ROGERS,)
)
Defendant.)

40CRI22-86

NOTICE OF APPEAL

TO: BRENDA HARVEY, LAWRENCE COUNTY STATE'S ATTORNEY, MARTY JACKLEY, ATTORNEY GENERAL:

PLEASE TAKE NOTICE that Dreau Lester Rogers appeals to the South Dakota Supreme Court the *Judgment of Conviction* entered in this action on January 3, 2024. No filing fee is remitted or required as this appeal is made by assigned counsel for an indigent Defendant. See SDCL §§ 23A-32-16; 23A-40-6.

Dated this 8th day of January 2024.

/s/ Robert J. Rohl
2902 W. Main Street, Suite 4
Rapid City, SD 57702
(605) 519-7750
robert@605legal.com

CERTIFICATE OF SERVICE

I hereby certify that on January 8th, 2024, I served a true and correct copy of the *Notice of Appeal* by electronic filing via Odyssey and via e-mail on the following individuals:

Brenda Harvey
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/s/ Robert J. Rohl
Robert J. Rohl, Trial Lawyer

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
:		
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	CRI 22-86
Plaintiff,)	
)	
VS.	)	JUDGMENT OF CONVICTION
)	
DREAU LESTER ROGERS,)	
Defendant.)	

An Indictment was filed with this Court on the 27th day of April, 2022, charging the Defendant with the crime of Count I: First Degree Murder Premeditated Design (Class A Felony) SDCL 22-16-4 Or In The Alternative Count IA: Murder In The Second Degree (SDCL 22-16-7) (Class B Felony) and Count II and III: Possession Of Firearm By Person With A Prior Felony Drug Related Conviction (SDCL 22-14-15.1) Class 6 Felony, Count IV: Possession Of Firearm With Altered Serial Number (SDCL 22-14-12 and SDCL 22-14-12 and 22-42-4 and 22-42-4.3), Class 6 Felony, Count V: Commission Of Felony While Armed With A Firearm (SDCL 22-14-12), Class 2 Felony Count 10: Unauthorized Ingestion Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B), Class 5 Felony and a Part II Information was filed with this Court on the 24th day of January, 2022.

The Defendant was arraigned on said Indictment and Part II Information on the 29th day of April, 2022. The Defendant and the Defendant's attorney, Robert Rohl, and Brenda K. Harvey and John Fitzgerald as 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, including but not limited to the right to a jury trial. The Defendant pled not guilty to the charges and requested a Jury Trial.

A Jury Trial commenced on the November 28, 29, 30, December 1, 4, 5, 6 and 7th, 2023. The Defendant and the Defendant's attorney,

Robert Rohl, and Brenda K. Harvey and Robert Haivala as prosecuting attorney appeared at the Defendant's Jury Trial. On the 7th day of December, 2023, the Jury found the Defendant guilty of Count IA: Murder In The Second Degree (SDCL 22-16-7) (Class B Felony) and Count II and III: Possession Of Firearm By Person With A Prior Felony Drug Related Conviction (SDCL 22-14-15.1) Class 6 Felony, Count IV: Possession Of Firearm With Altered Serial Number (SDCL 22-14-5), Class 6 Felony, Count V: Commission Of Felony While Armed With A Firearm (SDCL 22-14-12), Class 2 Felony and Count 10: Unauthorized Ingestion Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B), Class 5 Felony

It is therefore, the JUDGMENT of this Court that the Defendant is guilty of Count IA: Murder In The Second Degree (SDCL 22-16-7) (Class B Felony) and Count II and III: Possession Of Firearm By Person With A Prior Felony Drug Related Conviction (SDCL 22-14-15.1) Class 6 Felony, Count IV: Possession Of Firearm With Altered Serial Number (SDCL 22-14-5), Class 6 Felony, Count V: Commission Of Felony While Armed With A Firearm (SDCL 22-14-12), Class 2 Felony and Count 10: Unauthorized Ingestion Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B), Class 5 Felony.

S E N T E N C E

On the 2nd day of January, 2024, 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:

Count IA: Murder In The Second Degree (SDCL 22-16-7) (Class B Felony)

IT IS HEREBY ORDERED that the Defendant shall serve life in prison without parole and pay costs of \$116.50. The Defendant shall receive credit for time served of 709 days.

IT IS FURTHER ORDERED that the Defendant shall provide a DNA sample and sign a Waiver Of Extradition.

IT IS FURTHER ORDERED that the Defendant shall have no direct or indirect contact with any of the deceased's family members.

IT IS FURTHER ORDERED that the Defendant shall receive all treatment available with Department of Corrections.

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence Court for court appointed attorney fees \$4,293.66 for Joseph Kosel and Mr. Rohl's fees to be determined, paralegal fees to be determined, RO LLC investigation fees of \$12,453.97, \$236.35 computer forensic, and any other defense counsel fees.

Count II: Possession Of Firearm By Person With A Prior Felony Drug Related Conviction (SDCL 22-14-15.1) Class 6 Felony

IT IS HEREBY ORDERED that the Defendant shall serve two (2) years in the South Dakota State Penitentiary and pay costs of \$116.50. The Defendant shall receive credit for time served of 709 days. This Sentence shall run consecutive to Count IA:

IT IS FURTHER ORDERED that the Defendant shall provide a DNA sample and sign a Waiver Of Extradition.

IT IS FURTHER ORDERED that the Defendant shall receive all treatment available with Department of Corrections.

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence Court for court appointed attorney fees \$4,293.66 for Joseph Kosel and Mr. Rohl's fees to be determined, paralegal fees to be determined, RO LLC investigation fees of \$12,453.97, \$236.35 computer forensic, and any other defense counsel fees.

Count III: Possession Of Firearm By Person With A Prior Felony Drug Related Conviction (SDCL 22-14-15.1) Class 6 Felony

IT IS HEREBY ORDERED that the Defendant shall serve two (2) years in the South Dakota State Penitentiary and pay costs of \$116.50. The Defendant shall receive credit for time served of 709 days. This Sentence shall run consecutive to Count IA, Count II and Count III.

IT IS FURTHER ORDERED that the Defendant shall provide a DNA sample and sign a Waiver Of Extradition.

IT IS FURTHER ORDERED that the Defendant shall receive all treatment available with Department of Corrections.

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence Court for court appointed attorney fees \$4,293.66 for Joseph Kosel and Mr. Rohl's fees to be determined, paralegal fees to be determined, RO LLC investigation fees of \$12,453.97, \$236.35 computer forensic, and any other defense counsel fees.

Count IV: Possession Of Firearm With Altered Serial Number (SDCL 22-14-5), Class 6 Felony

IT IS HEREBY ORDERED that the Defendant shall serve two (2) years in the South Dakota State Penitentiary and pay costs of \$116.50. The Defendant shall receive credit for time served of 709 days. This Sentence shall run consecutive to Count IA and Count II and III.

IT IS FURTHER ORDERED that the Defendant shall provide a DNA sample and sign a Waiver Of Extradition.

IT IS FURTHER ORDERED that the Defendant shall receive all treatment available with Department of Corrections.

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence Court for court appointed attorney fees \$4,293.66 for Joseph Kosel and Mr. Rohl's fees to be determined, paralegal fees to be determined, RO LLC investigation fees of \$12,453.97, \$236.35 computer forensic, and any other defense counsel fees.

Count V: Commission Of Felony While Armed With A Firearm (SDCL 22-14-12), Class 2 Felony

IT IS HEREBY ORDERED that the Defendant shall serve 25 years in the South Dakota State Penitentiary and pay costs of \$116.50. The Defendant shall receive credit for time served of 709 days. This Sentence shall run consecutive to Count IA, Count II, III, and COUNT IV.

IT IS FURTHER ORDERED that the Defendant shall provide a DNA sample and sign a Waiver Of Extradition.

IT IS FURTHER ORDERED that the Defendant shall receive all treatment available with Department of Corrections.

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence Court for court appointed attorney fees \$4,293.66 for Joseph Kosel and Mr. Rohl's fees to be determined, paralegal fees to be determined, RO LLC investigation fees of \$12,453.97, \$236.35 computer forensic, and any other defense counsel fees.

Count 10: Unauthorized Ingestion Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B), Class 5 Felony

IT IS HEREBY ORDERED that the Defendant shall serve 5 years in the South Dakota State Penitentiary and pay costs of \$116.50. The Defendant shall receive credit for time served of 709 days. This Sentence shall run consecutive to Count IA, Count II, III, Count IV and Count V.

IT IS FURTHER ORDERED that the Defendant shall provide a DNA sample and sign a Waiver Of Extradition.

IT IS FURTHER ORDERED that the Defendant shall receive all treatment available with Department of Corrections.


IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence Court for court appointed attorney fees \$4,293.66 for Joseph Kosel and Mr. Rohl's fees to be determined, paralegal fees to be determined, RO LLC investigation fees of \$12,453.97, \$236.35 computer forensic, and any other defense counsel fees.

Attest: CAROL LATUSECK, CLERK
Hammond, Chelsea
Clerk/Deputy



BY THE COURT:

1/3/2024 2:47:11 PM


Hon. Mike Day
Circuit Court Judge

DATE OF OFFENSE: JANUARY 22, 2022

NOTICE OF APPEAL

You are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise within thirty (30) days from the date that this Judgment and Sentence is signed, attested and filed, written Notice of Appeal with the Lawrence County Clerk of Courts, together with proof of service that copies of such Notice of Appeal have been served upon the Attorney General of the State of South Dakota, and the Lawrence County State's Attorney.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
)	
STATE OF SOUTH DAKOTA,	)	FILE NO. CRI22-86
)	
Plaintiff,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW re: MOTION
vs.	)	TO SUPPRESS STATEMENTS
	)	AND/OR VIDEO TELECONFERENCE
DREAU ROGERS,	)	WITH DONOVAN DERREK
)	
Defendant.)	

Two evidentiary hearings which impact this Court's decision relating to *Defendant's Motion to Suppress Statements and/or Video Teleconference with Donovan Derek* were held. The first hearing took place on March 31st, 2022, wherein testimony was taken concerning jail policy and procedures. The transcript of the March 31st, 2022, will be hereafter referred and cited as *MH* (Motions Hearing) followed by the page number and corresponding line numbers. On June 10th, 2022, the second Evidentiary Hearing occurred wherein testimony was taken concerning Defendant's Motion to Suppress. The transcript of the June 10th, 2022, will be hereafter referred and cited as *EH* (Evidentiary Hearing) followed by the page number and corresponding line numbers. At both hearings the Defendant was personally present and represented by his counsel, Robert Rohl. The State was represented by John H. Fitzgerald, the Lawrence County State's Attorney.

This matter having come before the Court on June 10th, 2022, and the Court having taken testimony, considered all evidence, post-hearing submissions¹ and arguments by all parties, the

¹ The matter was deemed fully submitted to the Court on July 27, 2022.

Court hereby enters the following Findings of Fact and Conclusions of Law relating to Defendant's Motion to Suppress Statements and/or Video Teleconference with Donovan Derrek filed on April 25th, 2022:

FINDINGS OF FACT

1. On or about January 22nd, 2022, the Defendant, Dreau Rogers was arrested for the alleged murder of Destiny Rogers.
2. Prior to Defendant's arrest and during law enforcements' investigations, Dreau Rogers informed law enforcement that Donovan Derrek shot and killed Dreau's wife, Destiny Rogers. Upon law enforcement making contact with Donovan Derrek, Mr. Derrek directed law enforcement's attention to his alleged alibi, Alan Reddy. After law enforcement spoke with Alan Reddy, law enforcement arrested Defendant for the alleged murder of Destiny Rogers. *EH 7:9-19;10:16-19.*
3. During Donovan Derrek's questioning by law enforcement, Mr. Derrek specifically indicated multiple times he wished to speak with Defendant about the alleged murder. *EH 12:25 – 13:1-6.*
4. On or before January 24th, 2022, the Defendant exercised his right to counsel and his right to remain silent.
5. On January 24th, 2022, an Order for Court Appointed Counsel in criminal file 22-86 was entered appointing attorney Joe Kosci. *See Order for Court Appointed Counsel.*
6. On January 26th, 2022, an interagency memo was sent to the entire corrections Staff by Sergeant Wetz. An interagency memo is a written log of activities, events, or information that the corrections staff wishes to convey amongst themselves. *EH 39:1-6.*

7. Sergeant Wetz' January 26th, 2022, interagency memo to Lawrence County Corrections advised that Donovan Derrek was not approved as a visitor to see Defendant. In the memo Sergeant Wetz advised Lawrence County Corrections Staff that the decision prohibiting Donovan Derrek from visiting Defendant Rogers was made by Captain Little. Donovan Derrek was denied visitation by the jail because he was a "material witness." *EH* 39:14-24; 40:18-21; *Exhibit A*.

8. On January 28th, 2022, Captain Little received a phone call from Detective Sergeant Schumacher. Detective Schumacher requested that Captain Little authorize Donovan Derrek to visit Defendant. At the prior Motions Hearing (3-31-22), Captain Little testified that this phone call was made to his personal cell while driving home. Captain Little also testified that this type of phone call and request is something which happens "very infrequently". *EH* 42:1-4; *see also MH* 23:14-25.

9. On the following day, January 29th, 2022, Monica Lucio sent an interagency memo to Lawrence County Corrections Staff regarding Defendant. In this memo, Lawrence County Corrections Staff was advised that Donovan Derrick was allowed to visit Defendant but only with a device that is "recordable."² The interagency memo specifically lists the call signs of Captain Little, Tom Derby, and Detective Schumacher. *See Exhibit B; EH* 41:11-17.

10. The interagency memos to Lawrence County Corrections, *Defendant's Exhibit A and B*, were provided to defense counsel in open court by Captain Little in response to a Subpoena Duces Tecum issued upon him at a prior Motions Hearing. *EH* 38:23-25; *MH* 14:11-15; 16:4-15.

11. On February 2nd, 2022, the Defendant was charged by Indictment with First

² All visitation that occurs at the Lawrence County Jail between a visitor and an inmate is recorded and preserved.

Degree Murder Premeditated Design amongst nine other charges stemming from the January 22nd, 2022, allegations. *See generally*, file 22-86; *Indictment*.³

12. On February 4th, 2022, Donovan Derrek went to the Lawrence County Jail and commenced a recorded video teleconference with Defendant. Upon arrival at the jail, Donovan Derrek questioned Defendant about the alleged murder of Destiny Rogers on a recorded video format. The State seeks to introduce this evidence in its case in chief against Defendant Rogers. *See State's Exhibits 1 and 2.*

13. On February 4th, 2022, and prior to creation of *Defendant's Exhibit B*, law enforcement knew that Defendant had an attorney and exercised his right to remain silent. 19:24-25; 20:1. Law enforcement desired to watch and observe the interaction between Donovan and Defendant and sought to observe Defendant Rogers' reaction to Donovan Derrek's questions about the murder, despite the fact he was represented by counsel and had exercised his constitutional rights. *EH* 43:24-25; 44:1-12. The Defendant did not know that he was going to be visited by Donovan Derrek until his face came up on the video visitation screen. Prior to the visitation, Defendant Rogers was not advised the subject matter or identity of the visitor. *EH* 38:4-9.

CONCLUSIONS OF LAW

1. Any conclusions of law, if improperly denominated as such, shall be deemed a finding of fact so that the tenor and effect of the court's decision is maintained.
2. On April 25th, 2022, Defendant filed *Defendant's Motion to Suppress*

³ A Second Superseding Indictment was filed on April 28, 2022.

Statements and/or Video Teleconference with Donovan Derrek. Defendant has argued that the video teleconference with Donovan Derrek was “elicited from Defendant in violation of his privilege against self-incrimination and his right to counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article VI, Sections 7 and 9 of the Constitution of the State of South Dakota.” *See Defendant's Motion to Suppress Statements and/or Video Teleconference with Donovan Derrek.*

3. The purpose of the Fifth Amendment right to counsel is to protect individuals from self-incrimination and assist in the custodial interrogation process. *State v. Hoadley*, 2002 SD 109, ¶ 26 (citing *State v. Anderson*, 200 SD 45, ¶ 74). The Sixth Amendment provides for the right of counsel in criminal prosecution. *Id.* The right to counsel attaches only after judicial proceedings begin. *Id.* (citing *State v. Hamm*, 89 SD 507, 515-16 (SD 1975); *Kirby v. Illinois*, 406 US 682, (1972)).

4. The videotaped teleconference sought to be suppressed by Defendant, i.e. *State's Exhibits 1 and 2*, occurred after initiation of “adversary judicial criminal proceedings” against Defendant Rogers. “[W]hile members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, [a]ll of those cases have involved points of time at or after initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *Hamm*, 89 SD at 516 (citing *Powell v. Alabama*, 287 US 45 (1935); *Kirby v. Illinois*, 406 US 682 (1972)). The recorded videoconference between Donovan Derrek and Defendant occurred after he was Indicted and the appointment defense counsel. The recorded videoconference occurred at a time that law enforcement unanimously knew that Defendant was represented by counsel and exercised his rights. *EH 44:13-21; See also Indictment and Order for Court Appointed Counsel.*

5. In *Massiah v. U.S.*, 377 US 201, 206 (1964), the Supreme Court held that “the petitioner was denied the basic protections of [Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.”

6. In *Illinois v. Perkins*, the U.S. Supreme Court held that statements deliberately elicited by an undercover agent posing as the defendant’s cellmate were admissible because there is no coercion where the suspect does not know that he is speaking to a government agent. *Illinois v. Perkins*, 496 US 292, 496 US 292 (1990). *Illinois v. Perkins* further explains that *Massiah v. U.S.*, 377 US 201 (1964) did not apply because the Sixth Amendment right to counsel only applies once a suspect has been charged. In *Perkins*, no charges had been filed and “adversary judicial criminal proceedings” had not been initiated. In the present case with Defendant Rogers, charges had clearly been filed, and again, adversary judicial criminal proceedings had been commenced relating to the alleged murder. Defendant Rogers was appointed counsel on January 24th, 2022, and he was Indicted on February 2nd, 2022. The at-issue teleconference sought to be suppressed occurred on February 4th, 2022.

7. Law enforcement’s utilization of the *Perkins* technique may only be used before the suspects Sixth Amendment right to counsel attached. Here it is uncontroverted that the Sixth Amendment right to counsel attached and law enforcement knew the right attached. 19:16-25; 20:1-4; 44:13-21.

8. Unlike *Miranda*, the Sixth Amendment right to counsel can be violated by covert questioning, in or out of custody. *U.S. v. Henry*, 447 US 265, 264 (1980) held: “Respondent’s statements to the informant should not have been admitted at trial. By intentionally creating a situation likely to induce respondent to make incriminating statements without the assistance of

counsel, the Government violated respondent's Sixth Amendment right to counsel." *Main v. Moulton* expanded on Defendant's Sixth Amendment rights, the Court further held that: "The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State. Knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." *Maine v. Moulton*, 474 US 159, 160 (1985). The Court further notes that the *Moulton* decision held: "Once the right to counsel has attached and been asserted, the State must honor it. At the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Clint Spano v. New York*, 360 US 315 (1959); *Massiah v. United States*, 377 US 201 (1964); *United State v. Henry*, 447 US 264 (1980).

9. Whether or not Donovan Derrek was working for the Government as an "official" informant is irrelevant. Prior to February 4th, 2022, Donovan Derrek advised law enforcement multiple times of his intent to question Defendant about the alleged murder of Destiny Rogers. *EH* 12:25; 13:1-14; 21:19-23.

10. Based upon *Defendant's Exhibits A and B*, as well as the testimony of the witnesses, it is clear that Donovan Derrek was forbidden from visiting Defendant by order of Captain Little. An interoffice memorandum was sent to the entire Lawrence County Corrections Department forbidding Donovan Derrek from visiting Defendant. *See Defendant's Exhibit A*.

11. The Spearfish Police Department desired to record and observe Defendant being questioned by Donovan Derrek. *EH* 43:22-25; 44:1-15. Detective Schumacher called Captain

Little and requested that Donovan Derrek be allowed to visit Defendant and that the encounter be recorded. *EH* 25:25; 26:1-13; 44:6-12.

12. On January 29th, 2022, the day after Detective Schumacher called Captain Little on his personal phone, an updated interoffice memorandum was sent to the entire Lawrence County Corrections Department concerning Defendant. This memorandum expressly authorized Donovan Derrek to visit Defendant but it could only occur as long as it was recorded. See *Exhibit B; EH* 24:19-25; 25:1-8; 44:1-12. At this time, law enforcement knew that Defendant Rogers was represented by counsel and exercised his rights. *EH* 44:13-21.

13. Law Enforcement intentionally created a situation (allowing Derrek to speak with Defendant) likely to induce Defendant to make incriminating statements without the assistance of counsel. Law Enforcement engaged in a knowing exploitation of an opportunity to confront the accused without counsel being present in violation of longstanding United States Supreme Court jurisprudence.

14. The record demonstrates, that "but for" law enforcement's actions, this interaction would have never occurred. The relevant portions of the record in this regard are below.

Detective Steve Hoffman Testimony:

Q So but for law enforcement going through the channels of making that recorded visit happen, this would never have occurred; correct?

Mr. Fitzgerald: I would object. Calls for him to speculate.

The Court: Overruled.

A Without – I guess, without somebody contacting him and allowing the visit, then he wouldn't have known the visit was allowed.

Q (By Mr. Rohl, continuing): I'm not sure I understood your answer. So you agree or disagree that law enforcement was the only way this recorded visit was capable of occurring?

A With the information you have here, that's true. Correct.

25:15-25

Captain Tavis Little:

Q Well, I want to just seek your confirmation, Captain Little, that this is what your words state. "Donovan Derrek is not allowed to visit him, as he is a material witness in this case." True or false?

Mr. Fitzgerald: I object. Asked and answered.

The Court: Overruled.

A Those aren't my words. That is what Sergeant Wetz wrote. But, yes, that is the summary.

Q (By Mr. Rohl, continuing) The second exhibit there in front of you – Defendant's Exhibit B – this document interagency notes – expressly states that he must use a device that is recordable. Do you see that?

A I do.

Q And you would agree with me?

A Yes.

Q Would you agree with me that law enforcement wanted to observe this interaction?

A Yes.

Q Would you agree with me that law enforcement wanted Donovan Derrek to go in, so they could observe this interaction occur?

A I think it's fair to say, yes.

Q And would you agree with me that law enforcement knew he had a lawyer at that time?

A Yes.

Q And would you agree with me that law enforcement knew he had exercised his right to remain silent?

A Yes.

Q And would you agree with me that law enforcement – I asked you that – represented by counsel?

A Yes.

Q And would you agree with me that it was under the authority of the Spearfish investigators that this interaction was authorized to occur?

A That I can't answer.

Q They certainly played a role as far as what you testified to previously, though; right?

A I would believe they are aware and played a role, yes.

EH43:16-25; 44:1-25; 45:1-3.

15. Under these specific circumstances, this Court concludes that Law Enforcement in this case breached its "affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Citing Spano v. New York*, 360 US 315 (1959); *Massiah v. United States*, 377 US 201 (1964); *United State v. Henry*, 447 US 264 (1980). The record clearly establishes that Defendant exercised his right to an attorney and that adverse judicial proceedings on the murder charge had been initiated. Defendant's Sixth Amendment right to counsel had attached. The record further establishes that Donovan Derrek was denied access to visit Defendant as he was deemed a "material witness" by Captain Little and this was communicated to the entire Lawrence County Corrections Department. *Exhibit A*. Three days later, per law enforcement's directive, Mr. Derrek was authorized visitation with the Defendant. *Exhibit B*.

16. Knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." *Maine v. Moulton*, 474 US 159, 160 (1985). In this instance, at a minimum Law Enforcement exploited an opportunity to confront the accused without counsel being present and thereby circumvented

Defendant's right to the assistance of counsel in violation of the Constitution and the Supreme Court's jurisprudential mandates.

17. The Court concludes that Defendant's Motion to Suppress Statements and/or Video Teleconference with Donovan Derrek is GRANTED.

Let an ORDER enter accordingly.


ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS STATEMENT

In accordance with the foregoing Findings of Fact and Conclusions of law, which are incorporated herein by this reference, IT IS HEREBY:

ORDERED that Defendant's Motion is hereby GRANTED.

Dated this 10th day of August, 2022.

BY THE COURT:

By: 
Michael W. Day
Presiding Circuit Court Judge

ATTEST:


Clerk of Courts

Deputy



STATE OF SOUTH DAKOTA)
) SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
)
 Plaintiff,)
)
vs.)
)
DREAU ROGERS,)
)
 Defendant.)

40CRI22-000086

**DEFENDANT'S BRIEF IN SUPPORT
OF DUE PROCESS VIOLATION
DISMISSAL – BRADY VIOLATION**

COMES NOW, Dreau Rogers, by and through his attorney of record, Robert J. Rohl, and hereby files this *Defendant's Brief in Support of Due Process Violation – Brady Violation*.

INTRODUCTION

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At this point, this case has involved intentional 6th Amendment violations by involved law enforcement, two admitted violations of SDCL § 23A-37-15, and now a failure to disclose exculpatory evidence. The case should be dismissed.

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1- *Brady Violation – Withholding Exculpatory Information*

Had this information been disclosed, defense counsel would have presented a different

case to the jury – one in which the Spearfish Police Department agreed with Dreau Rogers and that fact is corroborated by their response and actions taken. SRT was briefed on Donovan Derek by information relayed to SRT by lead agent Hoffman. This information is memorialized within the contents of the reports received today – only after defense counsel’s examination of Detective Chad Sayles. The new discovery would have never been disclosed *but for* defense counsel’s examination of Detective Sayles. Had the information been disclosed, all the SRT officers would have been subpoenaed to discuss the information that they were provided with prior to their apprehension of Donovan Derek – information which originated with lead agent Hoffman.

Nothing within the contents of the disclosed discovery indicates in any way that reports of SRT should or did exist. The timeline of law enforcement’s actions and its decision-making process contained within this information is material as it shows that law enforcement both believed Dreau Rogers, and that law enforcement believed Donovan Derek was both capable of committing the crime and dangerous. According to the attached discovery, SRT was authorized to utilize less lethal exact rounds to prevent Donovan Derek from going back into his residence after he exited. *See attached.*

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In sum, *Brady* and its progeny address exculpatory evidence still in the government’s possession while *Arizona v. Youngblood*, 488 US 51 (1988) and *California v. Trombetta*, 467 US 479 (1984) govern cases in which the government no longer possesses the disputed evidence. Accordingly, after concluding that there has been a violation of *Youngblood*, the decision to either suppress the government’s secondary evidence describing the destroyed material or to dismiss the indictment turns on the prejudice that resulted to the defendant at trial. *California v.*

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“Under the two-prong *Trombetta* test, the government violates a defendant’s right to due process when: (1) it destroys evidence whose exculpatory significance is apparent before destruction; and (2) the defendant remains unable to obtain comparable evidence by other reasonably available means.” *Trombetta*, 467 U.S. at 489. The government commits a constitutional violation when it destroys evidence that might be expected to play a significant role in a suspect’s defense. *Trombetta*, 467 US at 488-89. A definition utilized by Courts across the country to ascertain whether the evidence was expected to play a “significant role” is whether the lost evidence could prove the defendant’s innocence. In this case, the question is, could the Donovan Derrek cellphone alone prove the defendant’s innocence. The answer to that question is yes. *See Hoffman Testimony*. The Donovan Derek cellphone was expected to play a significant role in Dreau Rogers’ defense, and it could not have been more apparent. That fact is also demonstrated in the newly received discovery. *See attached*, RCPD Allen Nelson (“suspects vehicle outside the trailer house and his phone was pinging in the area”).

In fact, Detective Fox communicated to Dreau Rogers during his second interview that Donovan Derek’s phone was going to be downloaded (evidence received in trial):

DR He was there. He shot my fucking wife. He fucking shot her.
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Because the Donovan Derrek cellphone alone could prove the defendant’s innocence, the loss of the cellphone renders the Defendant’s trial unfair and violates his due-process rights. There is no alternative other than dismissal which serves as the only remedy for the violation. Whether law enforcement’s destruction of the evidence was intentional or unintentional, i.e. bad

faith, is irrelevant because the destroyed evidence had such a significant bearing on the outcome of the case.

In the event a bad faith showing is required, that standard has been met. This is why defense counsel has included the Court decision with respect to the 6th Amendment Violation. There is a bad faith finding on the record by law enforcement in this case. In addition, there is now a Brady Violation, a Due Process Violation, and two violations of SDCL § 23A-37-15². This case has reached the level of sufficiently outrageous Government conduct mandating dismissal of the Indictment. Defendant incorporates by reference in support of this argument *U.S. v. Chapman*, 524 F.3d 1073:

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Dated this 30th day of November 2023.

/s/ Robert J. Rohl
Robert J. Rohl, Trial Lawyer
2902 W. Main Street, Suite 4
Rapid City, SD 57702
(605) 519-7750
robert@605legal.com

CERTIFICATE OF SERVICE

I hereby certify that on November 30th, 2023, I served a true and correct copy of the **DEFENDANT’S BRIEF IN SUPPORT OF DUE PROCESS VIOLATION DISMISSAL – BRADY VIOLATION** by electronic filing on the following individual:

Robert A. Haivala
Robert.Haivala@state.sd.us

Brenda Harvey
bharvey@lawrence.sd.us

/s/ Robert J. Rohl
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STATE OF SOUTH DAKOTA)
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IN CIRCUIT COURT

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40CRI22-000086

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**MOTION TO COMPEL DISCOVERY
RELATING TO DIGITAL EVIDENCE
AND REPORTS**

COMES NOW DEFENDANT, by and through his attorney of record, Robert J. Rohl, and hereby moves this Court to Compel Discovery Relating to Digital Evidence and Reports. The proper standard for ruling on a discovery motion is whether the information sought is "relevant to the subject matter involved in the pending action ..." SDCL 15-2-26(b)(1). "A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery ... the motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." SDCL § 15-6-37(a). Defendant has attempted to obtain the discovery informally on multiple occasions and the attempts are attached to the Motion as evidence of said "certification of good faith."

All of the evidence requested in this Motion is expressly referenced by law enforcement reports and/or search warrants as both "existing" and having "relevance" to the allegations relating to this case. The relevant law enforcement reports evidencing the existence of the requested discovery were attached and provided to the State in prior correspondence. See *attached* 12-1-22 Discovery Request, marked as Exhibit A.

DISCOVERY REQUESTED

1- Donovan Derek's "New" Phone.

According to law enforcement reports, "One June 28th, 2022, I conducted an exam of a TCL smart phone belonging to Donovan Derek ... The exam produced an extraction report. The report and supporting data were saved to a target storage device." See Exhibit A, Bates 405, 443-44. There has been no report produced and more importantly, the data utilized to produce the report has not been provided. Time is of the essence and this data needs to be reviewed by Defendant's expert witness with sufficient time prior to trial. Defendant is legally entitled to immediate disclosure of this information.

2- Destiny Rogers Apple iCloud account and Google Drive.

According to law enforcement reports, "I received a response from Google with Destiny's Google drive information. I requested that Samantha Rosenau turn the zip files in to a Cellebrite Read Report. Once it was completed, I placed the files onto the case hard drive along with the original zip files." Exhibit A, Bate 405. There has been no report produced and more importantly, the data utilized to produce the report has not been provided. Time is of the essence and this data needs to be reviewed by Defendant's expert witness with sufficient time prior to trial. The Court needs to compel immediate disclosure of this information.

According to law enforcement reports, "I received the result of Destiny's iCloud account ... The iCloud files were taken to ICAC in Rapid City, and on 7-25-22 Detective Almeida used Axiom to make a portable file for the files. I received a copy of the portable files and will provide them to the LCSA on 7-28-22 for their review. I have attached the ICAC Examination Report to this case." Bate 405. There has been no report produced and more importantly, the data utilized to produce the report has not been provided. Time is of the essence and this data

needs to be reviewed by Defendant's expert witness with sufficient time prior to trial. Defendant is legally entitled to immediate disclosure of this information.

3- Data obtained from 2020 phone extractions.

According to law enforcement reports, "I learned in 2020, Sergeant Rosenau completed a phone extraction of a previous phone belonging to Destiny and at that time she was using the password 2020 ... I had learned that the cellphone extraction from Destiny's phone in 2020 had recordings of Destiny and Dreau on them. There had also been a phone extraction completed on Dreau's cellphone at that point. The phone extraction had a large number of messages between Dreau and Destiny." Exhibit A, Bate 405. This information is believed to contain some of the basis for the to be noticed state's 404(b) evidence. It is necessary that Defendant get all the information to ensure it is properly contexted, amongst other issues all related to fairness and the ability to observe the state's evidence sought to be used against him at this trial. There have been no reports produced and more importantly, the data utilized to produce the reports has not been provided. Time is of the essence and this data needs to be reviewed by Defendant's expert witness with sufficient time prior to trial. Defendant is legally entitled to immediate disclosure of this information.

4- Verizon Pen Register & Trap and Trace (PRTT) related to Donovan Derek phone number (605)569-3874 & (605)415-6332.

According to law enforcement reports, "I applied for and was granted a pen register and/or trap and trace (PRTT) and a cell site location information search warrant for Donovan's cellphone (605)569-3874. The search warrant was granted by the Honorable Judge Callahan. The search warrant was served to Donovan's cellphone service provider, and I began to receive estimated tower locations of Donovan's cellphone. I responded to Donovan's residence, located at 362 Evans Lane in Spearfish, South Dakota. While on scene I received an updated location

showing Donovan's cellphone was near his residence. I also received information showing Donovan was communicating via text message with phone number (605)415-6332. Through law enforcement records, the phone number was listed to Alan Reddy." Exhibit A, Bates 19, 21.

Defendant is requesting all information in law enforcement's possession relating to the Verizon Pen Register & Trap and Trace, i.e., a complete return of all information provided in the exact same format as received from Verizon with any and all accompanying documentation. Time is of the essence and this data needs to be reviewed by Defendant's expert witness with sufficient time prior to trial. Defendant is legally entitled to immediate disclosure of this information.

5- Verizon Records relating to Dreau Rogers, Destiny Rogers, Donovan Derek; (605)569-1764, (605)430-8120; (605)569-3874.

On January 25, 2022, a search warrant was applied for by law enforcement and granted by Judge Callahan. Exhibit A, Bates 255-263, 469. According to law enforcement reports, "On 1-25-2022, I applied for and was granted a search warrant for Donovan's, Destiny's, and Dreau's call detail records (CDR) through Verizon by the Honorable Judge Callahan. On 2-27-2022, I received the data from Verizon. In the data, I received the International Mobile Equipment Identify (IMEI) numbers for Donovan's and Dreau's phones. On 2-18-2022, I applied for and was granted a search warrant for the IMEI location data through Google, LLC by the Honorable Judge Callahan. All data received from Verizon and Google, LLC were given to Division of Criminal Investigation (DCI) analysts for processing." Exhibit A, Bates 22. To date, none of the information law enforcement received from Verizon relative to these phone numbers has been provided.

Defendant requests all data received from Verizon and Google that was given to law enforcement. This includes all subscriber information, CDR, Stored Text Messages, Stored Cell

Site Locations, and all other data received. All reports created or generated as well as the digital data (in the form it was received by law enforcement) needs to be provided to Defendant. Time is of the essence and this data needs to be reviewed by Defendant's expert witness with sufficient time prior to trial. Defendant is legally entitled to immediate disclosure of this information.

CONCLUSION

This Motion to Compel should be granted in its entirety. Defendant has attempted multiple times to recover the relevant and discoverable information which is the subject matter of this Motion. Defendant's first informal request for much of this information dates back to June 21st, 2022. Defendant certifies that he has attempted in good faith to resolve this matter without Court intervention and a copy of the most recent correspondence indicating the same is attached. To aid the State, Defendant even attached all reports directly evidencing the information's existence and to help identify the proper law enforcement personnel for its retrieval. Given the approaching trial date and the necessity of Defendant's expert to thoroughly review the voluminous discoverable information still outstanding, a Court Order should enter compelling immediate disclosure of all this information in possession of law enforcement.

Dated this 27th day of December 2022.

/s/ Robert J. Rohl
Robert J. Rohl, Trial Lawyer
Attorney for Defendant
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**DEFENDANT'S BRIEF IN SUPPORT
OF SPOILIATION INSTRUCTION
AND IN THE ALTERNATIVE STATE
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INTRODUCTION/APPLICABLE LAW

For purposes of the applicable law section, the Defendant incorporates by reference the entire statement of law as set forth by the South Dakota Supreme Court in *State v. Zephter*, 2020 SD 54.

The Due Process Clause of the Fourteenth Amendment imposes upon states the requirement to ensure that "criminal prosecutions ... comport with prevailing notions of fundamental fairness." *State v. Zephter*, 2020 SD 54, ¶ 20. Implicit in this standard is the necessity that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *Id.* (citations omitted). "The resulting body of decisional law from the United States Supreme Court and this Court exist under a topical heading that 'might loosely be called the area of constitutionally guaranteed access to evidence.'" *Id.* (citations omitted).

Whenever potentially exculpatory evidence is permanently lost, i.e., Donovan Derrek's cellphone, the courts face the treacherous task of divining the import of materials whose contents

are unknown and, very often, disputed. *Zephier*, 2020 SD at ¶ 22. “Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense. To meet this standard of constitutional materiality ... evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Zephier*, 2020 SD at ¶ 23 (citations omitted); *refer also to trial testimony*.

In nondisclosure cases (which this is not), a court can simply grant the defendant a new trial at which time the previously suppressed evidence may be introduced. *State v. Iyerla*, 424 N.W.2d 908, 910-11. But, when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing the State’s most probative evidence. *Zephier*, 2020 SD at ¶ 22 (citations omitted). In this case, the Defendant was unable to request suppression, as there is no evidence to request suppression of that is even tangentially related. The call detail records of Donovan Derek highlighted the value of the actual phone and contained an exculpatory value for Dreau Rogers – for that reason suppression was not requested.

In South Dakota, our Legislature has enacted statutory standards which expressly govern law enforcement’s obligation to preserve evidence. See SDCL § 23A-37-14 and SDCL 23A-37-15.

SDCL § 23A-37-14, states in relevant part:

Property ... seized or confiscated by law enforcement personnel, ostensibly for use as evidence in a criminal prosecution shall be preserved, maintained, or stored at the expense of the county where the criminal offense occurred.

However, before releasing evidence to its owner, SDCL § 23A-37-15 requires law

enforcement officers to notify the defendant:

Before any property is returned to the owner pursuant to § 23A-37-14, the law enforcement personnel in possession of the property shall notify the defendant that the property will be returned to the owner. Upon a motion made by the defendant and upon good cause shown that the property contains exculpatory evidence of the defendant's innocence, the court may order the law enforcement personnel in possession of the property not to release it to the owner.

The South Dakota Supreme Court goes on to explain that it has never held that a violation of SDCL 23A-37-15 reflexively leads to a due process violation with the sanction of exclusion or a new trial. *Zephier*, 2020 SD at ¶ 29. "Instead, we have applied the Supreme Court's decisions in *Trombetta* and *Youngblood*, focusing on materiality and good faith." *Zephier*, 2020 SD at ¶ 29 (citing *State v. Danielson*, 2012 SD 36, ¶ 38 (applying *Trombetta* and *Youngblood* to hold that the defendant "failed to demonstrate that the State, in bad faith, destroyed evidence that would have played a significant role in his defense")).

SPOILIATION – BAD FAITH

For purposes of this section of Defendant's Brief, Defendant incorporates by reference his previous *Defendant's Brief in Support of Due Process Violation Dismissal – Brady Violation*. Defendant understands and respects this Court's decision regarding its finding on bad faith with respect to law enforcement and wishes to preserve this portion of the record.

STATE V. ZEPHIER, 2020 SD 54

In this case, after finding that the spoliation instruction was improper upon analysis of the same, the circuit court gave the jury a specific instruction regarding law enforcement's failure to comply with statutory standards regarding evidence preservation. Based on the evidence presented during this trial, Defendant Dreau Rogers is entitled to the following requested instruction based on *State v. Zephier*, 2020 SD 54, ¶ 17, ¶ 33:

DEFENDANT'S PROPOSED JURY INSTRUCTION – STATE V. ZEPHIER INSTRUCTION

It is the law of this state that when property is seized by law enforcement which constitutes evidence of a crime or exoneration, law enforcement must safely keep such property as long as it is required for trial and must not dispose of the same without an order of the court. It is an express finding of the Court that law enforcement violated statutory law which required law enforcement personnel in possession of Donovan Derrek's cellular telephones to notify the Defendant before returning them. Had the Defendant been provided with the statutorily required notice to return the seized property, the Defendant would have objected, and the Court would have required law enforcement to retain both cellular phones so they could be examined.

It is for your sole and exclusive determination whether returning the cellular phones to Donovan Derek in violation of law bears upon the verdict, guilty or not guilty, and the weight to be given to such fact.

CONCLUSION

Based on the foregoing, Defendant respectfully requests this Court find that the State has violated the Defendant's due process rights as specifically articulated in *California v. Trombetta*, 467 US 479 (1984), the Court should provide the jury with an inference spoliation jury instruction as set forth in *State v. Engesser* and *State v. Zephier*. In the alternative, Defendant requests that this Court instruct the jury in a fashion similar to the Circuit Court in *State v. Zephier*, as stated above, regarding the illegal destruction of cellular telephone evidence.

Dated this 3rd day of December, 2023.

/s/ Robert J. Rohl

Robert J. Rohl, Trial Lawyer
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(605) 519-7750
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CERTIFICATE OF SERVICE

I hereby certify that on December 3rd, 2023, I served a true and correct copy of the **DEFENDANT'S BRIEF IN SUPPORT OF SPOILIATION INSTRUCTION AND IN THE ALTERNATIVE STATE V. ZEPHIER INSTRUCTION** by electronic filing on the following individuals:

Robert A. Haivala
Robert.Haivala@state.sd.us

Brenda Harvey
bharvey@lawrence.sd.us

/s/ Robert J. Rohl
Robert J. Rohl, Trial Lawyer

SPOILIATION OF EVIDENCE

Instruction No. _____

The Court has determined that material evidence, i.e. Donovan Derrek's cell phone, was destroyed while in the care of and dominion of law enforcement. You are hereby instructed to presume that said evidence was destroyed by law enforcement in bad faith and you may infer that the Donovan Derreck cell phone evidence was unfavorable to the State.

Comment:

An adverse inference drawn from the destruction of evidence is predicated only on bad conduct. *State v. Engesser*, 2003 S.D. 47, 661 N.W.2d 739, 754 (citing *United State v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000), cert. denied, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001)). An instruction on the inference that may be drawn from the spoliation of evidence is proper only when the Court makes the threshold determination that substantial evidence exists to support a conclusion:

That the evidence was in existence; that it was in the possession or under the control of the party against whom the inference may be drawn; that the evidence would have been admissible at trial; and that the party responsible for destroying the evidence did so intentionally and in bad faith.

See Engesser, supra.

(New 2004)

State v. Zephier, 2020 SD 54, ¶ 33 Jury Instruction

It is the law of this state that when property is seized by law enforcement which constitutes evidence of a crime, law enforcement must safely keep such property as long as it is required for trial and must not dispose of the same without an order of the court. It is an express finding of the Court that law enforcement violated statutory law requiring law enforcement personnel in possession of Donovan Derrek's cell phone to notify the Defendant before returning it to the owner. Had the Defendant been provided with statutorily required notice to return the seized property he would have objected and the Court would have required law enforcement to retain the cell phone.

It is for your sole and exclusive determination whether returning the cell phone to Donovan Derek without a court order in violation of law bears upon up the verdict, guilty or not guilty, and the weight to be given to such fact.

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT
3

4
5 **STATE OF SOUTH DAKOTA,**) CRI22-86
6 Plaintiff,) JURY TRIAL PROCEEDINGS
7 vs.) VOIR DIRE
8 **DREAU ROGERS,**) Volume 1 of 10
9 Defendant.) Pages 1 to 240
10
11

12 BEFORE: **THE HONORABLE MICHAEL W. DAY**
13 Circuit Court Judge
14 Deadwood, South Dakota
15 November 27, 2023 at 8:30 a.m.

16 APPEARANCES:

17
18 For the State: **MS. BRENDA HARVEY**
19 Lawrence County State's Attorney
20 90 Sherman Street
21 Deadwood, South Dakota 57732

22 **MR. ROBERT HAIVAILA**
23 Attorney General
24 PO Box 70
25 Rapid City, SD 57709

26 For the Defendant: **MR. ROBERT J. ROHL**
27 Attorney at Law
28 2902 West Main Street #4
29 Rapid City, South Dakota 57702

1 evidence in this case. Namely, touch DNA, which
2 implicates Dreau as the shooter. And I'm sure you're
3 probably thinking to yourself, "Well, my God. That sounds
4 pretty good. Why are we here? What are we doing here,
5 Mr. Rohl?"

6 Why are we here? Five material facts. There are five
7 material facts in this case that will not change no matter
8 how hard they try.

9 Fact Number 1: Law enforcement broke the law during
10 this investigation. Bold claim, I know. I'll prove it.
11 Law enforcement broke the law during the investigation.
12 One of the few that ensures citizens have the right to
13 defend themselves against government accusations.

14 Fact Number 2: Police literally gave material
15 evidence away. I'm not talking about a hubcap here,
16 folks. I'm talking about Donovan Derrek's cell phone.
17 The digital device that tracks every message he makes and
18 everywhere he goes. They gave it away without preserving
19 it and it's gone and will never be reacquired. Those
20 things have the capability of tracking your GPS.

21 Fact Number 3: Law enforcement mishandled important
22 forensic evidence in this case. They contaminated
23 forensic evidence and it rendered it useless to prove
24 anything.

25 Again, I understand. I will show you this during the

1 trial. They did.

2 Fact Number 4: Donovan Derrek's alibi is weaker than
3 you can possibly fathom. As you sit there today, I can
4 tell you, the evidence will show his alibi witness is
5 weaker than you can possibly imagine.

6 Fact 5: The material omissions of evidence or the
7 refusal or failure to consider evidence which corroborates
8 and supports exactly what Dreau said happened.

9 That is the final fact of the five facts that I'm
10 going to show you during this trial.

11 And now any single one of those facts, if proven,
12 constitutes a reasonable doubt upon which you could find
13 Dreau Rogers not guilty of murdering his wife.

14 But taken together, cumulatively, all five of those
15 facts, there is no other choice. With those five facts,
16 there is no other choice.

17 Hear me now and hear me well. Dreau Rogers will not
18 testify during this trial. He's not going to do it. Why
19 would he? He told first responders when they showed up at
20 the scene who did it. He told Spearfish detectives in
21 interview rooms in the Spearfish Police Department exactly
22 who did it. In every single way imaginable, he expressed
23 and unequivocally said, "Donovan Derrek did it." He said
24 Donovan Derrek did it when law enforcement confronted him
25 of other viable theories in which to bounce a real

1 call?

2 **A** Yes. We log it all in a service on our -- we call it CAD.

3 It's a computer-aided dispatch system.

4 **Q** So even today, you can look back and know what call came
5 in at what time?

6 **A** Yes.

7 **Q** And you've confirmed that you received a call at
8 12:48 a.m. on the 22nd of January?

9 **A** Yes.

10 **Q** Do you keep track of kind of an idea of where the
11 Spearfish police officers are at any given time during
12 their shift?

13 **A** Not specifically. But we do know if they're out
14 patrolling or at the office. And they call out when they
15 go out somewhere.

16 **Q** Okay. Around that time -- 12:48 -- did you have Spearfish
17 officers that were on duty?

18 **A** I did. I had two on duty.

19 **Q** Okay. And do you know whether they were at the office or
20 if they were out patrolling?

21 **A** They were out in cars patrolling.

22 **Q** When that call came in at 12:48 a.m., what did the caller
23 tell you?

24 **A** He said he needed an ambulance and he gave me the address
25 that he was at.

1 Q There was no mention of police?

2 A No.

3 Q Did you attempt to get more information from the caller?

4 A I did.

5 Q How was that done?

6 A I asked him what was going on. He said he would explain
7 when they got there. He wanted an ambulance and he wanted
8 them to come fast.

9 Q So he didn't mention what? You didn't know if it was a
10 heart attack?

11 A No.

12 Q You didn't have any information at that point what kind of
13 emergency?

14 A Right.

15 Q Were you able to have a complete conversation with this
16 person that was calling?

17 A No.

18 Q Why was that?

19 A He initially stated that his phone was dead and it was on
20 the charger. He tried to disconnect from me but then left
21 the line open and so he had to go into the other room.

22 MR. ROHL: I am going to object. That statement calls for
23 speculation. She doesn't know what he was trying to do
24 with his phone.

25 THE COURT: Sustained.

1 Q (By Ms. Harvey, continuing) Approximately how long did it
2 take for the first emergency person to arrive on scene?

3 A Officer Bradley was there in about two minutes. Two
4 minutes -- two and a half minutes.

5 Q Did you leave that particular 911 call open?

6 A I did.

7 Q And I don't know if everybody -- what does it mean when I
8 say "open"?

9 A I stayed on the line and listened.

10 Q How long?

11 A Over nine minutes.

12 Q Was there a reason -- is that normal? Was there a reason
13 you left it open for so long?

14 A I did because I couldn't -- he couldn't tell me what was
15 going on with the patient, so I was trying to hear what
16 was going on with the patient. Sometimes you can hear
17 people crying or yelling or...

18 Q Have you had an opportunity to review that particular 911
19 call recently?

20 A I have.

21 Q How long ago did you review that?

22 A I listened to it last night.

23 Q Last night. And if I play that call, will you be able to
24 identify your voice as well as the other individual on the
25 recording?

1 **A** Yes.

2 **Q** And when you --

3 **MS. HARVEY:** Your Honor, I would ask for the opportunity
4 to publish the 911 recording as well as the transcripts to
5 the jury at this time.

6 **THE COURT:** All right. Are you offering Exhibit 1?

7 **Q** (By Ms. Harvey, continuing) Ms. Lolley, when you reviewed
8 it last and you confirmed that it's the same recording,
9 did that appear to be a true and accurate depiction of the
10 911 call --

11 **MR. ROHL:** I have no objection to admission, Your Honor.

12 **THE COURT:** Okay.

13 **MS. HARVEY:** I would ask to admit State's Exhibit 1, Your
14 Honor.

15 **THE COURT:** All right. State's Exhibit 1 will be
16 received.

17 (WHEREUPON, State's Exhibit 1 was published to
18 the jury.)

19 **MS. HARVEY:** Stopping at six minutes, Your Honor, for the
20 record.

21 **Q** (By Ms. Harvey, continuing) Can you explain -- we were
22 hearing some other voices in the background towards the
23 end. Can you explain what that was?

24 **A** Officer Bradley arrived on scene and was talking to the
25 caller. And, I believe, at the very end, the MAG unit was

1 Q If the jury listens pretty hard, they can hear what you
2 heard?

3 A Sometimes I can get a little more background noise through
4 my headset in my ear.

5 MR. ROHL: Oh, I understand. Okay.

6 I have nothing further. Thank you.

7 THE COURT: Thank you.

8 Any redirect?

9 MS. HARVEY: Just briefly.

10 REDIRECT EXAMINATION

11 BY MS. HARVEY:

12 Q Do you recall the phone number that called in this 911
13 call?

14 A I don't recall the phone number, but I did look it up in
15 our system and it belonged to Dreau.

16 MS. HARVEY: Nothing further, Your Honor. Thank you.

17 THE COURT: Mr. Rohl?

18 MR. ROHL: No further examination.

19 THE COURT: Is Ms. Lolley excused?

20 MS. HARVEY: Yes, Your Honor.

21 THE COURT: Thank you, ma'am.

22 MS. HARVEY: And I would ask -- just to make sure that --
23 because I know there were several subpoenas out there --
24 that she is excused to not have to return.

25 MR. ROHL: Yes.

1 it took you to get to the address?

2 **A** Yes. When I first heard it, I was actually in our
3 downtown area. I was on East Hudson Street and it took me
4 approximately two minutes to get to the address.

5 **Q** And to give us an idea where, you know, geographically --
6 some businesses -- where is this address located?

7 **A** Over by Common Cents or the roundabout that is now in
8 Spearfish.

9 **Q** When you got there, what did you do first?

10 **A** When I first got there, I retrieved my medical bag. I
11 went to the east door, which would have led into the
12 basement of the residence. I knocked on that door.
13 Nobody answered, so I began to go around a carport on the
14 south side to the west side of the house.

15 **Q** And were you able to gain entry into the home from that
16 door?

17 **A** Yes. When I got to the west side of the house, I was met
18 by a male who summoned me inside of the residence.

19 **Q** And what did you find there?

20 **A** I saw a female lying motionless on the ground. I saw a
21 small amount of blood near her upper arm. She was not
22 moving; she was not breathing. She appeared to be
23 deceased.

24 **Q** Where in the home was she?

25 **A** She was in the living room.

1 investigation?

2 A Yes.

3 Q And this would be a true and accurate depiction of what
4 the setup is in the living room?

5 A Yes, it would.

6 Q And where was Destiny, if you can show us?

7 A So she was laying on the floor over here by the couch.

8 (Indicating.)

9 Q Now, when you found the individual, Destiny, laying there,
10 what was your first reaction?

11 A My first reaction was to figure out how many times she had
12 been shot and then start providing medical aid to her.

13 Q And that was done?

14 A Yes.

15 Q In general, what type of aid did you employ?

16 A Because she was not breathing and she did not have a
17 pulse, I applied an AED to her chest, followed the
18 instructions on the AED. Initially, it said "No shock
19 advised," so I started compressions.

20 Q Did you have any indication that CPR had been done prior
21 to you beginning it?

22 A I was told that it had been done.

23 Q Was there anything to the contrary when you were actually
24 starting your compressions?

25 A So when I started compressions, I could feel ribs or

1 cartilage popping underneath my hands, which is
2 typically -- I feel that the first time I do CPR if nobody
3 has done it previously.

4 Q Now, up until you saw Destiny on the floor, did you have
5 any information from dispatch or anywhere that there had
6 been a shooting?

7 A Not from dispatch, no.

8 Q While you were giving aid to Destiny, were you asking her
9 husband, Dreau Rogers, any questions?

10 A Yes, I was.

11 Q What type of questions?

12 A I was getting the basic information, you know, who had
13 shot her, how many times, where was the gun at, where did
14 the shooter go.

15 Q And what information did Mr. Rogers supply to you?

16 A Mr. Rogers supplied information that Donovan Derrek had
17 come over to the residence. There was something about an
18 argument. He heard a loud noise and Destiny fell to the
19 ground. At that point, Donovan had left, and he called
20 911.

21 Q When you arrived, Destiny and Dreau were the only ones
22 present?

23 A Yes.

24 Q And when we're speaking of Dreau and the Defendant, the
25 individual that you had contact with that day, do you see

1 take that picture?

2 **A** Yes, I did.

3 **Q** And that was at the time, probably, approximately, 1:00 in
4 the morning?

5 **A** Yes.

6 **Q** What was the reason you were wanting to capture this
7 photo?

8 **A** I knew the shell casing was a piece of evidence. Again, I
9 wanted to get a picture of it in its undisturbed area so
10 we could figure out exactly where it was, based on the
11 carpet pattern.

12 **MS. HARVEY:** I ask to admit Exhibit 5, Your Honor.

13 **THE COURT:** Any objection?

14 **MR. ROHL:** No, Your Honor.

15 **THE COURT:** Exhibit 5 will be received.

16 **Q** (By Ms. Harvey, continuing) What can you tell us about the
17 location of where the shell casing was found?

18 **A** So the shell casing was found -- when I first observed it,
19 it was on the carpet between Destiny and a round coffee
20 table.

21 **Q** And is that -- upon review, is that where it was when you
22 entered the home?

23 **A** So, as I was reviewing my body cam footage, I did discover
24 it had been on the round coffee table. During the process
25 of attempting to resuscitate her and also Dreau moving

1 around the area, it had fallen off the table and onto the
2 floor.

3 Q Did you physically touch this shell casing at any time?

4 A No, I didn't.

5 Q Did you ensure that anyone else stayed away or didn't
6 maneuver it in any way?

7 A Yes. I told EMS several times to not move the shell
8 casing while they were trying to resuscitate Destiny.

9 Q And, finally, I handed you what's been marked as State's
10 Exhibit 6. Can you identify State's Exhibit 6 for me.

11 A Yes. This is a photo of Destiny that I took during the
12 resuscitation process.

13 Q And what all is depicted on that photo?

14 A So in this photo, what is depicted is a LUCAS device,
15 which is an automated CPR device that EMS uses, an AED pad
16 that I placed on her upper chest. In addition, you can
17 see an obvious wound on her right bicep area.

18 Q And this is a photograph, once again, that you took in
19 those early morning hours?

20 A Yes, it is.

21 MS. HARVEY: Your Honor, I ask to admit State's Exhibit 6.

22 THE COURT: Any objection?

23 MR. ROHL: No, Your Honor.

24 THE COURT: State's Exhibit 6 will be received.

25 Q (By Ms. Harvey, continuing) At some point, was Destiny

1 **MS. HARVEY:** It's a body cam. There is a time restraint
2 on the amount of information any one recording can hold,
3 so it is just a continuation that's on two separate disks.

4 **THE COURT:** All right. Thank you.

5 State's Exhibits 2 and 3 will be received.

6 **MS. HARVEY:** And I would ask, as well, to have the
7 transcripts published to the jury at this time.

8 **THE COURT:** Any objection?

9 **MR. ROHL:** No, Your Honor.

10 **THE COURT:** Please proceed.

11 (WHEREUPON, State's Exhibit 2 was published to
12 the jury.)

13 **MS. HARVEY:** Just for the record, Your Honor, that was the
14 end of State's Exhibit 2. Starting State's Exhibit 3.

15 **THE COURT:** Thank you.

16 (WHEREUPON, State's Exhibit 3 was published to
17 the jury.)

18 **Q** (By Ms. Harvey, continuing) Officer, was that a fairly
19 accurate representation of the beginning of your dealings
20 on this case?

21 **A** Yes.

22 **Q** After dropping the Defendant off at the police station,
23 what did you do next?

24 **A** I returned to the residence and I was basically scene
25 security. Making sure nobody went in or out of the house.

1 A Yes.

2 Q Is that an accurate summation of what you testified to?

3 A Yes, it is.

4 Q Okay. And you did prepare a report; correct?

5 A Yes.

6 Q And in your report, you talk about what's called an AED
7 usage report. Do you remember that?

8 A Yes, I do.

9 Q Would you tell these folks what that is.

10 A So our AED that you saw in the video, it's a newer model.
11 So once I get it back to the station, it uploads to the
12 Stryker website. That is the company. And then I get the
13 usage report that shows, basically, the initial
14 information, heart rhythm, exactly what time I put the
15 pads on, ratio of CPR compressions.

16 Q And you're even more specially trained in that emergency
17 medical care trauma situation; right?

18 A Right.

19 Q And so, essentially, in sum, and according to your report,
20 you state, based on the report -- the AED report -- you
21 conclude that Destiny had been shot around the time of the
22 911 call; correct?

23 A Yes.

24 Q Okay. You testified that after the videos we watched
25 occurred, you went back to the residence and did scene

1 for you?

2 **A** The blood on her arm was still wet and her body was still
3 warm.

4 **MS. HARVEY:** Nothing further, Your Honor.

5 **THE COURT:** Mr. Rohl?

6 **MR. ROHL:** You know, there was one thing.

7 **RECROSS-EXAMINATION**

8 **BY MR. ROHL:**

9 **Q** You testified that based off of your administration of
10 CPR, that you could tell Dreau Rogers never did that;
11 right?

12 **A** I could tell that proper CPR had not been done.

13 **Q** Okay. Do you know if he's trained in the administration
14 or giving of CPR?

15 **A** No, I don't.

16 **Q** You have to push a lot -- you have to push really hard;
17 right?

18 **A** Yes.

19 **Q** Harder than you would probably think if you weren't
20 trained in it; right?

21 **A** Possibly, yes.

22 **MR. ROHL:** Okay. Thank you for your honesty.

23 **THE COURT:** Is this witness excused?

24 **MS. HARVEY:** We do reserve the right to recall. There's
25 another issue we will be calling him later in the case,

1 -- it would be to the south.

2 **Q** And that's within the city limits of Spearfish?

3 **A** Yes, it is.

4 **Q** That's also within Lawrence County?

5 **A** Yes, it is.

6 **Q** Approximately what time did you go to that residence?

7 **A** I arrived there at approximately 052 hours.

8 **Q** Those of us who hate military time...

9 **A** About 50 minutes past midnight.

10 **Q** I still have to count on my fingers every time.

11 And when you arrive, which -- what street -- where did
12 you park your patrol vehicle?

13 **A** On Saint Joe.

14 **Q** Right in front of Saint Joe.

15 And when you park on Saint Joe, where is the house?
16 Obviously, I assume you park on the right side of the
17 road. Is it on the right or left side of the road?

18 **A** Left side of the road.

19 **Q** And were you advised or did you know where to respond?

20 We've been explained it's a duplex.

21 **A** Mm-hmm.

22 **Q** Were you explained where to respond when you got there?

23 **A** Yes. Officer Bradley advised me to go to the rear
24 entrance of the home which would be the west-facing side
25 of the house.

1 Sheriff's Office and we took some initial photos.

2 Q What is the reason that that is done?

3 A Just to document the condition of the subject while they
4 are at the hospital.

5 Q I'm going to hand you what's been marked as State's
6 Exhibit 9.

7 A Okay.

8 Q Can you tell me what State's Exhibit 9 is.

9 A That is a photo of Destiny's arm taken at the ER.

10 Q That is the condition that -- and what's more specifically
11 -- why was the picture taken of the arm?

12 A Because that is where the wound was at.

13 Q So this is depicting the gunshot wound?

14 A Yes.

15 Q And is that a true and accurate depiction of what that
16 wound looked like while you were at the ER?

17 A Yes, it is.

18 MS. HARVEY: Your Honor, I would ask to admit State's
19 Exhibit 9.

20 THE COURT: Any objection?

21 MR. ROHL: No objection, Your Honor.

22 THE COURT: Exhibit 9 will be received.

23 MS. HARVEY: Your Honor, I would ask at this time to play
24 Mr. Jurgensen's body cam video. The first video. And
25 publish the transcripts to the jury at this time.

1 Q Well, I want to make sure that we don't get confused on
2 this. So I will -- what we'll do is we'll work through
3 the transcript. Okay?

4 A Okay.

5 Q And I'm going to go through things that I highlighted.
6 Would it be a fair characterization for me to say there
7 was no doubt in your mind who Dreau Rogers said did it?

8 A Who he said did it?

9 Q Yes.

10 A No.

11 Q Very clear?

12 A Yes.

13 Q Unambiguous?

14 A That's what he told us.

15 Q The other thing I would like to seek your confirmation
16 about is, sadly, in the careers that we have and you had,
17 we deal with some pretty nasty things; right?

18 A Sure.

19 Q And we can get desensitized to things that it's sad to say
20 that we do. Things like what we saw in your video?

21 A It's possible.

22 Q Dreau Rogers had just witnessed his wife die. And you
23 observed him watching that; right?

24 A Correct.

25 Q That is an incredibly traumatic thing for a normal human

1 being?

2 **A** Yep.

3 **Q** Fair?

4 **A** Fair.

5 **Q** So everything that he's giving you is in the midst of this
6 trauma?

7 **A** Yes.

8 **Q** I just wanted to make sure that we were clear that that's
9 an adequate thing for me to characterize the setting as.

10 Fair?

11 **A** Fair.

12 **Q** The representation was made very shortly after -- or all
13 of the statements that were made to you were made very
14 shortly after the 911 call?

15 **A** Correct.

16 **Q** And so for all purposes, this is all close in proximity to
17 when everything happened?

18 **A** Correct.

19 **Q** The subject matter of this case?

20 **A** Correct.

21 **Q** Okay. And so Mr. Rogers told you he, referring to Donovan
22 Derrek, keeps showing up and stuff; right?

23 **A** Yes.

24 **Q** And, of course, you weren't involved in the subsequent
25 investigation. But -- so you're unfamiliar whether or not

1 that is a corroborated statement?

2 **A** At that point, no, I was not clear.

3 **Q** Okay. And in reference to Mr. Derrek, he told you he went
4 to jail a few days ago; right?

5 **A** That's what he told me.

6 **Q** And he mentioned something that Mr. Derrek said. He used
7 the word "alibi," didn't he?

8 **A** He did.

9 **Q** He said, "Mr. Derrek wanted me to be an alibi." That is a
10 peculiar word for him to say in that time, isn't it?

11 **A** I suppose so.

12 **Q** He told you that Mr. Derrek called him -- him, being Dreau
13 Rogers -- earlier that night; right?

14 **A** That's what he told us.

15 **Q** When you arrived, he didn't have his phone on him at that
16 time?

17 **A** I don't believe so.

18 **Q** And he actually had to go be escorted back to the room to
19 get his phone off of the charger; right?

20 **A** Okay.

21 **Q** Do you agree with that?

22 **A** I don't remember if he was or not.

23 **Q** Did you hear that statement made on the video we watched?

24 **A** I don't remember hearing it, I guess.

25 **Q** Okay. You're not saying that that's not what happened,

- 1 Q Emergency medical?
- 2 A Mm-hmm.
- 3 Q And then, subsequently, Deputy Merwin arrived?
- 4 A Correct.
- 5 Q And I believe -- would that be a fair characterization of
- 6 everybody that seemed to be on scene?
- 7 A Initially, yeah.
- 8 Q Initially?
- 9 A Yeah.
- 10 Q Mr. Rogers said that he picked up that shell that was on
- 11 the floor or the couch; right?
- 12 A Correct.
- 13 Q And that he set it on the coffee table?
- 14 A He set it down somewhere. I don't remember specifically
- 15 where he said.
- 16 Q Okay. That's fair. He told you that his phone was dead
- 17 and he was running back and forth. It's on the charger in
- 18 his room.
- 19 A Correct.
- 20 Q Told you Mr. Derrek was shooting at him?
- 21 A Correct.
- 22 Q Told you Destiny was behind him?
- 23 A He initially said behind and then next to.
- 24 Q "Right next to me"?
- 25 A Yes.

1 circumstances. Also, if we tend to go a little too long
2 and you need a break, let me know, and we'll take a break.
3 Thank you.

4 Ms. Harvey?

5 **MS. HARVEY:** Thank you, Your Honor.

6 We'll publish State's Exhibit 16.

7 I will warn there's no transcript for this video. It
8 is one of the shorter ones.

9 (WHEREUPON, State's Exhibit 16 was published
10 to the jury.)

11 (WHEREUPON, State's Exhibit 16 was marked by
12 the court reporter.)

13 **Q** (By Ms. Harvey, continuing) Leaving that interview brings
14 you to roughly 5:10 in the morning. Can you tell me what
15 was going on with the investigation at that time?

16 **A** At that point, I believe we were still coordinating the
17 SRT response and trying to figure out how that was all
18 going to work out, so when the SRT was going to arrive.

19 **Q** When the SRT team did arrive, did you participate with
20 that action?

21 **A** The only thing I did is sat in their command vehicle, if
22 they had questions about the case or anything like that.
23 I did not participate with anything that was going on
24 there other than just being in the command center.

25 **Q** And would that be on scene?

1 A Yes, yep. It's actually, basically, a bus. But it was
2 parked in the driveway to the trailer court.

3 Q So you, at some point, had left the police department and
4 gone to the area near where Mr. Derrek's residence was?

5 A Yes.

6 Q And I'm sure that took some time?

7 A Yes, it did.

8 Q Is there anything else that happened that you participated
9 in from the time of ending this interview until Mr. Derrek
10 was taken into custody?

11 A I guess, at this point, that's the only thing that I can
12 think of. We were, again, coordinating with other
13 agencies and figuring out how we were going to get him
14 into custody before we moved on.

15 Q When you said you were in the command center, you were on
16 scene, but you weren't — did you see when Mr. Derrek was
17 taken into custody?

18 A I did not.

19 Q Are you aware of, ultimately, when Donovan Derrek was
20 taken into custody by the SRT team?

21 A I believe it was around 9:00 in the morning.

22 Q And what — what's the next thing — so I assumed you were
23 notified that he was apprehended while you were in the
24 command center?

25 A Yes.

1 Q Towards the end of your interview, did Mr. Derrek seem to
2 have a different idea of why he might be at the police
3 station?

4 A Yes, he did.

5 Q How did that change?

6 A He had actually -- once he got to the police department,
7 the gunshot residue kit was actually completed on him by
8 Agent Eggers. So he knew that they collected gunshot
9 residue from his hands.

10 When he was transported to the police department, the
11 deputy actually drove down Saint Joe and then turned west
12 on Jackson Boulevard -- excuse me -- east on Jackson
13 Boulevard towards the police department. And Dreau's
14 residence is just a half block down. So he actually seen
15 police tape around the residence.

16 Q So Saint Joe Street -- one of the main roads -- is a half
17 a block from the roads in question?

18 A Approximately.

19 Q Did Mr. Derrek try to provide you with any kind of proof
20 or anything other than telling you that he was with this
21 other gentleman?

22 A He said that the other gentleman's name was Alan Reddy and
23 he said, "It's all going to be on my phone." He said,
24 "The phone will have my location for the night." And
25 stated that he was with Alan during this time frame that

1 **THE COURT:** Are we ready for the jurors?

2 **MR. ROHL:** Yes, Your Honor.

3 **MS. HARVEY:** Yes, Your Honor.

4 **THE COURT:** All right. Please bring in the jurors.

5 (WHEREUPON, the jury entered the courtroom.)

6 **THE COURT:** Thank you. Please be seated.

7 Are the parties satisfied these are the jurors you
8 have chosen in this case?

9 **MR. ROHL:** Yes, Your Honor.

10 **MS. HARVEY:** State is.

11 **THE COURT:** Thank you.

12 Detective, you're still under oath.

13 Ms. Harvey, you may continue.

14 **MS. HARVEY:** Thank you, Your Honor.

15 **Q** (By Ms. Harvey, continuing) We just finished watching the
16 second interview with Donovan Derrek. After that was
17 completed, I think shortly after 11:00 that morning, what
18 was your next course of action?

19 **A** Next course of action was to actually locate Alan. Alan
20 Reddy.

21 **Q** And was that done?

22 **A** Yes, it was.

23 **Q** And did you visit with Mr. Reddy about Donovan Derrek's
24 statements?

25 **A** Yes, we did.

1 the travel of the bullet from one side of the body to the
2 other. Actually, how it traveled through the body. So
3 that's actually been placed in the hole on each side, so
4 that you get an idea about travel path.

5 Q And, finally, can you take a look at State's Exhibit 31,
6 please?

7 A Exhibit 31 is the same thing. You just see it from the
8 opposite direction. So you see it on the exit side of the
9 body or where the bullet would have lodged, essentially.
10 Can everyone see okay?

11 Q Thank you.

12 Other than the bullet, was there any other evidence
13 that you collected during the autopsy and brought back
14 with?

15 A The only other things we collected, I believe, were hair
16 ties and underwear. A pair of underwear also.

17 Q And just to state — obviously, going back to the 22nd.
18 At some point, did you make a determination and place the
19 Defendant under arrest?

20 A Yes, we did.

21 Q Did you have another opportunity to visit with Donovan
22 Derrek regarding his version of what had happened?

23 A Yes, I believe that was on the 28th. January 28th.

24 Q Almost a week later?

25 A Yes.

- 1 A Yes.
- 2 Q Okay. And so you were obviously in the room when I made
3 representations to this jury in opening statement; right?
- 4 A Yes.
- 5 Q And I told the jury I would prove five things; right?
- 6 A Yes.
- 7 Q Not obligated to prove anything, but I told them I would
8 prove five things; right?
- 9 A Yes.
- 10 Q Okay. So for purposes of trying to make this as slick as
11 possible, I wrote down -- and I would just like your
12 confirmation on that -- the five things I said I would
13 prove; right? So on this piece of paper, I wrote five
14 material facts; right?
- 15 A Yes.
- 16 Q And I'll just -- five material facts; correct?
- 17 A Yes.
- 18 Q Fact number one: The police broke the law; right?
- 19 A That's number one.
- 20 Q That's what this says. I'm not saying you agree to that.
- 21 A Yes.
- 22 Q We'll talk about that. Okay.
- 23 A Okay.
- 24 Q Number two: Police gave away -- I called it material
25 evidence -- in my opening statement. Gave away the phone;

1 right?

2 A Yes.

3 Q That's what I have written down there. Fact number three:

4 The police mishandled forensic evidence. That's what I
5 have written down?

6 A Yes.

7 Q Fact number four: Donovan Derrek's alibi is weak?

8 A Yes.

9 Q Number five: I have material omissions; right?

10 A Yes.

11 Q Is that generally what I told these folks over here that I
12 would show them during this trial?

13 A Yes.

14 Q Okay. And so you spoke about the phone, of course, that
15 was seized from Mr. Derrek -- Donovan Derrek -- during the
16 investigation; right?

17 A Yes, I did.

18 Q And so before you seized it, law enforcement executed
19 what's called an affidavit; right?

20 A As far as the search warrant goes.

21 Q Sure.

22 A Yes.

23 Q What is an affidavit? Would you tell these folks what
24 that means.

25 A An affidavit is basically you're requesting that the judge

1 review your probable cause -- your paperwork -- to approve
2 a search warrant for a specific item.

3 Q If I put it in a little different terms, it's a sworn
4 statement. Would that be accurate?

5 A Yes.

6 Q You make that statement under oath; right?

7 A Yes.

8 Q And there was an affidavit in support of request for
9 search warrant for the cell phone belonging to Donovan
10 Derrek; correct?

11 A Yes.

12 Q Is that what I just handed you?

13 A Yes, it is.

14 Q Okay. And within the contents of that sworn statement by
15 law enforcement, you explained to the judge why you want
16 to have access to the phone; right?

17 A Yes. This would have been the one in June. Not the
18 original.

19 Q Oh, good point. We'll get to the one in June. But that
20 happened twice; correct?

21 A Yes. I didn't do the search warrant for the first one. I
22 did the search warrant for the second one.

23 Q Detective Derby actually did the first one?

24 A I believe that's correct.

25 Q Okay. And so what did you put in that sworn statement as

1 12:47 and change, but very close to that; right?

2 **A** Yes.

3 **Q** Okay. And so would you agree with me that information
4 that could be provided to these folks over here as to
5 Donovan Derrek's exact location at that time is material
6 evidence in this case?

7 **MR. HAIVALA:** I'm sorry. Could you say that last part? I
8 didn't hear you. I'm sorry.

9 **Q** (By Mr. Rohl, continuing) Did you hear me?

10 **A** Yes, I would say it is material evidence.

11 **Q** I appreciate that. And would you agree that, under the
12 law, law enforcement is the custodian of evidence --
13 material evidence in a crime?

14 **A** Yes.

15 **Q** And you would agree that South Dakota law imposes that
16 duty on law enforcement to maintain evidence seized in
17 conjunction with an investigation; right?

18 **A** Yes.

19 **Q** And so Donovan Derrek's phone was evidence seized in
20 conjunction with an investigation; right?

21 **A** Again, once it was originally taken, it was originally --
22 yes, it was.

23 **Q** Okay. And, according to the law, law enforcement has a
24 legal duty not to return that property unless notice is
25 given to the defendant; correct?

1 A That's what I've learned recently, yes.

2 Q And so that law was broken, wasn't it?

3 A The cell phones were -- the cell phone was returned to
4 Donovan, yes.

5 Q Sure. And that would actually be 23A-37-14, return of
6 property of victims seized as evidence; and then
7 23A-37-15, notice to defendant of return; right?

8 A Yes.

9 Q So I have your permission to put your initials under
10 number one then; right?

11 A Yes.

12 Q That is a fair thing that I just showed this jury right
13 here; correct?

14 A Yes.

15 Q Thank you.

16 There's another law I want to talk to you about. And
17 it's in relation to something you testified on direct.
18 And you said that SRT -- or what I kind of commonly refer
19 to as SWAT -- was brought in to apprehend Mr. Derrek;
20 right?

21 A Yes.

22 Q And that was done, if I remember correctly, for the
23 protection of Mr. Derrek's children or at least one of the
24 reasons; right?

25 A Yes, that would be one of the reasons.

1 **MR. ROHL:** I am an 80-year-old man stuck in a 38-year-old
2 body.

3 **Q** (By Mr. Rohl, continuing) So while we're getting that up,
4 I am going to hand you more documents. Because the
5 transaction of the phone coming and going from Rapid City
6 to the Spearfish Police Department is all documented;
7 right?

8 **A** Yes.

9 **Q** We're going to talk about those documents. Okay? I am
10 going to hand you what is marked "Rogers 375." You
11 testified that when an extraction attempt occurs, a report
12 is generated with it; correct?

13 **A** Yes.

14 **Q** And that is the report; right?

15 **A** This is one of the reports, yes.

16 **Q** And, specifically, that is the report associated with item
17 21; right?

18 **A** (Peruses document.) Yes, it is.

19 **Q** Donovan's phone?

20 **A** Yes, that's correct.

21 **Q** And so "Rogers 228," which has been published for the jury
22 — does that look like the same document that I handed you
23 on the stand?

24 **A** Yes.

25 **Q** Okay. The only difference is I have two phones

1 City Police Department back to us.

2 Q And does it appear to be a true and accurate copy?

3 A Appears to be, yes.

4 Q Okay. I'm going to take this back from you, just so I can
5 ask Ms. Glanzer to publish Bates stamp 371, please.

6 Okay. The only difference between the document that I
7 handed you and the one on the screen is I made highlights
8 on this document; right?

9 A Yes.

10 Q And I highlighted the moto cell phone XTP2005; right?

11 A Yes.

12 Q Which is the same — which is the same phones that was
13 sent to Rapid City originally; right?

14 A I believe so.

15 Q And the same thing with regard to that one right there;
16 correct?

17 A Yes. They're labeled differently, but, yes.

18 Q And so that was returned to the Spearfish Police
19 Department on February 1, 2022. Unambiguously undisputed;
20 right?

21 A Yes.

22 Q Okay. And with regard to the documentation with the
23 phones, you received these two extraction reports;
24 correct?

25 A Yes, correct.

1 **MR. ROHL:** And so, Ms. Glanzer, I am going to have you
2 publish 375 for me.

3 **Q** (By Mr. Rohl, continuing) Okay. This is item 21, which
4 corresponds with the property inventory receipt we just
5 looked at; right?

6 **A** Yes.

7 **Q** This is Donovan Derrek's phone; right?

8 **A** Yes, correct.

9 **Q** The phone he told you in every single interview exonerates
10 him from responsibility; right?

11 **A** Yes.

12 **MR. ROHL:** And so if we go down a little bit -- stop.

13 **Q** (By Mr. Rohl, continuing) We get to see the examiner's
14 name; right?

15 **A** Yes.

16 **Q** Detective Almeida. The date that he tried to perform the
17 exam, which is January 26, 2022; right?

18 **A** Yes.

19 **Q** The examiner agency, Rapid City ICAC; right?

20 **A** Yes.

21 **Q** And the software tool used for the report; right? Which
22 is Cellebrite.

23 **A** Yes.

24 **Q** And in the notes, what does it say there?

25 **A** It says the phone was not supported for lock bypass.

1 Unable to process further.

2 Q And we agreed that is material evidence; right?

3 A Yes.

4 Q And we can agree that had that document been looked at, it
5 would have been known that there was no examination
6 completed; right?

7 A Yes.

8 Q Whose responsibility was it to look at that?

9 A Essentially, mine.

10 Q Okay. The next thing that I have up --

11 MR. ROHL: You can take that down, Jodi. Thank you.

12 Q (By Mr. Rohl, continuing) Detective Hofmann, one and two
13 really play off of one another. Fair?

14 A Yes.

15 Q The difference is number one also includes the mandatory
16 reporter law?

17 A Yes.

18 Q But can we agree that number two, as I represented to the
19 jury in opening statement -- I can put your initials
20 there?

21 A I gave the phone back, yes.

22 Q Now, with regard to number three, we haven't had a chance
23 to get into that in much detail yet or, at least, I
24 haven't with the jury; right?

25 A Yes.

1 that?

2 **A** Probably, yes.

3 **Q** Okay. That's fair. I will do that.

4 Do you remember the length of the encounter that
5 Mr. Reddy initially indicated to you?

6 **A** I -- you know, I don't know for sure. I thought it was
7 11:50 to 1:20 was the time frame or thereabouts.

8 **Q** Well, I think it was after the second time. But the first
9 time that you interviewed him, it was approximately 40 to
10 50 minutes; right?

11 **A** I would have to go back and look. I don't know.

12 **Q** And when we go back and look at all of these other prior
13 encounters, based off of the text message, every other
14 encounter was 40 to 50 minutes; right?

15 **A** Again, I haven't seen those. I don't know.

16 **Q** And so the distance from Dreau Rogers's residence to Alan
17 Reddy's is a little over a mile; right?

18 **A** Approximately, yes.

19 **Q** And it would be about a five or six-minute drive; right?

20 **A** Yes.

21 **Q** And so by virtue of that 1:23 a.m. picture, there is
22 nothing that precludes Mr. Derrek, from a forensic
23 perspective, from being at Dreau Rogers's at 12:48; right?

24 **A** The information we were going off of also was statements.
25 Statements by Alan Reddy that he was at the residence with

1 him.

2 Q Right. I appreciate you telling me that.

3 Part of what this jury has to rely on in order to get
4 to the State's alibi is reliance on Donovan Derrek and
5 Alan Reddy. You gotta trust what they said; right?

6 A In part.

7 Q In part. But there is nothing forensically that shows
8 Donovan Derrek was not here at that time; right?

9 A Again, the only thing that would be would be the location
10 data off the phones, I believe, or from the phones.

11 Q There is no location data from Mr. Derrek's phone, because
12 you guys gave it back to him without protecting that
13 information?

14 A Well, I believe that was actually — I don't know if it
15 was Google. But, again, that is going to be something
16 that Lieutenant Smith — now Lieutenant Smith — will have
17 to answer.

18 Q Have you looked at that report? That CDR report that
19 you're talking about.

20 A I have.

21 Q Okay. I appreciate you bearing with me. There's a lot of
22 information; right?

23 A Yes, there is.

24 Q The report that you looked at —

25 MR. ROHL: If I may have permission to approach, Judge?

1 Q And, of course, that's another factor that has to be
2 considered when we're trying to parse out what happened;
3 correct?

4 A Yes.

5 Q And so, of course, you know, when Mr. Derrek's test was
6 sent to the lab for examination, there was no indications
7 of what I'll call mishandling of evidence at that time;
8 right?

9 A Correct.

10 Q It wasn't until you got the tests back that that became
11 worthy of investigation; right?

12 A Once we got the results back, we -- yes. That would be
13 correct.

14 Q Because the results conflict with your case; right?

15 A We didn't expect that he would have gunshot residue on his
16 hands -- Donovan.

17 Q Because that would indicate that he was at Dreau's house?

18 MS. HARVEY: Objection. Calls for speculation.

19 THE COURT: Sustained.

20 Q (By Mr. Rohl, continuing) What the Government is going to
21 present this jury with, as far as evidence is concerned,
22 is that the gunshot residue placed on Donovan's hands was
23 done unintentionally during his apprehension. Is that
24 fair?

25 A That's fair.

1 Q And so whether or not Donovan had gunshot residue on his
2 hands is material evidence in this case too; right?

3 A It is.

4 Q That's why you did it; right?

5 A That's why we originally took the gunshot residue or did
6 the test.

7 Q And so we can, of course, agree that it wasn't Dreau's
8 fault that gunshot residue tests with relation to Donovan
9 were tampered, according to the Government; correct?

10 **MS. HARVEY:** Objection. Misleading the witness on the
11 facts, Your Honor.

12 **THE COURT:** Overruled.

13 **THE WITNESS:** One more time, please. I'm sorry.

14 Q (By Mr. Rohl, continuing) It was a bad question. You, of
15 course, let me know when I ask a bad one. I'll be more
16 clear.

17 Law enforcement's obligation is to secure the scene
18 and secure the evidence; correct?

19 A Yes.

20 Q Gunshot residue is evidence; correct?

21 A Yes, it is.

22 Q Gunshot residue evidence and the appearance or lack
23 thereof or existence or lack thereof on Mr. Derrek's hands
24 is evidence in this case; correct?

25 A Yes.

1 Q Dreau Rogers had no ability to preserve that evidence, did
2 he?

3 A No.

4 Q That was law enforcement's obligation; right?

5 A Yes.

6 Q And so with relation to the gunshot residue on
7 Mr. Derrek's hands — that was mishandled forensic
8 evidence; correct?

9 MS. HARVEY: Objection. Assumes facts not in evidence.

10 THE COURT: Overruled.

11 A So — and, again, I wasn't there for him being taken into
12 custody and the only information I have is the results.

13 Q (By Mr. Rohl, continuing) Sure.

14 A That came back.

15 Q But once the results came back, you knew that you needed
16 to figure out a way to try to make this fit within your
17 case; right? Because it is your case?

18 A It's my case.

19 Q And so you had to try to figure out how or why gunshot
20 residue could get on his hands that didn't incriminate
21 Donovan; right?

22 A Had to try to determine — yes, why he's got gunshot
23 residue on his hands.

24 Q And so the Government's position -- your position to the
25 jury is that that residue got put on there — put on

1 added, about this case. Nothing. That's my response.

2 **THE COURT:** All right. Let's get to your motion to
3 dismiss.

4 **MR. ROHL:** Understood, Your Honor.

5 I will simply rely on the contents of my brief. Thank
6 you.

7 And I'm sorry that I got passionate. There's no place
8 for that. I just wanted to make a record in relation to
9 the factual allegations that were made.

10 **THE COURT:** All lawyers are passionate.

11 Mr. Haivala, response?

12 **MR. HAIVALA:** I'll just simply say I can't read the man's
13 mind. He sent me an email saying he had the reports.
14 Okay. So I can't read what he's telling to me.

15 Second, to say that this requirement of dismissal at
16 this stage, I sincerely disagree. The State has provided
17 tons and tons of information.

18 Based upon the email I received by Mr. Rohl, I assumed
19 he had the reports of SRT Tony Harrison.

20 So I think it's misplaced what the -- in order to,
21 number one, grant a mistrial, you have to show that
22 there's prejudice. I don't think there's any prejudice
23 here to begin with.

24 I looked at the SRT reports that came in yesterday.
25 There was nothing in there that I saw -- and I understand

1 it's my side of the street -- that showed that he had not
2 gotten any information that was -- that he had been
3 prejudiced.

4 All of those SRT reports are basically people who
5 talked about standing by the BearCat and -- which is the
6 big assault machine -- or setting up a perimeter. I know
7 you read them.

8 The only person who really had hands-on experience
9 with Mr. Donovan Derrek that day was Chad Sayles, who was
10 testifying yesterday.

11 So I take issue, if there was any prejudice. I don't
12 think mistrial was appropriate and I certainly don't think
13 dismissal is appropriate either.

14 I refer Court and counsel to *State v Anderson*.
15 Wherein to justify a mistrial, there has to be an actual
16 showing of prejudice. I don't think there was a showing
17 of prejudice.

18 And, by the way, he released Mr. Harrison from the
19 subpoena. I did not tell Mr. Harrison to try to go talk
20 him out of it. I tried to accommodate the defense. They
21 didn't want to do it. I understand. I'm fine with that.

22 But he subpoenaed Mr. Harrison, head of SRT. Tells me
23 he knew about Mr. Harrison, which he's admitted. He
24 released him from the subpoena. The State didn't tell him
25 to do that.

1 Thank you.

2 **THE COURT:** Thank you.

3 I didn't read the motion as a motion for a mistrial.
4 I read it as a motion to dismiss. Based on three things,
5 which I'll kind of intertwine.

6 One is, originally, when law enforcement allowed
7 Donovan Derrek to go to the jail and talk — attempt to
8 talk to Mr. Rogers. That — we had a hearing on that.
9 There was a motion to suppress filed. I granted that
10 motion to suppress. And I'll get back to that in a
11 minute.

12 The second is the SWAT reports. I find that the State
13 did not have those reports, the Defendant did not have
14 those reports.

15 Yesterday, Mr. Haivala, as an officer of the court,
16 said "I don't have them either." I believe him. He
17 didn't have them. I believe Mr. Rohl didn't have them.
18 There were 50-some pages of information that was provided
19 yesterday.

20 Mr. Rohl made a motion for a mistrial based upon
21 failure to comply with discovery; that there could have
22 been Brady material in those reports. I am not going to
23 judge whether or not there was or wasn't, because we have
24 an officer on the stand that Mr. Rohl has the opportunity
25 to cross-examine.

1 However, I did allow — we adjourned at — I forget —
2 10:00. And I gave Mr. Rohl the rest of the day to get the
3 reports and to go through them.

4 Those were emailed to me yesterday. I reviewed them
5 all. And so I think that grounds for a mistrial, based
6 upon lack of discovery, has been cured by the opportunity
7 to look at all of the information and question the witness
8 or call a witness, based upon that information.

9 The third is Donovan Derrek's phone. It's clear, as
10 the State's witnesses testified, that his phone was
11 material evidence in this case. It was seized, pursuant
12 to a search warrant, and he was — Mr. Derrek apparently
13 gave law enforcement the password. They sent it to ICAC.
14 The report came back. The report wasn't read for a number
15 of months in the interim. They gave Mr. Derrek his phone
16 back. Thought it had been downloaded, but it wasn't.
17 That was clearly a mistake. Clearly, I am going to say
18 negligent on behalf of law enforcement.

19 So then after they figure out — after they review the
20 ICAC report and find out it's not downloaded, they try to
21 get the phone back. Of course, it's gone. There's new
22 phones. They dumped those. Sent those to ICAC. That
23 information was gone.

24 I don't find that that is bad faith on behalf of law
25 enforcement. I find it is negligent, clearly.

1 And the officer admitted. "That is on me," he said.
2 And, unfortunately, it is on him.

3 However — and then you have to take all three,
4 because I think that's what Mr. Rohl is getting at.
5 You've got the original issue, which I suppressed the
6 discovery issue, which we dealt with yesterday, and then
7 the phone issue.

8 Well, the phone issue has been in existence since June
9 of 2022 or so. We knew, at least at that point, that the
10 phone was not downloaded even though it's material
11 evidence.

12 So we've had at least over a year and a half now to
13 deal with that issue. It was never brought up prior to
14 dismiss. It's brought up, basically, after our first week
15 of trial.

16 So I do not find that that is grounds to dismiss this
17 case or at least the murder charges: Count I and II or IA.

18 And so I am going to deny the motion to dismiss.

19 **MR. HAIVALA:** Your Honor, may I respectfully correct the
20 Court?

21 **THE COURT:** Go ahead.

22 **MR. HAIVALA:** It's the data, not the phone.

23 **THE COURT:** Well, I understand. The download information
24 off the phone.

25 **MR. HAIVALA:** And the reason I correct it is not to be

1 questions to someone else?

2 **A** Yes, sir.

3 **Q** Okay. As far as your understanding of what the data
4 shows, are you comfortable talking about that?

5 **A** As far as what the data provided and what it showed?

6 **Q** Right. Can I ask you questions about what your
7 understanding is of it?

8 **A** Oh, that will have to go to the person who ingested that
9 data to give us the report.

10 **Q** Okay. Have you looked at the report?

11 **A** Very briefly.

12 **Q** Okay.

13 **MR. ROHL:** I don't have anything further for the witness.

14 **THE COURT:** Thank you.

15 Mr. Haivala?

16 **REDIRECT EXAMINATION**

17 **BY MR. HAIVALA:**

18 **Q** So, as I understand it -- as I understand it, Officer,
19 based on cross-examination, are there two ways you get
20 location data off phones and cell towers?

21 **A** There's many different ways you can get locational data.
22 All I can tell you is CDR is one of those ways.

23 **Q** Okay. What are some other ways of doing it?

24 **A** Other way is you can use an actual physical device might
25 have some data in there to provide you. There is a chance

1 —

2 Q You answered my question.

3 A Okay.

4 Q Thank you.

5 The South Dakota Forensic Laboratory contacted you to
6 do these tests; fair?

7 A Yes. Yes, they did.

8 Q They sent you these two exhibits that are in front of you
9 there and said, "We want you to run tests on this."
10 Right?

11 A That's correct.

12 Q And so you did that; correct?

13 A Yes.

14 Q And this is the report right here that was generated as a
15 result?

16 A Yes.

17 MR. ROHL: Okay. And so — Jodi, will you scroll down a
18 little bit?

19 Q (By Mr. Rohl, continuing) It says "Particles of gunshot
20 residue were identified on the left hands of Dreau Rogers.
21 Gunshot residue can be deposited on the skin by
22 discharging a firearm, being near a firearm, or coming in
23 direct contact with an object or person or transferring
24 gunshot residue." Correct?

25 A That is correct.

1 A I am.

2 Q And according to the Kansas City Crime Lab's mission
3 statement, your goal is to provide testimony for both the
4 prosecution and the defense; right?

5 A Yes, I'm here on behalf of the Court. That is correct.

6 Q The exact statement is expert testimony is provided in all
7 disciplines to aid the prosecution and defense of criminal
8 defendants; right?

9 A Yes.

10 Q The presence of gunshot residue, if you know, on Donovan
11 Derrek could indicate that he was around a gun that was
12 shot or that he shot it; correct?

13 A That is one of the — I'm sorry — two of the three
14 scenarios. That's correct.

15 Q Okay. If the Government argues — if — that Donovan
16 Derrek's gunshot residue tests were transferred — or was
17 the result of the third conclusion — are you still with
18 me?

19 A Yes.

20 Q That would mean, during the collection, it was
21 contaminated; correct?

22 A As far as coming in contact with another object or
23 surface?

24 Q Correct.

25 A Yes. That would be a form of contamination that Donovan

1 **THE WITNESS:** Stand up?

2 **MR. ROHL:** Yes, please do.

3 **Q** (By Mr. Rohl, continuing) Same question. Is that a clean
4 glove?

5 **A** I do see some material on the glove.

6 **Q** Okay. And, specifically, if we look down on the
7 right-hand corner, there seems to be a powdery substance
8 there. Fair?

9 **A** I see -- yeah. I see what you're pointing out there, yes.

10 **Q** Okay. And so the rules and procedures manual says it
11 should be handled with clean gloves; right?

12 **A** What rules and procedures manual?

13 **Q** Well, the Rapid City Police Department --

14 **A** Yeah. Handling with clean gloves makes sense, yeah.

15 **Q** Okay. So can we agree there's more forensic evidence sent
16 in for testing to handle the dirty gloves?

17 **A** Yeah, whatever is on there.

18 **MR. ROHL:** Jodi, could you pull up 681 for me.

19 **Q** (By Mr. Rohl, continuing) So image 681 -- that's a picture
20 of the pistol right in front of you there; correct?

21 **A** Yep.

22 **MR. ROHL:** And would you zoom in on the gloves there for
23 me?

24 **Q** (By Mr. Rohl, continuing) Would it be fair for me to
25 characterize that bullet as a piece of material evidence?

1 A Yes.

2 Q And that's the bullet Mr. Haivala had you testify about;
3 right?

4 A That's correct.

5 Q Okay. And, again, can we agree those gloves there are
6 dirty?

7 A There is some substance on those gloves, yeah.

8 Q So to cut to the chase, the rules and procedures manual
9 exists to avoid cross-contamination; right?

10 A Yes.

11 Q And the purpose of clean gloves is to avoid what's called
12 cross-contamination; right?

13 A I would agree, yes.

14 Q Can we agree that Dreau Rogers's DNA is going to be all
15 over his house?

16 A It would be safe to assume it would, yeah.

17 Q And that's why it's important to change gloves; right?

18 A Yes.

19 Q I'm just going to grab a marker here real quick, Agent
20 Larson. I just want to darken this.

21 MR. ROHL: I have no further questions, Your Honor.

22 THE COURT: Thank you.

23 Mr. Haivala?

24 MR. HAIVALA: A couple questions.

25 Do you mind if I use your exhibits?

1 **THE COURT:** Okay. Fine. Let's bring in the jury.

2 (WHEREUPON, the jurors entered the courtroom.)

3 **THE COURT:** Are both sides satisfied these are the jurors
4 you have chosen in this case?

5 **MR. ROHL:** Defense is, Your Honor.

6 **MR. HAIVALA:** State is.

7 **THE COURT:** State may call its next witness.

8 **MR. HAIVALA:** State would call Sean Kennedy.

9 **SEAN KENNEDY,**

10 after having been first duly sworn,
11 testified as follows:

12 **DIRECT EXAMINATION**

13 **BY MR. HAIVALA:**

14 **Q** Good morning.

15 **A** Good morning.

16 **Q** State your name for the record, please.

17 **A** Say that again.

18 **Q** I apologize. We're in an old courtroom. Not very set up
19 for technology.

20 State your name for the record, please.

21 **A** My name is Sean Kennedy, S-e-a-n K-e-n-n-e-d-y.

22 **Q** And what is your name and title?

23 **A** I am a special agent with the Federal Bureau of
24 Investigations.

25 **Q** And how long have you been with the FBI?

1 A For about eight and a half years.

2 Q And as far as education, how far did you go in college?

3 A I graduated from college with a bachelor's degree.

4 Q And what college did you go to?

5 A I went to University of Southern California in Los
6 Angeles.

7 Q You're a Trojan?

8 A I was.

9 Q Okay. How were you employed prior to being a special
10 agent for the FBI?

11 A Just prior to joining the FBI, I worked for a company
12 called Bode Technology. For Bode, I worked as a
13 contractor at the FBI lab in a unit called Terrorist
14 Explosive Device Analytical Center.

15 Q We're going to be talking a lot of big words here.

16 Let me ask you this. Your college degree — what was
17 it in?

18 A It was in biomedical engineering.

19 Q So are you an engineer?

20 A I have a degree in engineering. I'm a special agent. I'm
21 not an engineer.

22 Q Okay. Where are you employed now?

23 A Currently, I am part of the Cellular Analysis Survey Team
24 or what we call CAST. As part of CAST, I have three
25 primary responsibilities.

1 and robberies.

2 Q So let me ask you this: What is historical cell site
3 analysis?

4 A In the most basic terms, historical cell site analysis is
5 determining the general location of a phone at a given
6 date and time.

7 Q And what is the purpose of the cell site analysis?

8 A The purpose of it is to determine the general location of
9 a phone as it relates to some type of incident: a
10 homicide, carjacking. Really, any type of case where you
11 want to know where a phone was located when an incident
12 occurred.

13 Q As a part of CAST, have you received any specialized
14 training regarding phones, technology, or historical cell
15 sites?

16 A Yes, I have.

17 Q And please explain the training you received.

18 A To become a member of CAST, you go through around seven
19 weeks of training that takes approximately two years to
20 complete. The first week of that training is what we call
21 our CAST basic class. We are introduced to call detail
22 records, tower lists, and mapping software for the first
23 time.

24 The call detail records are what make your phone go.
25 It has the dates and times for phone calls and text

1 **A** If your phone is on, timing advance data is constantly
2 being generated for it. The problem with timing advance
3 data is it's very voluminous. It might occur every 30
4 seconds to a minute. And phone companies have to manage
5 that data.

6 In the case of Verizon, they have — their timing
7 advanced data is only maintained for seven days.

8 This search warrant that I received the data for was
9 responded to after the seven-day window. So a lot of the
10 data from Verizon was lost.

11 The data that was shown here is specific to what's
12 called dropped calls. Verizon will keep their dropped
13 calls for longer in their network. They maintain that
14 data for 30 days.

15 When the search warrant was responded to was within
16 that 30-day window, which is why we have the timing
17 advanced data shown here.

18 If it was responded to in the seven-day window --
19 assuming the phone was still on during this entire time
20 frame — there would be a lot more data than what is shown
21 here. You should see it probably every minute.

22 **Q** Okay. So we understand the slide. You mentioned — it
23 looks to me there's a gap in time and the cell phone not
24 being used. Am I correct?

25 **A** That is correct. From 10:47 on the 21st to 1:45 on the

1 22nd, there is no timing advance data or cell tower
2 sector information that helps us locate the phone.

3 Q So the person wasn't using the phone?

4 A From what I can tell, there wasn't usage on the phone. I
5 can't say the person wasn't scrolling through their
6 contacts, going through photos, but there wasn't any calls
7 generated.

8 Q Still, the phone is generating a signal to the cell tower;
9 am I correct?

10 A If it's on, it would have been communicating with the cell
11 tower. But because the search warrant was done after the
12 seven-day retention window for this type of data from
13 Verizon, we don't have all of that data.

14 Q Okay. So I'm clear, you have an opinion as to the
15 location of the Donovan phone between 1/21, 10:18 p.m.,
16 and 1/22, 1:52 a.m. And that's the location of the phone?

17 A That's a little broad. I would expect the phone to be
18 somewhere in those arcs between 10:18 and 10:47 p.m. And
19 then again between 1:45 and 1:52 a.m. I can't tell you
20 where the phone is located between 10:47 p.m. and
21 1:45 a.m. There's no activity that I could map to give
22 you an opinion about the location of the phone during the
23 time frame.

24 Q Okay. Go to the next slide, please.

25 What's this slide of?

1 So if you type in a code into your phone -- if you
2 tried to type in the phone number to the White House and
3 you hit "send," if it starts ringing, that call will -- it
4 connects. But if you typed in "Star, 1, 2, 3, 4, pound,"
5 it's just going to -- you hit the green button and send
6 it, it's just going to make the noise like the phone
7 doesn't connect, because that's not actually a phone
8 number you can dial. That's kind of what's occurring
9 here.

10 Q Well, let's do that. I am going to Google "Star 2, 1
11 call." Okay?

12 A Okay.

13 Q And, essentially, what information does it generate?

14 A The first result is from Probes.com. It says "Can calling
15 Star, Pound, 2, 1, Pound reveal an FBI phone wire tap?"

16 Q That's really interesting, isn't it?

17 A There's a lot of interesting things on the internet. I
18 don't think that actually would do anything for you.

19 Q But that's the number that Donovan Derrek called at
20 1:45 a.m., wasn't it?

21 A I don't recall the exact number. But I recall a bunch of
22 service-type codes dialed in there. If you want to see
23 the exact number, I'd have to look at the call detail
24 records.

25 Q And you're familiar with mobile device examinations;

1 Again, I don't have any timing advance data or any
2 call detail records indicating where that phone was
3 located.

4 But based on the text message content, in my opinion,
5 having reviewed hundreds — hundreds of phones looking at
6 text message content, I think the phone is likely at 311
7 Evans Lane, because I was told that is actually where the
8 person he was texting lived.

9 And the nature of their conversations throughout the
10 day are very sexual in nature. And then he sends a
11 message at 1:42 a.m. saying "Thank you" and referring to
12 something sexual in nature.

13 **Q** So as I understand your testimony then, at 12:47, you
14 believe that's where the phone is located?

15 **A** Again, I don't know exactly where it's located. Based on
16 the text message content, I would assume he's with the
17 person he was texting —

18 **MR. ROHL:** I don't think that is a scientific opinion,
19 Your Honor.

20 **THE COURT:** Overruled.

21 **Q** (By Mr. Haivala, continuing) To be clear, you're talking
22 about the Donovan Derrek phone?

23 **A** Yes, I'm referring to the Donovan Derrek phone. But,
24 again, I don't have location data or timing advance data
25 to give you that opinion.

1 **A** I was in the presence of Mr. Reddy when he went to that
2 information — the detail page.

3 **Q** Okay. And what did that detail page show as to when that
4 picture was taken?

5 **A** The picture — it shows the picture was taken January 22,
6 2022, at 1:23 a.m.

7 **MR. ROHL:** I have no objection. Thank you.

8 **Q** (By Ms. Harvey, continuing) Sir, I'm handing you what's
9 been marked as State's Exhibit 63. Can you tell me what
10 is depicted in State's Exhibit 63?

11 **A** Digital messages from a conversation between Alan Reddy
12 and Donovan Derrek.

13 **Q** And, once again, where did you get these pictures?

14 **A** These are pictures I took of Mr. Reddy's phone.

15 **Q** And what times are depicted on the messages?

16 **A** At the very top of the page, there's a time of 11:27 p.m.
17 and it says "yesterday." There's three messages. Below
18 that, there is the time of 11:53 p.m. with "yesterday"
19 next to that. And then you go down three more messages
20 and then there's a time of 1:42 a.m. 142.

21 **Q** Now, remind us again what date you were speaking with
22 Mr. Reddy.

23 **A** The date was January 22, 2022.

24 **Q** So when the phone says "yesterday," what date would those
25 messages have occurred?

1 not 100 percent sure about that.

2 Q Well, let me ask you if you think this would be relevant.

3 Donovan Derrek calling Dreau Rogers at approximately 10:30
4 p.m.

5 A I'm not aware of that.

6 Q How about a text message from Donovan Derrek to Dreau
7 Rogers at 10:45 or 10:50 p.m. saying, quote, "We need to
8 speak face to face ASAP"?

9 A I'm not aware of that.

10 Q That would be relevant, though, wouldn't it?

11 A It would.

12 Q Okay. In relation to Dreau's account of what occurred
13 consistently, he stated Donovan Derrek came into his house
14 aggressively; right?

15 A Correct.

16 Q And, quote, "Wanted to fight" or some derivative of that?

17 A Correct.

18 MR. ROHL: I don't have anything further, Your Honor.

19 THE COURT: Thank you, Detective. You may step down.

20 MS. HARVEY: Your Honor, is the Detective excused?

21 MR. ROHL: I can't say that. I can't excuse him yet. I'm
22 sorry.

23 THE COURT: He's excused for now.

24 MR. ROHL: You're certainly allowed to leave the
25 courtroom.

1 Q Can you tell me if you — and if you need your records to
2 refresh your memory — how many phones or electronic
3 devices would be a better way to say — did they drop off?

4 A I collected, I believe, 11 items of evidence and they
5 varied from cell phones to tablets to SIM cards to USB
6 cards.

7 Q And do you have any records that would tell you who
8 dropped them off?

9 A Yes.

10 Q Do you need them to refresh your memory?

11 A No, Collin Smith dropped them off.

12 Q Okay. And that was on the 24th?

13 A Yes.

14 Q So did he drop off on that day a Samsung AAA1254 phone?

15 A I'm sure he did, but I would probably need a little more
16 information about the phone to tell you that.

17 Q Let me ask you this question: It's been already
18 identified there's been a phone taken in and dropped off.
19 The number was assigned to Dreau Rogers —

20 MR. ROHL: I'm going to object to leading, Your Honor.

21 THE COURT: Sustained.

22 Q (By Mr. Haivala, continuing) Okay. Did he ever drop off a
23 Samsung phone with phone number addressed to Dreau Rogers?

24 A Yes.

25 Q Okay. And do you remember what type of phone it was?

- 1 **A** It was a Samsung cell phone.
- 2 **Q** Okay. And did he ever drop off a phone that had a number
3 assigned to an Alan Reddy?
- 4 **A** Yes.
- 5 **Q** Do you remember what type of phone that was?
- 6 **A** That was also a Samsung.
- 7 **Q** And was there a phone brought to you that the number was
8 assigned to a Donovan Derrek?
- 9 **A** I received a phone that I was told belonged to Donovan
10 Derrek. I wasn't able to get an extraction off that
11 phone. It wasn't supported, so I wasn't able to confirm
12 the phone number.
- 13 **Q** Okay. Did you have a description of the phone?
- 14 **A** That was a Motorola cell phone.
- 15 **Q** Okay. So let's talk about the phone. First, the Dreau
16 Rogers's phone. I called it the "Alan Reddy phone," which
17 is the Samsung. Dreau and Alan's were Samsungs but
18 different models?
- 19 **A** Yes.
- 20 **Q** And did they also drop off a phone on the 24th an Apple 1
21 phone which belonged to Destiny Rogers?
- 22 **A** Yeah. That was Apple iPhone. SE2020.
- 23 **Q** Okay. First off, let me ask you this question: When you
24 are — and I'm going to use the word "mining for data" —
25 is it the phone — what's on the phone? Are you looking

1 extractions we're able to get at times typically only get
2 phone calls, contacts, text messages that are sent
3 through, like, Verizon through cell towers. It's not
4 typically going to extract data from those third-party
5 apps, like, Facebook, Instagram, TikTok, those types of
6 applications.

7 Q So you downloaded Dreau Rogers's Samsung?

8 A I did.

9 Q And that was loaded on some — loaded on some type of
10 electronic device? Can you kind of walk us through where
11 you dump the phone. Where does the data go?

12 A Yeah. The data gets stored on either a computer or server
13 where it stays until we make copies for our partner
14 agencies.

15 Q Is that the same thing you did with the Alan Reddy phone,
16 I'll call it, and the Destiny Rogers's phone?

17 A Yeah, so I — basically, I have all my forensic copies
18 that I store on our server on my work computer and then I
19 make copies of those to provide to the investigators once
20 I process it and make a case for them to review, because
21 they know more case details than I typically do.

22 Q Now, if I have an app — let's say the Grindr app — are
23 you able to get into that when you download — and, again,
24 I'll use the word "dump" the data from the phone?

25 A Yes and no. Depending on the make and model of the cell

1 Q Of course, no one saw any of this. We're just literally
2 operating off of what these two humans texted each other;
3 correct?

4 A That is correct.

5 Q And so I want to back up a little bit. There was —
6 there's been a lot of talk in this trial, Detective
7 Almeida, about cell phones and call detail records. Okay?

8 A That's correct.

9 Q Are you familiar with both?

10 A I'm a lot more familiar with forensics. A little less
11 familiar with call detail records.

12 Q Well, sure. Would it be a fair characterization for me to
13 say that you guys are — you guys are swamped in the
14 digital forensic section?

15 A That's very fair.

16 Q Why?

17 A Because everyone has a cell phone and every crime there is
18 a cell phone that we can review to show evidence.

19 Q Sure. You're valuable to the Rapid City Police
20 Department, aren't you?

21 A Thank you.

22 Q Well, I mean that. That's a fair characterization; right?

23 A Yes.

24 Q I mean, my God. If I give you this and I give you my
25 password and you go download that, you're going to learn a

- 1 lot about me, aren't you?
- 2 A Yes, I am.
- 3 Q You're going to know what I like; right?
- 4 A And, potentially, your darkest secrets.
- 5 Q Yeah, for sure. You're going to know where I go?
- 6 A Potentially.
- 7 Q Sure. So would it be fair to say this is an incredibly
- 8 significant piece of evidence?
- 9 A Yeah, it's valuable.
- 10 Q And would it be fair for me to say that, in this case,
- 11 having -- if you had access to Donovan Derrek's phone,
- 12 that would have been very valuable?
- 13 A I did have access to it.
- 14 Q If you would have been able to complete a download on it?
- 15 A Yes.
- 16 Q Now, I don't know if you know this, but Donovan Derrek's
- 17 phone was seized, of course, by the Spearfish Police
- 18 Department; right?
- 19 A It was.
- 20 Q And that was -- came into your custody; right?
- 21 A It did.
- 22 Q And that's not in dispute. There's evidence transfer,
- 23 property inventory receipts, which document that?
- 24 A Correct.
- 25 Q And so you attempt to do an extraction, but you don't have

1 that there is no evidence that he deleted anything?

2 **A** It's their job to review the evidence that's testified and
3 come to their own conclusion.

4 **Q** But you testified you can't tell if anything was deleted?

5 **A** Yeah. Based on the extraction and the data I was able to
6 get on the extraction that I got, I wasn't able to
7 determine that something was deleted or not.

8 **Q** So without some additional testimony, there is no evidence
9 that he deleted anything; right?

10 **A** That is correct.

11 **Q** I want to talk about how you can obtain information about
12 location with regards to a digital mobile device download.
13 Okay?

14 **A** Mm-hmm.

15 **Q** Would you explain how you can get locations from that.

16 **A** Yeah, so there's multiple ways. Like I talked about,
17 there's different, I guess, levels of extractions. On an
18 advanced logical or file system extraction, the odds of me
19 being able to determine location off a cell phone are low
20 unless the user sends a message saying "I'm here."

21 If I'm able to use GRAYKEY and get a full file system
22 extraction and/or a Cellebrite physical extraction, I have
23 a lot better odds of getting that.

24 Really, like, there has to be almost, like, a perfect
25 storm in order to get some of that information. The user

1 has to have on the applications that they're using that
2 it's okay to track me, it's okay to know my location, it's
3 okay to do all of that.

4 So if I have a user that, I guess, didn't change the
5 stuff so they're not being tracked by their app or their
6 phone or by their health application, there's a possibly.
7 But there's a lot of, I guess, nuances to it. It has to
8 be, like, all of these things have to line up fairly
9 perfectly in order to have a really good picture of where
10 someone is at a specific time.

11 Q Sure. Do you get more information when someone gives you
12 a password?

13 A I guess, the black-and-white answer is yes. But it still
14 determines on the make and model of the cell phone -- if
15 they're compatible with the tools that I have access to.

16 Q There's also application data aside from location that can
17 be beneficial. And, of course, an example of that is the
18 Grindr messages that we went through; right?

19 A That's correct.

20 Q According to -- and, again, I don't pretend to be as
21 knowledgeable about this as you. So if I misspeak, of
22 course, you'll let me know?

23 A Yeah.

24 Q According to the Grindr website, it collects your precise
25 location to determine your distance from other users;

- 1 A Yes, it's possible.
- 2 Q Individuals use different kinds of apps, as well, when
3 they're having discussions; right?
- 4 A Yeah. Like, in this case, they used the Grindr
5 application as well as text messages.
- 6 Q Sure. And this is what you do for a living; right?
- 7 A Yes.
- 8 Q So you're constantly dealing with people trying to
9 communicate on -- for lack of a better word -- I'll call
10 them "shady" or "incognito" applications?
- 11 A I guess, give an example of one of those.
- 12 Q Well, this is an example of what I'm getting at. Maybe
13 they'll communicate on WhatsApp or Snapchat with the
14 belief they're avoiding detection; right?
- 15 A Yeah, people use those apps for various reasons. Like,
16 for example, your example WhatsApp, it's encrypted through
17 Meta. And those messages are recoverable on the person's
18 cell phone. They are not recoverable, like Grindr,
19 through a subpoena.
- 20 Q And that would all be information that we could have
21 obtained via the digital download?
- 22 A That is correct.
- 23 Q Other ways we can determine location, of course, would be
24 GPS; right?
- 25 A Yes.

1 and Donovan?

2 A Can you ask that again, please?

3 Q Yeah. I told you I would ask you a bad question and I'm
4 following through, so I apologize.

5 The basis of your knowledge in this case about the
6 penis would be the contents of the Grindr messages and
7 text messages?

8 A Yeah. So for that specific image, it shows that the photo
9 was taken with Alan's cell phone at a date and time that,
10 based on the text messages, would leave a person to
11 believe that those two people were together.

12 Q Sure. And there was a Google search on Alan Reddy's
13 phone; right?

14 A That is correct.

15 Q And that occurred between the hours of 1:00 a.m. and
16 2:00 a.m.?

17 A Correct.

18 Q And that was "Does meth make people — guys — does meth
19 make men not be able to cum?" or something like that?

20 A That is the gist.

21 Q And then at 1:23 a.m., there's this picture we've heard so
22 much about; right?

23 A That is correct.

24 Q Okay. And so maybe you know, maybe you don't, but the 911
25 call came in at 12:48 a.m.?

1 that area of rubbing. And then there's two more circular
2 areas of abrasion towards the interior part of the wound.

3 Q So let's walk through the areas of abrasion. First area
4 of abrasion -- and to point out to the jury, if you would,
5 please -- what is that area?

6 A So this is a close-up wound -- close-up photograph --
7 pardon me -- of the Decedent's right arm. This is where
8 the entrance was. This is the only defect in the autopsy.

9 So the red around the wound is the abrasion that the
10 bullet makes when it goes into the skin.

11 This, to me, is different -- this area from about -- I
12 think it was down -- this part of the wound over this
13 lateral part of the wound. You have these two areas,
14 which are different to me. Those are made by something
15 else.

16 Q Okay. And looking at those abrasions, do you have an
17 opinion as to what made those abrasions?

18 A I think this is a contact -- I think this is a very close
19 wound. I think when the trigger is pulled -- pardon me --
20 the gun is very close to her arm. And this mark here and
21 these two marks here are caused by the tip of the barrel.

22 Q So the barrel was against -- the barrel of the gun was
23 against the shoulder when the bullet was triggered; am I
24 correct, in your opinion?

25 A Yes.

1 Q What about the other areas?

2 A I think those are the same thing. I think they're related
3 to the tip of the barrel.

4 Q Okay. All right. Continuing on then. Walk me through
5 what you did after you started the autopsy and examined
6 the body and found the wound on the shoulder.

7 A So that was the only thing significant externally, as it
8 relates to injury. Yeah, that was it.

9 So the only — you know, the only traumatic thing that
10 I found externally, as it relates to this autopsy
11 examination, was this gunshot wound.

12 Internally, of course, this becomes the cause of
13 death. So this is a gunshot wound involving predominantly
14 the chest portion of the body. It involves the right
15 lung; it involves the aorta; it involves the esophagus and
16 the left lung. So it's a gunshot wound that goes across
17 this portion of her body.

18 Q So you have before you several autopsy pictures that I
19 understand show the course of the bullet when it entered
20 the body. Can you please review those?

21 A (Peruses documents.)

22 Q Let's start with State's Exhibit 26. Please take a look
23 at that.

24 A Okay.

25 Q What is that picture?

1 millimeter base. Someone to do with ballistics can tell
2 you where that fits. There's all sorts of calibers.

3 Q Would a .45 caliber be consistent with that?

4 MR. ROHL: I'm going to object. He said he didn't know,
5 Your Honor.

6 THE COURT: Sustained.

7 Q (By Mr. Haivala, continuing) When you took the bullet out
8 of the body, what did you do with it?

9 A I gave it to the police officers investigating the case.

10 Q After performing the autopsy on January 25, 2022, of
11 Destiny Rogers, were you able to ascertain or come up with
12 a reasonable medical certainty the cause of death in this
13 case?

14 A Yes.

15 Q And can you tell the jury, in your opinion, what was the
16 medical cause of death?

17 A The cause of death in Destiny Rogers is a gunshot wound to
18 her chest.

19 Q Okay. I'd like to have you take a look at Exhibit 32.
20 I'm giving you a pair of gloves, if you would like to use
21 them. Those are latex gloves.

22 I'd ask you to take a look at the exhibit. Is this
23 the box that you gave the bullet to the Spearfish Police
24 Department?

25 A To be honest, I don't know. I gave the bullet to them.

1 spell it.

2 **A** My name is Bincy Thankachan. Last name spelled
3 T-h-a-n-k-a-c-h-a-n.

4 **Q** And how are you employed, ma'am?

5 **A** I am a forensic examiner with the Rapid City Police
6 Department.

7 **Q** How long have you been with the RCPD?

8 **A** I have been with the department for about five years and
9 three months.

10 **Q** Can you describe to me the training of -- I'll take a step
11 back. Can you describe to me your experience as an
12 evidence tech. Did I get that right?

13 **A** Forensic examiner.

14 **Q** Thank you. Can you describe to me your experience.

15 **A** I have a bachelor's degree in forensic science and a
16 master's degree in forensic medicine. I graduated from
17 the University of Maryland. After my graduation, I was
18 hired by the Rapid City Police Department as a forensic
19 examiner.

20 As a forensic examiner, I specialize in crime scene
21 investigations in fingerprint analysis. I respond to
22 major crimes, such as homicides, aggravated assaults,
23 sexual assaults, armed robbery, et cetera.

24 I go to crime scenes; I examine them; I document them
25 using photography. I collect evidence. I also examine

1 vehicles. I examine individuals involved and I attend
2 autopsies. I document autopsies, collect evidence from
3 autopsies as well.

4 Q And how many cases — how many times have you had to do
5 this in your career?

6 A Hundred-plus times.

7 Q What exactly — when you do your profession, as a forensic
8 examiner, walk me through — for example, when you take
9 evidence — DNA. What precautions do you do? What
10 protocols do you follow?

11 A Maybe evidence collection from the crime scene or from
12 people. It doesn't matter. I make sure that I wear a
13 pair of disposable gloves. I change them out as and when
14 it's necessary. I also wear an N95 mask.

15 Q And that is the proper protocol when taking DNA evidence?

16 A Yes.

17 Q And who establishes those protocols? Is there a national
18 organization?

19 A Yes. These are standard crime scene practices and we also
20 have internal standard operating procedures and the RCPD
21 policies.

22 Q When you take — when you're doing your examination,
23 taking a DNA sample, you do wear the mask then?

24 A Yes, sir.

25 Q Okay. I would like you to look at Exhibits 113 and 114,

1 which are in front of you.

2 A (Witness complies.)

3 Q Are you familiar with those exhibits?

4 A Yes.

5 Q I would like to take you back to the 22nd of January. Did
6 you come to Spearfish, South Dakota, to take some
7 evidence -- DNA evidence?

8 A Yes, I did.

9 Q Please describe to the jury what the circumstances were
10 that brought you to Spearfish from Rapid City.

11 A Yes.

12 Q Please tell the jury what happened.

13 A So I got a call from my supervisor. He said that
14 Spearfish Police Department required my assistance. When
15 I asked him the details, he told me there has been a
16 possible homicide and they would like me to come over and
17 process an individual.

18 Q And about what time of day was that?

19 A About 1448 hours, which is about 2:48 p.m.

20 Q In the afternoon?

21 A Yes, sir.

22 Q And so you drove from Rapid City to Spearfish. Where in
23 Spearfish?

24 A Spearfish Police Department.

25 Q What did you do when you got to the police department?

1 Q So, essentially, the position says the forensic examiner
2 is responsible for the collection and forensic analysis of
3 crime scene evidence on location; right?

4 A Yes.

5 Q So that means you know how to collect this stuff; right?

6 A Yes.

7 Q And you know how to do it in a scientifically sound way;
8 right?

9 A Yes, sir.

10 Q And I'm just going to come up here because this is
11 impressive. I want you to just go through a lot of those
12 duties. Really explain to the jury what it is that you
13 do.

14 A Okay. Level one or two?

15 Q Level two, please.

16 A Okay. So just the ones that are marked?

17 Q Whatever you're comfortable with.

18 A Okay. So these are the level two responsibilities of a
19 forensic examiner, as listed by RCPD. Completes all
20 essential duties listed under level one, provides
21 training, evidence collection, preservation, processing of
22 the scene and a laboratory setting, speaks to public
23 organizations on evidence or forensic-related topics,
24 performs technical/administrative reviews of casework —

25 **MR. HAIVALA:** May I have you slow down a lit bit? I know

1 the reporter is trying to take this down.

2 **THE WITNESS:** I apologize.

3 **MR. ROHL:** I should have spoke up.

4 **THE WITNESS:** Do you want me to start from the beginning?

5 **A** Speaks to forensically related topics, performs
6 technical/administrative reviews of casework, performs
7 administrative work to include monthly statistics,
8 accreditation reports, and other reports as necessary,
9 assists in training level one examiners to competency.

10 **Q** (By Mr. Rohl, continuing) Thank you.

11 I also brought a copy — you testified about the Rapid
12 City Police Department rules and procedures; right?

13 **A** Yes.

14 **Q** And there are rules and procedures as to how you're
15 supposed to collect evidence at a crime scene; right?

16 **A** Yes.

17 **Q** And so I brought a copy of those. I'm going to hand you
18 what's been marked Defendant's Exhibit G. Would you mind
19 telling the jury what that is.

20 **A** So this is the Rapid City Police Department's rules and
21 procedures particularly pertaining to collection and
22 preservation of evidence.

23 **Q** And what specific policy are you looking at in front of
24 you there? It's in the top left-hand corner.

25 **A** It is policy number 621-02.

1 rules and procedures manual is for evidence collection and
2 preservation, according to the rules and procedures
3 manual?

4 **A** In order to make sure we're all collecting any evidence
5 properly, you know, which includes maintaining integrity
6 of the same.

7 **Q** And so it actually uses the word there; right? "Integrity
8 of the evidence."

9 **A** Yes.

10 **Q** What is that?

11 **A** Integrity could mean a few things when it comes to
12 evidence. I can talk about contamination,
13 cross-contamination, chain of custody, et cetera.

14 **Q** I'd really like to zero in on contamination and
15 cross-contamination, if you could.

16 **A** Yes.

17 **Q** Can you please tell us more about that.

18 **A** Yes. Contamination generally means what the word stands
19 for. When we're collecting the sample, we want to make
20 sure we're collecting it and packaging it and securing it
21 properly so that foreign particles are not introduced into
22 it because that interferes with further testing.

23 **Q** And would it be fair for me to say that during the
24 evidence collecting process, if it's not done right,
25 there's exposure to contamination or cross-contamination?

1 A Yes.

2 Q And that's why these exist; right?

3 A Yes.

4 Q To make sure that we zealously guard that scene; right?

5 A Yes.

6 Q So that it doesn't happen?

7 A Yes.

8 MR. ROHL: I want you to scroll down a little bit, Jods,
9 to number 4, if you would. Okay. Right there. Number 4.

10 Q (By Mr. Rohl, continuing) That says "protection of
11 evidence." Right?

12 A Yes.

13 Q And when it says "employees," that means law enforcement;
14 right?

15 A Yes.

16 Q And it's law enforcement's obligation to take all
17 precautions to prevent contamination; right?

18 A Yes. And since this -- since this document -- this
19 document was particularly made for RCPD employees, so that
20 would be any law enforcement working with Rapid City
21 Police Department, yes.

22 Q Sure. And, of course, you're well-studied in this field;
23 right?

24 A Yes. I try my best to keep up with it and obtain any
25 knowledge there is, yes.

- 1 Q Absolutely you do. And you've reviewed this and there's
2 nothing in here that's not scientifically valid. Would
3 that be fair?
- 4 A That's fair.
- 5 Q Great. So I want you to turn to the next page of this for
6 me. If you would go to page 2 of 5.
- 7 So number 1 says "Officers, whether working
8 individually or in cooperation with others, are
9 responsible for preserving and protecting the scene of the
10 crime and the evidence contained therein." Right?
- 11 A That is correct.
- 12 Q And just so I can be super clear, that's this table's
13 responsibility here; right? Prosecution and law
14 enforcement.
- 15 A Law enforcement, yes. This particular -- number 1 is
16 talking about, particularly, people who are coming in
17 contact with that evidence item or people who are
18 handling -- physically handling -- that item.
- 19 Q Sure. Or going into the crime scene?
- 20 A Yes.
- 21 Q Does that include that?
- 22 A That's fair.
- 23 Q Okay. Now I want to go to number 2. Because number 2
24 throws quite a bit of information at us. Okay?
- 25 A Okay.

- 1 Q I'm sorry. Not number 2. I want to go to number 4.
- 2 A Okay.
- 3 Q I have it highlighted on your copy there.
- 4 A Yes.
- 5 Q And I'm going to read what I think is the relevant
6 portion. And if I misstate, of course, you'll let me
7 know. Okay?
- 8 A Yes, sir.
- 9 Q So this says "All evidence, particularly that which may
10 bear" — and I'm going to skip to "DNA."
- 11 A Okay.
- 12 Q "DNA or other types of trace evidentiary particles shall
13 be properly handled in such a way to prevent destruction
14 or contamination of evidence." Right?
- 15 A Yes, sir.
- 16 Q So the idea of contamination of evidence — this isn't
17 something I'm making up. This is well-known in the law
18 enforcement community?
- 19 A Yes, sir.
- 20 Q Fair?
- 21 A That's fair.
- 22 Q And then it says "If it is suspected that forensic testing
23 of any type will be requested, the items must be packaged
24 separately."
- 25 A Yes.

1 what I think is the crux of what I'm getting at. Would it
2 be fair for me to say that the beginning of Exhibit H —

3 A Yes.

4 Q — deals with integrity of the evidence?

5 A Yes.

6 Q That's super important?

7 A Yes, sir.

8 Q So if you would turn with me to page 4 of 8.

9 A (Witness complies.)

10 Q We're going to go to number 16 there. And there is
11 writing on it. And it is mine. And if there's anything
12 on there that's incorrect, you're going to let us know?

13 A Yes, sir.

14 Q Okay. All suspected DNA evidence must be protected from
15 possible cross-contamination; right?

16 A Yes, sir.

17 Q And so if there is DNA evidence collected at the scene in
18 this case, it needs to be protected from
19 cross-examination?

20 A Contamination, yes.

21 Q Or contamination. Thank you.

22 And I included a word here next to "gloves." I said
23 clean gloves should be worn at all times?

24 A Yes.

25 Q Is that scientifically accurate?

- 1 A That's fair.
- 2 Q Okay. Because if you're handling evidence with dirty
3 gloves —
- 4 A Yes.
- 5 Q — what does that mean?
- 6 A Contamination issues, yes.
- 7 Q Okay. So what happens if I show in this case that
8 evidence is being handled with dirty gloves?
- 9 A There would be possible contamination.
- 10 Q Sacrifices the integrity of the evidence; right?
- 11 A It does.
- 12 Q That's why these exist?
- 13 A Yes, sir.
- 14 Q It also states that you should never lay evidence directly
15 upon any surface without first putting down a clean
16 disposable piece of paper?
- 17 A Yes.
- 18 Q Is that scientifically valid?
- 19 A Yes, sir.
- 20 Q What if it didn't happen in this case?
- 21 A Then it would be possibly contaminated by whatever is on
22 that particular surface.
- 23 Q Sure. So if the surface is, say, Dreau Rogers's house,
24 his DNA is probably all over it, isn't it?
- 25 A Yes.

1 A Good afternoon.

2 Q Is that the right call, Agent?

3 A Yes.

4 Q It's important to me to get your name right and give you
5 the respect you need.

6 A Thank you.

7 Q Of course.

8 Would it be a fair characterization for me to say that
9 the majority of your involvement in this case is crime
10 scene processing?

11 A Absolutely, yes.

12 Q Obviously, you didn't interview Dreau or you didn't
13 interview Donovan; right?

14 A No.

15 Q So the majority of what you did is process the scene;
16 right?

17 A Yes.

18 Q And you took pictures of the processing — the photograph
19 process; right?

20 A Yes.

21 Q That was such a poorly worded question.

22 You photographed the processing of the crime scene?

23 A Yes.

24 Q Okay. And so I'm going to approach with what's been
25 marked — I believe it's Defendant's Exhibit D, but I

1 better confirm that. Defendant's Exhibit E. What I have
2 done is I've selected some photographs that I'm going to
3 ask you about. I would like you to review those for me,
4 if you would.

5 **A** Sure. (Peruses documents.) Okay.

6 **Q** Do those appear to be true and accurate depictions of some
7 of the photographs you took of the crime scene?

8 **A** Yes.

9 **MR. ROHL:** Your Honor, I would move to introduce
10 Defendant's E on that basis.

11 **THE COURT:** Any objection?

12 **MR. ROHL:** No, Your Honor.

13 **THE COURT:** Defendant's Exhibit E will be received.

14 **MR. ROHL:** Thank you, Your Honor.

15 **Q** (By Mr. Rohl, continuing) The — before we work through
16 the crime scene, I just want to confirm a couple things.

17 **A** Sure.

18 **Q** You testified on that holster there was what's referred to
19 as, like, a belt loop shelf; right?

20 **A** Yeah, maybe I didn't explain that real well.

21 **Q** Would you?

22 **A** Yeah. Basically, it's the part of the holster designed so
23 that when it slides into your — part of the holster goes
24 into your pants and the other part will be on the outside.
25 It will grip if you're wearing a belt.

- 1 Q Okay. So there's not, like, a separate attachment?
- 2 A No. I could look at it again here, but it would appear
3 that — my understanding is a paddle holster is just that
4 paddle that slides inside your pants and then there's that
5 shelf —
- 6 Q I think that's fair. I didn't know if there was another
7 attachment.
- 8 A No, I didn't mean to imply that. I apologize.
- 9 Q Okay. When you went through the evidence that Mr. Haivala
10 just presented you with, was that similar to the way you
11 processed the crime scene?
- 12 A I guess, can you be more specific?
- 13 Q Well, you put on a pair of gloves; right?
- 14 A Yes.
- 15 Q And then you began to go through different pieces of
16 evidence; right?
- 17 A Yes.
- 18 Q So do you know -- can nitrile gloves transfer DNA?
- 19 A I don't know.
- 20 Q Would you agree that's an important thing that you
21 probably should know?
- 22 A It's certainly an important thing, yes.
- 23 Q So there was an article in the *Capital Journal* where the
24 director of the State Forensic Laboratory was interviewed.
25 And within that interview, she states — well, let me back

- 1 **A** Right.
- 2 **Q** And so I'm going to have you come down off the witness
3 stand for me, if you would.
- 4 **MR. ROHL:** Jodi, will you zoom in right there. Top left.
5 If you can really get in on that glove for me.
- 6 **Q** (By Mr. Rohl, continuing) And now I'm just going to ask
7 you do those gloves right there look clean to you?
- 8 **MR. HAIVALA:** I am going to object. Lack of foundation.
9 We're not sure what we're looking at.
- 10 **MR. ROHL:** He's looking at Defendant's Exhibit E, 694, to
11 confirm that he saw it.
- 12 **THE COURT:** Overruled.
- 13 **Q** (By Mr. Rohl, continuing) Do those gloves look like
14 they're clean to you?
- 15 **A** Appears to be something white on them.
- 16 **Q** Well, let's really make a record here. Does there appear
17 to be a smudge on the palm here?
- 18 **A** Yes, some white specks and a smudge of some sort.
- 19 **Q** And then on this right hand over here. Would that be...
- 20 **A** Specks. I don't know.
- 21 **Q** Are pieces of DNA small?
- 22 **A** They can be, yeah.
- 23 **Q** And so are you telling this jury right here that those are
24 clean gloves that that piece of forensic evidence is being
25 handled with?

- 1 A I don't know whose gloves those are.
- 2 Q But you took the picture?
- 3 A I did take the picture, yes. And I do see white
- 4 substances on there.
- 5 Q And let me start off by saying I don't want to come after
- 6 you. I hope you know that. I'm not trying to do that.
- 7 I'm just seeking your confirmation that those are not
- 8 clean gloves.
- 9 A I do see something foreign on them.
- 10 Q And so do you agree that forensic evidence needs to be
- 11 handled with clean gloves?
- 12 A I do agree.
- 13 Q And so could you agree with me that forensic evidence that
- 14 is not handled with clean gloves is what we would call
- 15 mishandled forensic evidence?
- 16 A If it was dirty gloves, yes.
- 17 Q So do I have your permission to put your initials right
- 18 here under number 3: Mishandled forensic evidence?
- 19 A My permission?
- 20 Q Yes. I'm asking you, based off of what you just testified
- 21 to, I can put your initials here?
- 22 A I have no idea what that substance is on those gloves.
- 23 Q Well, it's your crime scene, though; right?
- 24 A I'm participating in it, yeah.
- 25 Q Well, collectively, it's law enforcement's crime scene?

1 A Yes.

2 Q Somebody should be able to tell me that those are clean
3 gloves; right?

4 A Presumably, yeah.

5 Q And, again, we're just looking at the same image; right?

6 A Yes.

7 Q And those don't appear to be clean?

8 A They appear to have something on them.

9 Q "BL"?

10 A That would be correct.

11 MR. ROHL: Jodi, would you go to 401 for me.

12 Q (By Mr. Rohl, continuing) Okay. So what is that picture?
13 It's Bates stamped 401, for the record, on the bottom
14 right-hand corner. What is that?

15 A That's a wooden box and a pack of cigarettes.

16 Q Okay. And do you know whose brand of cigarettes those
17 are?

18 A Camel, I believe.

19 Q Do you know who — if you know, who smokes those — that
20 brand of cigarettes?

21 A I have no idea.

22 Q Is it possible Dreau Rogers smoked that brand of
23 cigarettes?

24 A Potentially. I don't know if he smokes.

25 MR. ROHL: Jods, will you go to 403 for me?

1 Q Okay. Thank you.

2 So the difference between the picture we just saw and
3 the picture now is that the pack of cigarettes was moved
4 up to the top right-hand corner; right?

5 A That's one of them, yeah.

6 Q The bag was brought out of the box; correct?

7 A Yep.

8 Q The bullets were brought out of the bag; correct?

9 A Yes.

10 Q And the bullets were set on the bag; right?

11 A That's correct.

12 Q Can you tell this jury if there was any glove changes
13 during that process?

14 A I can't tell them if there was or wasn't.

15 Q Okay. Thank you for bearing with me.

16 MR. ROHL: Jodi, can you please put image 331 up. Okay.

17 Now, if you can zoom in on the bottom right-hand corner --

18 Q (By Mr. Rohl, continuing) Before we do, can you please
19 tell the jury what that is a picture of.

20 A Yes. It's a gloved hand holding a box of .22 rifle
21 bullets.

22 Q Okay. And so that picture that is being published to the
23 jury -- is that what that is?

24 A Yes.

25 MR. ROHL: And would you zoom in on that glove?

1 **THE WITNESS:** Stand up?

2 **MR. ROHL:** Yes, please do.

3 **Q** (By Mr. Rohl, continuing) Same question. Is that a clean
4 glove?

5 **A** I do see some material on the glove.

6 **Q** Okay. And, specifically, if we look down on the
7 right-hand corner, there seems to be a powdery substance
8 there. Fair?

9 **A** I see -- yeah. I see what you're pointing out there, yes.

10 **Q** Okay. And so the rules and procedures manual says it
11 should be handled with clean gloves; right?

12 **A** What rules and procedures manual?

13 **Q** Well, the Rapid City Police Department --

14 **A** Yeah. Handling with clean gloves makes sense, yeah.

15 **Q** Okay. So can we agree there's more forensic evidence sent
16 in for testing to handle the dirty gloves?

17 **A** Yeah, whatever is on there.

18 **MR. ROHL:** Jodi, could you pull up 681 for me.

19 **Q** (By Mr. Rohl, continuing) So image 681 -- that's a picture
20 of the pistol right in front of you there; correct?

21 **A** Yep.

22 **MR. ROHL:** And would you zoom in on the gloves there for
23 me?

24 **Q** (By Mr. Rohl, continuing) Would it be fair for me to
25 characterize that bullet as a piece of material evidence?

- 1 **A** Yes.
- 2 **Q** And that's the bullet Mr. Haivala had you testify about;
3 right?
- 4 **A** That's correct.
- 5 **Q** Okay. And, again, can we agree those gloves there are
6 dirty?
- 7 **A** There is some substance on those gloves, yeah.
- 8 **Q** So to cut to the chase, the rules and procedures manual
9 exists to avoid cross-contamination; right?
- 10 **A** Yes.
- 11 **Q** And the purpose of clean gloves is to avoid what's called
12 cross-contamination; right?
- 13 **A** I would agree, yes.
- 14 **Q** Can we agree that Dreau Rogers's DNA is going to be all
15 over his house?
- 16 **A** It would be safe to assume it would, yeah.
- 17 **Q** And that's why it's important to change gloves; right?
- 18 **A** Yes.
- 19 **Q** I'm just going to grab a marker here real quick, Agent
20 Larson. I just want to darken this.
- 21 **MR. ROHL:** I have no further questions, Your Honor.
- 22 **THE COURT:** Thank you.
- 23 Mr. Haivala?
- 24 **MR. HAIVALA:** A couple questions.
- 25 Do you mind if I use your exhibits?

1 right?

2 **A** That's why we try to change gloves as much as possible
3 while we're on scene dealing with biological stuff with
4 DNA on it, I guess.

5 **Q** Sure. Because you gotta protect it from
6 cross-contamination; right?

7 **A** Yes.

8 **Q** Super important; right?

9 **A** Yes.

10 **Q** If a guy like me shows there's potential for
11 cross-contamination, that's a big problem for the case;
12 right?

13 **A** If there was cross-contamination, yes.

14 **Q** Sure. Or even the potential for it?

15 **A** Correct.

16 **Q** And I just want to know, in general — certainly, as it
17 relates to Mr. Rogers, he's entitled to a thorough
18 investigation; right?

19 **A** Yes.

20 **Q** He's entitled to that?

21 **A** Yes.

22 **Q** That's a duty you have to complete a full and fair
23 investigation?

24 **MR. HAIVALA:** Objection. Asked and answered.

25 **THE COURT:** Sustained.

1 Q (By Mr. Rohl, continuing) And that would include adhering
2 to proper procedure and protocol; right?

3 A Correct.

4 Q Okay. So before we go through some pictures, I want to go
5 through number 16 with you on Exhibit H, page number 4.

6 A Yes.

7 Q I just want to know do you agree that all suspected DNA
8 evidence must be protected from possible
9 cross-contamination? Do you agree with that?

10 A Yes.

11 Q And do you agree that clean gloves should be worn at all
12 times?

13 A Yes.

14 Q And do you agree that you should never lay evidence
15 directly upon a surface without first laying down clean,
16 disposable paper?

17 A Yes, that's the best practice.

18 Q Okay. So we are going to start with image 680. Of
19 course, 680 is an important piece of evidence in this
20 case; right?

21 A Can I get it turned a little bit?

22 Q I'm going to actually bring you a copy of that.

23 A Oh, got ya. Yes.

24 Q Okay. And so doesn't Exhibit H state that that should be
25 set on a clean piece of paper?

- 1 A That's what it says on this document, yes.
- 2 Q Okay. And that would be the best practice; right?
- 3 A That would be -- yeah. Some agencies do that, yes.
- 4 Q Okay. Because science has shown that DNA can transfer
- 5 from surface to another surface? It's called indirect
- 6 transfer; right?
- 7 A Yes, I'm aware of that. Yeah.
- 8 Q And then if we go to image 681. That's this picture right
- 9 here; right?
- 10 A Yes.
- 11 Q And just to make sure the jury can see that. That's a
- 12 fair reproduction of this?
- 13 A Yep.
- 14 Q Do you know whose hand that is?
- 15 A I am not -- not my hand. I don't know whose hand that is.
- 16 Q Okay. So I think we can probably agree that those gloves
- 17 are dirty; right?
- 18 A Can I see the --
- 19 Q Yeah. I think it shows up better on the HD screen.
- 20 A There is some dust marks on the gloves, yes.
- 21 Q And, look, I get it. It's dirty outside; right?
- 22 A Yeah.
- 23 Q But for purposes of scientific contamination and rules and
- 24 procedures, there's no exception if it's dirty outside;
- 25 right?

1 **THE COURT:** Sustained.

2 **Q** (By Mr. Rohl, continuing) Just to make sure I don't miss
3 anything, Agent Agers, the extent of your investigation in
4 this case would be crime scene processing; fair?

5 **A** Correct, yeah.

6 **Q** Okay. You didn't interview anybody or anything like that?

7 **A** No.

8 **Q** So you process this crime scene and the collection of
9 evidence was done by yourself; right?

10 **A** Some of it, yes.

11 **Q** Mr. — Agent Larson; right?

12 **A** Yes.

13 **Q** Agent Cody Lineberger; right?

14 **A** Correct.

15 **Q** Sergeant Tom Derby?

16 **A** Yes.

17 **Q** Detective Schumacher?

18 **A** Yes.

19 **Q** Detective Dustin Ruvolo; right?

20 **A** I don't recall if he was helping with the actual crime
21 scene or not. He may have been in there at some point.

22 **Q** I'm approaching with the crime scene entry log.

23 **A** Okay.

24 **Q** That should have everybody on there; right?

25 **A** Yes.

1 **A** Correct. I've not been there present during the training.

2 **Q** So if I showed you pictures of how this occurred, you
3 couldn't even say whether or not it was done right?

4 **A** No, I have no crime scene training.

5 **Q** Do you know what the number one cause of wrongful
6 incarceration is in the country?

7 **MR. HAIVALA:** Objection, Your Honor. This is far outside
8 the scope of this witness.

9 **THE COURT:** It is. Sustained.

10 **Q** (By Mr. Rohl, continuing) Do you know what misleading
11 forensic science is?

12 **A** In what way? Can you be more specific with the question.

13 **Q** Sure, I can. Certainly, we can agree that it's very
14 important that evidence be collected properly; right?

15 **A** Absolutely.

16 **Q** And if it's not collected properly, it could lead to
17 misleading results?

18 **MR. HAIVALA:** Objection. Again, outside the scope of this
19 witness.

20 **THE COURT:** Overruled.

21 You can answer.

22 **A** Correct.

23 **Q** (By Mr. Rohl, continuing) And so it's absolutely crucial
24 that the evidence be collected properly?

25 **A** Absolutely.

1 Q And if it's not, your testimony could be misleading?

2 MR. HAIVALA: Objection, Your Honor. Grounds it's almost

3 argumentive.

4 THE COURT: Overruled. It's cross-examination.

5 A Can you repeat the question, please?

6 Q (By Mr. Rohl, continuing) I'll try. I'm sorry...

7 (WHEREUPON, the court reporter read the

8 previous question back.)

9 A Yes. The grounds of the information that I'm receiving is

10 not correct, yes.

11 Q (By Mr. Rohl, continuing) And so you pick this evidence up

12 with the assumption that everything up to it coming into

13 your contact has been done perfectly?

14 A Absolutely.

15 Q And if it's been shown in this case that it hasn't been

16 done perfectly or that's it's been done in violation of

17 rules and procedures, that would be a problem; right?

18 MR. HAIVALA: Objection. Again, way outside the scope of

19 this witness.

20 MR. ROHL: Your Honor, that has been testified to. There

21 has been —

22 THE COURT: Let's not argue objections. State your legal

23 objection. If I ask for a response, I'll ask for a

24 response.

25 So what's your legal objection?

1 grateful to you for clarifying that.

2 Cross-contamination is a big deal; right?

3 A Yes, it is.

4 Q Well-known fact that evidence needs to be handled with
5 clean gloves; right?

6 A Yes.

7 Q In addition to that, it is a well-known fact that DNA can
8 transfer from surface to surface; right?

9 A Correct.

10 Q And that is why a clean sheet, for example, is laid down
11 and evidence set on it; correct?

12 A Correct.

13 Q I have in my possession some rules and procedures that
14 have been admitted in this trial. And I just want to know
15 the soundness of the science associated with them. Okay?

16 A Okay.

17 Q I'm going to stand right next to you. I am going to
18 represent to you that this is Exhibit H.

19 A Okay.

20 Q And we're on page 4. And I want to know if you believe
21 this to be true. "All suspected DNA evidence must be
22 protected from possible cross-contamination."

23 A Yes.

24 Q Do you agree that clean gloves should be worn at all
25 times?

1 A Yes.

2 Q Do you agree that never lay such evidence directly upon
3 any surface without first putting down clean, disposable
4 paper?

5 A Yes.

6 Q Do you agree that this will help prevent the transfer of
7 DNA on the surface to the piece of evidence?

8 A Yes.

9 Q And all of this is done to protect the integrity of the
10 evidence; correct?

11 A Yes.

12 Q What is the integrity of the evidence?

13 A Making sure that nothing additional is added or
14 contaminated to that piece of evidence. Making sure -- as
15 my understanding in this concept -- is making sure that
16 that piece of evidence arrives to the lab the same way it
17 was found at the scene and not changed in any way before
18 it's gotten to me.

19 Q Simply put, would it be fair for me to say it's the way
20 that these folks can know they're doing the right thing,
21 based on the evidence collected?

22 A Yes.

23 MR. ROHL: I have no further questions, Your Honor.

24 Thank you.

25 THE COURT: Mr. Haivala?

1 Q So let's just jump to the second page. And I am looking
2 at paragraph -- I believe it's four -- which starts with
3 Item 1. Do you see that?

4 A Yes.

5 Q And I just want your confirmation that, essentially, what
6 you did in this case is you tried to match the bullet that
7 was retrieved from Destiny Rogers to the .45; correct?

8 A I examined the two to see if they were fired -- if it was
9 fired from this admitted pistol.

10 Q And you and Mr. Haivala had some back and forth on class
11 characteristics and that kind of thing. But, when push
12 comes to shove, the result was inconclusive; right?

13 A For the bullet, yes.

14 Q And you're not telling this jury that you can state as a
15 forensic scientist that, yes, I matched those two?

16 A I cannot.

17 Q Okay. And then the same is true with the cartridge case;
18 right?

19 A It is also inconclusive. But it's a different class -- a
20 different category. There was some agreement, but there
21 just wasn't enough to call it an identification.

22 Q So fair for me to say what you're telling this jury right
23 here is that the result was inconclusive?

24 A Yes.

25 Q All of your results were inconclusive?

1 A All of the microscopic comparison results were
2 inconclusive.

3 Q And, if you know, there has been some recent scientific
4 advancement studies in the -- particularly analyzing
5 inconclusive results. Are you familiar with any of that?

6 A I am familiar with some of it, yes.

7 Q And so the studies that have been conducted try to predict
8 with some type of numerical certainty what inconclusive
9 evidence -- or inconclusive results means; right?

10 A I have heard some articles that discuss that.

11 Q And so those articles are peer-reviewed; right?

12 A Some are. I don't know which ones you're referring to.

13 Q And, essentially, what they seem to agree and conclude on
14 is that approximately 80 percent or better of the time
15 there's inconclusive findings, in fact, it's not a match?

16 MR. HAIVALA: Excuse me, Your Honor. I am going to
17 interject an objection at this time. The objection is,
18 Your Honor, this is improper cross-examination.

19 If defense is going to cross-examine this witness with
20 some type of authority or some type of study, he's
21 obligated, as I understand the rules, to disclose what the
22 study is, ask if the Defendant has reviewed the study, and
23 then he can go forward and ask if the -- I said
24 "Defendant." Apologies. Witness has accepted the
25 findings of the study as authority. Thank you.

1 Q How can you tell that?

2 A My initials and date are on the lab barcode that we have
3 on it.

4 Q And this specifically is the shell casing. And the
5 process that you just explained to us in order to
6 determine if there's fingerprints — was that done with
7 regards to State's Exhibit 132?

8 A It was.

9 Q And what did you determine through your process?

10 A I did develop one latent print that was suitable for
11 comparison and identification. I did identify that to the
12 left little finger from Dreau Rogers.

13 Q So first you identify there is a latent print — that
14 there's enough characteristics to compare?

15 A Yes. I'm always looking at the latent prints first for
16 suitability and then I'm looking for those unique
17 identifying characteristics that are needed in order to do
18 a comparison when making an identification.

19 Q And you had Mr. Rogers as a named individual in this case?

20 A Yes.

21 Q So you sought out his fingerprint records?

22 A I did.

23 Q And can you tell us if you were able -- to which finger --
24 you're able to determine which fingerprint was on that
25 piece of exhibit?

1 MR. ROHL: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. ROHL:

4 Q Is it is Walti or Walti?

5 A It's Walti.

6 Q Ms. Walti, it's nice to meet you. I think I have,
7 possibly, just one question for you.

8 A Okay.

9 Q If Mr. Rogers told on-scene law enforcement that he
10 touched the expired cartridge, Item 3, would that be a
11 reasonable explanation as to how his fingerprint got on
12 it?

13 A Absolutely.

14 MR. ROHL: I have nothing further, Your Honor. Thank you.

15 THE COURT: Ms. Harvey, anything further?

16 MS. HARVEY: No, Your Honor.

17 THE COURT: Is this witness excused and released?

18 MS. HARVEY: Yes, Your Honor.

19 MR. ROHL: Yes, Your Honor.

20 THE COURT: Thank you, ma'am.

21 Members of the jury, we're going to take a recess.
22 It's your duty not to discuss the case amongst yourselves
23 nor should you allow anyone to discuss the case with you
24 nor are you to form or express any opinion about the case
25 until it's finally submitted to you for your

1 Q (By Mr. Rohl, continuing) Okay. So what is that document
2 or that picture of there in front of you? If you just
3 explain it for the record.

4 A It would appear to be taking a close-up photograph of what
5 appears to be bruising to the right thigh and using a
6 scale to measure the size of that bruising.

7 Q Why would you measure the size of the bruising?

8 A Just important to the crime scene investigation as a
9 whole.

10 Q Sure. You testified to different observations you make as
11 an officer; right?

12 A Correct.

13 Q And different injuries you come across in the course of
14 the scope of your work as an officer; right?

15 A Correct.

16 Q You certainly dealt with victims of trauma and assault;
17 right?

18 A Correct.

19 Q And those could be corroborative of that type of thing, as
20 well; fair?

21 A It's fair to say, yeah.

22 Q Spontaneously, I believe you said that Mr. Derrek
23 mentioned that all of his injuries were from
24 methamphetamine abuse; is that correct?

25 A Those aren't the verbatim words that he used. But

- 1 Q Mr. Derrek, if I reverse your name, I've been doing it the
2 whole trial. I apologize in advance.
- 3 A That's okay.
- 4 Q What do you do for a living?
- 5 A I'm a maintenance man at two hotels in Spearfish.
- 6 Q You live in Spearfish?
- 7 A Yes.
- 8 Q How long have you been in Spearfish?
- 9 A My whole life. Since I was 12.
- 10 Q You went to Spearfish High School?
- 11 A Since I was a junior.
- 12 Q What year was that?
- 13 A '94.
- 14 Q Sir, we'll get some things out of the way right away. You
15 are a convicted felon?
- 16 A Yes, sir.
- 17 Q And you also use meth?
- 18 A Yes, sir.
- 19 Q And you are headed to treatment for that meth addiction?
- 20 A Yes.
- 21 Q When do you do the treatment?
- 22 A The 20th of this month.
- 23 Q Where at?
- 24 A Compass Point in Sturgis.
- 25 Q Okay. Do you know Destiny Rogers?

1 agreements, whatever, that he may have with the State.

2 **MR. ROHL:** Understood, Your Honor.

3 **THE COURT:** Let's bring the jury back in.

4 (WHEREUPON, the jurors entered the courtroom.)

5 **THE COURT:** Mr. Haivala, you may continue.

6 **MR. HAIVALA:** Thank you.

7 **Q** (By Mr. Haivala, continuing) Mr. Derrek, let's walk
8 through the day of January 21, 2022. You remember that
9 day?

10 **A** Yes, I do.

11 **Q** Walk me through starting in the early morning hours of the
12 day. Did you have contact with an Alan Reddy?

13 **A** Yes, I did.

14 **Q** What time was that?

15 **A** 5:30 in the morning.

16 **Q** Tell me what the nature of the contact was.

17 **A** Sexual encounter.

18 **Q** And did you at some point that morning go over to Alan
19 Reddy's house?

20 **A** Yes, I did.

21 **Q** Okay. And can you tell me when you got there —
22 approximately what time you got to Alan's house.

23 **A** Around 5:30, I'd say.

24 **Q** And this was after you had several texting messages with
25 him?

1 A Yes, I did.

2 Q About what time was that?

3 A 11:00 in the morning. 10:30.

4 Q All right. Why did you stop there? Strike that. What
5 were you looking for when you went to Dreau Rogers's
6 house?

7 A Well, I was looking for Dreau, because I hadn't seen him
8 in a while or heard from him. It's very odd for me and
9 him to not have contact for that long.

10 Q And did you at that point go look for some oil for your
11 car?

12 A There was some in the breezeway, yes.

13 Q When you stopped at Dreau's house that morning, did you
14 talk to him?

15 A No, I did not.

16 Q Did you see him?

17 A No, I did not.

18 Q Was he at the house?

19 A I assumed he was. Both of his vehicles were there. I
20 didn't know if he was or not.

21 Q Okay. What did you do next?

22 A After I left Dreau's, I went to my friend Ed's house
23 and — which is down by my house on Lower Valley. Talked
24 to him about Dreau. He said he had been there the night
25 before. He had a different phone number for him, so I got

1 that phone number and just kept it, because I had to get
2 ahold of Dreaun that morning. So I held on to it.

3 After I left Ed's, I went up to Walmart, I believe.

4 Q Where is that?

5 A Kind of was just looking around for drugs all day is what
6 I was doing.

7 Q Okay. And I didn't hear that last part. Sorry.

8 A I was looking for drugs all day.

9 Q Did there come a time when you had another contact with
10 Mr. Reddy?

11 A Later that night, yes. Oh, no. There was earlier that
12 day. I borrowed 20 bucks from him.

13 Q Then you went to his house to get the money?

14 A Yes.

15 Q About what time was that?

16 A 2:30, maybe.

17 Q Then did you head to Deadwood?

18 A Yes, I did.

19 Q Why did you go to Deadwood?

20 A I made some food. I had a friend up here that was
21 working, so I brought her some food.

22 Q And you came back from Deadwood about what time?

23 A 6ish at night.

24 Q Okay. And where did you go after you came back from
25 Deadwood?

- 1 A Yes.
- 2 Q After you went to Alan Reddy's house, what did you do?
- 3 A After I went to Alan's?
- 4 Q Yeah.
- 5 A I went home.
- 6 Q Excuse me. Let me rephrase. You said you went to Alan's
- 7 house about 11:30 — excuse me. I misspoke. 11:30,
- 8 11:35.
- 9 A Right.
- 10 Q Did you have your phone with you?
- 11 A Yes, I did.
- 12 Q Then you went into Alan's house?
- 13 A Yes.
- 14 Q When you went into Alan's house and met with him, what did
- 15 you do?
- 16 A He performed oral sex on me and we talked. I guess that's
- 17 that.
- 18 Q About what time did you leave Alan's house?
- 19 A 1:30, 1:20. Somewhere in there.
- 20 Q And what did you do when you went to — left Alan's house?
- 21 A I went home.
- 22 Q And that, again, is the residence at the end of Evans
- 23 Lane?
- 24 A Yes.
- 25 Q And walk through with me, then, the morning — now it's

1 Q This accurately depicts your car?

2 A Yes, it is my car.

3 MR. HAIVALA: Offer 115.

4 MR. ROHL: No objection.

5 THE COURT: Exhibit 115 will be received.

6 Q (By Mr. Haivala, continuing) Did you have a fight with
7 Dreau Rogers on January 21st or 22nd?

8 A No, I did not.

9 Q Okay. And it's been introduced into evidence —

10 MR. ROHL: Mr. Haivala, would you direct your witness not
11 to stare at my client?

12 MR. HAIVALA: I will.

13 MR. ROHL: I really appreciate that.

14 MR. HAIVALA: Mr. Derrek, will you look at me, please?

15 THE WITNESS: Yes.

16 Q (By Mr. Haivala, continuing) Handing you what's been
17 marked Exhibit 107.

18 A That is from my shooting methamphetamine and missing.

19 Q Okay. So was this picture accurately taken of you at the
20 police station on January 22nd?

21 A Yes, it is.

22 Q Okay. And tell me what 107 shows.

23 A It shows me with a big Band-Aid on — right here where I
24 have scars from that from shooting meth. (Indicating.)

25 MR. HAIVALA: May the record reflect that the witness is

1 your body on the morning of January 22nd?

2 **MR. ROHL:** Same objection.

3 **THE COURT:** Overruled.

4 Go ahead and answer.

5 **A** Yes, I did.

6 **Q** (By Mr. Haivala, continuing) And did you have any bruises
7 on the lower end of your body?

8 **A** On my legs, yes, I did.

9 **Q** Can you tell the jury what those bruises were.

10 **A** They were from trying to shoot dope. And the best way to
11 do it, if you can't find a vein, is use a flashlight and
12 try to find a vein somewhere. You end up missing and that
13 blood goes and causes a bruise.

14 **Q** At that time in your addiction, were you shooting up a
15 lot?

16 **A** Yes.

17 **Q** How much were you shooting at the time every day?

18 **A** About a half gram at a time, maybe. Maybe a little less a
19 day. More than a gram easy.

20 **Q** How many separate times would you shoot it up?

21 **A** Three, four. Three, four a day.

22 **Q** And, for the record, what was your drug of choice?

23 **A** Methamphetamine.

24 **Q** Okay. And do you have trouble finding a vein when you
25 shoot up?

- 1 Q Right,
- 2 A I have,
- 3 Q Now, sometime shortly before January 21st, I would say
- 4 that weekish, you were released from jail; right?
- 5 A I guess so, yes.
- 6 Q You were in jail for a grand theft; right?
- 7 A Yes.
- 8 Q And that would be File 21-1391?
- 9 A I don't know what the file number is.
- 10 Q And you were charged with a Class 5 felony?
- 11 A Yep.
- 12 Q And the State —
- 13 **MR. HAIVALA:** I'm going to object at this point, Your
- 14 Honor. I think that violates the Court's ruling on 609.
- 15 **THE COURT:** No. He opened the door on his criminal
- 16 history. Said he was a felon. So I'm going to allow it.
- 17 **MR. ROHL:** Thank you, Your Honor.
- 18 Q (By Mr. Rohl, continuing) And in that case, you were
- 19 accused of stealing different items; right?
- 20 A Yes.
- 21 Q And one of the items that the victim accused you of
- 22 stealing a gun, wasn't it?
- 23 A No.
- 24 Q So in that police report, there's no mention of —
- 25 A I didn't say that. I didn't get accused of stealing a

- 1 **A** Yes.
- 2 **Q** And your bond was not revoked?
- 3 **A** No.
- 4 **Q** And then, after that, you were charged with two more
- 5 felonies; right?
- 6 **A** Possibly.
- 7 **Q** I don't want to put words in your mouth.
- 8 **A** Yes.
- 9 **Q** What are those felonies?
- 10 **MR. HAIVALA:** Again, relevancy, Your Honor.
- 11 **THE COURT:** Overruled.
- 12 **A** What did you say?
- 13 **Q** (By Mr. Rohl, continuing) What charges?
- 14 **A** Failing to register as a sex offender.
- 15 **Q** And the other one?
- 16 **A** Restrictions on residence within community safety zone.
- 17 **Q** And that's all just since January of 2022; correct?
- 18 **A** That's because of January, 2022.
- 19 **Q** And so you've represented to these folks over here that
- 20 your testimony today has absolutely nothing to do with
- 21 your pending sentencing?
- 22 **A** Not at all, sir.
- 23 **Q** Is your attorney going to ask for probation?
- 24 **A** Wouldn't any attorney? Yes.
- 25 **Q** And you're expecting to get that?

1 A I'm expecting to get whatever the Court hands down. I
2 don't expect anything.

3 Q You testified that you are in the process of going to go
4 to treatment?

5 A Yep.

6 Q Are you under the influence right now?

7 A No.

8 Q Have you ever been diagnosed with any mental health
9 conditions?

10 A Yes.

11 Q Have you ever been diagnosed with schizophrenia?

12 A Yes.

13 Q Do they know that?

14 A Yes.

15 Q Did you advise them of that?

16 A I believe we talked about it at some point maybe.

17 Q Who did you talk about it with?

18 A Possibly just my attorney.

19 Q So you can't say that that table over there knows that?

20 A I don't 100 percent know that, no.

21 Q The day in question — I believe you testified that you
22 started communicating with Mr. Reddy approximately
23 4:30 a.m. on Grindr; right?

24 A Around there, yes.

25 Q The messages would show the time. You wouldn't dispute

- 1 that?
- 2 **A** No.
- 3 **Q** Had you gone to bed?
- 4 **A** When?
- 5 **Q** Before you started communicating with Mr. Reddy.
- 6 **A** That early morning?
- 7 **Q** Yeah.
- 8 **A** I believe so, yeah.
- 9 **Q** What time did you wake up?
- 10 **A** 1:30, 2:00 in the morning.
- 11 **Q** What time did you go to bed?
- 12 **A** I don't know. 10:00, 11:00.
- 13 **Q** So you begin this communication with Mr. Reddy. Had you
- 14 ever met him before?
- 15 **A** No.
- 16 **Q** So if Mr. Reddy indicated you had met a week before, that
- 17 would be incorrect?
- 18 **A** Yes.
- 19 **Q** You went to Dreau's house; right? At about 10:00 or 11:00
- 20 in the morning?
- 21 **A** Yes.
- 22 **Q** Unannounced?
- 23 **A** Yep.
- 24 **Q** And you banged on the back door?
- 25 **A** I knocked.

- 1 Q Same thing with the windows?
- 2 A I knocked.
- 3 Q Let yourself into his garage?
- 4 A No, there's no door. It's a breezeway.
- 5 Q You let yourself into the breezeway?
- 6 A That's the only way to get to the back door.
- 7 Q Helped yourself to some oil?
- 8 A It was my oil. I left it there so he could change the oil
- 9 in his car.
- 10 Q Okay. So you took your oil?
- 11 A Yep.
- 12 Q And then you said you put it in the trash; right?
- 13 A In the front, yes.
- 14 Q You went from Dreau's house to Ed Moore's house; right?
- 15 A Yes.
- 16 Q Because you wanted to get Dreau's phone number?
- 17 A That's not why I went to Ed's. That's just the cause of
- 18 going to Ed's. I got Dreau's phone number.
- 19 Q That is what you told law enforcement; right? You went to
- 20 Ed's to get Dreau's number.
- 21 A No, that's not what I said.
- 22 Q Okay. So you get his number?
- 23 A Yep.
- 24 Q And you're looking for drugs?
- 25 A Yep.

1 Q And you call Dreau at approximately 10:00 p.m.; right?

2 A Yes.

3 Q And there's about a four-minute phone conversation; right?

4 A I don't know how long it is. Didn't seem that long to me.

5 Q Or shorter.

6 And you testified that the content of the phone call
7 was — you're trying to check up on him; right?

8 A Yeah.

9 Q And then you followed that phone call up with a text
10 message; right?

11 A I might have.

12 Q And the content of the text message was we, quote — "we
13 need to meet face to face...ASAP" —

14 A Absolutely.

15 Q — end quote?

16 A Yes.

17 Q And that was at approximately 10:00 p.m.?

18 A Yes.

19 Q And during this process, you continue to be looking for
20 drugs. Where did you find them?

21 A I don't think that's relevant.

22 Q Where did you find them?

23 A A friend's.

24 Q Who?

25 A I'm not saying who I got them from that night. I'm not

- 1 A At some point, yeah. Somebody has.
- 2 Q If I have no reports of that, that would be weird to you?
- 3 A I don't know how that all works.
- 4 Q And same thing for Mr. England. Did Mr. England, to your
- 5 knowledge, get spoken to?
- 6 A I don't know.
- 7 Q And, of course, your kids; right?
- 8 A Yes.
- 9 Q Told your daughter you were going to Dreau's house?
- 10 A Yes.
- 11 Q Said, "I'm leaving. I'm going to Dreau's." Right?
- 12 A Yep.
- 13 Q And did they ever talk to her?
- 14 A I don't believe so.
- 15 Q The phone calls you made after you got home at 1:42 a.m.,
- 16 according to your Grindr messages — you dialed star 67;
- 17 right?
- 18 A Possibly, I could have, yes.
- 19 Q You called that at 1:52 a.m.; right?
- 20 A Star 67? I would have to call someone beyond that. Star
- 21 67 doesn't do anything.
- 22 Q That's a number somebody calls to try to figure out if
- 23 their phone is being tapped by the FBI?
- 24 A No, absolutely not. Star 67 shows when you call them, it
- 25 doesn't show up as your name on their phone.

- 1 Q Oh, so you do know what it is?
- 2 A Star 67, absolutely. It's like star 69.
- 3 Q So you dialed star 67 to shield your number from someone?
- 4 A I must have. I don't know what number it was.
- 5 Q Either do I.
- 6 A Well, then how do you know I dialed star 67?
- 7 Q You dialed star 21 at 1:45 a.m.; right?
- 8 A I don't know. I don't know what that means.
- 9 Q You dialed it.
- 10 A Okay. I don't know what it does.
- 11 Q According to testimony, it's a number that's dialed to try
- 12 to figure out if your phone is being tapped?
- 13 Does that sound like something you would have tried to
- 14 do?
- 15 A Okay. Sounds like a meth paranoia. Yeah, absolutely.
- 16 Q Somebody that's nervous about law enforcement —
- 17 A When you're on meth, absolutely.
- 18 Q And you dialed pound 004; right?
- 19 A I guess.
- 20 Q Same question.
- 21 A I don't know what it's for.
- 22 Q And you dialed that, actually, at 10:18 p.m.; right?
- 23 A 10:18 p.m.?
- 24 Q Yeah.
- 25 A I guess.

1 Q You don't remember, though?

2 A Dialing star -- no, I don't.

3 Q You told law enforcement that -- and I do want you to know

4 I don't mean this to be offensive --

5 A I'm sure you don't.

6 Q I take no position as it relates to sexual -- any of that

7 stuff --

8 MR. HAIVALA: Objection. Defense is testifying -- defense
9 attorney.

10 THE COURT: It is.

11 Q (By Mr. Rohl, continuing) You told law enforcement that
12 you're not gay and you're not bisexual; correct?

13 A I don't believe so, no.

14 Q But you told them when you're on methamphetamine, that
15 changes?

16 A Yes.

17 Q Okay. And so when you're on methamphetamine, you do
18 things that you normally wouldn't do?

19 A Yes, sexually. Not shoot somebody.

20 Q You told law enforcement multiple times that you were
21 using a needle that night; right?

22 A Yes.

23 Q And that you fell asleep next to the needle?

24 A Yes.

25 Q Where did you hide the needle when they searched your

1 house?

2 **A** I don't know that it's relevant.

3 **Q** They never found it?

4 **A** They didn't find a bunch of them.

5 **Q** Did you tell them that?

6 **A** No, why would I do that?

7 **Q** So you were able to successfully hide drugs from their
8 search?

9 **A** A needle.

10 **Q** Multiple needles, you said; right? And so if I suggested
11 that you were able to successfully hide other things, that
12 would be asinine; right?

13 **A** No.

14 **MR. ROHL:** May I have a moment, Your Honor?

15 **THE COURT:** You may.

16 **MR. ROHL:** I think I just have two more, Your Honor.

17 **THE COURT:** Go ahead.

18 **Q** (By Mr. Rohl, continuing) Law enforcement asked you to do
19 a polygraph test and you refused; correct?

20 **A** I originally brought it up to take one.

21 **Q** But you refused to do it?

22 **A** Yes.

23 **MR. HAIVALA:** I am going to object, Your Honor. That's
24 irrelevant.

25 **THE COURT:** Overruled.

1 pistol. I am not going to dig it out. It's already in
2 evidence. It's -- it was one of the -- it was a gun that
3 was found at the murder scene. Have you ever touched a
4 .45 Hi-Point pistol?

5 A No, I have not.

6 Q Would you know how to use it?

7 A I know how to pull a trigger. That's about it.

8 Q Not how to lock and load?

9 A No.

10 Q All right. Question was asked didn't you tell your
11 daughter that you were going to Dreau Rogers's house that
12 night?

13 A Yes.

14 Q About what time was that?

15 A Around 11:15. 11:30.

16 Q Why didn't you tell her you were going to Alan Reddy's
17 house?

18 A Because I don't have very many friends. She wouldn't have
19 understood, "Hey, I'm going out at 11:30 at night to get
20 my dick sucked by some gay guy." If I said, "I'm going to
21 Alan's," she would have questioned it.

22 Q Would you agree it would be embarrassing to tell a
23 16-year-old --

24 A Absolutely, yeah.

25 Q 16-year-old girl you're going to go have sex with a man?

- 1 A Yes.
- 2 Q Have you gotten rid of it?
- 3 A I had to get a new one. It took so long to get it back.
- 4 I got a new one before they got it back to me.
- 5 Q What did you do with the other phone?
- 6 A I think I turned it into the Walmart kiosk for \$2.
- 7 Q This is the phone that you confirmed over and over to law
- 8 enforcement corroborated everything you said; right?
- 9 A Absolutely.
- 10 Q And you got rid of it?
- 11 A No. They had it for two months and they gave it back to
- 12 me. I figured they had everything off of it.
- 13 Q You got rid of a phone that you said exonerated you from a
- 14 shooting?
- 15 A They said they didn't need it anymore, yes. That didn't
- 16 work.
- 17 Q Other question I would like to ask you has to do with,
- 18 specifically, the last time you used.
- 19 A The last time I used?
- 20 Q Yeah.
- 21 A About four days ago.
- 22 Q Where were you?
- 23 A That doesn't matter.
- 24 Q Where were you?
- 25 MR. HAIVALA: Objection. Relevancy.

1 A I didn't have any prior ones. Not in my eyes at that
2 time.

3 Q So your testimony is that you had no prior sexual
4 encounters with Mr. Reddy prior to the night of?

5 A In my eyes, no, I did not.

6 Q You're going to have to explain what you mean by that.

7 A When you're on meth and you're up for so long, that is one
8 big, long day. So early Thursday — late Thursday night
9 to early Friday morning to the night of Friday night to
10 Saturday morning, that is one long day to somebody that's
11 been up that whole time.

12 So did I have prior encounters? To me, no. I said
13 what I meant in that day. To me, that was that day.

14 Q So you had been up for a long time?

15 A At that time, yeah.

16 Q And you had not gone to bed?

17 A I might have caught a nap here and there somewhere.

18 Q The text messages indicate prior sexual encounters?

19 A That morning. Same day.

20 Q And they indicate another meeting around midday?

21 A To borrow 20 bucks.

22 Q And after you left his house, he -- being Mr. Reddy --
23 indicated that he loved the sexual encounter?

24 A From that morning.

25 Q You testified about the difficulty you have with finding

1 fight?

2 **A** No, I didn't. I did not. That wasn't the same time.

3 When I went over to Alan's house unannounced is when I got
4 done being interrogated by the Spearfish PD.

5 **Q** Did you tell Alan Reddy you were in a fight with Dreau?

6 **A** Never.

7 **Q** You never said that?

8 **A** Never said that.

9 **Q** And so if Mr. Reddy said that over seven times to law
10 enforcement, he's making that up?

11 **A** Absolutely or he misunderstood something I said. But I
12 never said that to him, no.

13 **Q** The information that shows where you were that night is
14 exclusively limited to your testimony?

15 **A** No.

16 **Q** I want you not to look at him when you answer those
17 questions. Okay?

18 **MR. HAIVALA:** I object, Your Honor.

19 **THE COURT:** Sustained.

20 **Q** (By Mr. Rohl, continuing) What other information is there?

21 **A** I believe there was FBI pinging.

22 **Q** But that occurred after. There was nothing during the
23 relevant time period that shows where you were at at that
24 time that you're aware of?

25 **A** I don't understand what you're trying to say.

1 Mr. Derrek.

2 A Early morning hours. No, like -- no contact in the early
3 morning hours. And we had contact later on that evening.
4 I was out just in Rapid City hanging out with friends,
5 things like that. And then later --

6 Q I apologize.

7 A Am I speaking too low?

8 Q Yeah. Move in a little bit. The best you can. Terrible
9 acoustics.

10 A Okay. No contact early in the morning. I was hanging out
11 with friends in Rapid City. Just -- I was in -- kind of
12 in between jobs. I was hanging out with friends in Rapid
13 City. Looking for jobs and stuff.

14 We didn't come into contact until later on in the
15 evening. And there was some text messages that we had
16 exchanged saying -- hanging out -- things like that. We
17 didn't come into contact until later in the evening.
18 Closer to midnight.

19 Q Let's take a step back. Okay. Early morning hours of the
20 21st. Not the 22nd, but the 21st.

21 A Oh, before that. Okay. 21st.

22 Q Okay. Did you have contact with Derrek Donovan?

23 A Donovan Derrek?

24 Q Did he come to your trailer house that early morning of
25 the 21st?

1 A No, he did not.

2 Q Okay. So you did not have contact with him?

3 A Hm-mm.

4 Q Okay. And, again, walk me through the day. Did you go to
5 work in Rapid City?

6 A I was — like I said, I was not working. I had left — I
7 had separated from the VA. And I was in between jobs,
8 like, waiting on applications, things like that. And I
9 was not working at the time.

10 Q Okay. And seems to be some confusion. Did you tell law
11 enforcement Donovan Derrek had come over to your house on
12 the morning of the 21st? If you remember.

13 A Morning of the 21st? 22nd was the evening we hung out.
14 21st. I don't recall if I had -- I honestly don't recall
15 if I had told them he had come over, but I don't --

16 Q Let me ask it this way. Maybe this would help you. The
17 homicide -- the murder in this case happened in the early
18 morning hours of January 22nd. Past midnight. So when
19 I'm asking you this question, I'm talking about the day
20 before that happened. That morning before.

21 MR. ROHL: Asked and answered.

22 THE COURT: Overruled.

23 A Okay. So --

24 Q (By Mr. Haivala, continuing) Go ahead.

25 A No, we had never hung out in the morning time. There was

1 no hanging out in the morning the day before it happened.

2 Q Okay. All right. So you had separated from the VA, you
3 said?

4 A Yeah, I had — I quit working at the VA.

5 Q What were you doing at the VA?

6 A I was a psychiatric nurse's assistant.

7 Q Then who did you go work for?

8 A I was not working until I went to work with TSA. And that
9 was in April.

10 Q To clarify that, then, on January 22, 2022, you were
11 unemployed?

12 A Yeah; correct.

13 Q So you went to Rapid City. About what time was that?

14 A Earlier — on the day of the 22nd or the 21st?

15 Q 21st.

16 A 21st, I was — I don't recall any times. I was hanging
17 out with friends. And — yeah. It would have been, like,
18 earlier in the day. Earlier in the day after I got up and
19 stuff. But I was going to Rapid City and hanging out with
20 friends.

21 Q Then after you're in Rapid City hanging out with friends,
22 did you come back to Spearfish, South Dakota, at some
23 point?

24 A Yeah. I came home, probably, later in the evening and was
25 just at home on the evening of the 21st.

1 said "Oh LoL Door to your house." That he was walking out
2 of his door.

3 Q All right. So what time -- approximately what time did he
4 get to your house?

5 A Very shortly after that. Just probably a few minutes
6 after midnight, maybe.

7 Q After the text messages were sent?

8 A Yeah, because he didn't live very far from me. It was a
9 few minutes after that.

10 Q So he's knocking at your door about --

11 A I would say probably around midnight. He was only around
12 five or six blocks away from my house.

13 Q All right. Then, Mr. Reddy, do you have a sexual
14 encounter with Mr. Derrek?

15 A Yes, yeah.

16 Q And then he left after the sexual encounter?

17 A Mm-hmm, yes.

18 Q Can you tell me approximately what time he left? If I
19 gave you the exhibit, would that help you?

20 A Maybe. So it would have been probably -- I would say
21 probably around 1:30 in the morning. Somewhere just
22 before he had arrived home at 1:42 a.m.

23 Q And this is the text message and the exhibit from
24 Mr. Donovan Derrek. What does it say?

25 A He says "Goodnight...thanx and i apologize for not

1 cumming, you were terrific so dont for one second think it
2 was your fault, u went above and beyond..."

3 Q So that was said at 1:42 a.m. on the 22nd?

4 A Correct.

5 Q Now, this is going to get a little embarrassing. I don't
6 mean to embarrass you, sir. But during this sexual
7 encounter, were you able to — let me put it this way.
8 Was Mr. Donovan Derrek able to climax? Do you know what I
9 mean by that term?

10 A Yeah, I know that term. No, he was not.

11 Q Handing you what has been marked previously 61 and 71. Do
12 you recognize those exhibits?

13 A Yes, I do.

14 Q First, this has been admitted into court already. What is
15 71?

16 A 71 is a picture that I had taken at 1:23 a.m. of Donovan's
17 genitalia.

18 Q Donovan's penis?

19 A Correct.

20 Q And that was taken at what time?

21 A 1:23 a.m. on January 22nd.

22 Q Just so I'm getting my timeline straight. He's at your
23 door, I think you testified, ten to 12:00. Somewhere in
24 there.

25 A Ten to 12:00.

1 Q Your cell phone had been taken by the police?

2 A Yes, they had subpoenaed my cell phone. I went there
3 to -- I don't quite remember all of the details of what we
4 talked about. But I just -- I had given him more
5 information about the day after Donovan was released. He
6 stopped by my house to apologize to me for all of --
7 everything that had happened and caught me up to speed,
8 because I had no idea who Dreau or Destiny were. And he
9 said he was sorry and kind of just did, like, a rundown
10 of, like, I guess, that -- of what happened to him. Being
11 arrested and things like that.

12 Q In your statement, do you remember saying something to
13 Detective Fox about Mr. Donovan Derrek being in a fight
14 with Dreau Rogers?

15 A The morning he had come over, he told me that he had had
16 an argument with Dreau and he didn't tell me what it was
17 about. He just said he and Dreau had an argument and that
18 was pretty much all he said about it. I didn't push too
19 many questions. I was upset about the whole thing.

20 Q Did he say when this argument was?

21 A He didn't, no. He didn't say when the argument was. My
22 assumption -- I was thinking it was probably, like, before
23 -- before him and I had met up on the 22nd.

24 Q Okay. So as you stand here today, you made some
25 assumptions as to the date and time is that what you're

1 into an argument.

2 Q And there is no room in your mind to the contrary?

3 A I don't recall if I told them different.

4 Q Okay. So I have a copy of your transcript --

5 A Mm-hmm.

6 Q — from the second interview. Alan Reddy tells Detective
7 Fox, quote, "Him and Dreau got into a physical altercation
8 that day or whatever." Did you say that?

9 A I don't recall saying "physical altercation," but if they
10 say I did, then I must have. But I don't recall saying a
11 "physical altercation."

12 Q Well, that's what you testified to?

13 A Mm-hmm.

14 Q You also said, quote, "I don't know if he said they were
15 at his house or Dreau's house or what." But they said
16 they got into, like, a quote, "physical altercation." Do
17 you see that?

18 A I see it, yes. Like I said, I don't remember if those
19 were the exact words. This was a long time ago.

20 Q Well, these are the exact words.

21 A In my head, I don't remember.

22 Q Detective Fox asks you when you say there was a physical
23 altercation, "Did he go into much detail about it?" Your
24 response "He said it was earlier. Before he had contacted
25 me about hanging out." Right?

1 A Mm-hmm.

2 Q And then, again, you said "We got into it and things got
3 physical"?

4 MR. HAIVALA: Can you give me a page number, please,
5 Counsel?

6 MR. ROHL: Yeah, it's page 5 of his second interview,
7 specifically, line 23.

8 MR. HAIVALA: Thank you.

9 A Okay. I know that was said there and you're showing it to
10 me. But I don't remember those exact words about it being
11 physical.

12 Q (By Mr. Rohl, continuing) You said it again. "And he said
13 they just got physical and Dreau was pissed at him." And
14 that is on page 6, lines 18 through 19.

15 A Okay. I do see it, yes. Like I said, I don't recall
16 those exact words. But he had mentioned an argument. I
17 don't recall exactly if he said they had got physical with
18 each other.

19 Q Well, you testified he said there was no mention of
20 physical.

21 A Correct. I testified at that time. Like I'm saying to
22 you right now, I don't remember exactly saying it was
23 physical.

24 Q Well, I appreciate that. But we're going to keep on
25 working through this here. And then you said it again.

1 "And then he started talking about Dreau. How they got
2 into it and got physical." Right?

3 A Mm-hmm.

4 Q And that is page 11, lines 11 through 13.

5 I have made a list of statements that you have made
6 candidly that I feel are not accurate. And I am going to
7 confront you with them. And I'm just being —

8 MR. HAIVALA: Again, defense is testifying.

9 THE COURT: He is. Sustained.

10 Q (By Mr. Rohl, continuing) Okay. When law enforcement came
11 to your house, you understood that it was important to be
12 honest with them?

13 A Mm-hmm; correct.

14 Q Fair? You told law enforcement that you met Donovan
15 online about a week ago?

16 A Mm-hmm; correct.

17 Q Is that true?

18 A Yeah, I had met him that week. Yeah.

19 Q So the Grindr messages that are in evidence start on the
20 21st at 4:30 in the morning; right?

21 A Yeah, I guess. I didn't — I don't remember the times of
22 the Grindr messages. I mean, we had met that week.

23 Q How did you meet him?

24 A On Grindr.

25 Q Okay. Are there Grindr messages that you deleted?

1 "And then he started talking about Dreau. How they got
2 into it and got physical." Right?

3 A Mm-hmm.

4 Q And that is page 11, lines 11 through 13.

5 I have made a list of statements that you have made
6 candidly that I feel are not accurate. And I am going to
7 confront you with them. And I'm just being —

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10 Q (By Mr. Rohl, continuing) Okay. When law enforcement came
11 to your house, you understood that it was important to be
12 honest with them?

13 A Mm-hmm; correct.

14 Q Fair? You told law enforcement that you met Donovan
15 online about a week ago?

16 A Mm-hmm; correct.

17 Q Is that true?

18 A Yeah, I had met him that week. Yeah.

19 Q So the Grindr messages that are in evidence start on the
20 21st at 4:30 in the morning; right?

21 A Yeah, I guess. I didn't — I don't remember the times of
22 the Grindr messages. I mean, we had met that week.

23 Q How did you meet him?

24 A On Grindr.

25 Q Okay. Are there Grindr messages that you deleted?

1 A No. I mean, the Grindr app, I assume, eventually deletes
2 them, because they're no longer — they were no longer in
3 there after a while.

4 Q Okay. So according to the Grindr app, you met Donovan on
5 the 21st, as you're being interviewed on the 22nd; right?

6 A Like, I don't remember the exact day on Grindr that I met
7 him.

8 Q But you told law enforcement that you met him online about
9 a week ago?

10 A Correct.

11 Q And it would have been literally yesterday?

12 A Okay. Yeah.

13 Q You told law enforcement that you suspected Donovan was on
14 drugs?

15 A Mm-hmm.

16 Q But you, in fact, knew he was on drugs?

17 A Yeah, I knew he was when I met him. After I saw the marks
18 on his arm.

19 Q Right. But when law enforcement asked you, you told them
20 that you just suspected he was on drugs?

21 A Mm-hmm.

22 Q You didn't tell him you knew he was on drugs; right?

23 A Yeah.

24 Q You didn't tell him that you gave him money to buy drugs?

25 A No, because I never did.

1 specific on it at all? Was it, like, after midnight,
2 before midnight?" What was your response?

3 A "It was after midnight."

4 MR. HAIVALA: Page, please?

5 MR. ROHL: Page 9.

6 Q (By Mr. Rohl, continuing) Right?

7 A Yeah.

8 Q And then in relation to when he left, what did you say?

9 A About ten to 1:00. A quarter to 1:00. It was around
10 there. And then — yeah, I was flabbergasted with
11 everything they told me.

12 Q Well, you were referring to —

13 A And I said I guess my suspicions were right.

14 Q Referring to you pretending to have ignorance about his
15 drug use?

16 A I didn't pretend to have ignorance. I originally
17 suspected when I met him and saw his arms. But I'm not
18 going to just throw that on him and say he was a rampant
19 drug user.

20 Q He told you he was an IV drug user?

21 A Later on, he did. Like, we didn't discuss drugs that
22 night.

23 Q When you met with law enforcement on the 22nd —

24 A Mm-hmm.

25 Q — you knew he was an IV drug user?

- 1 A Mm-hmm. (Peruses document.)
- 2 Q Do you see that green bubble there?
- 3 A Yeah, the one telling him to drive down Evans?
- 4 Q Yeah. Who is telling him to drive down Evans?
- 5 A Me. I am telling him to drive down Evans. It will be on
- 6 the left. Lantern Estates. Where I was living at the
- 7 time.
- 8 Q What time was it?
- 9 A Looks like January 21st at 5:15 a.m.
- 10 Q Does that refresh your recollection about whether or not
- 11 you met up before the night of the 22nd?
- 12 A (Peruses document.) It does not. Because -- I mean, the
- 13 biggest feeling I'm getting about this -- the reason I'm
- 14 not remembering. A lot of our meetings ended up being
- 15 talk. Never meeting in person. This one, I told him
- 16 where to go. I don't recall if he came over on that day.
- 17 Q I'm going to have you look at page 1 now of Exhibit 70, if
- 18 you would be so kind. I want you to look -- what time of
- 19 day is that?
- 20 A That is at 8:18 a.m.
- 21 Q On what day?
- 22 A On January 21st.
- 23 Q And so that would be, like, what, an hour and a half, two
- 24 hours after that Grindr message you just read?
- 25 A Mm-hmm.

- 1 A That's at 11:07.
- 2 Q A.m.?
- 3 A Yes.
- 4 Q You guys exchange texts sexual in nature. I don't want
5 you to read those.
- 6 A Mm-hmm.
- 7 Q Okay. Page 9. Yep. What does Donovan tell you right
8 there and what time is it?
- 9 A The one on the bottom of page 8 or 9? Sorry.
- 10 Q Don't be sorry. The one on the bottom of page 8 --
- 11 A He says "Im gonna be 100% honest with you.... I still
12 shoot meth and it gets me SUPER fucking horny and thats
13 when i have the biggest/best orgasms...i dont even
14 masturbate sober and i dont let guys suck it if im
15 sober...i never share my needles and im clean of
16 everything...if u still wanna play with me great, if not i
17 completely understand...im telling you this cause im
18 playing with it watching my you tube and i could bust it
19 if i wanted to but ill save it if u still want it."
- 20 Q What time of day is that?
- 21 A That is at 2:40 p.m. on the 21st.
- 22 Q Okay. What day?
- 23 A On January 21st.
- 24 Q So you have not been interviewed by law enforcement yet;
25 correct?

- 1 A Correct, I have not. So he told me, so I knew then.
- 2 Q At this point, it's unambiguous you know this man is an IV
3 meth user?
- 4 A From what he said in this text.
- 5 Q Okay. We'll get to the interview. And — okay. On mine,
6 it's page 11. What does Donovan tell you in that text
7 message and what time is it there?
- 8 A At 3:02 on January 21st — 3:02 p.m. — he says "Im also
9 out of shit and since i cant access my \$ im fucked till
10 tomorrow...i would love nothing more than to do a blast
11 and then go directly to your house and let you have at
12 it!!!!!"
- 13 Q And what do you say back?
- 14 A I said "I'd love that!"
- 15 Q And what do you say after that?
- 16 A The same page?
- 17 Q No, next page.
- 18 A Page 12.
- 19 Q Sorry. Go back to page 11. Pages are just a little bit
20 different here.
- 21 If you recall, do you tell Mr. Derrek — do you ask
22 him if you won't let him — you ask him why he won't let
23 you perform oral sex when he's sober. Do you remember
24 that?
- 25 A Mm-hmm.

1 you about this text.

2 A Mm-hmm.

3 Q When he said he was going to stop by to grab that, you
4 knew he was referring to money -- your money; right?

5 A Mm-hmm.

6 Q And then when he said he was going to run to Deadwood to
7 get it, you knew he was referring to meth; right?

8 A I assumed he was referring to his drug, yeah. On that
9 time here, he actually didn't -- he actually didn't make
10 it and I never gave him money there. I gave him money on
11 a later date. And I did have -- I thought you guys had
12 grabbed those text messages as well. I gave him money on
13 a later date. It was \$20. I never gave him money here at
14 a later time. He ended up not coming by until later that
15 night.

16 Q So when you say you gave him money at a later date, do you
17 mean on the 21st or sometime --

18 A Sometime -- it was after the shooting. After the murder.
19 That's the only time I gave him ever money.

20 Q You're telling us you gave Donovan Derrek money after this
21 happened?

22 A \$20 because he said he didn't have any money to eat and he
23 didn't have anything to get anything to eat or drink and
24 that was later on I gave him money. That was after.

25 Q How many times have you met with him since this happened?

1 **A** Since that happened, a few times after. And those are in
2 my text messages, as well, that you guys have acquired.

3 **Q** Who are "you guys"? I --

4 **A** The police, the Government, whoever.

5 **MR. HAIVALA:** I am going to object. This is getting
6 argumentive.

7 **THE COURT:** All right. You guys are talking over each
8 other horribly. Just ask a question and give an answer.

9 **Q** (By Mr. Rohl, continuing) Does that table right there know
10 that you have met with Donovan Derrek after the shooting
11 occurred?

12 **A** Yes. We talked about it, yes. Because they -- I -- after
13 everybody had taken my phone and seen my text messages, I
14 just talked about everything. And every time I met, I --
15 it is in the text messages that we have met again after
16 that.

17 **Q** Have you guys had or maintained a sexual relationship
18 since this occurred?

19 **A** Yes, a few times. A couple times.

20 **Q** After?

21 **A** Yes.

22 **Q** Would it be fair to say that it's hard to keep track of
23 everything?

24 **A** Not as hard to keep track of everything, no. It wouldn't
25 be fair to say that.

1 **RECROSS-EXAMINATION**2 **BY MR. ROHL:**3 **Q** When we went through your messages in relation to prior
4 meetups -- do you remember that?5 **A** Just a little bit ago when we talked about it? Yeah, yes.6 **Q** And there were messages that seemed to indicate there was
7 a meet-up that you said didn't happen; right?8 **A** Yes. And, like I told you, there were times that we just
9 talked about meeting, but we never did. Many, many times.10 **Q** Sure. But the night of question, that couldn't have
11 happened; right?12 **A** Yeah. On the 21st, we did not meet up, because he didn't
13 end up showing up.14 **Q** Sure.15 **A** And I left to go to Rapid City, like I said.16 **MR. ROHL:** You answered my question. Thank you.17 **THE COURT:** Is he excused and released?18 **MR. ROHL:** He's excused and released from my subpoena,
19 Your Honor.20 **MR. HAIVALA:** He's excused from the State.21 **THE COURT:** Thank you, sir. You're free to go.

22 Counsel, approach, please.

23 (WHEREUPON, an off-the-record bench conference
24 was held.)25 **THE COURT:** Does the State have any more witnesses?

1 **MR. HAIVALA:** Your Honor, after thinking about making a
2 record on an earlier issue of the immunity issue that we
3 talked about earlier, I decided we will not go forward
4 with the record.

5 **THE COURT:** All right. Thank you.

6 Mr. Rohl, you would like to make motions?

7 **MR. ROHL:** I would, Your Honor.

8 **THE COURT:** Please proceed.

9 **MR. ROHL:** Thank you.

10 This motion applies to Count I, Count IA, Count IV,
11 and V. I am going to read this into the record.

12 As this Court knows well, the State is tasked with
13 disproving every single reasonable doubt of guilt in this
14 case.

15 Dreau Rogers presented a third-party perpetrator
16 defense, which has demonstrated the potential culpability
17 of another while simultaneously highlighting the failures
18 of law enforcement to follow rules and procedures with
19 respect to the entirety of investigation.

20 Shortly after Destiny Rogers's death, Dreau Rogers
21 immediately and promptly hailed emergency services to
22 dispatch to his home.

23 Upon arrival, Dreau Rogers clearly and unambiguously
24 articulated who the responsible party was. Law
25 enforcement obtained the aid of SWAT or SRT to apprehend

1 Donovan Derrek and bring him in for questioning and
2 gunshot residue testing.

3 Both Dreau Rogers's and Donovan Derrek's gunshot
4 residue tests yielded positive results.

5 These findings corroborated every single way exactly
6 what Dreau Rogers stated occurred. The results rebut and
7 further incriminate in every way what Donovan Derrek told
8 law enforcement.

9 Gunshot residue. Approximately six months before
10 trial, the State undertook efforts to try and prove that
11 Mr. Derrek's gunshot residue tests were the result of
12 transference. Keyword, "try."

13 The State did not send the gloves at issue in for
14 forensic testing. And as they lay there in evidence,
15 there is absolutely zero forensic testing that has taken
16 place on these gloves.

17 Sure, the State will say, "Well, we didn't have to
18 test them, because we realized this over a year after it
19 had taken place." Doesn't matter. They have the burden.

20 At a minimum, they should have sent the gloves in for
21 testing to at least confirm or deny whether the glove's
22 natural course of use — they could have gunshot residue
23 on them. They didn't. They shouldn't even be allowed to
24 argue transference in the absence of the testing.

25 It is pure and complete speculation by the State to

1 make that argument.

2 A reasonable person could not find -- a reasonable
3 person could find in any way that this set of
4 circumstances in relation to gunshot residue is anything
5 other than exculpatory evidence, plain and simple.

6 Two, cell phone evidence. The entirety of the
7 at-issue cell evidence is another fact upon which
8 reasonable minds could not disagree.

9 The call detail records do not in any way evince guilt
10 of Defendant Dreau Rogers. Those records do not support
11 in any way a finding that Donovan Derrek was not at Dreau
12 Rogers's during the relevant time period shortly before
13 12:48 a.m., January 22nd. No reasonable mind could defer
14 in that regard.

15 Further, law enforcement's violation of law to
16 preserve material evidence is another factor upon which
17 only exculpatory conclusions can reasonably be drawn.

18 The jury was told that the CDR data would objectively
19 show that Donovan Derrek was not at Dreau Rogers's. They
20 did not. They do not.

21 They show that Donovan Derrek called Dreau Rogers
22 after going out of his way to get his number.

23 The CDR records show that Donovan Derrek texted Dreau
24 Rogers at 10ish p.m. Hours before the 911 call was made
25 by Dreau. Quote, "We need to meet face-to-face ASAP," end

1 quote. They show that.

2 Then, finally, they show that Donovan Derrek was
3 dialing code pound 21 at 1:42 a.m. and seeking to learn
4 whether or not the FBI was tracing his phone. That is
5 what the objective CDR records show.

6 Text messages between Alan Reddy and Donovan Derrek
7 regarding sexual encounter number four on the day in
8 question are not indicative of anything.

9 They are representations made by these two guys and
10 their reliability rests exclusively on the credibility of
11 these two. The credibility, which I suggest is only
12 exculpatory evidence after today's testimony.

13 Fact three, DNA evidence. Every single witness who is
14 capable of testifying to it unanimously agreed that
15 evidence collection and the integrity of the evidence was
16 key to this case.

17 Bincy Thankachan, forensic examiner, testified exactly
18 how forensic evidence is to be collected in a way that
19 prevents cross-contamination.

20 The evidence in this case was corrupted to such extent
21 that the State's expert Ashley Bullock was forced to admit
22 on numerous occasions that she didn't understand how
23 evidence was supposed to be collected and if it was
24 collected improperly, the results are meaningless.

25 Based on the testimony received by the jury, no

1 reasonable juror could come to a conclusion that the State
2 has proved beyond a reasonable doubt that Dreau Rogers
3 committed the crimes.

4 Beyond a reasonable doubt means, in this case, that
5 the State must disprove all reasonable possibility that
6 Donovan Derrek committed the crime.

7 How do they do that? I can't tell you that.

8 I can tell you how they don't do it. They don't
9 disprove it with admittedly mishandled DNA evidence. They
10 don't do it by breaking the law, and in conjunction with
11 the statutory violation, losing cell phone evidence, which
12 would further incriminate Mr. Derrek. And, finally, they
13 don't do it by having on the record forensic evidence that
14 further implicates Donovan Derrek as the killer, i.e.,
15 gunshot residue. I know that is not how they do it.
16 Point being, no reasonable juror could find guilt.

17 Thank you.

18 **THE COURT:** And so I'm clear, Mr. Rohl, your judgment of
19 acquittal is referencing Count I, IA, IV, and V; is that
20 correct?

21 **MR. ROHL:** I, IA, II, which is possession of a firearm by
22 a person with a prior drug-related conviction. I believe
23 that count to be in relation to the .45 caliber. I am not
24 making that argument in relation to the .22 and in
25 relation to the ingestion charge, Your Honor.

1 **THE COURT:** Okay. So I, IA, II, IV, and V?

2 **MR. ROHL:** Yes.

3 **THE COURT:** Correct?

4 **MR. ROHL:** Yes, Your Honor.

5 And, for the record, can I actually read in the crimes
6 that I'm referencing?

7 **THE COURT:** Please, please.

8 **MR. ROHL:** Count I, first-degree murder; Count IA,
9 second-degree murder; Count II, possession of a firearm by
10 a person with a prior felony drug-related conviction,
11 .45 caliber; possession of a firearm with an altered
12 serial number, again, .45 caliber; commission of a felony
13 while armed with a firearm, to wit, murder.

14 **THE COURT:** All right. Thank you.

15 Who is making the argument response from the State?

16 **MR. HAIVALA:** I'm sorry?

17 **THE COURT:** Who is responding from the State to the
18 motion?

19 **MR. HAIVALA:** Oh, I will.

20 **THE COURT:** Okay. Please proceed.

21 **MR. HAIVALA:** Your Honor, what Mr. Rohl is making is an
22 argument to the jury, but he's making it to you in the
23 form of a motion to dismiss.

24 I am not going to go through every one of them. He
25 has made his motions. He makes it clear this is his

1 position.

2 However, I will say there's more than enough unrefuted
3 evidence in the file to show that all of these crimes
4 should go to a jury -- alleged crimes -- should go to a
5 jury. The jury should decide that based on the evidence
6 presented.

7 Mr. Rohl brings up things about contamination. He
8 quotes some witnesses, I think out of context, in my
9 opinion, and incorrectly -- I don't mean that
10 disrespectfully -- as to the evidence presented.

11 So, therefore, we think there is more than enough
12 evidence to take this matter to the jury.

13 **THE COURT:** Thank you.

14 Any response?

15 **MR. ROHL:** No, Your Honor.

16 I would rely on my prior submission.

17 **THE COURT:** Thank you.

18 The law requires that in a judgment of acquittal --
19 requests for a judgment of acquittal -- the evidence must
20 show the defendant committed all the elements of the
21 underlying offenses in this case.

22 The test is whether the evidence was sufficient to
23 sustain a conviction.

24 The Court must decide whether after reviewing the
25 evidence in light most favorable to the prosecution that

1 any rational trier of fact could have found the essential
2 elements of the crimes beyond a reasonable doubt.

3 In this case, the Court finds that the State has
4 submitted sufficient evidence on which this jury, who is
5 the trier of fact, could reasonably find Mr. Rogers guilty
6 of the crimes charged.

7 The motion for judgment of acquittal on those counts
8 is denied.

9 **MR. ROHL:** Thank you, Your Honor.

10 **THE COURT:** Since we don't have the jury here, how would
11 you like to proceed, since the State has rested?

12 **MR. HAIVALA:** State rested.

13 **MR. ROHL:** I — I don't think I'm going to call any
14 witnesses, Your Honor. But could I maybe have just a
15 ten-minute opportunity to talk to my client about —

16 **THE COURT:** Of course —

17 **MR. ROHL:** — moving forward?

18 **THE COURT:** Just let me know when you're ready. Thank
19 you.

20 **MR. ROHL:** Could we have access to some privacy?
21 Mr. Rogers and I?

22 **THE COURT:** I assume that can be arranged.

23 **MR. HAIVALA:** Absolutely.

24 (WHEREUPON, a brief recess was taken.)

25 **THE COURT:** Are we ready to bring in the jurors?

1 law of the case.

2 Now, here, the Defendant's not objecting. The State
3 is objecting and they want theirs — I don't think -- it's
4 up to the jury to weigh those things. I think the jury —
5 they must — it's for their sole and exclusive
6 determination whether returning the property to — in this
7 case — the alleged third-party perpetrator without a
8 Court order — what weight that is given on guilt or
9 innocence of Mr. Rogers. That's my position.

10 But what I will do is I'm going to mark yours "State's
11 Proposed Number 1." And I'm going to deny it.

12 **MR. HAIVALA:** Okay.

13 **THE COURT:** The reason is I think that the Court's
14 proposed Instruction Number — it would be 48 — correctly
15 states the law. And when this instruction and all of the
16 instructions are taken as a whole, it correctly states the
17 law of the case.

18 So I'm going to deny. And I'm going to say "See
19 Court's Instruction Number 48." And I'm going to sign my
20 name. Today's the 6th. And I will file this proposed
21 instruction from the State.

22 **MR. HAIVALA:** Thank you, Judge.

23 **MR. ROHL:** Thank you, Judge.

24 One last thing. I just want to make sure that I'm not
25 waiving my spoliation jury instruction requests by

1 agreeing with the Court as to its Instruction 48.

2 **THE COURT:** All right. Should we make a record on that?

3 **MR. ROHL:** Well, the only record I want to make, Your
4 Honor, is that, of course, the case law -- this is in my
5 position -- the case law needs to be addressed. I think
6 that in order to get a spoliation argument, I basically
7 have to prove that law enforcement intentionally
8 mishandled evidence in a crime.

9 I think that, if I prove that, the case should be
10 thrown out. And it's almost impossible the way the law is
11 written to get that instruction.

12 And I just want to preserve my client's ability to
13 make that argument.

14 **THE COURT:** All right. And I'm going to make a record on
15 this. Because the issue is what remedy is available to
16 Mr. Rogers, because the Spearfish Police Department
17 released the undownloaded cellular phone of Donovan
18 Derrek, which is contrary to 23A-37-15. More
19 specifically, what -- whether a due process violation
20 occurred. And, if not, whether a jury instruction about
21 how the jury should deal with the lost evidence is
22 appropriate.

23 And, of course, we've been talking about *State v*
24 *Zephier* or *Zephier*. However you want to pronounce it.

25 But the Supreme Court noted that there were two types

1 of cases involving the constitutionally guaranteed access
2 to evidence that arise under the due process clause of the
3 14th Amendment.

4 The two types are -- the two types of cases are that
5 which the exculpatory value of the undisclosed evidence is
6 known in cases that it's not.

7 The Court further indicates that in cases where the
8 exculpatory value of undisclosed evidence is known is also
9 Brady evidence. And such evidence is exculpatory when it
10 is identifiable and intact and is material to the guilt of
11 the defendant.

12 Supreme Court also said, furthermore, evidence is
13 material if there is a reasonable probability that, had
14 the evidence been disclosed to the defense, the result of
15 a proceeding would have been different.

16 Finally, if the evidence shows exculpatory value, the
17 good faith or bad faith intent of the Government is
18 irrelevant.

19 In this case, the Court finds that the defense has not
20 shown and cannot do so that the evidence on Derrek --
21 Donovan Derrek's phone is exculpatory, and, thus,
22 material, because it is impossible to show that the
23 proceeding would operate any differently than it has
24 operated because what is on the phone is unknown.

25 The evidence on Mr. Derrek's phone could be entirely

1 unhelpful to the defense by showing that Donovan Derrek
2 was not anywhere near the scene of the crime,
3 nevertheless, the evidence on his phone could also show
4 that he was physically present at or near the scene of the
5 crime.

6 The proceeding thus far has not clearly identified
7 where exactly Donovan Derrek was during the period in
8 which it is alleged that Destiny Rogers was shot.

9 Since it cannot be shown that the contents of Derrek's
10 phone is material, let alone exculpatory, because the
11 phone is lost — the information on the phone is lost,
12 really — there is no remedy available here.

13 However, the second line of cases involving due
14 process rights involve where the exculpatory value of
15 undisclosed evidence is not shown.

16 In those situations, it is potentially useful that a
17 defendant must show that law enforcement officers acted in
18 bad faith to establish a due process violation.

19 Here, it could reasonably be argued that the evidence
20 on the alleged third-party perpetrator or cell phone is
21 the most accurate way to prove the physical location of
22 the individual owner of that phone.

23 However, the defense cannot show that the Spearfish
24 Police Department, the State's Attorney's Office, or the
25 Rapid City Police Department engaged in any bad faith.

1 Rather, the State, through the State's Attorney's
2 Office, would have a reason to obtain the data off the
3 phone to further their theory that Donovan Derrek was not
4 the alleged murderer. But, instead, the opposite, which
5 is the opposite of the Defendant's argument.

6 The State has shown that it was negligent in returning
7 the phone to Donovan Derrek because when the phone was
8 returned to the police department with a report indicating
9 that nothing had been downloaded off the phone -- if
10 nothing had been downloaded, the State could not have
11 known the contents and, thus, could not have acted in bad
12 faith to destroy the evidence that was known to be useful
13 to the defendant, i.e., bad faith.

14 It can be argued that the police department from
15 Spearfish engaged in clearly negligent conduct, as found
16 by this Court in this case, by releasing the phone
17 contrary to SDCL 23A-37-15, which, of course, is the
18 notice to the defendant when evidence is going to be
19 released statute.

20 Additionally, the Spearfish Police Department released
21 the phone when they knew or should have known, based upon
22 the report by Rapid City police, that the phone was unable
23 to be downloaded.

24 It was a potentially useful source of evidence for the
25 defense. Thus, it can be said negligence occurred, but it

1 cannot be said that it was done in bad faith.

2 So the remedy of a due process violation is generally
3 a new trial. However, a due process violation did not
4 occur in this case. Therefore, the remedy of a new trial
5 is not appropriate for failure to preserve the content of
6 Donovan Derrek's phone.

7 Nonetheless, the issue turns to whether a jury
8 instruction would be appropriate to remedy the negligent
9 loss of the evidence by the Spearfish Police Department.

10 Jury instructions are sufficient when, as considered
11 as a whole, they correctly state the applicable law and
12 inform the jury.

13 Trial court has the duty to instruct the jury on the
14 law applicable to this case.

15 The jury instruction that has now been proposed by the
16 Defendant has been withdrawn in favor of Court's jury
17 Instruction 48.

18 So I believe Instruction 48 properly states the law to
19 which the Trial Court has a duty to present to the jury
20 under 23A-37-15, which is the notice provision.

21 It is the province of the jury to weigh all of the
22 evidence presented that was properly before it.

23 No objection has been made about the fact that the
24 State made the mistake of failing to provide notice to the
25 jury, rather, it was presented uncontroverted.

1 In other words, both sides agreed it was a mistake,
2 you know? That the evidence was lost because it was a
3 mistake.

4 The State attempted to rehabilitate their case and had
5 the opportunity effectively to show how such conduct
6 should not have an affect upon the decision whether the
7 defense had the exact same inverse opportunity.

8 The jury, again, must weigh the evidence presented,
9 including the mistake by the State, meaning the facts that
10 the jury must find are true.

11 And, also — and I want to say it was *Engesser*, but
12 I'm not sure. But they — the Court in *Engesser* said bad
13 faith is not simply bad judgment or negligence. Rather,
14 it implies the conscious doing of a wrong because of a
15 dishonest purpose and that is not the evidence in this
16 case.

17 Do you want to make a record, Mr. Rohl?

18 **MR. ROHL:** I mean, of course, the Court made a record,
19 which was very good, because you're a very good judge.

20 I agree with you that that is the status of the law
21 right now. I briefed this issue. I would incorporate my
22 brief into the objection that I would like to preserve.
23 So, if necessary, I can take a run at trying to explain
24 why I think the law should be modified.

25 The jury instruction — I mean, the way that the law

1 is written, the Court essentially has to find bad faith.
2 And then the proposed jury instruction says "Well, if you
3 find bad faith, it shouldn't even be a question for the
4 jury, then, about bad faith." Because the Court has to
5 make that expressed finding before they even give the jury
6 the option.

7 And that's what I would like to be able to argue
8 upstairs, if necessary.

9 **THE COURT:** Right. And I'll give you a chance,
10 Mr. Haivala.

11 **MR. HAIVALA:** Sure.

12 **THE COURT:** If we have a finding of bad faith here, we
13 probably wouldn't be sitting here today.

14 **MR. ROHL:** Right.

15 **THE COURT:** Because it would have been a mistrial. In
16 other words, new trial, as the *Zephier* court talked about.

17 The other thing that the *Zephier* decision did not
18 address was whether or not the trial court made a finding
19 at all. He — I think the words was the trial court was
20 concerned about giving the guns back the day of the
21 incident. And later on, it was discovered that the
22 state's attorney told the officer, "Yeah, it's okay. Give
23 the guns back."

24 **MR. ROHL:** Go ahead.

25 **THE COURT:** I'm not even sure if *Zephier* was arrested at

1 that point. Could have been. I'm not sure if there was
2 notice to be given to anybody because the co-defendant
3 took off and they had to go try to find him.

4 So I agree to some extent with Mr. Rohl. There's no
5 finding in that case of negligence or bad faith. There
6 were concerns by the judge.

7 The judge, however, did give this instruction, which
8 is now 48, and let the jury decide whether it has an
9 effect on the guilt or innocence, in this case, of
10 Mr. Rogers.

11 Any record?

12 **MR. HAIVALA:** Just thinking this through, Judge. I don't
13 want to violate any type of order or instructions.

14 The Court is not finding bad faith or good faith or
15 anything like that?

16 **THE COURT:** I found no bad faith. I found negligence.

17 **MR. HAIVALA:** So given the finding of the Court — where
18 I'm going with it when I do my closing argument — I don't
19 think — or can I say "The Court has found no bad faith
20 and would ask the jury to consider it"? That's where I'm
21 going.

22 I don't want to run that tightrope of saying something
23 like that and Mr. Rohl will ask for a mistrial.

24 **THE COURT:** This case, a big issue — one of the biggest
25 issues that has been raised in this case is that the cell

1 throughout my phone."

2 In addition, you heard from Detective Almeida from
3 Rapid City who had a chance to go through all the
4 downloads. He gave his opinion on where Donovan was
5 during that fateful time.

6 He was asked on the stand "Where was Donovan at
7 12:48?" Obvious. He was over at Alan's house.

8 The FBI — FBI Officer Sean Kennedy testified that he
9 took what information was available off of Donovan's
10 CDR — Donovan's call detail records — and he pinpointed
11 that arc. He used the cell phone towers to determine
12 where Donovan was during that time. Putting him nowhere
13 near the Rogers's residence, but over by his house, over
14 by Alan's house.

15 Now, is there a gap in there? I'll give you. There's
16 a gap, because he wasn't texting during that time. I
17 submit to you that the witnesses testified what was going
18 on during that time gap. Why there wasn't any texting.
19 They were together, so they weren't texting with each
20 other anymore.

21 Would it be nice to have had Donovan's phone to
22 further corroborate his story? It would have been nice.
23 Would that have yielded any difference in the outcome?
24 We're not sure. We don't know what evidence.

25 The witnesses said — Detective Almeida wasn't even

1 able to get to crack his phone. So if he doesn't have the
2 technology to crack Donovan's phone, what would be
3 available? We didn't hear any testimony about where any
4 of the other individuals were; that there was GPS that can
5 follow a map that says everywhere anyone was that day.
6 Everybody's hoping — they're all wishing that was
7 available.

8 There was the next best thing. They had the mirror
9 images of Donovan's messages on Alan's phone. They had
10 those.

11 Now, law enforcement told you their bad. They
12 apologized. They should not have done that. But was that
13 an evidence — was that a piece of evidence of a crime?
14 It wasn't evidence of a crime. It was argued to be
15 evidence of an alibi. Evidence of not having committed a
16 crime.

17 When they inadvertently thought that they had had that
18 information, it had been downloaded. They felt bad for
19 Alan too. They already had all of Alan's information.
20 They returned his phone. They had these gentlemen's
21 phones who had done nothing wrong and they had their
22 phones for two months.

23 Should they have done it? No. They returned the
24 phones because they felt bad, because Alan specifically
25 said he was harping on law enforcement. He wanted his

1 remember, when he does that, he doesn't know what's going
2 to come back. As Mr. Rohl pointed out, it could be
3 exculpatory. It could be used by the State.

4 Big thing to note is Collin Smith doesn't know. All
5 he knows is "I've got to try to do some justice here, so
6 I'm sending to the FBI. Give me some location. You tell
7 me, Sean Kennedy." So he does. He sends it out to
8 Portland to Special Agent Kennedy.

9 You heard him testify. It's interesting that defense
10 in closing wants to say, "Well, you know, Sean Kennedy --
11 there's a gap there." But remember what Sean Kennedy
12 said. He said, "I can't ignore the text messages. And in
13 my opinion, the phone of Donovan Derrek was not at the
14 crime scene at the time the murder was committed."

15 Again, go off your memory. Don't trust mine. Okay.

16 So, yes, was there a mistake made that this man made?
17 Yes. But what they tried to do is rectify the problem.

18 The other thing that Mr. Rohl did not bring up -- it
19 kind of irritated me at the time. But I kind of thought
20 through it.

21 Remember he said that -- and I'm, again,
22 paraphrasing -- the police broke the law again. Broke the
23 law again? Yeah, mandatory reporting. Didn't report
24 Donovan Derrek to the Department of Social Services. You
25 all remember that?

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30588

**DREAU LESTER ROGERS,
Defendant/Appellant,**

v.

**STATE OF SOUTH DAKOTA,
Plaintiff/Appellee.**

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

HONORABLE MICHAEL DAY, PRESIDING JUDGE

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PRELIMINARY STATEMENT

Defendant/Appellant, Dreau Rogers, will be referred to as “Rogers”; Plaintiff/Appellee will be referred to as “State”. References to pleadings and other documents in the underlying record, *State of South Dakota vs. Dreau Rogers*, Lawrence County Criminal File No. 40CRI22-000086, will be supported by a citation to the pertinent pleading or transcript. The November 27th, 2023, through December 7th, 2023, jury trial transcript, will be referred to as “JT” followed by page and line number(s). Admitted exhibits from the jury trial will be referred to as “Exhibit” followed by the assigned number or letter as designated in the trial.

JURISDICTIONAL STATEMENT

Rogers appeals from the Circuit Court’s *Judgment of Conviction* filed on January 3rd, 2024. Rogers was sentenced to life in prison without parole. Specifically, Rogers appeals the Circuit Court’s Oral Order denying his motion for judgment of acquittal as to Counts IA, II, IV, and V, entered by the trial court on December 6th, 2023. JT 1327:17-25; 1328:1-8. Rogers further appeals from the Circuit Court’s Oral Order denying his request for a spoliation jury instruction on December 6th, 2023. JT 1352-1361; *see also Defendant’s Brief in Support of Spoliation Instruction and in the Alternative State v. Zephier Instruction*. Finally, Rogers appeals from the Circuit Court’s November 30th, 2023, Oral Order denying his Motion to Dismiss. JT 575-579; *see also Defendant’s Brief in Support of Due Process Violation Dismissal – Brady Violation*. The Court has jurisdiction pursuant to SDCL §§ 23A-32-2; 23A-23-4; and ch. 15-26A.

STATEMENT OF LEGAL ISSUES

1. **Considering all the evidence presented to the fact finder, could a reasonable juror find Dreau Rogers guilty of Counts IA, II, IV, and V.**

The trial court improperly denied Roger's Rule 29A Motion for Judgment of Acquittal.

Most relevant cases and authority:

SDCL ch. 23A-23

State v. Tofani, 2006 SD 63

2. **Can law enforcement bad faith requisite for a spoliation instruction be established by contemporaneous law enforcement conduct, i.e. a judicial finding that law enforcement intentionally circumvented a Defendant's 6th Amendment Rights.**

The trial court found that the defense cannot show that the Spearfish Police Department, the State's Attorney's Office, or the Rapid City Police Department engaged in any bad faith when violating SDCL 23A-37-14.

Most relevant cases and authority:

SDCL 23A-37-14

State v. Zephier, 2020 SD 54

State v. Engesser, 2003 SD 47, ¶ 46

3. **Was Dreau Rogers denied due process under the 14th Amendment, constitutionally guaranteed access to evidence.**

The trial court found that material evidence was disposed of in a negligent fashion and that it is impossible to know its exculpatory or incriminatory value.

Most relevant cases and authority:

Arizona v. Youngblood, 488 US 51, 59-60 (1988)

California v. Trombetta, 467 US 479 (1984)

State v. Zephier, 2020 SD 54

STATEMENT OF THE CASE AND FACTS

Statement of the Case: Rogers was convicted by a jury of: Count IA: Murder in the Second Degree (SDCL 22-16-7); Count II: Possession of Firearm by Person with a Prior Felony Drug Related Conviction, .45 Caliber Pistol (SDCL 22-14-15.1); Count III: Possession of Firearm by Person with a Prior Felony Drug Related Conviction, .22 Caliber Pistol (SDCL 22-14-15.1); Count IV: Possession of Firearm with Altered Serial Number, .45 Caliber Pistol (SDCL 22-14-5); Count V: Commission of Felony While Armed with Firearm – Murder (SDCL 22-14-12); and Count X: Unauthorized Ingestion of Controlled Substance, Methamphetamine (SDCL 22-42-5.1). The jury trial commenced on November 27th, 2023, and was completed on December 7th, 2023.

In opening statements, the jury heard that the defense would prove five facts which prevent them from rendering a guilty verdict. Rogers contends that having proved these facts makes a finding of guilt unreasonable for any rational juror. The facts proven at trial by Rogers are: (a) the police broke the law during this investigation; (b) the police gave material evidence away; (c) the police contaminated important forensic evidence; (d) the third-party perpetrator's alibi is unquestionably weak; and (e) the omissions of material evidence. JT 288:6-25; 289:1-16; 466:2-25; 467:1-13. Beyond reasonable doubt of guilt cannot exist upon proof of these five facts.

Rogers challenges: (1) the denial of the Motion for Judgment of Acquittal to Counts IA, II, IV, and V; (2) the Court's refusal to instruct the jury on spoliation; and (3) the Court's denial of his Motion to Dismiss – Due Process Violation.

Statement of the Facts: In the early morning of January 22nd, 2022, 12:48 a.m., Dreau Rogers ("Rogers") called 9-1-1. *See Exhibit I*; JT 296:3-10; 298:12-15. Rogers

requested an ambulance to come fast. JT 293:24-25; 294:6-8. Rogers said, "that he would explain when they got there and that someone is injured bad". *Exhibit 1*. Rogers notified dispatch that his phone was dead and that it needed to be on the charger. *Exhibit 1*. Rogers explains that he needs to go into the other room. *Exhibit 1*. Rogers is overheard in the other room pleading to Destiny Rogers ("Destiny") to "stay with him." *Exhibit 1*. Two and a half minutes after making the call, law enforcement arrived. JT 295:1-4.

Officer Hunter Bradley (Bradley), Spearfish Police Department, was the first on-scene. JT 301:17-19. Bradley was met by Dreau Rogers who summoned Bradley inside. JT 301:10-18. Bradley's body camera was activated and depicts his involvement in this case. The footage was shown to the jury. *See Exhibits 2 and 3*; JT 314:1-21. Bradley immediately saw Destiny lying motionless on the living room floor. *Exhibit 2*, JT 301:19-25. Bradley applied an "AED" to Destiny's chest and started compressions. JT 303:16-19.

While rendering emergency aid, Bradley began asking what occurred. JT 304:8-14. Bradley's "AED" report proved Destiny had been shot around the time of the 9-1-1 call. JT 317:19-23. The blood on Destiny's arm was still wet and her body was warm. JT 319:2-3. Rogers stated that Donovan Derrek (Derrek) shot Destiny. JT 304:16-20.

Bradley noted that a .45 caliber shell casing was found in the home near Destiny's body. JT 308:18-20. Bradley stated that the shell casing was on the coffee table and fell to the ground during the emergency aid provided to Destiny. JT 308:21-25; 309:1-2. Destiny had a gunshot wound on her right shoulder. *Exhibit 43*; JT 309:13-17.

The second officer on-scene was Aaron Jurgensen (Jurgensen). JT 322: 19-25.

Jurgensen's body camera was activated and depicts his involvement in this case. The footage was shown to the jury. *See Exhibit 9*; JT 330:18-25. Rogers told Jurgensen that Derrek was the shooter. JT 337:5-14. Jurgensen agreed that Rogers was speaking with law enforcement while watching Destiny die. JT 338:1-20. Rogers told Jurgensen he set the shell casing on the table. JT 343:10-13. Rogers told Jurgensen his phone was dead. JT 343:16-19. Rogers was subsequently transported to the police station. JT 314:22-25. Rogers was allowed to retrieve his phone from the charger. JT 339: 18-25; 343:16-19.

Law enforcement began searching for Derrek. Law enforcement also began drafting Affidavits to search and seize evidence and acquire other potentially relevant information. Rogers's home was secured to enable evidence collection and forensic analysis. The South Dakota Department of Criminal Investigations primarily handled forensic evidence collection and documentation.

Rogers was interviewed at the Spearfish Police Department. All of his interviews were published to the jury. *Exhibits 13, 14, 16, 19*. Rogers never faltered in his representations that Derrek was the shooter. *Exhibits 2, 3, 8, 13, 14, 16, 19*.

Derrek was apprehended by the Rapid City SRT team. JT 433:16-18. Derrek was brought in for questioning at the Spearfish Police Department. JT 434:19-21. Every Derrek interview was published to the jury. *Exhibits 17, 21, 23*. Derrek informed law that he had an alibi. Derrek advised law enforcement he was engaged in sexual conduct with a man, Alan Reddy (Reddy). *Exhibits 17, 21, 23*; *see also* JT 440:22-25. Derrek expressly told law enforcement, "[my] phone will have my location for the night." JT 440:24-25.

Reddy was interviewed in effort to confirm Derrek's alibi. JT 445:19-25. Reddy

was questioned by law enforcement a total of two times. Every interview was published to the jury. *Exhibits 58, I*. In sum, Reddy advised law enforcement that at the time of the shooting, Derrek was at Reddy's residence. *See Exhibits 58, I*. Reddy's home is approximately a mile and a half from Roger's residence. JT 493:16-18. It is a less than five-minute drive. JT 493:19-20.

Rogers was confronted with Derrek's alibi during his last interview. In response Rogers said the following:

Rogers: Like I just explained it to you, and, obviously, it's not going to fucking check out. So you guys are going to pin – you're going to pin this mother fucker shooting my wife on me? Seriously?

Det. Fox: He wasn't there and an alibi –

Rogers: I'm telling you he was there. I promise you. His alibi is bullshit.

Det. Fox: We have another person that verifies it.

Rogers: Check it out harder. Bullshit. If I got a lawyer, then that's what I got to do, but that's bullshit. I'm telling you right now.

Exhibit 19.

Law enforcement searched both the Rogers and Derek residences. Items deemed to have significance were collected at both homes and some submitted for forensic testing. The mobile phones of Rogers, Derrek, Destiny, and Reddy were seized for submission to digital forensic analysis. Photographs, urinalysis tests, and gunshot residue tests were taken, administered, and performed on both Rogers and Derrek. Rogers was placed under arrest for murder on January 22nd, 2022. JT 459:17-20.

a. Items of Evidentiary Significance and Relevant Forensic Testing Conclusions

Destiny was shot one time in the upper right arm/shoulder. *Exhibit 43*. Dr. Habbe, forensic pathologist, performed an autopsy on Destiny. *Exhibit 43*. The autopsy

revealed that the cause of death was a gunshot wound. *Exhibit 43*. There were no other signs of trauma. *Exhibit 43*; JT 829:9-11. A bullet fragment was recovered from Destiny's body and submitted for forensic analysis. *Exhibits 32, 43*; JT 833:7-9. Dr. Habbe concluded that the gun was very close to Destiny when it was shot. JT 828:16-25.

Patrick Jones (Jones), forensic scientist, with the Kansas City Crime Laboratory, conducted analysis of the gunshot residue kits collected from Derrek and Rogers. *Exhibit 67*. Jones concluded that both Derrek and Rogers had gunshot residue on them. *Exhibits 56, 57, 67*.

The search of Rogers's residence yielded several items with evidentiary significance. Law enforcement located: a spent .45 caliber casing on the floor inside his home; a wooden box containing mixed makes and models of .45 caliber ammunition on the counter near the home's entrance; a .22 caliber revolver pistol and .22 caliber bullets both inside a hallway dresser; and a .45 caliber high point pistol with its magazine located outside the home under a walk-way wooden set of stairs leading to an alley. *See Exhibits 45, 46, 47, 48, 50, 52, 53 102, 103, 104, 105, 123, 131, 132*.

Forensic testing of significance was performed on the following items: (1) the .45 caliber high point pistol; (2) the spent .45 caliber cartridge; (3) .45 caliber ammunition located in the magazine of the .45 caliber high point pistol; (4) .45 caliber ammunition collected from the wooden box near the entrance; and (5) the bullet fragment recovered from Destinys' body. *Exhibits 77, 98, 99, 100, 101, 110*.

Adam Dolezal (Dolezal), forensic scientist, testified to his forensic findings. *Exhibit 77*. His findings were all inconclusive, meaning Mr. Dolezal was incapable of matching the expired .45 shell casing found on the floor as being fired by the .45 caliber

high point pistol. JT 1081:17-21. Mr. Dolezal's findings with respect to the bullet fragment retrieved from Destiny's body were also inconclusive. JT 1081:10-16. "All of the microscopic comparison results were inconclusive." 1081:25; 1082:1-2.

Kristi Walti (Walti), forensic scientist, testified to her forensic findings. *Exhibit 110*. Ms. Walti examined items of significance for fingerprints. Ms. Walti concluded that Rogers's latent fingerprint was located on the expired .45 caliber shell casing. JT 1095:9-12. Recall, Rogers told first responders he placed the shell casing on the coffee table. JT 343:10-13; JT 1099:9-13.

Ashley Bullock (Bullock), forensic scientist, testified to her forensic findings. *Exhibits 98, 99, 100, 101*. Bullock's DNA examinations revealed the following: (1) .45 shell casing had DNA with a mixture of three individuals (Rogers excluded as major contributor); (2) .45 ammunition in the box near residence entry had DNA from at least three individuals; (3) grip of the .45 high point pistol had a mixture of DNA from Dreau Rogers and Destiny Rogers detected; (4) trigger, trigger chamber, and sight of the .45 high point pistol had a mixture of DNA from three individuals; (5) barrel of the high point pistol had Destiny's DNA on it; (6) edges of holster for .45 high point pistol had DNA from three individuals and Rogers was specifically identified as one of the contributors; (7) .45 ammunition located inside magazine of .45 high point pistol had DNA of Rogers and Destiny; and (8) magazine of .45 high point pistol indicated DNA from three individuals – Rogers and Destiny could not be excluded. *Exhibit 99*.

Bullock testified that DNA evidence must be collected properly and that failure to properly collect it could lead to misleading results. JT 1025:12-25; 1026:1-10. Bullock testified that forensic evidence submitted for DNA testing needs to be handled with clean

gloves. JT 1028:4-6. Bullock agreed that it is a “well-known fact that DNA can transfer from surface to surface.” JT 1028:7-9. Bullock agreed to the material provisions of *Exhibit H*, including that “[a]ll suspected DNA evidence must be protected from possible cross-contamination.” JT 1028:20-23. Bullock agreed that evidence should never be set directly upon any surface without first putting down clean paper to protect against cross-contamination or surface to surface DNA transfer. JT 1029:2-5. Ms. Bullock agreed compliance with proper DNA evidence collection practices is necessary to “protect the integrity of the evidence.” JT 1029:9-11. Finally, Bullock testified that integrity of the evidence means ensuring that nothing additional is added or contaminated to a piece of evidence. JT 1029:12-18.

Detective Matthew Almeida (Almeida) performed digital forensic examinations of cell phones seized by law enforcement. Almeida forensically examined the mobile phones of Rogers, Reddy, and Destiny. JT 746:22-24; 747:2-4; 749:15-21. Derrek’s mobile phone was provided to Almeida for analysis, but he could not perform a forensic examination on the phone. JT 747:9-12. Almeida acknowledged that Derrek’s cell phone may have showed his exact location at the time of the shooting. JT 803:22-25; 804:1-25; 806:15-25; 807:1-19; 810:1-25.

Agent Sean Kennedy (Kennedy), FBI CAST analyst, testified with respect to Call Detail Records (CDR) he reviewed in this investigation. JT 631:14-25; 632:22-25. Kennedy performed his analysis for the purpose of attempting to locate the cell phone of Derrek at the time of the shooting. JT 634:7-12. Kennedy stated there was no CDR information by which to locate the Derrek phone between the hours of 10:47 PM, January 21st, 2022, through 1:45 AM, January 22nd, 2022. JT 655:22-25; 656:1-2, 17-23 (stating

“there’s no activity that I could map to give you an opinion about the location of [Derek’s] phone during the time frame”).

Kennedy acknowledged that Derrek’s mobile device examination may have provided data showing the exact location of his phone at the time of the shooting.

Derek testified he called Rogers at approximately 10:00 PM on January 21st, 2021. JT 1255:1-2. Shortly after the phone call, Derrek sent a text message to Rogers, “We need to meet face to face ASAP”. JT 1255:12-16. Derrek testified that he told his daughter, upon leaving his home around midnight, that he was going over to Rogers’s home. JT 1257:9-12.

STANDARD OF REVIEW

“The denial of a motion for judgment of acquittal presents a question of law, and thus our review is de novo.” *State v. Tofani*, 2006 SD 63, ¶ 24 (citing *United States v. Staula*, 80 F.3d 596, 604 (1st Cir. 1996)). In measuring sufficiency of the evidence, this reviewing Court asks, “whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Tofani*, 2006 SD 63, ¶ 24 (citing *Jackson v. Virginia*, 443 US 307, 319 (1979)).

The standard of review for requests to give proposed jury instructions is abuse of discretion. *State v. Engesser*, 2003 SD 47, ¶ 15 (citing *State v. Wright*, 1999 SD 50, ¶ 12)). With respect to due process, a constitutional question, the review is de novo. See *Steichen v. Weber*, 2009 SD 4, ¶ 7 (citing *Moeller v. Weber*, 2004 SD 100, ¶ 42 n. 3)).

ARGUMENT

1. The Court improperly denied Rogers’s Rule 29A Motion for Judgment of Acquittal

Rogers's argument is that reasonable doubt for Counts IA, II, IV, and V cannot exist upon his proof of the following five facts: (a) the police broke the law during this investigation; (b) the police gave material evidence away; (c) the police contaminated important forensic evidence; (d) the third-party perpetrator's alibi is unquestionably weak; and (e) the material omissions of evidence. JT 288:6-25; 289:1-16; 466:2-25; 467:1-13. Beyond a reasonable doubt of guilt cannot exist amidst proven facts (a) through (e). At the conclusion of the State's evidence, Rogers made Motion for Judgment of Acquittal. JT 1321:9-25; 1322:1-25; 1323:1-25; 1324:1-25; 1325:1-17; JT 1326:1-2.

(a) The Police Broke the Law During the Investigation

The South Dakota Legislature has enacted statutory standards governing law enforcement's obligation to preserve evidence. *State v. Zephier*, 2020 SD 54, ¶ 25; SDCL §§ 23A-37-14 and 23A-37-15. This Court has expressly stated that the statutes reflect the requirements of due process. *Id.*

The police seized Derrek's phone pursuant to the Destiny investigation. The lead detective agreed that South Dakota law imposes a duty on law enforcement to maintain evidence seized in conjunction with a criminal prosecution. JT 470:15-18. The lead detective agreed that Derrek's phone was seized evidence as evidence in this case. JT 470:19-25. The lead detective agreed that law enforcement had a legal duty not to return the phone without providing proper notice to the Defendant. JT 470:23-25; 471:1. The lead detective agreed that the defense proved that law enforcement broke the law. JT 471:9-14.

(b) The Police Gave Material Evidence Away

In *State v. Zephier*, 2020 SD 54, ¶ 28, the Court's analogical reasoning applies in concluding that the Derrek phone constitutes "lost or destroyed" evidence.

Law enforcement was provided representations by key witnesses in this case as to the phone's materiality. Rogers pleaded to law enforcement to look into the alibi closer. . *Exhibit 19. Exhibit 19.* Derrek advised law enforcement that his phone would prove his alibi. JT 480:7-11.

The lead detective agreed that information potentially providing the exact location of Derrek's phone at the time of the shooting was material. JT 470:3-10. The lead detective agreed that the destroyed evidence was material. JT 470:3-10. The lead detective agreed when a phone extraction attempt occurs that a report is generated detailing the results. JT 475:9-15. The lead detective agreed that he received a report, prior to destroying the evidence, explaining no forensic examination of Derrek's phone occurred. JT 481:2-7.

After law enforcement returned the mobile device to Derrek he disposed of the phone at a Wal-Mart kiosk for two dollars. JT 1266:3-9.

(c) The Police Contaminated Important Forensic Evidence

Bincy Thankachan (Thankachan) with the Rapid City Police Department testified regarding her education, training, experience, and understanding of forensic evidence collection. JT 839-841. She testified that she knows and understands the science associated with forensic evidence collection. JT 851:1-9.

Thankachan testified to the Rapid City Police Department Rules and Procedures Manual (RCPD R&P) for forensic evidence collection. JT 852:14-25; *Exhibits G, H.* Thankachan testified that if evidence is not collected properly there is exposure to contamination or cross-contamination of forensic evidence. JT 857:23-25; 858:1-7. Thankachan agreed that the RCPD R&P Manual for forensic evidence collection is

scientifically valid. JT 859:1-4.

Thankachan testified that law enforcement handling forensic evidence is responsible for preserving and protecting the evidence. JT 859:12-18. She testified that DNA shall be properly handled to prevent destruction or contamination. JT 860:12-15. Thankachan testified that DNA evidence must be handled with clean gloves. JT 864:17-25; 865:1-6. Thankachan testified that if forensic evidence is handled with dirty gloves, there is possible contamination, and the integrity of the evidence is sacrificed. JT 865:7-13. Thankachan testified law enforcement should never lay evidence directly upon any surface without first putting down a clean piece of paper. JT 865:14-25. Thankachan stated that failure to adhere to this procedure also results in contamination of forensic evidence. JT 865:14-25.

Thankachan's testimony was confirmed and supported by the testimony of Bullock. *See Appellant's Brief, Statement of Facts*, pg. 6. Bullock testified that DNA evidence must be collected properly and that failure to properly collect it could lead to misleading results. JT 1025:10-25.

Agent Brian Larson (Larson) testified that the majority of his involvement in the case was crime scene processing. JT 913:8-11. Larson testified that he photographed processing of the crime scene. JT 913:15-23; JT 914:6-13. Larson testified that he did not know if nitrile gloves can transfer DNA and that it is an important thing to know. JT 915:18-22. Larson agreed that forensic evidence not handled with clean gloves is "mishandled forensic evidence." JT 919:13-16.

Larson was confronted with *Exhibit E*, image 694. This photograph shows law

enforcement handling evidence with dirty gloves.¹ Larson testified that there were foreign substances on the glove. JT 918:13-20; 919:5-9 (acknowledging that the gloves have something foreign on them). This photograph shows noncompliance with *Exhibit G* and *Exhibit H*. It further shows, according to Thankachan's and Bullock's testimonies, that the forensic integrity of the evidence was sacrificed.

Next, Larson was confronted with *Exhibit E*, images 401 through 406. These photographs show law enforcement's acquisition process of the .45 caliber ammunition located in a wooden box near the entrance of Rogers's home. Larson could not testify that law enforcement changed gloves when manipulating all the photographed evidence. JT 923:12-14. These photographs document law enforcement's noncompliance with the requirement to lay forensic evidence on a clean piece of paper to prevent contact transfer.

Larson was confronted with *Exhibit E*, image 331. This photograph shows law enforcement handling evidence with dirty gloves.² Larson testified that the gloves were not clean. JT 924:3-17.

Larson was confronted with *Exhibit E*, image 681. This photograph shows a law enforcement officer with dirty gloves handling the .45 high point pistol.³ Further, this photograph documents noncompliance with the requirement to lay potential forensic evidence on a clean piece of paper.

Agent Eggers (Eggers) was the other DCI Agent that testified to crime scene processing. JT 971:2-5. Eggers agreed that clean gloves are necessary to protect forensic

¹ This is a very high-resolution image that was published to the jury. Dust and smudges can clearly be seen on the right-hand glove of the officer handling the evidence depicted in the photograph.

² This is a very high-resolution image that was published to the jury. Foreign substances can clearly be seen on the gloves handling the evidence depicted in the photograph.

³ This is a very high-resolution image that was published to the jury. Foreign substances can clearly be seen on the gloves handling the evidence depicted in the photograph.

evidence from cross-contamination. JT 965:5-7. Eggers agreed if defense counsel shows potential for cross-contamination that it is a big problem for the State's case. JT 965:10-15. Eggers testified that evidence should never be laid directly upon a surface without first laying down clean paper. JT 966:14-17.

Eggers was confronted with *Exhibit E*, image 680. This photograph shows the .45 caliber high point pistol, the gun's holster, and a bullet set directly on a piece of wood outside the Rogers's residence.⁴ Eggers testified that *Exhibit H* indicates that the forensic evidence documented in image 680 should have been set on a clean piece of paper and was not. JT 966:24-25; 967:1-7.

The State's argument in support of guilt, unsupported by any actual forensic testing, is that they contaminated material forensic evidence:

Q The presence of gunshot residue, if you know, on Donovan Derrek could indicate that he was around a gun that was shot or that he shot it; correct?

A That is one of the – I'm sorry – two of the three scenarios. That's correct.

Q Okay. If the Government argues – if – that Donovan Derrek's gunshot residue tests were transferred – or was the result of the third conclusion – are you still with me?

A Yes.

Q That would mean, during the collection, it was contaminated; correct?

A As far as coming in contact with another object or surface?

Q Correct.

A Yes. That would be a form of contamination that Donovan Derrek came in contact with a tabletop that had gunshot residue on it or he came in contact with a person that transferred gunshot residue to him.

Q Sure. And you would agree that it is law enforcement's responsibility to protect forensic evidence?

⁴ This is a very high-resolution image that was published to the jury. Forensic evidence is clearly set on a piece of wood outside the Rogers' residence in violation of the requirement that forensic evidence be placed on a clean piece of paper.

A They are one of the protectors of forensic evidence. Anyone responding to a scene.

Q And so if forensic evidence is contaminated, then the evidence prior to contamination is also lost forever; right?

A Yes. Once something is contaminated, there is very little that can be spoken towards its validity or legitimacy of results.

Q And that doesn't just apply to your field of science; correct?

A That's correct.

JT 624:10-25; 625:1-18.

The lead agent, on this topic, testified as follows:

Q Law enforcement's obligation is to secure the scene and secure the evidence; correct?

A Yes.

Q Gunshot residue is evidence; correct?

A Yes, it is.

Q Gunshot residue evidence and the appearance or lack thereof or existence or lack thereof on Mr. Derrek's hands is evidence in this case; correct?

A Yes.

Q Dreau Rogers had no ability to preserve that evidence, did he?

A No.

Q That was law enforcement's obligation; right?

A Yes.

JT 502:1-25; 503:1-25; 504:1-12.

The forensic evidence acquisition in this case was not conducted in a scientifically valid fashion or in compliance with relevant rules and procedures. The credibility/integrity of any forensic DNA testing in this case was destroyed. According to the State's own expert witnesses, law enforcement, and relevant exhibits, the forensic testimony was invalid and misleading due to improper evidence collection, i.e. contamination. No rational juror could draw any conclusions from the forensic DNA

testing based upon the evidence presented in this trial. Larson expressly agreed fact (c) was proven to the jury. JT 919:5-25; 920:1-10; 925:2-20

(d) The Third-Party Perpetrator's Alibi is Unquestionably Weak

Derrek's alibi, rests exclusively on the credibility of Derrek and Reddy. For the reasons articulated in (c) above, the forensic DNA analysis was proven invalid, because of improper evidence collection.

The lead agent was questioned about the strength of the alibi:

Q And so by virtue of that 1:23 a.m. picture, there is nothing that precludes Mr. Derrek, from a forensic perspective, from being at Dreau Rogers's at 12:48; right?

A The information we were going off of also was statements. Statements by Alan Reddy that he was at the residence with him.

Q Right. I appreciate you telling me that. Part of what this jury has to rely on in order to get to the state's alibi is reliance on Donovan Derrek and Alan Reddy. You gotta trust what they said; right?

A In part.

Q In part. But there is nothing forensically that shows Donovan Derrek was not here at that time; right?

A Again, the only thing that would be would be the location data off the phones, I believe, or from the phones.

Q There is no location data from Mr. Derrek's phone, because you guys gave it back to him without protecting that information?

A Well, I believe that was actually – I don't know if it was Google. But, again, that is going to be something that Lieutenant Smith – now Lieutenant Smith – will have to answer.

JT: 493:21-25; 494:1-17.

Lieutenant Smith (Smith) was subsequently asked about the phone data demonstrating the location of Derrek's phone. JT 600:3-8. Smith said he could not speak about the phone records and that topic should be discussed with Kennedy. JT 600:3-8. Recall, according to Kennedy, there was no CDR information by which to

locate Derrek's phone between the hours of 10:47 PM, January 21st, 2022, through 1:45 AM, January 22nd, 2022. JT 655:22-25; 656:1-2, 17-23. It is a fact that no forensic evidence proves Derrek's alibi.

Derrek is a convicted felon, sex-offender, and had multiple felonies pending at the time of his testimony. JT 1226:14-16; 1251:9-16. Derrek admitted that he would not pass a drug test and that he violated the conditions of his felony bond on multiple occasions and in multiple ways, including the commission of new felonies. JT 1261:3-8. For reasons beyond comprehension, Derrek's bond was not revoked, and according to the State, it nothing to do with plea deals for cooperating. JT 1227:25; 1228:1-25; 1229:1-19; 1251:19-22. Derrek is a diagnosed schizophrenic daily intravenous meth user, using half a gram of meth at a time, three or four times a day (easily more than a gram a day). JT 1245:17-21 1252:11-12.

The Derrek and Reddy testimony was inconsistent, conflicting, and unreliable. According to Derrek, his day started with a sexual encounter with Reddy. JT 1230:11-17. Derrek testified that he subsequently went to Rogers's home unannounced at 10:00 a.m., January 21st, 2022, "because I hadn't seen him in a while or heard from him." JT 1232:7-8. Derrek testified that while at Rogers's residence, he knocked on the door, and knocked on the windows. JT 1253:19-25; 1254:1-13. Upon leaving Rogers's home, Derrek went to his friend Ed's house and talked to him about Rogers. JT 1232:22-25. Derrek obtained Rogers's phone number from Ed. JT 1232:22-25; 1233:1-3. Derrek stated he borrowed twenty dollars from Reddy. JT 1233:9-14. Derrek testified that he went to Reddy's at 11:30 p.m. to 11:35 p.m., January 21st, 2022. JT 1236:6-11. Derrek testified that he left Reddy's at 1:20 a.m. to 1:30 a.m., January 22nd, 2022. JT 1236:18-

19. Derrek testified that the bruising on his body was all related to intravenous meth use. JT 1243:16-24.

Reddy testified that he had no contact with Derrek in the early morning hours of January 21st, 2022, or any time prior to the evening in question. JT 1277:1-12, 24-25; 1278:1, 16-25; 1279:1. Reddy testified that he was hanging out with friends in Rapid City and came back to Spearfish in the evening of January 21st, 2022. JT 1279:21-25. Reddy testified that Derrek came to his house sometime around midnight January 22nd, 2022, and that Derrek left around 1:30 a.m., January 22nd, 2022. JT 1283:3-6, 18-22. Reddy testified that he took a picture of Derrek's penis at 1:23 a.m., January 22nd, 2022. JT 1284:16-21. Reddy testified he indicated that Derrek advised Reddy he was in a non-physical argument with Rogers. JT 1292:12-19 ("there was no mention of any kind of physical altercation").

Derrek indicated that Reddy was wrong if he indicated they met a week before. JT 1253:16-18. Reddy testified that he told law enforcement they met a week before online. JT 1299:10-18. Reddy testified that he did not meet Derrek the morning the morning of January 21st, 2022, despite the message content. JT 1319:10-13. Upon being shown the message content between Reddy and Derrek, the following colloquy occurred:

Q Do you see that green bubble there?

A Yeah, the one telling him to drive down Evans?

Q Yeah. Who is telling him to drive down Evans?

A Me. I am telling him to drive down Evans. It will be on the left. Lantern Estates. Where I was living at the time.

Q What time was it?

A Looks like January 21st at 5:15 a.m.

- Q Does that refresh your recollection about whether or not you met up before the night of the 22nd?
- A (Peruses document.) It does not. Because – I mean, the biggest feeling I’m getting about this – the reason I’m not remembering. *A lot of our meetings ended up being talk. Never meeting in person.* This one, I told him where to go. I don’t recall if he came over on that day.

JT 1305:2-16 (Emphasis added).

- Q And there were messages that seemed to indicate there was a meet-up that you said didn’t happen; right?
- A Yes. **And, like I told you, there were times that we just talked about meeting, but we never did. Many, many times.**
- Q Sure. But the night of question, that couldn’t have happened; right?
- A Yeah. On the 21st, we did not meet up, because he didn’t end up showing up.

JT 1319:6-13 (Emphasis added).

According to the expert opinions of both Kennedy and Almeida, Derrek was at Reddy’s at the time of the shooting. These opinions were based upon the content of the messages between Reddy and Derrek. JT 668:13-16 (testifying “I don’t know exactly where it’s located. Based on the text message content, I would assume he’s with the person he was texting.”); JT 812:3-8 (testifying “[B]ased on the [content of] the text messages, would leave a person to believe that those two people were together.”). According to Reddy’s testimony, the message content between the two was not indicative of whether they met up.

Derrek testified that he “never” told Reddy that he was in a physical fight with Rogers. JT 1273:5-6. Reddy first testified that Donovan never said the dispute between Rogers and Donovan was physical. JT 1292:12-19. Reddy acknowledged he told law enforcement at least five times that Derrek advised him he was in a “physical” fight with Rogers. JT 1297-1299. Reddy acknowledged that he told law

enforcement, while the event was fresh in his mind, that Derrek arrived after midnight and left approximately a quarter to 1:00 a.m. JT 1300:13-18; 1302:8-11. Reddy told law enforcement he only had suspicions Donovan might be on drugs, despite being advised by Donovan that he intravenously shoots meth and providing him with money for drugs. JT 1309:10-25; 1310:1-4; 1312:6-15.

Finally, Reddy testified that the money he gave to Donovan was on a later date and that he thought “you guys” had grabbed those text messages as well. JT 1312:8-15. Reddy testified that those texts were acquired by the police. JT 1313:1-4. Reddy testified and disclosed that he spoke to the Government about continuing to meet up with Derrek and maintaining a sexual relationship with him while the Rogers’s prosecution was pending. JT 1313:1-21. None of this *Brady* information has ever been disclosed to the defense, i.e. the continuing sexual relationship between Derrek and Reddy, i.e. goes to motive and bias.⁵

If this same “quality” of alibi defense was proffered by a Defendant, it would not be sufficient to avoid prosecution nor convince a jury. Imagine a Defendant explaining that the forensic evidence to support the purported alibi was destroyed by his own, at best grossly negligent, conduct. The only “alibi evidence” acquired by the State rising to the level of “forensic proof” is the penis picture taken by Reddy’s phone at 1:23 a.m. JT 685:3-6. As this Court has stated multiple times, “A purported alibi that leaves it possible for the accused to be the guilty person is no alibi at all.” *State v. Goodroad*, 521 N.W.2d 433, 440 (S.D. 1994) (citing *State v. Floody*, 481 N.W.2d 242, 248 (S.D. 1992)). Based on the evidence submitted in trial, Derek’s alibi is

⁵ *State v. Lysterla*, 424 N.W.2d 908, “Impeachment evidence falls within the *Brady* rule.” (citing *State v. Hartley*, 326 N.W.2d 226 (S.D. 1982)).

unquestionably weak and reasonable minds could not differ as to that conclusion.

(e) Material Omissions of Evidence

There is abundant evidence in the trial record supporting Rogers's theory of the defense. Derrek was at his house and shot Destiny immediately before the 9-1-1 call. Pursuant to the rules of criminal procedure and criminal jurisprudence, the State's obligation was to disprove every reasonable doubt premised on the defense that Derrek was the shooter.

Forensic evidence ties Derrek to the scene of the crime, i.e. gunshot residue. Jones testified the presence of gunshot residue on Derrek could indicate that he shot the gun. JT 624:10-14. The presence of gunshot residue on Rogers could indicate that Rogers was near the gun that was shot. JT 622:19-25. *Exhibits 19, 67*. No reasonable juror could draw conclusions supporting guilt from these facts.

CDR data collected from Derrek's phone corroborates Rogers's defense. Derrek called Rogers at 10:00 pm, January 21st, 2022. JT 1255:1-16. Derrek texted Rogers hours before the shooting stating "they needed to meet face to face ... ASAP." JT 1255:1-16. Smith testified that he was unaware of the phone call and text message and that it was "relevant". JT 735:2-11. CDR data shows, an hour after the murder, Derrek was attempting to determine if his phone was being tracked by the Government, i.e. evidence evincing a guilty conscience. JT 1258:11-15.

Derrek testified that when he left his home, shortly before the shooting, Derrek told his daughter he was going to Rogers's residence. JT 1257:9-10; 1263:10-15. According to Reddy's law enforcement interview, Derrek explained that he was in a "physical fight" with Rogers prior to his arrival. JT 1297-1299. Agent Cody Lineberger

testified that the bruising on Derrek could be indicating of trauma from assault, i.e. physical altercation with Rogers. JT 1145:1-21; *Exhibit F*.

Derrek testified that he is addicted to meth, that meth use makes him paranoid and stay up for long periods of time, that he is schizophrenic, and that during the period in question he was up for a prolonged amount of time. JT 1245:14-19; 1252:11-12; 1258:11-15; 1271:6-11. Derrek acknowledged that he was accused in a police report of stealing a gun in a Grant Theft case pending against him at the time of the shooting. JT 1248:20-25.

Derrek testified that he gets his drugs from Rogers and that he could not get ahold of him. JT 1256:5-7. Derrek went to Rogers's home, unannounced, the morning before the murder and knocked on the door and windows. JT 1253:19-25; 1254:1-9. Then he went to Ed Moore's (Moore) house to obtain Rogers's phone number. JT 1254:14-23. Derrek called Rogers at 10:00 p.m., the evening of the shooting and followed it up with a text stating, "we need to meet face to face ... ASAP". JT 1255:1-16. Derrek testified he was looking for meth at the time he called and texted Rogers. JT 1255:9-21. An hour after the shooting, Derrek dials a code in his phone in effort to ascertain whether or not the Government was tracking him. JT 662:10-15; 1258:11-15.

Derrek testified that he successfully hid illegal contraband within his home when law enforcement executed the search warrant. JT 1259:23-25; 1260:1-13. Derrek refused to testify where he successfully concealed the illegal contraband. JT 1259:23-25; 1260:1-13. Derrek, convicted sex offender, testified that meth use makes him do things sexually that he would not normally do. JT 1259:17-19.

In *State v. Bolden*, 2024 SD 22, ¶ 39, this Court stated "[i]n measuring the

sufficiency of the evidence, we ask “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (quoting *State v. Brim*, 2010 SD 74, ¶ 6). It is a fact that law enforcement broke the law, it is a fact that law enforcement gave away material evidence, it is a fact that law enforcement contaminated important forensic evidence during its collection⁶, it is a fact that Derrek’s alibi is weak⁷, and it is a fact that Rogers’s theory of defense was never properly considered. The Motion for Judgement of Acquittal is properly granted.

2. Sufficient Bad Faith for the Spoliation Instruction can be Inferred from Contemporaneous Law Enforcement Action

South Dakota Criminal Pattern Jury Instruction 1-14-12, was proposed by the Defendant in this case. In *State v. Engesser*, 2003 SD 47, ¶ 46, this Court explained that:

An instruction on the inference that may be drawn from the spoliation of evidence is proper only when substantial evidence exists to support a conclusion that the evidence was in existence, that it was in the possession or under the control of the party against whom the inference may be drawn, that the evidence would been admissible at trial, and that the party responsible for destroying the evidence did so intentionally and in bad faith.

All elements except that of intentional bad faith are definitively presented. Derrek’s mobile phone and the data contained within it was in existence, it was under the control of law enforcement, law enforcement destroyed it when it gave it back to Derrek, law enforcement had a report authored by Almeida that the mobile examination had not occurred when the evidence was, nonetheless, destroyed. *See Godbe v. City of Rapid*

⁶ There is not a single State witness that testified in this entire trial that law enforcement properly collected the forensic evidence in this case. There is not mention in the record anywhere by any witness that the forensic evidence was properly collected and not contaminated. JT:1-1689.

⁷ The trial court specifically found, after the close of evidence, “[t]he proceeding thus far has not clearly identified where exactly Donovan Derrek was during the period in which it is alleged that Destiny Rogers was shot.” JT 1355:6-8. Based upon this finding and considering the weight of the evidence, the State failed to meet its burden.

City, 2022 SD 1, ¶ 49 (J. Kern dissent); *see also* JT 481:4-9.

The question presented in this section of the appeal is whether concurrent bad faith by law enforcement can be considered. On August 10th, 2022, the trial court entered *Findings of Fact and Conclusions of Law re: Motion to Suppress Statements and/or Video Teleconference with Donovan Derrek*. The law enforcement conduct which was judicially determined to be bad faith occurred on February 4th, 2022, the same time the evidence was destroyed. *See Findings of Fact and Conclusions of Law re: Motion to Suppress Statements and/or Video Teleconference with Donovan Derrek*, p. 4, ¶ 12.

Derrek's phones were returned to the Spearfish Police Department from Rapid City ICAC (Almeida) on February 1st, 2022. The Evidence Transfer Receipt indicating the same was published to the jury but not offered into evidence. JT 479:18-21. Detective Hofmann acknowledged that reports from Almeida indicated the Derrek phones were not examined and that it was his responsibility to look at them. JT 481:2-9. Derrek's mobile phones (material evidence) were given back to him, i.e. destroyed, on February 16th, 2022. The Spearfish Police Department Evidence Transfer Receipt bears Derrek's signature and is dated "2-16-22". Derrek signed the document when he was given the phones back by the Spearfish Police Department on February 16th, 2022.

Pursuant to a suppression motion, the trial court concluded that law enforcement acted with intentional bad faith. *See Findings of Fact and Conclusions of Law re: Motion to Suppress Statements and/or Video Teleconference with Donovan Derrek*, p. 10-11, ¶¶s 15-16

Law enforcement's knowing and intentional violation of Rogers's Sixth Amendment right to counsel is intentional bad conduct. The Court's Findings and

Conclusions indicate the same. As this Court opined in *State v. Mousseaux*, 2020 SD 35, ¶ 13, to trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it. (citing *Herring v. United States*, 555 US 135, 144 (2009)).

At the same time law enforcement acted in bad faith to violate Rogers's Sixth Amendment rights, law enforcement destroyed the material evidence at issue.

In denying the spoliation instruction, the Court concluded "the defense cannot show that the Spearfish Police Department, the State's Attorney's Office, or the Rapid City Police Department engaged in any bad faith." JT 1355:23-25. To the contrary, Rogers has shown that the Spearfish Police Department engaged in intentional bad faith and that it was occurring at the same time and with the same personnel as when the material evidence was destroyed in violation of law.

Substantial evidence exists in this case to support charging the jury as requested. The trial court failed to consider the other contemporaneous bad faith conduct of law enforcement.

3. Dreau Rogers was Denied Due Process, Constitutionally Guaranteed Access to Evidence

The Supreme Court has held that to safeguard a criminal defendant's right to present a complete defense, the Court has developed the area of constitutionally guaranteed access to evidence. *California v. Trombetta*, 467 US 479, 485 (1984); *Arizona v. Youngblood*, 488 US 51, 55 (1988); see generally *State v. Zephier*, 2020 SD 54. In analyzing this question, the Court will look to the guidance provided within *State v. Zephier*.

The Due Process Clause of the Fourteenth Amendment imposes upon states the

requirement to ensure that “criminal prosecutions ... comport with prevailing notions of fundamental fairness.” *State v. Zephier*, 2020 SD 54, ¶ 20 (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)). This is a case in which the exculpatory value of the undisclosed evidence is unknown, as it always is, when law enforcement destroys evidence. *State v. Zephier*, 2020 SD 54, ¶ 22.

As this Court stated, courts seeking to assess the materiality of the lost evidence face a practical complication:

Whenever potentially exculpatory evidence is permanently lost, the courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed. Moreover, fashioning remedies for the illegal destruction of evidence can pose troubling choices. In nondisclosure cases, a court can grant the defendant a new trial at which the previously suppressed evidence may be introduced. But when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing the State’s most probative evidence.

State v. Zephier, 2020 SD 54, ¶ 22 (citing *State v. Lyerla*, 424 N.W.2d 908, 910-11 (S.D. 1988)).

Further:

Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

State v. Zephier, 2020 SD 54, ¶ 23; *California v. Trombetta*, 467 US 485, 488-89 (1984).

The materiality test is where this case differs substantially from *State v. Zephier*, *California v. Trombetta*, and *Arizona v. Youngblood*.

In *Trombetta*, the Court concluded that respondents had alternative means of

demonstrating their innocence. *California v. Trombetta*, 467 U.S. 479, 490 (1984). As a result, the *Trombetta* Court concluded that the Due Process Clause of the Fourteenth Amendment did not require law enforcement to preserve breath samples in order to introduce the result at trial. *Id.* Rogers had no alternative means of demonstrating his innocence, law enforcement destroyed the only evidence. The analogical *Trombetta* Court reasoning stops here.

In *Youngblood*, the trial court instructed the jury on spoliation, despite the lack of bad faith. 488 US 51, 59-60 (1988) (J. Stevens Concurrence) (stating [m]ore significantly, the trial judge instructed the jury: “If you find that the State has... allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State’s interest”). Unlike *Youngblood*, Rogers was denied his request for a spoliation inference instruction. Moreover, a State’s failure to turn over (or preserve) potentially exculpatory evidence “must be evaluated in the context of the entire record.” *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 112 (1976)). Evaluating law enforcement’s failure in light of the entire record demonstrates justice requires different judicial action.

Also, unlike *Youngblood*, in this case there is sufficient suggestion of bad faith on the part of the police. *See Appellant’s Brief, Argument 2.* The following finding by the trial court is erroneous in denying the Motion:

However, the defense cannot show that the Spearfish Police Department, the State’s Attorney’s Office, or the Rapid City Police Department engaged in any bad faith.

Rather, the State, through the State’s Attorney’s Office, would have a reason to obtain the data off the phone to further their theory that Donovan Derrek was not the alleged murderer. But, instead, the opposite, which is the opposite of the Defendant’s argument.

JT 1355:23-25; 1356:1-5.

The subsequent actions of law enforcement do not support this finding. Only after the defense expressly requested the phone data in writing did the State and law enforcement attempt to reacquire the destroyed evidence. JT 468:14-22; *see also Motion to Compel Discovery Relating to Digital Evidence and Reports*, 12/27/2022 (stating “Defendant’s first informal request for much of this information dates back to June 21st, 2022”).⁸ Unlike *Youngblood*, Rogers is not arguing that the police had an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance. 488 US 51, 58 (1988). However, the police do have an absolute duty to preserve and retain evidence that they were expressly told has material evidentiary significance. *Exhibit 19* (Rogers pleading “check [the alibi] out harder”); *see also* JT 440:24-25 (Detective Hofmann testifying that Donovan Derrek told him “[my] phone will have my location for the night”; “It’s all going to be on my phone”) JT 440:24-25.

In *State v. Zephier*, law enforcement appropriately sought guidance from the local prosecutor before releasing the evidence in violation of law. Advice of counsel is a strong affirmative defense to many legal claims, both criminal and civil. That, of course, did not happen in this case.

The destroyed evidence in *Zephier* could not itself independently exonerate the

⁸ Steve Hofmann’s 6/28/22 report states in relevant:

On 6-27-22, Detective Smith and I had a meeting with Lawrence County State’s Attorney John Fitzgerald about a letter from Robbie Rohl that was dated 6-21-22. The letter was written to address discovery concerns that Attorney Rohl had. In the letter there was a total of 12 areas of concern. The first item mentioned was SPD Item #21 which was a Motorola cellphone in a black and green case. This was Donovan Derrek’s cellphone.

Defendant⁹. Derrek's phone location at the time of the shooting, potentially retrievable via the destroyed phone data, could have independently exonerated Rogers.

Unlike *Zephier*, the phone's materiality was immediately apparent due to statements made by both Rogers and Derrek. Of course, it will be argued that the phone did not possess "apparent exculpatory value," but certainly it possessed apparent material value.

Finally, the *Zephier* court stated:

Zephier's argument to the contrary simply focuses on the State's violation of the procedures outlined in SDCL 23A-37-15 without any additional showing that officers or the prosecutor were acting in bad faith. We can discern nothing from the decisions of the United States Supreme Court or our own cases that supports the view that due process requires such an inflexible per se bad faith rule.

State v. Zephier, 2020 SD 54, ¶ 32. Rogers is not arguing the destroyed evidence was "potentially useful." Rogers has shown that the destroyed evidence could have completely exonerated him from a conviction that resulted in a sentence of life in prison. The record contains ample evidence to suggest bad faith and there is a contemporaneous judicial finding that law enforcement engaged in intentional bad faith conduct at the exact same time. In addition to the contemporaneous bad faith, at best law enforcement's actions with regards to the destruction of the evidence were "willful and wanton misconduct", i.e. gross negligence.

"In South Dakota, the phrases gross negligence and willful or wanton misconduct mean the same thing." *Fischer v. City of Sioux Falls*, 2018 SD 71, ¶ 8 (citations omitted). Establishing willful or wanton misconduct requires proof of an element not present in a negligence claim, it entails a mental element." *Fischer v. City of Sioux Falls*, 2018 SD 71,

⁹ Lack of fingerprint forensic evidence would not itself exonerate a Defendant.

¶ 9. Detective Hofmann testified that he received a document advising him that the destroyed “material evidence” unambiguously explained that the data was not preserved. JT 480:23-25; 481:1-9. The document was published to the jury. Detective Hofmann advised it was his responsibility to read the document but he, apparently, chose not to read it. JT 481:8-9.

The second part of ¶ 32 is also distinguishable. Discernment from United States Supreme Court is expressly available based upon the record before the Court. In *Youngblood*, the Supreme Court stated, “In the present case, the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears to be greater than it was in *Trombetta*, but here, unlike in *Trombetta*, the State did not attempt to *make any use of the materials* in its own case in chief.” 488 US 51, 56 (1988) (Emphasis added). In this case, the State called two expert cellphone witnesses (Almeida and Kennedy) who were both credentialed to the jury as reliable experts. Both expressly testified that their expert opinions, based on cell phone information not destroyed by law enforcement, were that Derrek was at Reddy’s at the time of the shooting.

Not only did the prosecution attempt to make use of the materials, in Closing Argument they zeroed in on it:

ARGUMENT: “You heard from Detective Almeida from Rapid City who had a chance to go through all the downloads. He gave his opinion on where Donovan was during that fateful time. He was asked on the stand ‘Where was Donovan at 12:48’ Obvious. He was over at Alan’s house.” JT 1397:2-5; “Detective Almeida wasn’t even able to get to crack his phone. So, if he doesn’t have the technology to crack Donovan’s phone, what would be available?” JT 1397:25; 1398:1-3.

ARGUMENT: "FBI Officer Sean Kennedy testified that he took what information was available off Donovan's CDR – Donovan's call detail records – and he pinpointed that arc. He used the cell phone towers to determine where Donovan was during that time. Putting him nowhere near the Rogers's residence, but over by his house, over by Alan's house." JT 1397:8-14.

ARGUMENT: "It's interesting that defense in closing wants to say, 'Well, you know, Sean Kennedy – there's a gap there.' But remember what Sean Kennedy said. He said, 'I can't ignore the text messages. And in my opinion, the phone of Donovan Derrek was not at the crime scene at the time the murder was committed.'" JT 1450:9-14.

Based on the foregoing, the Defendant's Due Process rights were violated. "When evidence is destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing the State's most probative evidence." *State v. Lyerla*, 424 N.W.2d 908, 910-11 (S.D. 1988) (quotation omitted). The only remedy available is barring prosecution.

CONCLUSION

The State's obligation was to disprove every reasonable doubt premised on the defense that Donovan Derrek was the shooter. The defense proved the following facts: (a) the police broke the law during this investigation; (b) the police gave material evidence away; (c) the police contaminated important forensic evidence; (d) the third-party perpetrator's alibi is unquestionably weak; and (e) the material omissions of evidence. Proof beyond a reasonable doubt does not exist considering proven facts (a) through (e). The trial court improperly denied Defendant's Motion for Judgment of Acquittal with respect to Counts IA, II, IV, and V.

The trial court failed to consider evidence of bad faith. Contemporaneous intentional bad faith law enforcement conduct with willful and wanton conduct destruction of material evidence supports instructing the jury on spoliation. The Court abused its discretion in refusing to charge the jury as requested.

Rogers's Due Process Rights guaranteed and imposed on all the states by the Fourteenth Amendment were violated. The criminal prosecution did not comport with prevailing notions of fundamental fairness. The State breached its Constitutional duty when it destroyed evidence that was expected to play a significant role in Rogers's defense, certainly his trial. The materiality of the evidence was immediately apparent before it was destroyed, and the evidence was of such a nature that Rogers is unable to obtain comparable evidence by any other available means.

WHEREFORE, the Defendant, Dreau Rogers respectfully requests this Court to reverse his convictions for Count IA, Count II, Count IV, and Count V, on the grounds that his Motion for Judgment of Acquittal was improperly denied. Further, Dreau Rogers requests that his convictions for Count IA, Count II, Count IV, and Count V, be vacated with instructions that any future criminal prosecution for these charges is barred for violation of Due Process. In the alternative, Defendant Dreau Rogers requests this Court to reverse the Judgment of Conviction and remand the case for a new trial with specific instructions that the trial court charge the jury on the issue of Spoliation.

REQUEST FOR ORAL ARGUMENT

The Appellant-Defendant Dreau Rogers respectfully requests this Court to order oral argument.

Dated this 3rd day of June, 2024.

/s/ Robert J. Rohl

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL §15-26A-66(b), Robert J. Rohl, counsel for the Appellee does hereby submit the following:

The foregoing brief is 39 pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 30 pages, 9,023 words in the body of the brief.

Dated this 3rd day of June, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on June 3rd, 2024, I served a true and correct copy of the *Appellant's Brief* by electronic filing via Odyssey and via e-mail on the following individuals:

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Excerpts of Examination of Ashley Bullock	Appellant App 140
Excerpts of Examination of Adam Dolezol.....	Appellant App 144
Excerpts of Examination of Cody Lineberger	Appellant App 148
Excerpts of Examination of Donovan Derrek.....	Appellant App 149
Excerpts of Examination of Alan Reddy Jr.	Appellant App 170
Excerpts of Bench Conference at conclusion of testimony	Appellant App 188
Excerpts of Bench Conference on Jury Instructions.....	Appellant App 196
Excerpts from State's Closing Argument	Appellant App 205
Excerpts from State's Closing Rebuttal.....	Appellant App 207

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

40CRI22-86

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Dreau Lester Rogers appeals to the South Dakota

See SDCL §§ 23A-32-16; 23A-40-6.

/s/ Robert J. Rohl
2902 W. Main Street, Suite 4
Rapid City, SD 57702
(605) 519-7750
robert@605legal.com

/s/ Robert J. Rohl
Robert J. Rohl, Trial Lawyer

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
:		
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	CRI 22-86
Plaintiff,)	
)	
VS.	)	JUDGMENT OF CONVICTION
)	
DREAU LESTER ROGERS,)	
Defendant.)	

An Indictment was filed with this Court on the 27th day of April, 2022, charging the Defendant with the crime of Count I: First Degree Murder Premeditated Design (Class A Felony) SDCL 22-16-4 Or In The Alternative Count IA: Murder In The Second Degree (SDCL 22-16-7) (Class B Felony) and Count II and III: Possession Of Firearm By Person With A Prior Felony Drug Related Conviction (SDCL 22-14-15.1) Class 6 Felony, Count IV: Possession Of Firearm With Altered Serial Number (SDCL 22-14-12 and SDCL 22-14-12 and 22-42-4 and 22-42-4.3), Class 6 Felony, Count V: Commission Of Felony While Armed With A Firearm (SDCL 22-14-12), Class 2 Felony Count 10: Unauthorized Ingestion Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B), Class 5 Felony and a Part II Information was filed with this Court on the 24th day of January, 2022.

The Defendant was arraigned on said Indictment and Part II Information on the 29th day of April, 2022. The Defendant and the Defendant's attorney, Robert Rohl, and Brenda K. Harvey and John Fitzgerald as 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, including but not limited to the right to a jury trial. The Defendant pled not guilty to the charges and requested a Jury Trial.

A Jury Trial commenced on the November 28, 29, 30, December 1, 4, 5, 6 and 7th, 2023. The Defendant and the Defendant's attorney,

Robert Roal, and Brenda K. Harvey and Robert Haivala as prosecuting attorney appeared at the Defendant's Jury Trial. On the 7th day of December, 2023, the Jury found the Defendant guilty of Count IA: Murder In The Second Degree (SDCL 22-16-7) (Class B Felony) and Count II and III: Possession Of Firearm By Person With A Prior Felony Drug Related Conviction (SDCL 22-14-15.1) Class 6 Felony, Count IV: Possession Of Firearm With Altered Serial Number (SDCL 22-14-5), Class 6 Felony, Count V: Commission Of Felony While Armed With A Firearm (SDCL 22-14-12), Class 2 Felony and Count 10: Unauthorized Ingestion Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B), Class 5 Felony

It is therefore, the JUDGMENT of this Court that the Defendant is guilty of Count IA: Murder In The Second Degree (SDCL 22-16-7) (Class B Felony) and Count II and III: Possession Of Firearm By Person With A Prior Felony Drug Related Conviction (SDCL 22-14-15.1) Class 6 Felony, Count IV: Possession Of Firearm With Altered Serial Number (SDCL 22-14-5), Class 6 Felony, Count V: Commission Of Felony While Armed With A Firearm (SDCL 22-14-12), Class 2 Felony and Count 10: Unauthorized Ingestion Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B), Class 5 Felony.

S E N T E N C E

On the 2nd day of January, 2024, 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:

Count IA: Murder In The Second Degree (SDCL 22-16-7) (Class B Felony)

IT IS HEREBY ORDERED that the Defendant shall serve life in prison without parole and pay costs of \$116.50. The Defendant shall receive credit for time served of 709 days.

IT IS FURTHER ORDERED that the Defendant shall provide a DNA sample and sign a Waiver Of Extradition.

IT IS FURTHER ORDERED that the Defendant shall have no direct or indirect contact with any of the deceased's family members.

IT IS FURTHER ORDERED that the Defendant shall receive all treatment available with Department of Corrections.

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence Court for court appointed attorney fees \$4,293.66 for Joseph Kosel and Mr. Rohl's fees to be determined, paralegal fees to be determined, RO LLC investigation fees of \$12,453.97, \$236.35 computer forensic, and any other defense counsel fees.

Count II: Possession Of Firearm By Person With A Prior Felony Drug Related Conviction (SDCL 22-14-15.1) Class 6 Felony

IT IS HEREBY ORDERED that the Defendant shall serve two (2) years in the South Dakota State Penitentiary and pay costs of \$116.50. The Defendant shall receive credit for time served of 709 days. This Sentence shall run consecutive to Count IA:

IT IS FURTHER ORDERED that the Defendant shall provide a DNA sample and sign a Waiver Of Extradition.

IT IS FURTHER ORDERED that the Defendant shall receive all treatment available with Department of Corrections.

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence Court for court appointed attorney fees \$4,293.66 for Joseph Kosel and Mr. Rohl's fees to be determined, paralegal fees to be determined, RO LLC investigation fees of \$12,453.97, \$236.35 computer forensic, and any other defense counsel fees.

Count III: Possession Of Firearm By Person With A Prior Felony Drug Related Conviction (SDCL 22-14-15.1) Class 6 Felony

IT IS HEREBY ORDERED that the Defendant shall serve two (2) years in the South Dakota State Penitentiary and pay costs of \$116.50. The Defendant shall receive credit for time served of 709 days. This Sentence shall run consecutive to Count IA, Count II and Count III.

IT IS FURTHER ORDERED that the Defendant shall provide a DNA sample and sign a Waiver Of Extradition.

IT IS FURTHER ORDERED that the Defendant shall receive all treatment available with Department of Corrections.

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence Court for court appointed attorney fees \$4,293.66 for Joseph Kosel and Mr. Rohl's fees to be determined, paralegal fees to be determined, RO LLC investigation fees of \$12,453.97, \$236.35 computer forensic, and any other defense counsel fees.

Count IV: Possession Of Firearm With Altered Serial Number (SDCL 22-14-5), Class 6 Felony

IT IS HEREBY ORDERED that the Defendant shall serve two (2) years in the South Dakota State Penitentiary and pay costs of \$116.50. The Defendant shall receive credit for time served of 709 days. This Sentence shall run consecutive to Count IA and Count II and III.

IT IS FURTHER ORDERED that the Defendant shall provide a DNA sample and sign a Waiver Of Extradition.

IT IS FURTHER ORDERED that the Defendant shall receive all treatment available with Department of Corrections.

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence Court for court appointed attorney fees \$4,293.66 for Joseph Kosel and Mr. Rohl's fees to be determined, paralegal fees to be determined, RO LLC investigation fees of \$12,453.97, \$236.35 computer forensic, and any other defense counsel fees.

Count V: Commission Of Felony While Armed With A Firearm (SDCL 22-14-12), Class 2 Felony

IT IS HEREBY ORDERED that the Defendant shall serve 25 years in the South Dakota State Penitentiary and pay costs of \$116.50. The Defendant shall receive credit for time served of 709 days. This Sentence shall run consecutive to Count IA, Count II, III, and COUNT IV.

IT IS FURTHER ORDERED that the Defendant shall provide a DNA sample and sign a Waiver Of Extradition.

IT IS FURTHER ORDERED that the Defendant shall receive all treatment available with Department of Corrections.

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence Court for court appointed attorney fees \$4,293.66 for Joseph Kosel and Mr. Rohl's fees to be determined, paralegal fees to be determined, RO LLC investigation fees of \$12,453.97, \$236.35 computer forensic, and any other defense counsel fees.

Count 10: Unauthorized Ingestion Of A Controlled Drug Or Substance (SDCL 22-42-5 and 34-20B), Class 5 Felony

IT IS HEREBY ORDERED that the Defendant shall serve 5 years in the South Dakota State Penitentiary and pay costs of \$116.50. The Defendant shall receive credit for time served of 709 days. This Sentence shall run consecutive to Count IA, Count II, III, Count IV and Count V.

IT IS FURTHER ORDERED that the Defendant shall provide a DNA sample and sign a Waiver Of Extradition.

IT IS FURTHER ORDERED that the Defendant shall receive all treatment available with Department of Corrections.


IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence Court for court appointed attorney fees \$4,293.66 for Joseph Kosel and Mr. Rohl's fees to be determined, paralegal fees to be determined, RO LLC investigation fees of \$12,453.97, \$236.35 computer forensic, and any other defense counsel fees.

Attest: CAROL LATUSECK, CLERK
Hammond, Chelsea
Clerk/Deputy



BY THE COURT:

1/3/2024 2:47:11 PM


Hon. Mike Day
Circuit Court Judge

DATE OF OFFENSE: JANUARY 22, 2022

NOTICE OF APPEAL

You are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise within thirty (30) days from the date that this Judgment and Sentence is signed, attested and filed, written Notice of Appeal with the Lawrence County Clerk of Courts, together with proof of service that copies of such Notice of Appeal have been served upon the Attorney General of the State of South Dakota, and the Lawrence County State's Attorney.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
)	
STATE OF SOUTH DAKOTA,	)	FILE NO. CRI22-86
)	
Plaintiff,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW re: MOTION
vs.	)	TO SUPPRESS STATEMENTS
	)	AND/OR VIDEO TELECONFERENCE
DREAU ROGERS,	)	WITH DONOVAN DERREK
)	
Defendant.)	

Two evidentiary hearings which impact this Court's decision relating to *Defendant's Motion to Suppress Statements and/or Video Teleconference with Donovan Derek* were held. The first hearing took place on March 31st, 2022, wherein testimony was taken concerning jail policy and procedures. The transcript of the March 31st, 2022, will be hereafter referred and cited as *MH* (Motions Hearing) followed by the page number and corresponding line numbers. On June 10th, 2022, the second Evidentiary Hearing occurred wherein testimony was taken concerning Defendant's Motion to Suppress. The transcript of the June 10th, 2022, will be hereafter referred and cited as *EH* (Evidentiary Hearing) followed by the page number and corresponding line numbers. At both hearings the Defendant was personally present and represented by his counsel, Robert Rohl. The State was represented by John H. Fitzgerald, the Lawrence County State's Attorney.

This matter having come before the Court on June 10th, 2022, and the Court having taken testimony, considered all evidence, post-hearing submissions¹ and arguments by all parties, the

¹ The matter was deemed fully submitted to the Court on July 27, 2022.

Court hereby enters the following Findings of Fact and Conclusions of Law relating to Defendant's Motion to Suppress Statements and/or Video Teleconference with Donovan Derrek filed on April 25th, 2022:

FINDINGS OF FACT

1. On or about January 22nd, 2022, the Defendant, Dreau Rogers was arrested for the alleged murder of Destiny Rogers.
2. Prior to Defendant's arrest and during law enforcements' investigations, Dreau Rogers informed law enforcement that Donovan Derrek shot and killed Dreau's wife, Destiny Rogers. Upon law enforcement making contact with Donovan Derrek, Mr. Derrek directed law enforcement's attention to his alleged alibi, Alan Reddy. After law enforcement spoke with Alan Reddy, law enforcement arrested Defendant for the alleged murder of Destiny Rogers. *EH 7:9-19;10:16-19.*
3. During Donovan Derrek's questioning by law enforcement, Mr. Derrek specifically indicated multiple times he wished to speak with Defendant about the alleged murder. *EH 12:25 – 13:1-6.*
4. On or before January 24th, 2022, the Defendant exercised his right to counsel and his right to remain silent.
5. On January 24th, 2022, an Order for Court Appointed Counsel in criminal file 22-86 was entered appointing attorney Joe Kosci. *See Order for Court Appointed Counsel.*
6. On January 26th, 2022, an interagency memo was sent to the entire corrections Staff by Sergeant Wetz. An interagency memo is a written log of activities, events, or information that the corrections staff wishes to convey amongst themselves. *EH 39:1-6.*

7. Sergeant Wetz' January 26th, 2022, interagency memo to Lawrence County Corrections advised that Donovan Derrek was not approved as a visitor to see Defendant. In the memo Sergeant Wetz advised Lawrence County Corrections Staff that the decision prohibiting Donovan Derrek from visiting Defendant Rogers was made by Captain Little. Donovan Derrek was denied visitation by the jail because he was a "material witness." *EH* 39:14-24; 40:18-21; *Exhibit A*.

8. On January 28th, 2022, Captain Little received a phone call from Detective Sergeant Schumacher. Detective Schumacher requested that Captain Little authorize Donovan Derrek to visit Defendant. At the prior Motions Hearing (3-31-22), Captain Little testified that this phone call was made to his personal cell while driving home. Captain Little also testified that this type of phone call and request is something which happens "very infrequently". *EH* 42:1-4; *see also MH* 23:14-25.

9. On the following day, January 29th, 2022, Monica Lucio sent an interagency memo to Lawrence County Corrections Staff regarding Defendant. In this memo, Lawrence County Corrections Staff was advised that Donovan Derrick was allowed to visit Defendant but only with a device that is "recordable."² The interagency memo specifically lists the call signs of Captain Little, Tom Derby, and Detective Schumacher. *See Exhibit B; EH* 41:11-17.

10. The interagency memos to Lawrence County Corrections, *Defendant's Exhibit A and B*, were provided to defense counsel in open court by Captain Little in response to a Subpoena Duces Tecum issued upon him at a prior Motions Hearing. *EH* 38:23-25; *MH* 14:11-15; 16:4-15.

11. On February 2nd, 2022, the Defendant was charged by Indictment with First

² All visitation that occurs at the Lawrence County Jail between a visitor and an inmate is recorded and preserved.

Degree Murder Premeditated Design amongst nine other charges stemming from the January 22nd, 2022, allegations. *See generally*, file 22-86; *Indictment*.³

12. On February 4th, 2022, Donovan Derrek went to the Lawrence County Jail and commenced a recorded video teleconference with Defendant. Upon arrival at the jail, Donovan Derrek questioned Defendant about the alleged murder of Destiny Rogers on a recorded video format. The State seeks to introduce this evidence in its case in chief against Defendant Rogers. *See State's Exhibits 1 and 2.*

13. On February 4th, 2022, and prior to creation of *Defendant's Exhibit B*, law enforcement knew that Defendant had an attorney and exercised his right to remain silent. 19:24-25; 20:1. Law enforcement desired to watch and observe the interaction between Donovan and Defendant and sought to observe Defendant Rogers' reaction to Donovan Derrek's questions about the murder, despite the fact he was represented by counsel and had exercised his constitutional rights. *EH* 43:24-25; 44:1-12. The Defendant did not know that he was going to be visited by Donovan Derrek until his face came up on the video visitation screen. Prior to the visitation, Defendant Rogers was not advised the subject matter or identity of the visitor. *EH* 38:4-9.

CONCLUSIONS OF LAW

1. Any conclusions of law, if improperly denominated as such, shall be deemed a finding of fact so that the tenor and effect of the court's decision is maintained.
2. On April 25th, 2022, Defendant filed *Defendant's Motion to Suppress*

³ A Second Superseding Indictment was filed on April 28, 2022.

Statements and/or Video Teleconference with Donovan Derrek. Defendant has argued that the video teleconference with Donovan Derrek was “elicited from Defendant in violation of his privilege against self-incrimination and his right to counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article VI, Sections 7 and 9 of the Constitution of the State of South Dakota.” *See Defendant's Motion to Suppress Statements and/or Video Teleconference with Donovan Derrek.*

3. The purpose of the Fifth Amendment right to counsel is to protect individuals from self-incrimination and assist in the custodial interrogation process. *State v. Hoadley*, 2002 SD 109, ¶ 26 (citing *State v. Anderson*, 200 SD 45, ¶ 74). The Sixth Amendment provides for the right of counsel in criminal prosecution. *Id.* The right to counsel attaches only after judicial proceedings begin. *Id.* (citing *State v. Hamm*, 89 SD 507, 515-16 (SD 1975); *Kirby v. Illinois*, 406 US 682, (1972)).

4. The videotaped teleconference sought to be suppressed by Defendant, i.e. *State's Exhibits 1 and 2*, occurred after initiation of “adversary judicial criminal proceedings” against Defendant Rogers. “[W]hile members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, [a]ll of those cases have involved points of time at or after initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *Hamm*, 89 SD at 516 (citing *Powell v. Alabama*, 287 US 45 (1935); *Kirby v. Illinois*, 406 US 682 (1972)). The recorded videoconference between Donovan Derrek and Defendant occurred after he was Indicted and the appointment defense counsel. The recorded videoconference occurred at a time that law enforcement unanimously knew that Defendant was represented by counsel and exercised his rights. *EH 44:13-21; See also Indictment and Order for Court Appointed Counsel.*

5. In *Massiah v. U.S.*, 377 US 201, 206 (1964), the Supreme Court held that “the petitioner was denied the basic protections of [Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.”

6. In *Illinois v. Perkins*, the U.S. Supreme Court held that statements deliberately elicited by an undercover agent posing as the defendant’s cellmate were admissible because there is no coercion where the suspect does not know that he is speaking to a government agent. *Illinois v. Perkins*, 496 US 292, 496 US 292 (1990). *Illinois v. Perkins* further explains that *Massiah v. U.S.*, 377 US 201 (1964) did not apply because the Sixth Amendment right to counsel only applies once a suspect has been charged. In *Perkins*, no charges had been filed and “adversary judicial criminal proceedings” had not been initiated. In the present case with Defendant Rogers, charges had clearly been filed, and again, adversary judicial criminal proceedings had been commenced relating to the alleged murder. Defendant Rogers was appointed counsel on January 24th, 2022, and he was Indicted on February 2nd, 2022. The at-issue teleconference sought to be suppressed occurred on February 4th, 2022.

7. Law enforcement’s utilization of the *Perkins* technique may only be used before the suspects Sixth Amendment right to counsel attached. Here it is uncontroverted that the Sixth Amendment right to counsel attached and law enforcement knew the right attached. 19:16-25; 20:1-4; 44:13-21.

8. Unlike *Miranda*, the Sixth Amendment right to counsel can be violated by covert questioning, in or out of custody. *U.S. v. Henry*, 447 US 265, 264 (1980) held: “Respondent’s statements to the informant should not have been admitted at trial. By intentionally creating a situation likely to induce respondent to make incriminating statements without the assistance of

counsel, the Government violated respondent's Sixth Amendment right to counsel." *Main v. Moulton* expanded on Defendant's Sixth Amendment rights, the Court further held that: "The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State. Knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." *Maine v. Moulton*, 474 US 159, 160 (1985). The Court further notes that the *Moulton* decision held: "Once the right to counsel has attached and been asserted, the State must honor it. At the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Clint Spano v. New York*, 360 US 315 (1959); *Massiah v. United States*, 377 US 201 (1964); *United State v. Henry*, 447 US 264 (1980).

9. Whether or not Donovan Derrek was working for the Government as an "official" informant is irrelevant. Prior to February 4th, 2022, Donovan Derrek advised law enforcement multiple times of his intent to question Defendant about the alleged murder of Destiny Rogers. *EH* 12:25; 13:1-14; 21:19-23.

10. Based upon *Defendant's Exhibits A and B*, as well as the testimony of the witnesses, it is clear that Donovan Derrek was forbidden from visiting Defendant by order of Captain Little. An interoffice memorandum was sent to the entire Lawrence County Corrections Department forbidding Donovan Derrek from visiting Defendant. *See Defendant's Exhibit A*.

11. The Spearfish Police Department desired to record and observe Defendant being questioned by Donovan Derrek. *EH* 43:22-25; 44:1-15. Detective Schumacher called Captain

Little and requested that Donovan Derrek be allowed to visit Defendant and that the encounter be recorded. *EH* 25:25; 26:1-13; 44:6-12.

12. On January 29th, 2022, the day after Detective Schumacher called Captain Little on his personal phone, an updated interoffice memorandum was sent to the entire Lawrence County Corrections Department concerning Defendant. This memorandum expressly authorized Donovan Derrek to visit Defendant but it could only occur as long as it was recorded. See *Exhibit B; EH* 24:19-25; 25:1-8; 44:1-12. At this time, law enforcement knew that Defendant Rogers was represented by counsel and exercised his rights. *EH* 44:13-21.

13. Law Enforcement intentionally created a situation (allowing Derrek to speak with Defendant) likely to induce Defendant to make incriminating statements without the assistance of counsel. Law Enforcement engaged in a knowing exploitation of an opportunity to confront the accused without counsel being present in violation of longstanding United States Supreme Court jurisprudence.

14. The record demonstrates, that "but for" law enforcement's actions, this interaction would have never occurred. The relevant portions of the record in this regard are below.

Detective Steve Hoffman Testimony:

Q So but for law enforcement going through the channels of making that recorded visit happen, this would never have occurred; correct?

Mr. Fitzgerald: I would object. Calls for him to speculate.

The Court: Overruled.

A Without – I guess, without somebody contacting him and allowing the visit, then he wouldn't have known the visit was allowed.

Q (By Mr. Rohl, continuing): I'm not sure I understood your answer. So you agree or disagree that law enforcement was the only way this recorded visit was capable of occurring?

A With the information you have here, that's true. Correct.

25:15-25

Captain Tavis Little:

Q Well, I want to just seek your confirmation, Captain Little, that this is what your words state. "Donovan Derrek is not allowed to visit him, as he is a material witness in this case." True or false?

Mr. Fitzgerald: I object. Asked and answered.

The Court: Overruled.

A Those aren't my words. That is what Sergeant Wetz wrote. But, yes, that is the summary.

Q (By Mr. Rohl, continuing) The second exhibit there in front of you – Defendant's Exhibit B – this document interagency notes – expressly states that he must use a device that is recordable. Do you see that?

A I do.

Q And you would agree with me?

A Yes.

Q Would you agree with me that law enforcement wanted to observe this interaction?

A Yes.

Q Would you agree with me that law enforcement wanted Donovan Derrek to go in, so they could observe this interaction occur?

A I think it's fair to say, yes.

Q And would you agree with me that law enforcement knew he had a lawyer at that time?

A Yes.

Q And would you agree with me that law enforcement knew he had exercised his right to remain silent?

A Yes.

Q And would you agree with me that law enforcement – I asked you that – represented by counsel?

A Yes.

Q And would you agree with me that it was under the authority of the Spearfish investigators that this interaction was authorized to occur?

A That I can't answer.

Q They certainly played a role as far as what you testified to previously, though; right?

A I would believe they are aware and played a role, yes.

EH43:16-25; 44:1-25; 45:1-3.

15. Under these specific circumstances, this Court concludes that Law Enforcement in this case breached its "affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Citing Spano v. New York*, 360 US 315 (1959); *Massiah v. United States*, 377 US 201 (1964); *United State v. Henry*, 447 US 264 (1980). The record clearly establishes that Defendant exercised his right to an attorney and that adverse judicial proceedings on the murder charge had been initiated. Defendant's Sixth Amendment right to counsel had attached. The record further establishes that Donovan Derrek was denied access to visit Defendant as he was deemed a "material witness" by Captain Little and this was communicated to the entire Lawrence County Corrections Department. *Exhibit A*. Three days later, per law enforcement's directive, Mr. Derrek was authorized visitation with the Defendant. *Exhibit B*.

16. Knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." *Maine v. Moulton*, 474 US 159, 160 (1985). In this instance, at a minimum Law Enforcement exploited an opportunity to confront the accused without counsel being present and thereby circumvented

Defendant's right to the assistance of counsel in violation of the Constitution and the Supreme Court's jurisprudential mandates.

17. The Court concludes that Defendant's Motion to Suppress Statements and/or Video Teleconference with Donovan Derrek is GRANTED.

Let an ORDER enter accordingly.


ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS STATEMENT

In accordance with the foregoing Findings of Fact and Conclusions of law, which are incorporated herein by this reference, IT IS HEREBY:

ORDERED that Defendant's Motion is hereby GRANTED.

Dated this 10th day of August, 2022.

BY THE COURT:

By: 
Michael W. Day
Presiding Circuit Court Judge

ATTEST:


Clerk of Courts

Deputy



STATE OF SOUTH DAKOTA)
) SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
)
Plaintiff,)
)
vs.)
)
DREAU ROGERS,)
)
Defendant.)

40CRI22-000086

**DEFENDANT'S BRIEF IN SUPPORT
OF DUE PROCESS VIOLATION
DISMISSAL – BRADY VIOLATION**

COMES NOW, Dreau Rogers, by and through his attorney of record, Robert J. Rohl, and hereby files this *Defendant's Brief in Support of Due Process Violation – Brady Violation*.

INTRODUCTION

The constitutional right implicated by suppression of exculpatory evidence is explained in *Brady v. Maryland*: "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The Supreme Court stated in *California v. Trombetta*, with respect to the Due Process Clause of the Fourteenth Amendment: "We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence." 467 US 479, 485 (1984).

The right *Brady* describes definitely applies to prosecutors and imposes upon them an absolute disclosure duty. But *Brady's* protections also extend to actions of other law enforcement officers such as investigating officers. However, an investigating officer's failure to preserve evidence potentially useful to the accused or their failure to disclose such evidence does

not constitute a denial of due process in the absence of bad faith. *Villasana v. Whilhott*, 368 F.3d, 980 (8th Cir. 2004).

RELEVANT FACTS

For purposes of the relevant facts section in this brief, Defendant incorporates by record the following: (1) *Findings of Fact and Conclusions of Law re: Motion to Suppress Statement and/or Video Teleconference with Donovan Derrek* (on the record finding of intentional 6th Amendment violation – bad faith); (2) *Memorandum of Decision on the State's Motion for and in Limine of Third Party Perpetrator Evidence*; (3) trial testimony of all relevant witnesses (Agent Hoffman; Detective Sayles); and (4) Defendant further incorporates by reference into this record each and every fact elicited through testimony at trial relating to these particular issues, i.e. (a) Brady Violation – suppression of exculpatory information; and (b) law enforcement's admitted violation of SDCL § 23A-37-15 (both seized phones from the Derek residence)¹.

Unlike many criminal cases, the defense of Mr. Rogers required actual disclosure to the Government, i.e. *Notice of Third Party-Perpetrator Evidence*. Defendant complied with all notice requirements. The Government has known exactly what defense Mr. Rogers was lodging against the Government's accusations for at least a year. The Defendant named Donovan Derek as the third-party perpetrator in this case. This issue was litigated as the Government endeavored to keep the defense from the jury – the Government's argument was unsuccessful.

On Trial Day 4 – Thursday, November 30th, 2023, Detective Sayles was called to the stand by the prosecution. Defense counsel noticed Detective Sayles had what appeared to be a report with him. This case has been highly litigated, and all non-evidentiary motions and

¹ Agent Hoffman also acknowledged during the trial that SDCL § 26-8A-3 was not adhered to, as he was a mandatory reporter. On re-direct, the Lawrence County State's Attorney led Detective Hoffman to acknowledge that he did not "intentionally" fail to make the report.

subsequent orders mandate that exculpatory evidence and reports be disclosed. Upon questioning of Detective Sayles, it was learned that 53 pages of discovery regarding Donovan Derek's apprehension was not provided. Defense counsel examined Detective Sayles on the record in and out of the presence of the jury. Detective Sayles stated that he expressly advised the prosecution that he would "bring his report" or something to that effect.

Incorporated by reference into this statement of facts is the 53 pages of discovery which had not been disclosed. Donovan Derek is referred to as the "murder suspect" and Dreau Rogers is referred to as the "witness" and "RP", i.e., Reporting Party. Donovan Derek is referred to as the suspect of the Destiny Rogers murder by 21 different responding officers. Of greater note, lead agent Steve Hoffman authors an email to Tony Harrison on January 22nd, 2022. The email was sent by lead agent Hoffman at 4:30 AM. This email would have occurred after several Dreau Rogers interviews had taken place. Dreau Rogers is referred to by lead agent Hoffman as the "RP" and Donovan Derrek is referred to as the "suspect".

The only responding officer listed on the State's Witness List was Detective Chad Sayles. Mr. Haivala provided defense counsel with an email by and between Agent Cody Lineberger and Robert Haivala. *See attached*. Nothing indicates that Detective Sayles or anyone else involved from SRT authored a report.

At this point, this case has involved intentional 6th Amendment violations by involved law enforcement, two admitted violations of SDCL § 23A-37-15, and now a failure to disclose exculpatory evidence. The case should be dismissed.

ARGUMENT/LAW

1- *Brady Violation – Withholding Exculpatory Information*

Had this information been disclosed, defense counsel would have presented a different

case to the jury – one in which the Spearfish Police Department agreed with Dreau Rogers and that fact is corroborated by their response and actions taken. SRT was briefed on Donovan Derek by information relayed to SRT by lead agent Hoffman. This information is memorialized within the contents of the reports received today – only after defense counsel’s examination of Detective Chad Sayles. The new discovery would have never been disclosed *but for* defense counsel’s examination of Detective Sayles. Had the information been disclosed, all the SRT officers would have been subpoenaed to discuss the information that they were provided with prior to their apprehension of Donovan Derek – information which originated with lead agent Hoffman.

Nothing within the contents of the disclosed discovery indicates in any way that reports of SRT should or did exist. The timeline of law enforcement’s actions and its decision-making process contained within this information is material as it shows that law enforcement both believed Dreau Rogers, and that law enforcement believed Donovan Derek was both capable of committing the crime and dangerous. According to the attached discovery, SRT was authorized to utilize less lethal exact rounds to prevent Donovan Derek from going back into his residence after he exited. *See attached.*

2- *Arizona v. Youngblood and California v. Trombetta*

In sum, *Brady* and its progeny address exculpatory evidence still in the government’s possession while *Arizona v. Youngblood*, 488 US 51 (1988) and *California v. Trombetta*, 467 US 479 (1984) govern cases in which the government no longer possesses the disputed evidence. Accordingly, after concluding that there has been a violation of *Youngblood*, the decision to either suppress the government’s secondary evidence describing the destroyed material or to dismiss the indictment turns on the prejudice that resulted to the defendant at trial. *California v.*

Trombetta, 467 U.S. 479, 487 (1984).

“Under the two-prong *Trombetta* test, the government violates a defendant’s right to due process when: (1) it destroys evidence whose exculpatory significance is apparent before destruction; and (2) the defendant remains unable to obtain comparable evidence by other reasonably available means.” *Trombetta*, 467 U.S. at 489. The government commits a constitutional violation when it destroys evidence that might be expected to play a significant role in a suspect’s defense. *Trombetta*, 467 US at 488-89. A definition utilized by Courts across the country to ascertain whether the evidence was expected to play a “significant role” is whether the lost evidence could prove the defendant’s innocence. In this case, the question is, could the Donovan Derrek cellphone alone prove the defendant’s innocence. The answer to that question is yes. *See Hoffman Testimony*. The Donovan Derek cellphone was expected to play a significant role in Dreau Rogers’ defense, and it could not have been more apparent. That fact is also demonstrated in the newly received discovery. *See attached*, RCPD Allen Nelson (“suspects vehicle outside the trailer house and his phone was pinging in the area”).

In fact, Detective Fox communicated to Dreau Rogers during his second interview that Donovan Derek’s phone was going to be downloaded (evidence received in trial):

DR He was there. He shot my fucking wife. He fucking shot her.
SF They’re – they’re doing a download of the phones right now. They’re going to.

DR Perfect.

Because the Donovan Derrek cellphone alone could prove the defendant’s innocence, the loss of the cellphone renders the Defendant’s trial unfair and violates his due-process rights. There is no alternative other than dismissal which serves as the only remedy for the violation. Whether law enforcement’s destruction of the evidence was intentional or unintentional, i.e. bad

faith, is irrelevant because the destroyed evidence had such a significant bearing on the outcome of the case.

In the event a bad faith showing is required, that standard has been met. This is why defense counsel has included the Court decision with respect to the 6th Amendment Violation. There is a bad faith finding on the record by law enforcement in this case. In addition, there is now a Brady Violation, a Due Process Violation, and two violations of SDCL § 23A-37-15². This case has reached the level of sufficiently outrageous Government conduct mandating dismissal of the Indictment. Defendant incorporates by reference in support of this argument *U.S. v. Chapman*, 524 F.3d 1073:

A court may dismiss an indictment under its supervisory powers only when the defendant suffers “substantial prejudice,” *United States v. Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988), and where “no lesser remedial action is available,” (citation omitted). The government has only proposed a single lesser remedy, the mistrial declaration itself, which it insists is an adequate sanction for the discovery violations. The district court considered and properly rejected that argument, because the mistrial remedy would advantage the government, probably allowing it to salvage what the district court viewed as a poorly conducted prosecution. The court identified myriad weaknesses in the government’s presentation during the three-week trial.

[...]

The prosecutor has a “sworn duty ... to assure that the defendant has a fair and impartial trial,” and his “interest in a particular case is not necessarily to win, but to do justice.” *N Mariana Islands v. Bowte*, 236 F.3d 1083, 1089(9th Cir. 2001). In this case the district court was clearly troubled by the government’s conduct and its failure to own up to its actions. We are similarly troubled, both by the AUSA’s actions at trial and by the government’s lack of contrition on appeal. The government attorneys who appeared in the original AUSA’s stead on the critical day of the hearing on the motion to dismiss the indictment told the trial court that they “took this matter extremely seriously” and conceded that the government made a “very serious mistake in terms of [its] discovery obligations.” Before us, however, these same attorneys have attempted to minimize the extent of the prosecutorial misconduct, completely disregarding the AUSA’s repeated misrepresentations to the court and the failure to obtain and prepare many of the

² Detective Hoffman acknowledged on cross-examination that he received the ICAC report, prior to destroying the at-issue cell phone, which expressly states no phone download occurred.

critical documents until *after* the trial was underway.

“Because the district court did not clearly err in finding that the government recklessly violated its discovery obligations and made flagrant misrepresentations to the court, we hold that the dismissal was not an abuse of discretion.” *U.S. v. Chapman*, 524 F.3d 1073, 1086 (9th Cir. 2008).

Lead Agent Hoffman’s silence on his email to Tony Harrison – which contradicts his trial testimony – is yet another example of the Government’s disregard for justice and disregard of its duty to disclose exculpatory evidence.

Dated this 30th day of November 2023.

/s/ Robert J. Rohl
Robert J. Rohl, Trial Lawyer
2902 W. Main Street, Suite 4
Rapid City, SD 57702
(605) 519-7750
robert@605legal.com

CERTIFICATE OF SERVICE

I hereby certify that on November 30th, 2023, I served a true and correct copy of the **DEFENDANT’S BRIEF IN SUPPORT OF DUE PROCESS VIOLATION DISMISSAL – BRADY VIOLATION** by electronic filing on the following individual:

Robert A. Haivala
Robert.Haivala@state.sd.us

Brenda Harvey
bharvey@lawrence.sd.us

/s/ Robert J. Rohl
Robert J. Rohl

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
)
 Plaintiff,)
)
vs.)
)
DREAU ROGERS,)
)
 Defendant.)

40CRI22-000086

**DEFENDANT'S BRIEF IN SUPPORT
OF DUE PROCESS VIOLATION
DISMISSAL – BRADY VIOLATION**

COMES NOW, Dreau Rogers, by and through his attorney of record, Robert J. Rohl, and hereby files this *Defendant's Brief in Support of Due Process Violation – Brady Violation*.

INTRODUCTION

The constitutional right implicated by suppression of exculpatory evidence is explained in *Brady v. Maryland*: “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. 83, 87 (1963). The Supreme Court stated in *California v. Trombetta*, with respect to the Due Process Clause of the Fourteenth Amendment: “We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence.” 467 US 479, 485 (1984).

The right *Brady* describes definitely applies to prosecutors and imposes upon them an absolute disclosure duty. But *Brady's* protections also extend to actions of other law enforcement officers such as investigating officers. However, an investigating officer's failure to preserve evidence potentially useful to the accused or their failure to disclose such evidence does

not constitute a denial of due process in the absence of bad faith. *Villasana v. Whilhoit*, 368 F.3d, 980 (8th Cir. 2004).

RELEVANT FACTS

For purposes of the relevant facts section in this brief, Defendant incorporates by record the following: (1) *Findings of Fact and Conclusions of Law re: Motion to Suppress Statement and/or Video Teleconference with Donovan Derrek* (on the record finding of intentional 6th Amendment violation – bad faith); (2) *Memorandum of Decision on the State's Motion for and in Limine of Third Party Perpetrator Evidence*; (3) trial testimony of all relevant witnesses (Agent Hoffman; Detective Sayles); and (4) Defendant further incorporates by reference into this record each and every fact elicited through testimony at trial relating to these particular issues, i.e. (a) Brady Violation – suppression of exculpatory information; and (b) law enforcement's admitted violation of SDCL § 23A-37-15 (both seized phones from the Derek residence)¹.

Unlike many criminal cases, the defense of Mr. Rogers required actual disclosure to the Government, i.e. *Notice of Third Party-Perpetrator Evidence*. Defendant complied with all notice requirements. The Government has known exactly what defense Mr. Rogers was lodging against the Government's accusations for at least a year. The Defendant named Donovan Derek as the third-party perpetrator in this case. This issue was litigated as the Government endeavored to keep the defense from the jury – the Government's argument was unsuccessful.

On Trial Day 4 – Thursday, November 30th, 2023, Detective Sayles was called to the stand by the prosecution. Defense counsel noticed Detective Sayles had what appeared to be a report with him. This case has been highly litigated, and all non-evidentiary motions and

¹ Agent Hoffman also acknowledged during the trial that SDCL § 26-8A-3 was not adhered to, as he was a mandatory reporter. On re-direct, the Lawrence County State's Attorney led Detective Hoffman to acknowledge that he did not "intentionally" fail to make the report.

subsequent orders mandate that exculpatory evidence and reports be disclosed. Upon questioning of Detective Sayles, it was learned that 53 pages of discovery regarding Donovan Derek's apprehension was not provided. Defense counsel examined Detective Sayles on the record in and out of the presence of the jury. Detective Sayles stated that he expressly advised the prosecution that he would "bring his report" or something to that effect.

Incorporated by reference into this statement of facts is the 53 pages of discovery which had not been disclosed. Donovan Derek is referred to as the "murder suspect" and Dreau Rogers is referred to as the "witness" and "RP", i.e., Reporting Party. Donovan Derek is referred to as the suspect of the Destiny Rogers murder by 21 different responding officers. Of greater note, lead agent Steve Hoffman authors an email to Tony Harrison on January 22nd, 2022. The email was sent by lead agent Hoffman at 4:30 AM. This email would have occurred after several Dreau Rogers interviews had taken place. Dreau Rogers is referred to by lead agent Hoffman as the "RP" and Donovan Derrek is referred to as the "suspect".

The only responding officer listed on the State's Witness List was Detective Chad Sayles. Mr. Haivala provided defense counsel with an email by and between Agent Cody Lineberger and Robert Haivala. *See attached*. Nothing indicates that Detective Sayles or anyone else involved from SRT authored a report.

At this point, this case has involved intentional 6th Amendment violations by involved law enforcement, two admitted violations of SDCL § 23A-37-15, and now a failure to disclose exculpatory evidence. The case should be dismissed.

ARGUMENT/LAW

1- *Brady Violation – Withholding Exculpatory Information*

Had this information been disclosed, defense counsel would have presented a different

case to the jury – one in which the Spearfish Police Department agreed with Dreau Rogers and that fact is corroborated by their response and actions taken. SRT was briefed on Donovan Derek by information relayed to SRT by lead agent Hoffman. This information is memorialized within the contents of the reports received today – only after defense counsel’s examination of Detective Chad Sayles. The new discovery would have never been disclosed *but for* defense counsel’s examination of Detective Sayles. Had the information been disclosed, all the SRT officers would have been subpoenaed to discuss the information that they were provided with prior to their apprehension of Donovan Derek – information which originated with lead agent Hoffman.

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/s/ Robert J. Rohl

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DREAU ROGERS,)
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 Defendant.)

40CRI22-000086

**MOTION TO COMPEL DISCOVERY
RELATING TO DIGITAL EVIDENCE
AND REPORTS**

COMES NOW DEFENDANT, by and through his attorney of record, Robert J. Rohl, and hereby moves this Court to Compel Discovery Relating to Digital Evidence and Reports. The proper standard for ruling on a discovery motion is whether the information sought is "relevant to the subject matter involved in the pending action ..." SDCL 15-2-26(b)(1). "A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery ... the motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." SDCL § 15-6-37(a). Defendant has attempted to obtain the discovery informally on multiple occasions and the attempts are attached to the Motion as evidence of said "certification of good faith."

All of the evidence requested in this Motion is expressly referenced by law enforcement reports and/or search warrants as both "existing" and having "relevance" to the allegations relating to this case. The relevant law enforcement reports evidencing the existence of the requested discovery were attached and provided to the State in prior correspondence. See *attached* 12-1-22 Discovery Request, marked as Exhibit A.

DISCOVERY REQUESTED

1- Donovan Derek's "New" Phone.

According to law enforcement reports, "One June 28th, 2022, I conducted an exam of a TCL smart phone belonging to Donovan Derek ... The exam produced an extraction report. The report and supporting data were saved to a target storage device." See Exhibit A, Bates 405, 443-44. There has been no report produced and more importantly, the data utilized to produce the report has not been provided. Time is of the essence and this data needs to be reviewed by Defendant's expert witness with sufficient time prior to trial. Defendant is legally entitled to immediate disclosure of this information.

2- Destiny Rogers Apple iCloud account and Google Drive.

According to law enforcement reports, "I received a response from Google with Destiny's Google drive information. I requested that Samantha Rosenau turn the zip files in to a Cellebrite Read Report. Once it was completed, I placed the files onto the case hard drive along with the original zip files." Exhibit A, Bate 405. There has been no report produced and more importantly, the data utilized to produce the report has not been provided. Time is of the essence and this data needs to be reviewed by Defendant's expert witness with sufficient time prior to trial. The Court needs to compel immediate disclosure of this information.

According to law enforcement reports, "I received the result of Destiny's iCloud account ... The iCloud files were taken to ICAC in Rapid City, and on 7-25-22 Detective Almeida used Axiom to make a portable file for the files. I received a copy of the portable files and will provide them to the LCSA on 7-28-22 for their review. I have attached the ICAC Examination Report to this case." Bate 405. There has been no report produced and more importantly, the data utilized to produce the report has not been provided. Time is of the essence and this data

needs to be reviewed by Defendant's expert witness with sufficient time prior to trial. Defendant is legally entitled to immediate disclosure of this information.

3- Data obtained from 2020 phone extractions.

According to law enforcement reports, "I learned in 2020, Sergeant Rosenau completed a phone extraction of a previous phone belonging to Destiny and at that time she was using the password 2020 ... I had learned that the cellphone extraction from Destiny's phone in 2020 had recordings of Destiny and Dreau on them. There had also been a phone extraction completed on Dreau's cellphone at that point. The phone extraction had a large number of messages between Dreau and Destiny." Exhibit A, Bate 405. This information is believed to contain some of the basis for the to be noticed state's 404(b) evidence. It is necessary that Defendant get all the information to ensure it is properly contexted, amongst other issues all related to fairness and the ability to observe the state's evidence sought to be used against him at this trial. There have been no reports produced and more importantly, the data utilized to produce the reports has not been provided. Time is of the essence and this data needs to be reviewed by Defendant's expert witness with sufficient time prior to trial. Defendant is legally entitled to immediate disclosure of this information.

4- Verizon Pen Register & Trap and Trace (PRTT) related to Donovan Derek phone number (605)569-3874 & (605)415-6332.

According to law enforcement reports, "I applied for and was granted a pen register and/or trap and trace (PRTT) and a cell site location information search warrant for Donovan's cellphone (605)569-3874. The search warrant was granted by the Honorable Judge Callahan. The search warrant was served to Donovan's cellphone service provider, and I began to receive estimated tower locations of Donovan's cellphone. I responded to Donovan's residence, located at 362 Evans Lane in Spearfish, South Dakota. While on scene I received an updated location

showing Donovan's cellphone was near his residence. I also received information showing Donovan was communicating via text message with phone number (605)415-6332. Through law enforcement records, the phone number was listed to Alan Reddy." Exhibit A, Bates 19, 21.

Defendant is requesting all information in law enforcement's possession relating to the Verizon Pen Register & Trap and Trace, i.e., a complete return of all information provided in the exact same format as received from Verizon with any and all accompanying documentation. Time is of the essence and this data needs to be reviewed by Defendant's expert witness with sufficient time prior to trial. Defendant is legally entitled to immediate disclosure of this information.

5- Verizon Records relating to Dreau Rogers, Destiny Rogers, Donovan Derek; (605)569-1764, (605)430-8120; (605)569-3874,

On January 25, 2022, a search warrant was applied for by law enforcement and granted by Judge Callahan. Exhibit A, Bates 255-263, 469. According to law enforcement reports, "On 1-25-2022, I applied for and was granted a search warrant for Donovan's, Destiny's, and Dreau's call detail records (CDR) through Verizon by the Honorable Judge Callahan. On 2-27-2022, I received the data from Verizon. In the data, I received the International Mobile Equipment Identify (IMEI) numbers for Donovan's and Dreau's phones. On 2-18-2022, I applied for and was granted a search warrant for the IMEI location data through Google, LLC by the Honorable Judge Callahan. All data received from Verizon and Google, LLC were given to Division of Criminal Investigation (DCI) analysts for processing." Exhibit A, Bates 22. To date, none of the information law enforcement received from Verizon relative to these phone numbers has been provided.

Defendant requests all data received from Verizon and Google that was given to law enforcement. This includes all subscriber information, CDR, Stored Text Messages, Stored Cell

Site Locations, and all other data received. All reports created or generated as well as the digital data (in the form it was received by law enforcement) needs to be provided to Defendant. Time is of the essence and this data needs to be reviewed by Defendant's expert witness with sufficient time prior to trial. Defendant is legally entitled to immediate disclosure of this information.

CONCLUSION

This Motion to Compel should be granted in its entirety. Defendant has attempted multiple times to recover the relevant and discoverable information which is the subject matter of this Motion. Defendant's first informal request for much of this information dates back to June 21st, 2022. Defendant certifies that he has attempted in good faith to resolve this matter without Court intervention and a copy of the most recent correspondence indicating the same is attached. To aid the State, Defendant even attached all reports directly evidencing the information's existence and to help identify the proper law enforcement personnel for its retrieval. Given the approaching trial date and the necessity of Defendant's expert to thoroughly review the voluminous discoverable information still outstanding, a Court Order should enter compelling immediate disclosure of all this information in possession of law enforcement.

Dated this 27th day of December 2022.

/s/ Robert J. Rohl
Robert J. Rohl, Trial Lawyer
Attorney for Defendant
2902 West Main Street, Suite 4
Rapid City, SD 57702
(605) 519-7750
robert@605legal.com

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2022, I served a true and correct copy of the *Motion to Compel Discovery Relating to Digital Evidence and Reports* by electronic filing on the following individual:

Lawrence County State's Attorney Office
jfitzer@lawrence.sd.us.org

/s/ Robert J. Rohl
Robert J. Rohl, Trial Lawyer

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IN CIRCUIT COURT
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40CRI22-000086

**DEFENDANT'S BRIEF IN SUPPORT
OF SPOILIATION INSTRUCTION
AND IN THE ALTERNATIVE STATE
V. ZEPHIER INSTRUCTION**

COMES NOW, Defendant Rogers, by and through his attorney of record, Robert J. Rohl, and hereby files this *Defendant's Brief in Support Spoliation Instruction, and in the Alternative State v. Zephter Instruction*.

INTRODUCTION/APPLICABLE LAW

For purposes of the applicable law section, the Defendant incorporates by reference the entire statement of law as set forth by the South Dakota Supreme Court in *State v. Zephter*, 2020 SD 54.

The Due Process Clause of the Fourteenth Amendment imposes upon states the requirement to ensure that "criminal prosecutions ... comport with prevailing notions of fundamental fairness." *State v. Zephter*, 2020 SD 54, ¶ 20. Implicit in this standard is the necessity that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *Id.* (citations omitted). "The resulting body of decisional law from the United States Supreme Court and this Court exist under a topical heading that 'might loosely be called the area of constitutionally guaranteed access to evidence.'" *Id.* (citations omitted).

Whenever potentially exculpatory evidence is permanently lost, i.e., Donovan Derrek's cellphone, the courts face the treacherous task of divining the import of materials whose contents

are unknown and, very often, disputed. *Zephier*, 2020 SD at ¶ 22. “Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense. To meet this standard of constitutional materiality ... evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Zephier*, 2020 SD at ¶ 23 (citations omitted); *refer also to trial testimony*.

In nondisclosure cases (which this is not), a court can simply grant the defendant a new trial at which time the previously suppressed evidence may be introduced. *State v. Iyerla*, 424 N.W.2d 908, 910-11. But, when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing the State’s most probative evidence. *Zephier*, 2020 SD at ¶ 22 (citations omitted). In this case, the Defendant was unable to request suppression, as there is no evidence to request suppression of that is even tangentially related. The call detail records of Donovan Derek highlighted the value of the actual phone and contained an exculpatory value for Dreau Rogers – for that reason suppression was not requested.

In South Dakota, our Legislature has enacted statutory standards which expressly govern law enforcement’s obligation to preserve evidence. See SDCL § 23A-37-14 and SDCL 23A-37-15.

SDCL § 23A-37-14, states in relevant part:

Property ... seized or confiscated by law enforcement personnel, ostensibly for use as evidence in a criminal prosecution shall be preserved, maintained, or stored at the expense of the county where the criminal offense occurred.

However, before releasing evidence to its owner, SDCL § 23A-37-15 requires law

enforcement officers to notify the defendant:

Before any property is returned to the owner pursuant to § 23A-37-14, the law enforcement personnel in possession of the property shall notify the defendant that the property will be returned to the owner. Upon a motion made by the defendant and upon good cause shown that the property contains exculpatory evidence of the defendant's innocence, the court may order the law enforcement personnel in possession of the property not to release it to the owner.

The South Dakota Supreme Court goes on to explain that it has never held that a violation of SDCL 23A-37-15 reflexively leads to a due process violation with the sanction of exclusion or a new trial. *Zephier*, 2020 SD at ¶ 29. "Instead, we have applied the Supreme Court's decisions in *Trombetta* and *Youngblood*, focusing on materiality and good faith." *Zephier*, 2020 SD at ¶ 29 (citing *State v. Danielson*, 2012 SD 36, ¶ 38 (applying *Trombetta* and *Youngblood* to hold that the defendant "failed to demonstrate that the State, in bad faith, destroyed evidence that would have played a significant role in his defense")).

SPOILIATION – BAD FAITH

For purposes of this section of Defendant's Brief, Defendant incorporates by reference his previous *Defendant's Brief in Support of Due Process Violation Dismissal – Brady Violation*. Defendant understands and respects this Court's decision regarding its finding on bad faith with respect to law enforcement and wishes to preserve this portion of the record.

STATE V. ZEPHIER, 2020 SD 54

In this case, after finding that the spoliation instruction was improper upon analysis of the same, the circuit court gave the jury a specific instruction regarding law enforcement's failure to comply with statutory standards regarding evidence preservation. Based on the evidence presented during this trial, Defendant Dreau Rogers is entitled to the following requested instruction based on *State v. Zephier*, 2020 SD 54, ¶ 17, ¶ 33:

DEFENDANT'S PROPOSED JURY INSTRUCTION – STATE V. ZEPHIER INSTRUCTION

It is the law of this state that when property is seized by law enforcement which constitutes evidence of a crime or exoneration, law enforcement must safely keep such property as long as it is required for trial and must not dispose of the same without an order of the court. It is an express finding of the Court that law enforcement violated statutory law which required law enforcement personnel in possession of Donovan Derrek's cellular telephones to notify the Defendant before returning them. Had the Defendant been provided with the statutorily required notice to return the seized property, the Defendant would have objected, and the Court would have required law enforcement to retain both cellular phones so they could be examined.

It is for your sole and exclusive determination whether returning the cellular phones to Donovan Derek in violation of law bears upon the verdict, guilty or not guilty, and the weight to be given to such fact.

CONCLUSION

Based on the foregoing, Defendant respectfully requests this Court find that the State has violated the Defendant's due process rights as specifically articulated in *California v. Trombetta*, 467 US 479 (1984), the Court should provide the jury with an inference spoliation jury instruction as set forth in *State v. Engesser* and *State v. Zephier*. In the alternative, Defendant requests that this Court instruct the jury in a fashion similar to the Circuit Court in *State v. Zephier*, as stated above, regarding the illegal destruction of cellular telephone evidence.

Dated this 3rd day of December, 2023.

/s/ Robert J. Rohl

Robert J. Rohl, Trial Lawyer
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CERTIFICATE OF SERVICE

I hereby certify that on December 3rd, 2023, I served a true and correct copy of the **DEFENDANT'S BRIEF IN SUPPORT OF SPOILIATION INSTRUCTION AND IN THE ALTERNATIVE STATE V. ZEPHIER INSTRUCTION** by electronic filing on the following individuals:

Robert A. Haivala
Robert.Haivala@state.sd.us

Brenda Harvey
bharvey@lawrence.sd.us

/s/ Robert J. Rohl
Robert J. Rohl, Trial Lawyer

SPOLIATION OF EVIDENCE

Instruction No. _____

The Court has determined that material evidence, i.e. Donovan Derrek's cell phone, was destroyed while in the care of and dominion of law enforcement. You are hereby instructed to presume that said evidence was destroyed by law enforcement in bad faith and you may infer that the Donovan Derreck cell phone evidence was unfavorable to the State.

Comment:

An adverse inference drawn from the destruction of evidence is predicated only on bad conduct. *State v. Engesser*, 2003 S.D. 47, 661 N.W.2d 739, 754 (citing *United State v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000), cert. denied, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001)). An instruction on the inference that may be drawn from the spoliation of evidence is proper only when the Court makes the threshold determination that substantial evidence exists to support a conclusion:

That the evidence was in existence; that it was in the possession or under the control of the party against whom the inference may be drawn; that the evidence would have been admissible at trial; and that the party responsible for destroying the evidence did so intentionally and in bad faith.

See Engesser, supra.

(New 2004)

State v. Zephier, 2020 SD 54, ¶ 33 Jury Instruction

It is the law of this state that when property is seized by law enforcement which constitutes evidence of a crime, law enforcement must safely keep such property as long as it is required for trial and must not dispose of the same without an order of the court. It is an express finding of the Court that law enforcement violated statutory law requiring law enforcement personnel in possession of Donovan Derrek's cell phone to notify the Defendant before returning it to the owner. Had the Defendant been provided with statutorily required notice to return the seized property he would have objected and the Court would have required law enforcement to retain the cell phone.

It is for your sole and exclusive determination whether returning the cell phone to Donovan Derek without a court order in violation of law bears upon up the verdict, guilty or not guilty, and the weight to be given to such fact.

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 2 COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT
 3

4
 5 **STATE OF SOUTH DAKOTA,**) CRI22-86
 6 Plaintiff,) JURY TRIAL PROCEEDINGS
 7 vs.) VOIR DIRE
 8 **DREAU ROGERS,**) Volume 1 of 10
 9 Defendant.) Pages 1 to 240
 10
 11

12 BEFORE: **THE HONORABLE MICHAEL W. DAY**
 13 Circuit Court Judge
 14 Deadwood, South Dakota
 15 November 27, 2023 at 8:30 a.m.

16 APPEARANCES:

17
 18 For the State: **MS. BRENDA HARVEY**
 19 Lawrence County State's Attorney
 20 90 Sherman Street
 21 Deadwood, South Dakota 57732

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23
 24 For the Defendant: **MR. ROBERT J. ROHL**
 25 Attorney at Law
 2902 West Main Street #4
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1 evidence in this case. Namely, touch DNA, which
2 implicates Dreau as the shooter. And I'm sure you're
3 probably thinking to yourself, "Well, my God. That sounds
4 pretty good. Why are we here? What are we doing here,
5 Mr. Rohl?"

6 Why are we here? Five material facts. There are five
7 material facts in this case that will not change no matter
8 how hard they try.

9 Fact Number 1: Law enforcement broke the law during
10 this investigation. Bold claim, I know. I'll prove it.
11 Law enforcement broke the law during the investigation.
12 One of the few that ensures citizens have the right to
13 defend themselves against government accusations.

14 Fact Number 2: Police literally gave material
15 evidence away. I'm not talking about a hubcap here,
16 folks. I'm talking about Donovan Derrek's cell phone.
17 The digital device that tracks every message he makes and
18 everywhere he goes. They gave it away without preserving
19 it and it's gone and will never be reacquired. Those
20 things have the capability of tracking your GPS.

21 Fact Number 3: Law enforcement mishandled important
22 forensic evidence in this case. They contaminated
23 forensic evidence and it rendered it useless to prove
24 anything.

25 Again, I understand. I will show you this during the

1 trial. They did.

2 Fact Number 4: Donovan Derrek's alibi is weaker than
3 you can possibly fathom. As you sit there today, I can
4 tell you, the evidence will show his alibi witness is
5 weaker than you can possibly imagine.

6 Fact 5: The material omissions of evidence or the
7 refusal or failure to consider evidence which corroborates
8 and supports exactly what Dreau said happened.

9 That is the final fact of the five facts that I'm
10 going to show you during this trial.

11 And now any single one of those facts, if proven,
12 constitutes a reasonable doubt upon which you could find
13 Dreau Rogers not guilty of murdering his wife.

14 But taken together, cumulatively, all five of those
15 facts, there is no other choice. With those five facts,
16 there is no other choice.

17 Hear me now and hear me well. Dreau Rogers will not
18 testify during this trial. He's not going to do it. Why
19 would he? He told first responders when they showed up at
20 the scene who did it. He told Spearfish detectives in
21 interview rooms in the Spearfish Police Department exactly
22 who did it. In every single way imaginable, he expressed
23 and unequivocally said, "Donovan Derrek did it." He said
24 Donovan Derrek did it when law enforcement confronted him
25 of other viable theories in which to bounce a real

1 call?

2 **A** Yes. We log it all in a service on our -- we call it CAD.

3 It's a computer-aided dispatch system.

4 **Q** So even today, you can look back and know what call came
5 in at what time?

6 **A** Yes.

7 **Q** And you've confirmed that you received a call at
8 12:48 a.m. on the 22nd of January?

9 **A** Yes.

10 **Q** Do you keep track of kind of an idea of where the
11 Spearfish police officers are at any given time during
12 their shift?

13 **A** Not specifically. But we do know if they're out
14 patrolling or at the office. And they call out when they
15 go out somewhere.

16 **Q** Okay. Around that time -- 12:48 -- did you have Spearfish
17 officers that were on duty?

18 **A** I did. I had two on duty.

19 **Q** Okay. And do you know whether they were at the office or
20 if they were out patrolling?

21 **A** They were out in cars patrolling.

22 **Q** When that call came in at 12:48 a.m., what did the caller
23 tell you?

24 **A** He said he needed an ambulance and he gave me the address
25 that he was at.

1 Q There was no mention of police?

2 A No.

3 Q Did you attempt to get more information from the caller?

4 A I did.

5 Q How was that done?

6 A I asked him what was going on. He said he would explain
7 when they got there. He wanted an ambulance and he wanted
8 them to come fast.

9 Q So he didn't mention what? You didn't know if it was a
10 heart attack?

11 A No.

12 Q You didn't have any information at that point what kind of
13 emergency?

14 A Right.

15 Q Were you able to have a complete conversation with this
16 person that was calling?

17 A No.

18 Q Why was that?

19 A He initially stated that his phone was dead and it was on
20 the charger. He tried to disconnect from me but then left
21 the line open and so he had to go into the other room.

22 MR. ROHL: I am going to object. That statement calls for
23 speculation. She doesn't know what he was trying to do
24 with his phone.

25 THE COURT: Sustained.

1 Q (By Ms. Harvey, continuing) Approximately how long did it
2 take for the first emergency person to arrive on scene?

3 A Officer Bradley was there in about two minutes. Two
4 minutes -- two and a half minutes.

5 Q Did you leave that particular 911 call open?

6 A I did.

7 Q And I don't know if everybody -- what does it mean when I
8 say "open"?

9 A I stayed on the line and listened.

10 Q How long?

11 A Over nine minutes.

12 Q Was there a reason -- is that normal? Was there a reason
13 you left it open for so long?

14 A I did because I couldn't -- he couldn't tell me what was
15 going on with the patient, so I was trying to hear what
16 was going on with the patient. Sometimes you can hear
17 people crying or yelling or...

18 Q Have you had an opportunity to review that particular 911
19 call recently?

20 A I have.

21 Q How long ago did you review that?

22 A I listened to it last night.

23 Q Last night. And if I play that call, will you be able to
24 identify your voice as well as the other individual on the
25 recording?

1 **A** Yes.

2 **Q** And when you --

3 **MS. HARVEY:** Your Honor, I would ask for the opportunity
4 to publish the 911 recording as well as the transcripts to
5 the jury at this time.

6 **THE COURT:** All right. Are you offering Exhibit 1?

7 **Q** (By Ms. Harvey, continuing) Ms. Lolley, when you reviewed
8 it last and you confirmed that it's the same recording,
9 did that appear to be a true and accurate depiction of the
10 911 call --

11 **MR. ROHL:** I have no objection to admission, Your Honor.

12 **THE COURT:** Okay.

13 **MS. HARVEY:** I would ask to admit State's Exhibit 1, Your
14 Honor.

15 **THE COURT:** All right. State's Exhibit 1 will be
16 received.

17 (WHEREUPON, State's Exhibit 1 was published to
18 the jury.)

19 **MS. HARVEY:** Stopping at six minutes, Your Honor, for the
20 record.

21 **Q** (By Ms. Harvey, continuing) Can you explain -- we were
22 hearing some other voices in the background towards the
23 end. Can you explain what that was?

24 **A** Officer Bradley arrived on scene and was talking to the
25 caller. And, I believe, at the very end, the MAG unit was

1 Q If the jury listens pretty hard, they can hear what you
2 heard?

3 A Sometimes I can get a little more background noise through
4 my headset in my ear.

5 MR. ROHL: Oh, I understand. Okay.

6 I have nothing further. Thank you.

7 THE COURT: Thank you.

8 Any redirect?

9 MS. HARVEY: Just briefly.

10 REDIRECT EXAMINATION

11 BY MS. HARVEY:

12 Q Do you recall the phone number that called in this 911
13 call?

14 A I don't recall the phone number, but I did look it up in
15 our system and it belonged to Dreau.

16 MS. HARVEY: Nothing further, Your Honor. Thank you.

17 THE COURT: Mr. Rohl?

18 MR. ROHL: No further examination.

19 THE COURT: Is Ms. Lolley excused?

20 MS. HARVEY: Yes, Your Honor.

21 THE COURT: Thank you, ma'am.

22 MS. HARVEY: And I would ask -- just to make sure that --
23 because I know there were several subpoenas out there --
24 that she is excused to not have to return.

25 MR. ROHL: Yes.

1 it took you to get to the address?

2 **A** Yes. When I first heard it, I was actually in our
3 downtown area. I was on East Hudson Street and it took me
4 approximately two minutes to get to the address.

5 **Q** And to give us an idea where, you know, geographically --
6 some businesses -- where is this address located?

7 **A** Over by Common Cents or the roundabout that is now in
8 Spearfish.

9 **Q** When you got there, what did you do first?

10 **A** When I first got there, I retrieved my medical bag. I
11 went to the east door, which would have led into the
12 basement of the residence. I knocked on that door.
13 Nobody answered, so I began to go around a carport on the
14 south side to the west side of the house.

15 **Q** And were you able to gain entry into the home from that
16 door?

17 **A** Yes. When I got to the west side of the house, I was met
18 by a male who summoned me inside of the residence.

19 **Q** And what did you find there?

20 **A** I saw a female lying motionless on the ground. I saw a
21 small amount of blood near her upper arm. She was not
22 moving; she was not breathing. She appeared to be
23 deceased.

24 **Q** Where in the home was she?

25 **A** She was in the living room.

1 investigation?

2 A Yes.

3 Q And this would be a true and accurate depiction of what
4 the setup is in the living room?

5 A Yes, it would.

6 Q And where was Destiny, if you can show us?

7 A So she was laying on the floor over here by the couch.

8 (Indicating.)

9 Q Now, when you found the individual, Destiny, laying there,
10 what was your first reaction?

11 A My first reaction was to figure out how many times she had
12 been shot and then start providing medical aid to her.

13 Q And that was done?

14 A Yes.

15 Q In general, what type of aid did you employ?

16 A Because she was not breathing and she did not have a
17 pulse, I applied an AED to her chest, followed the
18 instructions on the AED. Initially, it said "No shock
19 advised," so I started compressions.

20 Q Did you have any indication that CPR had been done prior
21 to you beginning it?

22 A I was told that it had been done.

23 Q Was there anything to the contrary when you were actually
24 starting your compressions?

25 A So when I started compressions, I could feel ribs or

1 cartilage popping underneath my hands, which is
2 typically -- I feel that the first time I do CPR if nobody
3 has done it previously.

4 **Q** Now, up until you saw Destiny on the floor, did you have
5 any information from dispatch or anywhere that there had
6 been a shooting?

7 **A** Not from dispatch, no.

8 **Q** While you were giving aid to Destiny, were you asking her
9 husband, Dreau Rogers, any questions?

10 **A** Yes, I was.

11 **Q** What type of questions?

12 **A** I was getting the basic information, you know, who had
13 shot her, how many times, where was the gun at, where did
14 the shooter go.

15 **Q** And what information did Mr. Rogers supply to you?

16 **A** Mr. Rogers supplied information that Donovan Derrek had
17 come over to the residence. There was something about an
18 argument. He heard a loud noise and Destiny fell to the
19 ground. At that point, Donovan had left, and he called
20 911.

21 **Q** When you arrived, Destiny and Dreau were the only ones
22 present?

23 **A** Yes.

24 **Q** And when we're speaking of Dreau and the Defendant, the
25 individual that you had contact with that day, do you see

1 take that picture?

2 **A** Yes, I did.

3 **Q** And that was at the time, probably, approximately, 1:00 in
4 the morning?

5 **A** Yes.

6 **Q** What was the reason you were wanting to capture this
7 photo?

8 **A** I knew the shell casing was a piece of evidence. Again, I
9 wanted to get a picture of it in its undisturbed area so
10 we could figure out exactly where it was, based on the
11 carpet pattern.

12 **MS. HARVEY:** I ask to admit Exhibit 5, Your Honor.

13 **THE COURT:** Any objection?

14 **MR. ROHL:** No, Your Honor.

15 **THE COURT:** Exhibit 5 will be received.

16 **Q** (By Ms. Harvey, continuing) What can you tell us about the
17 location of where the shell casing was found?

18 **A** So the shell casing was found -- when I first observed it,
19 it was on the carpet between Destiny and a round coffee
20 table.

21 **Q** And is that -- upon review, is that where it was when you
22 entered the home?

23 **A** So, as I was reviewing my body cam footage, I did discover
24 it had been on the round coffee table. During the process
25 of attempting to resuscitate her and also Dreau moving

1 around the area, it had fallen off the table and onto the
2 floor.

3 Q Did you physically touch this shell casing at any time?

4 A No, I didn't.

5 Q Did you ensure that anyone else stayed away or didn't
6 maneuver it in any way?

7 A Yes. I told EMS several times to not move the shell
8 casing while they were trying to resuscitate Destiny.

9 Q And, finally, I handed you what's been marked as State's
10 Exhibit 6. Can you identify State's Exhibit 6 for me.

11 A Yes. This is a photo of Destiny that I took during the
12 resuscitation process.

13 Q And what all is depicted on that photo?

14 A So in this photo, what is depicted is a LUCAS device,
15 which is an automated CPR device that EMS uses, an AED pad
16 that I placed on her upper chest. In addition, you can
17 see an obvious wound on her right bicep area.

18 Q And this is a photograph, once again, that you took in
19 those early morning hours?

20 A Yes, it is.

21 MS. HARVEY: Your Honor, I ask to admit State's Exhibit 6.

22 THE COURT: Any objection?

23 MR. ROHL: No, Your Honor.

24 THE COURT: State's Exhibit 6 will be received.

25 Q (By Ms. Harvey, continuing) At some point, was Destiny

1 **MS. HARVEY:** It's a body cam. There is a time restraint
2 on the amount of information any one recording can hold,
3 so it is just a continuation that's on two separate disks.

4 **THE COURT:** All right. Thank you.

5 State's Exhibits 2 and 3 will be received.

6 **MS. HARVEY:** And I would ask, as well, to have the
7 transcripts published to the jury at this time.

8 **THE COURT:** Any objection?

9 **MR. ROHL:** No, Your Honor.

10 **THE COURT:** Please proceed.

11 (WHEREUPON, State's Exhibit 2 was published to
12 the jury.)

13 **MS. HARVEY:** Just for the record, Your Honor, that was the
14 end of State's Exhibit 2. Starting State's Exhibit 3.

15 **THE COURT:** Thank you.

16 (WHEREUPON, State's Exhibit 3 was published to
17 the jury.)

18 **Q** (By Ms. Harvey, continuing) Officer, was that a fairly
19 accurate representation of the beginning of your dealings
20 on this case?

21 **A** Yes.

22 **Q** After dropping the Defendant off at the police station,
23 what did you do next?

24 **A** I returned to the residence and I was basically scene
25 security. Making sure nobody went in or out of the house.

1 A Yes.

2 Q Is that an accurate summation of what you testified to?

3 A Yes, it is.

4 Q Okay. And you did prepare a report; correct?

5 A Yes.

6 Q And in your report, you talk about what's called an AED
7 usage report. Do you remember that?

8 A Yes, I do.

9 Q Would you tell these folks what that is.

10 A So our AED that you saw in the video, it's a newer model.
11 So once I get it back to the station, it uploads to the
12 Stryker website. That is the company. And then I get the
13 usage report that shows, basically, the initial
14 information, heart rhythm, exactly what time I put the
15 pads on, ratio of CPR compressions.

16 Q And you're even more specially trained in that emergency
17 medical care trauma situation; right?

18 A Right.

19 Q And so, essentially, in sum, and according to your report,
20 you state, based on the report -- the AED report -- you
21 conclude that Destiny had been shot around the time of the
22 911 call; correct?

23 A Yes.

24 Q Okay. You testified that after the videos we watched
25 occurred, you went back to the residence and did scene

1 for you?

2 **A** The blood on her arm was still wet and her body was still
3 warm.

4 **MS. HARVEY:** Nothing further, Your Honor.

5 **THE COURT:** Mr. Rohl?

6 **MR. ROHL:** You know, there was one thing.

7 **RECROSS-EXAMINATION**

8 **BY MR. ROHL:**

9 **Q** You testified that based off of your administration of
10 CPR, that you could tell Dreau Rogers never did that;
11 right?

12 **A** I could tell that proper CPR had not been done.

13 **Q** Okay. Do you know if he's trained in the administration
14 or giving of CPR?

15 **A** No, I don't.

16 **Q** You have to push a lot -- you have to push really hard;
17 right?

18 **A** Yes.

19 **Q** Harder than you would probably think if you weren't
20 trained in it; right?

21 **A** Possibly, yes.

22 **MR. ROHL:** Okay. Thank you for your honesty.

23 **THE COURT:** Is this witness excused?

24 **MS. HARVEY:** We do reserve the right to recall. There's
25 another issue we will be calling him later in the case,

1 -- it would be to the south.

2 **Q** And that's within the city limits of Spearfish?

3 **A** Yes, it is.

4 **Q** That's also within Lawrence County?

5 **A** Yes, it is.

6 **Q** Approximately what time did you go to that residence?

7 **A** I arrived there at approximately 052 hours.

8 **Q** Those of us who hate military time...

9 **A** About 50 minutes past midnight.

10 **Q** I still have to count on my fingers every time.

11 And when you arrive, which -- what street -- where did
12 you park your patrol vehicle?

13 **A** On Saint Joe.

14 **Q** Right in front of Saint Joe.

15 And when you park on Saint Joe, where is the house?
16 Obviously, I assume you park on the right side of the
17 road. Is it on the right or left side of the road?

18 **A** Left side of the road.

19 **Q** And were you advised or did you know where to respond?

20 We've been explained it's a duplex.

21 **A** Mm-hmm.

22 **Q** Were you explained where to respond when you got there?

23 **A** Yes. Officer Bradley advised me to go to the rear
24 entrance of the home which would be the west-facing side
25 of the house.

1 Sheriff's Office and we took some initial photos.

2 Q What is the reason that that is done?

3 A Just to document the condition of the subject while they
4 are at the hospital.

5 Q I'm going to hand you what's been marked as State's
6 Exhibit 9.

7 A Okay.

8 Q Can you tell me what State's Exhibit 9 is.

9 A That is a photo of Destiny's arm taken at the ER.

10 Q That is the condition that -- and what's more specifically
11 -- why was the picture taken of the arm?

12 A Because that is where the wound was at.

13 Q So this is depicting the gunshot wound?

14 A Yes.

15 Q And is that a true and accurate depiction of what that
16 wound looked like while you were at the ER?

17 A Yes, it is.

18 MS. HARVEY: Your Honor, I would ask to admit State's
19 Exhibit 9.

20 THE COURT: Any objection?

21 MR. ROHL: No objection, Your Honor.

22 THE COURT: Exhibit 9 will be received.

23 MS. HARVEY: Your Honor, I would ask at this time to play
24 Mr. Jurgensen's body cam video. The first video. And
25 publish the transcripts to the jury at this time.

1 Q Well, I want to make sure that we don't get confused on
2 this. So I will -- what we'll do is we'll work through
3 the transcript. Okay?

4 A Okay.

5 Q And I'm going to go through things that I highlighted.
6 Would it be a fair characterization for me to say there
7 was no doubt in your mind who Dreau Rogers said did it?

8 A Who he said did it?

9 Q Yes.

10 A No.

11 Q Very clear?

12 A Yes.

13 Q Unambiguous?

14 A That's what he told us.

15 Q The other thing I would like to seek your confirmation
16 about is, sadly, in the careers that we have and you had,
17 we deal with some pretty nasty things; right?

18 A Sure.

19 Q And we can get desensitized to things that it's sad to say
20 that we do. Things like what we saw in your video?

21 A It's possible.

22 Q Dreau Rogers had just witnessed his wife die. And you
23 observed him watching that; right?

24 A Correct.

25 Q That is an incredibly traumatic thing for a normal human

- 1 being?
- 2 **A** Yep.
- 3 **Q** Fair?
- 4 **A** Fair.
- 5 **Q** So everything that he's giving you is in the midst of this
- 6 trauma?
- 7 **A** Yes.
- 8 **Q** I just wanted to make sure that we were clear that that's
- 9 an adequate thing for me to characterize the setting as.
- 10 Fair?
- 11 **A** Fair.
- 12 **Q** The representation was made very shortly after -- or all
- 13 of the statements that were made to you were made very
- 14 shortly after the 911 call?
- 15 **A** Correct.
- 16 **Q** And so for all purposes, this is all close in proximity to
- 17 when everything happened?
- 18 **A** Correct.
- 19 **Q** The subject matter of this case?
- 20 **A** Correct.
- 21 **Q** Okay. And so Mr. Rogers told you he, referring to Donovan
- 22 Derrek, keeps showing up and stuff; right?
- 23 **A** Yes.
- 24 **Q** And, of course, you weren't involved in the subsequent
- 25 investigation. But -- so you're unfamiliar whether or not

1 that is a corroborated statement?

2 **A** At that point, no, I was not clear.

3 **Q** Okay. And in reference to Mr. Derrek, he told you he went
4 to jail a few days ago; right?

5 **A** That's what he told me.

6 **Q** And he mentioned something that Mr. Derrek said. He used
7 the word "alibi," didn't he?

8 **A** He did.

9 **Q** He said, "Mr. Derrek wanted me to be an alibi." That is a
10 peculiar word for him to say in that time, isn't it?

11 **A** I suppose so.

12 **Q** He told you that Mr. Derrek called him -- him, being Dreau
13 Rogers -- earlier that night; right?

14 **A** That's what he told us.

15 **Q** When you arrived, he didn't have his phone on him at that
16 time?

17 **A** I don't believe so.

18 **Q** And he actually had to go be escorted back to the room to
19 get his phone off of the charger; right?

20 **A** Okay.

21 **Q** Do you agree with that?

22 **A** I don't remember if he was or not.

23 **Q** Did you hear that statement made on the video we watched?

24 **A** I don't remember hearing it, I guess.

25 **Q** Okay. You're not saying that that's not what happened,

- 1 Q Emergency medical?
- 2 A Mm-hmm.
- 3 Q And then, subsequently, Deputy Merwin arrived?
- 4 A Correct.
- 5 Q And I believe -- would that be a fair characterization of
- 6 everybody that seemed to be on scene?
- 7 A Initially, yeah.
- 8 Q Initially?
- 9 A Yeah.
- 10 Q Mr. Rogers said that he picked up that shell that was on
- 11 the floor or the couch; right?
- 12 A Correct.
- 13 Q And that he set it on the coffee table?
- 14 A He set it down somewhere. I don't remember specifically
- 15 where he said.
- 16 Q Okay. That's fair. He told you that his phone was dead
- 17 and he was running back and forth. It's on the charger in
- 18 his room.
- 19 A Correct.
- 20 Q Told you Mr. Derrek was shooting at him?
- 21 A Correct.
- 22 Q Told you Destiny was behind him?
- 23 A He initially said behind and then next to.
- 24 Q "Right next to me"?
- 25 A Yes.

1 circumstances. Also, if we tend to go a little too long
2 and you need a break, let me know, and we'll take a break.
3 Thank you.

4 Ms. Harvey?

5 **MS. HARVEY:** Thank you, Your Honor.

6 We'll publish State's Exhibit 16.

7 I will warn there's no transcript for this video. It
8 is one of the shorter ones.

9 (WHEREUPON, State's Exhibit 16 was published
10 to the jury.)

11 (WHEREUPON, State's Exhibit 16 was marked by
12 the court reporter.)

13 **Q** (By Ms. Harvey, continuing) Leaving that interview brings
14 you to roughly 5:10 in the morning. Can you tell me what
15 was going on with the investigation at that time?

16 **A** At that point, I believe we were still coordinating the
17 SRT response and trying to figure out how that was all
18 going to work out, so when the SRT was going to arrive.

19 **Q** When the SRT team did arrive, did you participate with
20 that action?

21 **A** The only thing I did is sat in their command vehicle, if
22 they had questions about the case or anything like that.
23 I did not participate with anything that was going on
24 there other than just being in the command center.

25 **Q** And would that be on scene?

1 A Yes, yep. It's actually, basically, a bus. But it was
2 parked in the driveway to the trailer court.

3 Q So you, at some point, had left the police department and
4 gone to the area near where Mr. Derrek's residence was?

5 A Yes.

6 Q And I'm sure that took some time?

7 A Yes, it did.

8 Q Is there anything else that happened that you participated
9 in from the time of ending this interview until Mr. Derrek
10 was taken into custody?

11 A I guess, at this point, that's the only thing that I can
12 think of. We were, again, coordinating with other
13 agencies and figuring out how we were going to get him
14 into custody before we moved on.

15 Q When you said you were in the command center, you were on
16 scene, but you weren't — did you see when Mr. Derrek was
17 taken into custody?

18 A I did not.

19 Q Are you aware of, ultimately, when Donovan Derrek was
20 taken into custody by the SRT team?

21 A I believe it was around 9:00 in the morning.

22 Q And what — what's the next thing — so I assumed you were
23 notified that he was apprehended while you were in the
24 command center?

25 A Yes.

1 Q Towards the end of your interview, did Mr. Derrek seem to
2 have a different idea of why he might be at the police
3 station?

4 A Yes, he did.

5 Q How did that change?

6 A He had actually -- once he got to the police department,
7 the gunshot residue kit was actually completed on him by
8 Agent Eggers. So he knew that they collected gunshot
9 residue from his hands.

10 When he was transported to the police department, the
11 deputy actually drove down Saint Joe and then turned west
12 on Jackson Boulevard -- excuse me -- east on Jackson
13 Boulevard towards the police department. And Dreau's
14 residence is just a half block down. So he actually seen
15 police tape around the residence.

16 Q So Saint Joe Street -- one of the main roads -- is a half
17 a block from the roads in question?

18 A Approximately.

19 Q Did Mr. Derrek try to provide you with any kind of proof
20 or anything other than telling you that he was with this
21 other gentleman?

22 A He said that the other gentleman's name was Alan Reddy and
23 he said, "It's all going to be on my phone." He said,
24 "The phone will have my location for the night." And
25 stated that he was with Alan during this time frame that

1 **THE COURT:** Are we ready for the jurors?

2 **MR. ROHL:** Yes, Your Honor.

3 **MS. HARVEY:** Yes, Your Honor.

4 **THE COURT:** All right. Please bring in the jurors.

5 (WHEREUPON, the jury entered the courtroom.)

6 **THE COURT:** Thank you. Please be seated.

7 Are the parties satisfied these are the jurors you
8 have chosen in this case?

9 **MR. ROHL:** Yes, Your Honor.

10 **MS. HARVEY:** State is.

11 **THE COURT:** Thank you.

12 Detective, you're still under oath.

13 Ms. Harvey, you may continue.

14 **MS. HARVEY:** Thank you, Your Honor.

15 **Q** (By Ms. Harvey, continuing) We just finished watching the
16 second interview with Donovan Derrek. After that was
17 completed, I think shortly after 11:00 that morning, what
18 was your next course of action?

19 **A** Next course of action was to actually locate Alan. Alan
20 Reddy.

21 **Q** And was that done?

22 **A** Yes, it was.

23 **Q** And did you visit with Mr. Reddy about Donovan Derrek's
24 statements?

25 **A** Yes, we did.

1 the travel of the bullet from one side of the body to the
2 other. Actually, how it traveled through the body. So
3 that's actually been placed in the hole on each side, so
4 that you get an idea about travel path.

5 Q And, finally, can you take a look at State's Exhibit 31,
6 please?

7 A Exhibit 31 is the same thing. You just see it from the
8 opposite direction. So you see it on the exit side of the
9 body or where the bullet would have lodged, essentially.
10 Can everyone see okay?

11 Q Thank you.

12 Other than the bullet, was there any other evidence
13 that you collected during the autopsy and brought back
14 with?

15 A The only other things we collected, I believe, were hair
16 ties and underwear. A pair of underwear also.

17 Q And just to state — obviously, going back to the 22nd.
18 At some point, did you make a determination and place the
19 Defendant under arrest?

20 A Yes, we did.

21 Q Did you have another opportunity to visit with Donovan
22 Derrek regarding his version of what had happened?

23 A Yes, I believe that was on the 28th. January 28th.

24 Q Almost a week later?

25 A Yes.

- 1 A Yes.
- 2 Q Okay. And so you were obviously in the room when I made
3 representations to this jury in opening statement; right?
- 4 A Yes.
- 5 Q And I told the jury I would prove five things; right?
- 6 A Yes.
- 7 Q Not obligated to prove anything, but I told them I would
8 prove five things; right?
- 9 A Yes.
- 10 Q Okay. So for purposes of trying to make this as slick as
11 possible, I wrote down -- and I would just like your
12 confirmation on that -- the five things I said I would
13 prove; right? So on this piece of paper, I wrote five
14 material facts; right?
- 15 A Yes.
- 16 Q And I'll just -- five material facts; correct?
- 17 A Yes.
- 18 Q Fact number one: The police broke the law; right?
- 19 A That's number one.
- 20 Q That's what this says. I'm not saying you agree to that.
- 21 A Yes.
- 22 Q We'll talk about that. Okay.
- 23 A Okay.
- 24 Q Number two: Police gave away -- I called it material
25 evidence -- in my opening statement. Gave away the phone;

1 right?

2 A Yes.

3 Q That's what I have written down there. Fact number three:

4 The police mishandled forensic evidence. That's what I
5 have written down?

6 A Yes.

7 Q Fact number four: Donovan Derrek's alibi is weak?

8 A Yes.

9 Q Number five: I have material omissions; right?

10 A Yes.

11 Q Is that generally what I told these folks over here that I
12 would show them during this trial?

13 A Yes.

14 Q Okay. And so you spoke about the phone, of course, that
15 was seized from Mr. Derrek -- Donovan Derrek -- during the
16 investigation; right?

17 A Yes, I did.

18 Q And so before you seized it, law enforcement executed
19 what's called an affidavit; right?

20 A As far as the search warrant goes.

21 Q Sure.

22 A Yes.

23 Q What is an affidavit? Would you tell these folks what
24 that means.

25 A An affidavit is basically you're requesting that the judge

1 review your probable cause -- your paperwork -- to approve
2 a search warrant for a specific item.

3 Q If I put it in a little different terms, it's a sworn
4 statement. Would that be accurate?

5 A Yes.

6 Q You make that statement under oath; right?

7 A Yes.

8 Q And there was an affidavit in support of request for
9 search warrant for the cell phone belonging to Donovan
10 Derrek; correct?

11 A Yes.

12 Q Is that what I just handed you?

13 A Yes, it is.

14 Q Okay. And within the contents of that sworn statement by
15 law enforcement, you explained to the judge why you want
16 to have access to the phone; right?

17 A Yes. This would have been the one in June. Not the
18 original.

19 Q Oh, good point. We'll get to the one in June. But that
20 happened twice; correct?

21 A Yes. I didn't do the search warrant for the first one. I
22 did the search warrant for the second one.

23 Q Detective Derby actually did the first one?

24 A I believe that's correct.

25 Q Okay. And so what did you put in that sworn statement as

1 12:47 and change, but very close to that; right?

2 **A** Yes.

3 **Q** Okay. And so would you agree with me that information
4 that could be provided to these folks over here as to
5 Donovan Derrek's exact location at that time is material
6 evidence in this case?

7 **MR. HAIVALA:** I'm sorry. Could you say that last part? I
8 didn't hear you. I'm sorry.

9 **Q** (By Mr. Rohl, continuing) Did you hear me?

10 **A** Yes, I would say it is material evidence.

11 **Q** I appreciate that. And would you agree that, under the
12 law, law enforcement is the custodian of evidence --
13 material evidence in a crime?

14 **A** Yes.

15 **Q** And you would agree that South Dakota law imposes that
16 duty on law enforcement to maintain evidence seized in
17 conjunction with an investigation; right?

18 **A** Yes.

19 **Q** And so Donovan Derrek's phone was evidence seized in
20 conjunction with an investigation; right?

21 **A** Again, once it was originally taken, it was originally --
22 yes, it was.

23 **Q** Okay. And, according to the law, law enforcement has a
24 legal duty not to return that property unless notice is
25 given to the defendant; correct?

1 A That's what I've learned recently, yes.

2 Q And so that law was broken, wasn't it?

3 A The cell phones were -- the cell phone was returned to
4 Donovan, yes.

5 Q Sure. And that would actually be 23A-37-14, return of
6 property of victims seized as evidence; and then
7 23A-37-15, notice to defendant of return; right?

8 A Yes.

9 Q So I have your permission to put your initials under
10 number one then; right?

11 A Yes.

12 Q That is a fair thing that I just showed this jury right
13 here; correct?

14 A Yes.

15 Q Thank you.

16 There's another law I want to talk to you about. And
17 it's in relation to something you testified on direct.
18 And you said that SRT -- or what I kind of commonly refer
19 to as SWAT -- was brought in to apprehend Mr. Derrek;
20 right?

21 A Yes.

22 Q And that was done, if I remember correctly, for the
23 protection of Mr. Derrek's children or at least one of the
24 reasons; right?

25 A Yes, that would be one of the reasons.

1 **MR. ROHL:** I am an 80-year-old man stuck in a 38-year-old
2 body.

3 **Q** (By Mr. Rohl, continuing) So while we're getting that up,
4 I am going to hand you more documents. Because the
5 transaction of the phone coming and going from Rapid City
6 to the Spearfish Police Department is all documented;
7 right?

8 **A** Yes.

9 **Q** We're going to talk about those documents. Okay? I am
10 going to hand you what is marked "Rogers 375." You
11 testified that when an extraction attempt occurs, a report
12 is generated with it; correct?

13 **A** Yes.

14 **Q** And that is the report; right?

15 **A** This is one of the reports, yes.

16 **Q** And, specifically, that is the report associated with item
17 21; right?

18 **A** (Peruses document.) Yes, it is.

19 **Q** Donovan's phone?

20 **A** Yes, that's correct.

21 **Q** And so "Rogers 228," which has been published for the jury
22 — does that look like the same document that I handed you
23 on the stand?

24 **A** Yes.

25 **Q** Okay. The only difference is I have two phones

1 City Police Department back to us.

2 Q And does it appear to be a true and accurate copy?

3 A Appears to be, yes.

4 Q Okay. I'm going to take this back from you, just so I can
5 ask Ms. Glanzer to publish Bates stamp 371, please.

6 Okay. The only difference between the document that I
7 handed you and the one on the screen is I made highlights
8 on this document; right?

9 A Yes.

10 Q And I highlighted the moto cell phone XTP2005; right?

11 A Yes.

12 Q Which is the same — which is the same phones that was
13 sent to Rapid City originally; right?

14 A I believe so.

15 Q And the same thing with regard to that one right there;
16 correct?

17 A Yes. They're labeled differently, but, yes.

18 Q And so that was returned to the Spearfish Police
19 Department on February 1, 2022. Unambiguously undisputed;
20 right?

21 A Yes.

22 Q Okay. And with regard to the documentation with the
23 phones, you received these two extraction reports;
24 correct?

25 A Yes, correct.

1 **MR. ROHL:** And so, Ms. Glanzer, I am going to have you
2 publish 375 for me.

3 **Q** (By Mr. Rohl, continuing) Okay. This is item 21, which
4 corresponds with the property inventory receipt we just
5 looked at; right?

6 **A** Yes.

7 **Q** This is Donovan Derrek's phone; right?

8 **A** Yes, correct.

9 **Q** The phone he told you in every single interview exonerates
10 him from responsibility; right?

11 **A** Yes.

12 **MR. ROHL:** And so if we go down a little bit -- stop.

13 **Q** (By Mr. Rohl, continuing) We get to see the examiner's
14 name; right?

15 **A** Yes.

16 **Q** Detective Almeida. The date that he tried to perform the
17 exam, which is January 26, 2022; right?

18 **A** Yes.

19 **Q** The examiner agency, Rapid City ICAC; right?

20 **A** Yes.

21 **Q** And the software tool used for the report; right? Which
22 is Cellebrite.

23 **A** Yes.

24 **Q** And in the notes, what does it say there?

25 **A** It says the phone was not supported for lock bypass.

1 Unable to process further.

2 Q And we agreed that is material evidence; right?

3 A Yes.

4 Q And we can agree that had that document been looked at, it
5 would have been known that there was no examination
6 completed; right?

7 A Yes.

8 Q Whose responsibility was it to look at that?

9 A Essentially, mine.

10 Q Okay. The next thing that I have up --

11 MR. ROHL: You can take that down, Jodi. Thank you.

12 Q (By Mr. Rohl, continuing) Detective Hofmann, one and two
13 really play off of one another. Fair?

14 A Yes.

15 Q The difference is number one also includes the mandatory
16 reporter law?

17 A Yes.

18 Q But can we agree that number two, as I represented to the
19 jury in opening statement -- I can put your initials
20 there?

21 A I gave the phone back, yes.

22 Q Now, with regard to number three, we haven't had a chance
23 to get into that in much detail yet or, at least, I
24 haven't with the jury; right?

25 A Yes.

1 that?

2 **A** Probably, yes.

3 **Q** Okay. That's fair. I will do that.

4 Do you remember the length of the encounter that
5 Mr. Reddy initially indicated to you?

6 **A** I -- you know, I don't know for sure. I thought it was
7 11:50 to 1:20 was the time frame or thereabouts.

8 **Q** Well, I think it was after the second time. But the first
9 time that you interviewed him, it was approximately 40 to
10 50 minutes; right?

11 **A** I would have to go back and look. I don't know.

12 **Q** And when we go back and look at all of these other prior
13 encounters, based off of the text message, every other
14 encounter was 40 to 50 minutes; right?

15 **A** Again, I haven't seen those. I don't know.

16 **Q** And so the distance from Dreau Rogers's residence to Alan
17 Reddy's is a little over a mile; right?

18 **A** Approximately, yes.

19 **Q** And it would be about a five or six-minute drive; right?

20 **A** Yes.

21 **Q** And so by virtue of that 1:23 a.m. picture, there is
22 nothing that precludes Mr. Derrek, from a forensic
23 perspective, from being at Dreau Rogers's at 12:48; right?

24 **A** The information we were going off of also was statements.
25 Statements by Alan Reddy that he was at the residence with

1 him.

2 Q Right. I appreciate you telling me that.

3 Part of what this jury has to rely on in order to get
4 to the State's alibi is reliance on Donovan Derrek and
5 Alan Reddy. You gotta trust what they said; right?

6 A In part.

7 Q In part. But there is nothing forensically that shows
8 Donovan Derrek was not here at that time; right?

9 A Again, the only thing that would be would be the location
10 data off the phones, I believe, or from the phones.

11 Q There is no location data from Mr. Derrek's phone, because
12 you guys gave it back to him without protecting that
13 information?

14 A Well, I believe that was actually — I don't know if it
15 was Google. But, again, that is going to be something
16 that Lieutenant Smith — now Lieutenant Smith — will have
17 to answer.

18 Q Have you looked at that report? That CDR report that
19 you're talking about.

20 A I have.

21 Q Okay. I appreciate you bearing with me. There's a lot of
22 information; right?

23 A Yes, there is.

24 Q The report that you looked at —

25 MR. ROHL: If I may have permission to approach, Judge?

1 Q And, of course, that's another factor that has to be
2 considered when we're trying to parse out what happened;
3 correct?

4 A Yes.

5 Q And so, of course, you know, when Mr. Derrek's test was
6 sent to the lab for examination, there was no indications
7 of what I'll call mishandling of evidence at that time;
8 right?

9 A Correct.

10 Q It wasn't until you got the tests back that that became
11 worthy of investigation; right?

12 A Once we got the results back, we -- yes. That would be
13 correct.

14 Q Because the results conflict with your case; right?

15 A We didn't expect that he would have gunshot residue on his
16 hands -- Donovan.

17 Q Because that would indicate that he was at Dreau's house?

18 MS. HARVEY: Objection. Calls for speculation.

19 THE COURT: Sustained.

20 Q (By Mr. Rohl, continuing) What the Government is going to
21 present this jury with, as far as evidence is concerned,
22 is that the gunshot residue placed on Donovan's hands was
23 done unintentionally during his apprehension. Is that
24 fair?

25 A That's fair.

1 Q And so whether or not Donovan had gunshot residue on his
2 hands is material evidence in this case too; right?

3 A It is.

4 Q That's why you did it; right?

5 A That's why we originally took the gunshot residue or did
6 the test.

7 Q And so we can, of course, agree that it wasn't Dreau's
8 fault that gunshot residue tests with relation to Donovan
9 were tampered, according to the Government; correct?

10 MS. HARVEY: Objection. Misleading the witness on the
11 facts, Your Honor.

12 THE COURT: Overruled.

13 THE WITNESS: One more time, please. I'm sorry.

14 Q (By Mr. Rohl, continuing) It was a bad question. You, of
15 course, let me know when I ask a bad one. I'll be more
16 clear.

17 Law enforcement's obligation is to secure the scene
18 and secure the evidence; correct?

19 A Yes.

20 Q Gunshot residue is evidence; correct?

21 A Yes, it is.

22 Q Gunshot residue evidence and the appearance or lack
23 thereof or existence or lack thereof on Mr. Derrek's hands
24 is evidence in this case; correct?

25 A Yes.

1 Q Dreau Rogers had no ability to preserve that evidence, did
2 he?

3 A No.

4 Q That was law enforcement's obligation; right?

5 A Yes.

6 Q And so with relation to the gunshot residue on
7 Mr. Derrek's hands — that was mishandled forensic
8 evidence; correct?

9 MS. HARVEY: Objection. Assumes facts not in evidence.

10 THE COURT: Overruled.

11 A So — and, again, I wasn't there for him being taken into
12 custody and the only information I have is the results.

13 Q (By Mr. Rohl, continuing) Sure.

14 A That came back.

15 Q But once the results came back, you knew that you needed
16 to figure out a way to try to make this fit within your
17 case; right? Because it is your case?

18 A It's my case.

19 Q And so you had to try to figure out how or why gunshot
20 residue could get on his hands that didn't incriminate
21 Donovan; right?

22 A Had to try to determine — yes, why he's got gunshot
23 residue on his hands.

24 Q And so the Government's position -- your position to the
25 jury is that that residue got put on there — put on

1 added, about this case. Nothing. That's my response.

2 **THE COURT:** All right. Let's get to your motion to
3 dismiss.

4 **MR. ROHL:** Understood, Your Honor.

5 I will simply rely on the contents of my brief. Thank
6 you.

7 And I'm sorry that I got passionate. There's no place
8 for that. I just wanted to make a record in relation to
9 the factual allegations that were made.

10 **THE COURT:** All lawyers are passionate.

11 Mr. Haivala, response?

12 **MR. HAIVALA:** I'll just simply say I can't read the man's
13 mind. He sent me an email saying he had the reports.
14 Okay. So I can't read what he's telling to me.

15 Second, to say that this requirement of dismissal at
16 this stage, I sincerely disagree. The State has provided
17 tons and tons of information.

18 Based upon the email I received by Mr. Rohl, I assumed
19 he had the reports of SRT Tony Harrison.

20 So I think it's misplaced what the -- in order to,
21 number one, grant a mistrial, you have to show that
22 there's prejudice. I don't think there's any prejudice
23 here to begin with.

24 I looked at the SRT reports that came in yesterday.
25 There was nothing in there that I saw -- and I understand

1 it's my side of the street -- that showed that he had not
2 gotten any information that was -- that he had been
3 prejudiced.

4 All of those SRT reports are basically people who
5 talked about standing by the BearCat and -- which is the
6 big assault machine -- or setting up a perimeter. I know
7 you read them.

8 The only person who really had hands-on experience
9 with Mr. Donovan Derrek that day was Chad Sayles, who was
10 testifying yesterday.

11 So I take issue, if there was any prejudice. I don't
12 think mistrial was appropriate and I certainly don't think
13 dismissal is appropriate either.

14 I refer Court and counsel to *State v Anderson*.
15 Wherein to justify a mistrial, there has to be an actual
16 showing of prejudice. I don't think there was a showing
17 of prejudice.

18 And, by the way, he released Mr. Harrison from the
19 subpoena. I did not tell Mr. Harrison to try to go talk
20 him out of it. I tried to accommodate the defense. They
21 didn't want to do it. I understand. I'm fine with that.

22 But he subpoenaed Mr. Harrison, head of SRT. Tells me
23 he knew about Mr. Harrison, which he's admitted. He
24 released him from the subpoena. The State didn't tell him
25 to do that.

1 Thank you.

2 **THE COURT:** Thank you.

3 I didn't read the motion as a motion for a mistrial.
4 I read it as a motion to dismiss. Based on three things,
5 which I'll kind of intertwine.

6 One is, originally, when law enforcement allowed
7 Donovan Derrek to go to the jail and talk — attempt to
8 talk to Mr. Rogers. That — we had a hearing on that.
9 There was a motion to suppress filed. I granted that
10 motion to suppress. And I'll get back to that in a
11 minute.

12 The second is the SWAT reports. I find that the State
13 did not have those reports, the Defendant did not have
14 those reports.

15 Yesterday, Mr. Haivala, as an officer of the court,
16 said "I don't have them either." I believe him. He
17 didn't have them. I believe Mr. Rohl didn't have them.
18 There were 50-some pages of information that was provided
19 yesterday.

20 Mr. Rohl made a motion for a mistrial based upon
21 failure to comply with discovery; that there could have
22 been Brady material in those reports. I am not going to
23 judge whether or not there was or wasn't, because we have
24 an officer on the stand that Mr. Rohl has the opportunity
25 to cross-examine.

1 However, I did allow — we adjourned at — I forget —
2 10:00. And I gave Mr. Rohl the rest of the day to get the
3 reports and to go through them.

4 Those were emailed to me yesterday. I reviewed them
5 all. And so I think that grounds for a mistrial, based
6 upon lack of discovery, has been cured by the opportunity
7 to look at all of the information and question the witness
8 or call a witness, based upon that information.

9 The third is Donovan Derrek's phone. It's clear, as
10 the State's witnesses testified, that his phone was
11 material evidence in this case. It was seized, pursuant
12 to a search warrant, and he was — Mr. Derrek apparently
13 gave law enforcement the password. They sent it to ICAC.
14 The report came back. The report wasn't read for a number
15 of months in the interim. They gave Mr. Derrek his phone
16 back. Thought it had been downloaded, but it wasn't.
17 That was clearly a mistake. Clearly, I am going to say
18 negligent on behalf of law enforcement.

19 So then after they figure out — after they review the
20 ICAC report and find out it's not downloaded, they try to
21 get the phone back. Of course, it's gone. There's new
22 phones. They dumped those. Sent those to ICAC. That
23 information was gone.

24 I don't find that that is bad faith on behalf of law
25 enforcement. I find it is negligent, clearly.

1 And the officer admitted. "That is on me," he said.
2 And, unfortunately, it is on him.

3 However — and then you have to take all three,
4 because I think that's what Mr. Rohl is getting at.
5 You've got the original issue, which I suppressed the
6 discovery issue, which we dealt with yesterday, and then
7 the phone issue.

8 Well, the phone issue has been in existence since June
9 of 2022 or so. We knew, at least at that point, that the
10 phone was not downloaded even though it's material
11 evidence.

12 So we've had at least over a year and a half now to
13 deal with that issue. It was never brought up prior to
14 dismiss. It's brought up, basically, after our first week
15 of trial.

16 So I do not find that that is grounds to dismiss this
17 case or at least the murder charges: Count I and II or IA.

18 And so I am going to deny the motion to dismiss.

19 **MR. HAIVALA:** Your Honor, may I respectfully correct the
20 Court?

21 **THE COURT:** Go ahead.

22 **MR. HAIVALA:** It's the data, not the phone.

23 **THE COURT:** Well, I understand. The download information
24 off the phone.

25 **MR. HAIVALA:** And the reason I correct it is not to be

1 questions to someone else?

2 **A** Yes, sir.

3 **Q** Okay. As far as your understanding of what the data
4 shows, are you comfortable talking about that?

5 **A** As far as what the data provided and what it showed?

6 **Q** Right. Can I ask you questions about what your
7 understanding is of it?

8 **A** Oh, that will have to go to the person who ingested that
9 data to give us the report.

10 **Q** Okay. Have you looked at the report?

11 **A** Very briefly.

12 **Q** Okay.

13 **MR. ROHL:** I don't have anything further for the witness.

14 **THE COURT:** Thank you.

15 Mr. Haivala?

16 **REDIRECT EXAMINATION**

17 **BY MR. HAIVALA:**

18 **Q** So, as I understand it -- as I understand it, Officer,
19 based on cross-examination, are there two ways you get
20 location data off phones and cell towers?

21 **A** There's many different ways you can get locational data.
22 All I can tell you is CDR is one of those ways.

23 **Q** Okay. What are some other ways of doing it?

24 **A** Other way is you can use an actual physical device might
25 have some data in there to provide you. There is a chance

1 —

2 Q You answered my question.

3 A Okay.

4 Q Thank you.

5 The South Dakota Forensic Laboratory contacted you to
6 do these tests; fair?

7 A Yes. Yes, they did.

8 Q They sent you these two exhibits that are in front of you
9 there and said, "We want you to run tests on this."
10 Right?

11 A That's correct.

12 Q And so you did that; correct?

13 A Yes.

14 Q And this is the report right here that was generated as a
15 result?

16 A Yes.

17 MR. ROHL: Okay. And so — Jodi, will you scroll down a
18 little bit?

19 Q (By Mr. Rohl, continuing) It says "Particles of gunshot
20 residue were identified on the left hands of Dreau Rogers.
21 Gunshot residue can be deposited on the skin by
22 discharging a firearm, being near a firearm, or coming in
23 direct contact with an object or person or transferring
24 gunshot residue." Correct?

25 A That is correct.

1 A I am.

2 Q And according to the Kansas City Crime Lab's mission
3 statement, your goal is to provide testimony for both the
4 prosecution and the defense; right?

5 A Yes, I'm here on behalf of the Court. That is correct.

6 Q The exact statement is expert testimony is provided in all
7 disciplines to aid the prosecution and defense of criminal
8 defendants; right?

9 A Yes.

10 Q The presence of gunshot residue, if you know, on Donovan
11 Derrek could indicate that he was around a gun that was
12 shot or that he shot it; correct?

13 A That is one of the — I'm sorry — two of the three
14 scenarios. That's correct.

15 Q Okay. If the Government argues — if — that Donovan
16 Derrek's gunshot residue tests were transferred — or was
17 the result of the third conclusion — are you still with
18 me?

19 A Yes.

20 Q That would mean, during the collection, it was
21 contaminated; correct?

22 A As far as coming in contact with another object or
23 surface?

24 Q Correct.

25 A Yes. That would be a form of contamination that Donovan

1 **THE WITNESS:** Stand up?

2 **MR. ROHL:** Yes, please do.

3 **Q** (By Mr. Rohl, continuing) Same question. Is that a clean
4 glove?

5 **A** I do see some material on the glove.

6 **Q** Okay. And, specifically, if we look down on the
7 right-hand corner, there seems to be a powdery substance
8 there. Fair?

9 **A** I see -- yeah. I see what you're pointing out there, yes.

10 **Q** Okay. And so the rules and procedures manual says it
11 should be handled with clean gloves; right?

12 **A** What rules and procedures manual?

13 **Q** Well, the Rapid City Police Department --

14 **A** Yeah. Handling with clean gloves makes sense, yeah.

15 **Q** Okay. So can we agree there's more forensic evidence sent
16 in for testing to handle the dirty gloves?

17 **A** Yeah, whatever is on there.

18 **MR. ROHL:** Jodi, could you pull up 681 for me.

19 **Q** (By Mr. Rohl, continuing) So image 681 -- that's a picture
20 of the pistol right in front of you there; correct?

21 **A** Yep.

22 **MR. ROHL:** And would you zoom in on the gloves there for
23 me?

24 **Q** (By Mr. Rohl, continuing) Would it be fair for me to
25 characterize that bullet as a piece of material evidence?

- 1 **A** Yes.
- 2 **Q** And that's the bullet Mr. Haivala had you testify about;
3 right?
- 4 **A** That's correct.
- 5 **Q** Okay. And, again, can we agree those gloves there are
6 dirty?
- 7 **A** There is some substance on those gloves, yeah.
- 8 **Q** So to cut to the chase, the rules and procedures manual
9 exists to avoid cross-contamination; right?
- 10 **A** Yes.
- 11 **Q** And the purpose of clean gloves is to avoid what's called
12 cross-contamination; right?
- 13 **A** I would agree, yes.
- 14 **Q** Can we agree that Dreau Rogers's DNA is going to be all
15 over his house?
- 16 **A** It would be safe to assume it would, yeah.
- 17 **Q** And that's why it's important to change gloves; right?
- 18 **A** Yes.
- 19 **Q** I'm just going to grab a marker here real quick, Agent
20 Larson. I just want to darken this.
- 21 **MR. ROHL:** I have no further questions, Your Honor.
- 22 **THE COURT:** Thank you.
- 23 Mr. Haivala?
- 24 **MR. HAIVALA:** A couple questions.
- 25 Do you mind if I use your exhibits?

1 **THE COURT:** Okay. Fine. Let's bring in the jury.

2 (WHEREUPON, the jurors entered the courtroom.)

3 **THE COURT:** Are both sides satisfied these are the jurors
4 you have chosen in this case?

5 **MR. ROHL:** Defense is, Your Honor.

6 **MR. HAIVALA:** State is.

7 **THE COURT:** State may call its next witness.

8 **MR. HAIVALA:** State would call Sean Kennedy.

9 **SEAN KENNEDY,**

10 after having been first duly sworn,
11 testified as follows:

12 **DIRECT EXAMINATION**

13 **BY MR. HAIVALA:**

14 **Q** Good morning.

15 **A** Good morning.

16 **Q** State your name for the record, please.

17 **A** Say that again.

18 **Q** I apologize. We're in an old courtroom. Not very set up
19 for technology.

20 State your name for the record, please.

21 **A** My name is Sean Kennedy, S-e-a-n K-e-n-n-e-d-y.

22 **Q** And what is your name and title?

23 **A** I am a special agent with the Federal Bureau of
24 Investigations.

25 **Q** And how long have you been with the FBI?

1 A For about eight and a half years.

2 Q And as far as education, how far did you go in college?

3 A I graduated from college with a bachelor's degree.

4 Q And what college did you go to?

5 A I went to University of Southern California in Los
6 Angeles.

7 Q You're a Trojan?

8 A I was.

9 Q Okay. How were you employed prior to being a special
10 agent for the FBI?

11 A Just prior to joining the FBI, I worked for a company
12 called Bode Technology. For Bode, I worked as a
13 contractor at the FBI lab in a unit called Terrorist
14 Explosive Device Analytical Center.

15 Q We're going to be talking a lot of big words here.

16 Let me ask you this. Your college degree — what was
17 it in?

18 A It was in biomedical engineering.

19 Q So are you an engineer?

20 A I have a degree in engineering. I'm a special agent. I'm
21 not an engineer.

22 Q Okay. Where are you employed now?

23 A Currently, I am part of the Cellular Analysis Survey Team
24 or what we call CAST. As part of CAST, I have three
25 primary responsibilities.

1 and robberies.

2 Q So let me ask you this: What is historical cell site
3 analysis?

4 A In the most basic terms, historical cell site analysis is
5 determining the general location of a phone at a given
6 date and time.

7 Q And what is the purpose of the cell site analysis?

8 A The purpose of it is to determine the general location of
9 a phone as it relates to some type of incident: a
10 homicide, carjacking. Really, any type of case where you
11 want to know where a phone was located when an incident
12 occurred.

13 Q As a part of CAST, have you received any specialized
14 training regarding phones, technology, or historical cell
15 sites?

16 A Yes, I have.

17 Q And please explain the training you received.

18 A To become a member of CAST, you go through around seven
19 weeks of training that takes approximately two years to
20 complete. The first week of that training is what we call
21 our CAST basic class. We are introduced to call detail
22 records, tower lists, and mapping software for the first
23 time.

24 The call detail records are what make your phone go.
25 It has the dates and times for phone calls and text

1 **A** If your phone is on, timing advance data is constantly
2 being generated for it. The problem with timing advance
3 data is it's very voluminous. It might occur every 30
4 seconds to a minute. And phone companies have to manage
5 that data.

6 In the case of Verizon, they have — their timing
7 advanced data is only maintained for seven days.

8 This search warrant that I received the data for was
9 responded to after the seven-day window. So a lot of the
10 data from Verizon was lost.

11 The data that was shown here is specific to what's
12 called dropped calls. Verizon will keep their dropped
13 calls for longer in their network. They maintain that
14 data for 30 days.

15 When the search warrant was responded to was within
16 that 30-day window, which is why we have the timing
17 advanced data shown here.

18 If it was responded to in the seven-day window --
19 assuming the phone was still on during this entire time
20 frame — there would be a lot more data than what is shown
21 here. You should see it probably every minute.

22 **Q** Okay. So we understand the slide. You mentioned — it
23 looks to me there's a gap in time and the cell phone not
24 being used. Am I correct?

25 **A** That is correct. From 10:47 on the 21st to 1:45 on the

1 22nd, there is no timing advance data or cell tower
2 sector information that helps us locate the phone.

3 Q So the person wasn't using the phone?

4 A From what I can tell, there wasn't usage on the phone. I
5 can't say the person wasn't scrolling through their
6 contacts, going through photos, but there wasn't any calls
7 generated.

8 Q Still, the phone is generating a signal to the cell tower;
9 am I correct?

10 A If it's on, it would have been communicating with the cell
11 tower. But because the search warrant was done after the
12 seven-day retention window for this type of data from
13 Verizon, we don't have all of that data.

14 Q Okay. So I'm clear, you have an opinion as to the
15 location of the Donovan phone between 1/21, 10:18 p.m.,
16 and 1/22, 1:52 a.m. And that's the location of the phone?

17 A That's a little broad. I would expect the phone to be
18 somewhere in those arcs between 10:18 and 10:47 p.m. And
19 then again between 1:45 and 1:52 a.m. I can't tell you
20 where the phone is located between 10:47 p.m. and
21 1:45 a.m. There's no activity that I could map to give
22 you an opinion about the location of the phone during the
23 time frame.

24 Q Okay. Go to the next slide, please.

25 What's this slide of?

1 So if you type in a code into your phone -- if you
2 tried to type in the phone number to the White House and
3 you hit "send," if it starts ringing, that call will -- it
4 connects. But if you typed in "Star, 1, 2, 3, 4, pound,"
5 it's just going to -- you hit the green button and send
6 it, it's just going to make the noise like the phone
7 doesn't connect, because that's not actually a phone
8 number you can dial. That's kind of what's occurring
9 here.

10 Q Well, let's do that. I am going to Google "Star 2, 1
11 call." Okay?

12 A Okay.

13 Q And, essentially, what information does it generate?

14 A The first result is from Probes.com. It says "Can calling
15 Star, Pound, 2, 1, Pound reveal an FBI phone wire tap?"

16 Q That's really interesting, isn't it?

17 A There's a lot of interesting things on the internet. I
18 don't think that actually would do anything for you.

19 Q But that's the number that Donovan Derrek called at
20 1:45 a.m., wasn't it?

21 A I don't recall the exact number. But I recall a bunch of
22 service-type codes dialed in there. If you want to see
23 the exact number, I'd have to look at the call detail
24 records.

25 Q And you're familiar with mobile device examinations;

1 Again, I don't have any timing advance data or any
2 call detail records indicating where that phone was
3 located.

4 But based on the text message content, in my opinion,
5 having reviewed hundreds — hundreds of phones looking at
6 text message content, I think the phone is likely at 311
7 Evans Lane, because I was told that is actually where the
8 person he was texting lived.

9 And the nature of their conversations throughout the
10 day are very sexual in nature. And then he sends a
11 message at 1:42 a.m. saying "Thank you" and referring to
12 something sexual in nature.

13 **Q** So as I understand your testimony then, at 12:47, you
14 believe that's where the phone is located?

15 **A** Again, I don't know exactly where it's located. Based on
16 the text message content, I would assume he's with the
17 person he was texting —

18 **MR. ROHL:** I don't think that is a scientific opinion,
19 Your Honor.

20 **THE COURT:** Overruled.

21 **Q** (By Mr. Haivala, continuing) To be clear, you're talking
22 about the Donovan Derrek phone?

23 **A** Yes, I'm referring to the Donovan Derrek phone. But,
24 again, I don't have location data or timing advance data
25 to give you that opinion.

1 **A** I was in the presence of Mr. Reddy when he went to that
2 information — the detail page.

3 **Q** Okay. And what did that detail page show as to when that
4 picture was taken?

5 **A** The picture — it shows the picture was taken January 22,
6 2022, at 1:23 a.m.

7 **MR. ROHL:** I have no objection. Thank you.

8 **Q** (By Ms. Harvey, continuing) Sir, I'm handing you what's
9 been marked as State's Exhibit 63. Can you tell me what
10 is depicted in State's Exhibit 63?

11 **A** Digital messages from a conversation between Alan Reddy
12 and Donovan Derrek.

13 **Q** And, once again, where did you get these pictures?

14 **A** These are pictures I took of Mr. Reddy's phone.

15 **Q** And what times are depicted on the messages?

16 **A** At the very top of the page, there's a time of 11:27 p.m.
17 and it says "yesterday." There's three messages. Below
18 that, there is the time of 11:53 p.m. with "yesterday"
19 next to that. And then you go down three more messages
20 and then there's a time of 1:42 a.m. 142.

21 **Q** Now, remind us again what date you were speaking with
22 Mr. Reddy.

23 **A** The date was January 22, 2022.

24 **Q** So when the phone says "yesterday," what date would those
25 messages have occurred?

1 not 100 percent sure about that.

2 Q Well, let me ask you if you think this would be relevant.

3 Donovan Derrek calling Dreau Rogers at approximately 10:30
4 p.m.

5 A I'm not aware of that.

6 Q How about a text message from Donovan Derrek to Dreau
7 Rogers at 10:45 or 10:50 p.m. saying, quote, "We need to
8 speak face to face ASAP"?

9 A I'm not aware of that.

10 Q That would be relevant, though, wouldn't it?

11 A It would.

12 Q Okay. In relation to Dreau's account of what occurred
13 consistently, he stated Donovan Derrek came into his house
14 aggressively; right?

15 A Correct.

16 Q And, quote, "Wanted to fight" or some derivative of that?

17 A Correct.

18 MR. ROHL: I don't have anything further, Your Honor.

19 THE COURT: Thank you, Detective. You may step down.

20 MS. HARVEY: Your Honor, is the Detective excused?

21 MR. ROHL: I can't say that. I can't excuse him yet. I'm
22 sorry.

23 THE COURT: He's excused for now.

24 MR. ROHL: You're certainly allowed to leave the
25 courtroom.

1 Q Can you tell me if you — and if you need your records to
2 refresh your memory — how many phones or electronic
3 devices would be a better way to say — did they drop off?

4 A I collected, I believe, 11 items of evidence and they
5 varied from cell phones to tablets to SIM cards to USB
6 cards.

7 Q And do you have any records that would tell you who
8 dropped them off?

9 A Yes.

10 Q Do you need them to refresh your memory?

11 A No, Collin Smith dropped them off.

12 Q Okay. And that was on the 24th?

13 A Yes.

14 Q So did he drop off on that day a Samsung AAA1254 phone?

15 A I'm sure he did, but I would probably need a little more
16 information about the phone to tell you that.

17 Q Let me ask you this question: It's been already
18 identified there's been a phone taken in and dropped off.
19 The number was assigned to Dreau Rogers —

20 **MR. ROHL:** I'm going to object to leading, Your Honor.

21 **THE COURT:** Sustained.

22 Q (By Mr. Haivala, continuing) Okay. Did he ever drop off a
23 Samsung phone with phone number addressed to Dreau Rogers?

24 A Yes.

25 Q Okay. And do you remember what type of phone it was?

- 1 **A** It was a Samsung cell phone.
- 2 **Q** Okay. And did he ever drop off a phone that had a number
3 assigned to an Alan Reddy?
- 4 **A** Yes.
- 5 **Q** Do you remember what type of phone that was?
- 6 **A** That was also a Samsung.
- 7 **Q** And was there a phone brought to you that the number was
8 assigned to a Donovan Derrek?
- 9 **A** I received a phone that I was told belonged to Donovan
10 Derrek. I wasn't able to get an extraction off that
11 phone. It wasn't supported, so I wasn't able to confirm
12 the phone number.
- 13 **Q** Okay. Did you have a description of the phone?
- 14 **A** That was a Motorola cell phone.
- 15 **Q** Okay. So let's talk about the phone. First, the Dreau
16 Rogers's phone. I called it the "Alan Reddy phone," which
17 is the Samsung. Dreau and Alan's were Samsungs but
18 different models?
- 19 **A** Yes.
- 20 **Q** And did they also drop off a phone on the 24th an Apple 1
21 phone which belonged to Destiny Rogers?
- 22 **A** Yeah. That was Apple iPhone. SE2020.
- 23 **Q** Okay. First off, let me ask you this question: When you
24 are — and I'm going to use the word "mining for data" —
25 is it the phone — what's on the phone? Are you looking

1 extractions we're able to get at times typically only get
2 phone calls, contacts, text messages that are sent
3 through, like, Verizon through cell towers. It's not
4 typically going to extract data from those third-party
5 apps, like, Facebook, Instagram, TikTok, those types of
6 applications.

7 Q So you downloaded Dreau Rogers's Samsung?

8 A I did.

9 Q And that was loaded on some — loaded on some type of
10 electronic device? Can you kind of walk us through where
11 you dump the phone. Where does the data go?

12 A Yeah. The data gets stored on either a computer or server
13 where it stays until we make copies for our partner
14 agencies.

15 Q Is that the same thing you did with the Alan Reddy phone,
16 I'll call it, and the Destiny Rogers's phone?

17 A Yeah, so I — basically, I have all my forensic copies
18 that I store on our server on my work computer and then I
19 make copies of those to provide to the investigators once
20 I process it and make a case for them to review, because
21 they know more case details than I typically do.

22 Q Now, if I have an app — let's say the Grindr app — are
23 you able to get into that when you download — and, again,
24 I'll use the word "dump" the data from the phone?

25 A Yes and no. Depending on the make and model of the cell

1 Q Of course, no one saw any of this. We're just literally
2 operating off of what these two humans texted each other;
3 correct?

4 A That is correct.

5 Q And so I want to back up a little bit. There was —
6 there's been a lot of talk in this trial, Detective
7 Almeida, about cell phones and call detail records. Okay?

8 A That's correct.

9 Q Are you familiar with both?

10 A I'm a lot more familiar with forensics. A little less
11 familiar with call detail records.

12 Q Well, sure. Would it be a fair characterization for me to
13 say that you guys are — you guys are swamped in the
14 digital forensic section?

15 A That's very fair.

16 Q Why?

17 A Because everyone has a cell phone and every crime there is
18 a cell phone that we can review to show evidence.

19 Q Sure. You're valuable to the Rapid City Police
20 Department, aren't you?

21 A Thank you.

22 Q Well, I mean that. That's a fair characterization; right?

23 A Yes.

24 Q I mean, my God. If I give you this and I give you my
25 password and you go download that, you're going to learn a

1 lot about me, aren't you?

2 A Yes, I am.

3 Q You're going to know what I like; right?

4 A And, potentially, your darkest secrets.

5 Q Yeah, for sure. You're going to know where I go?

6 A Potentially.

7 Q Sure. So would it be fair to say this is an incredibly
8 significant piece of evidence?

9 A Yeah, it's valuable.

10 Q And would it be fair for me to say that, in this case,
11 having -- if you had access to Donovan Derrek's phone,
12 that would have been very valuable?

13 A I did have access to it.

14 Q If you would have been able to complete a download on it?

15 A Yes.

16 Q Now, I don't know if you know this, but Donovan Derrek's
17 phone was seized, of course, by the Spearfish Police
18 Department; right?

19 A It was.

20 Q And that was -- came into your custody; right?

21 A It did.

22 Q And that's not in dispute. There's evidence transfer,
23 property inventory receipts, which document that?

24 A Correct.

25 Q And so you attempt to do an extraction, but you don't have

1 that there is no evidence that he deleted anything?

2 **A** It's their job to review the evidence that's testified and
3 come to their own conclusion.

4 **Q** But you testified you can't tell if anything was deleted?

5 **A** Yeah. Based on the extraction and the data I was able to
6 get on the extraction that I got, I wasn't able to
7 determine that something was deleted or not.

8 **Q** So without some additional testimony, there is no evidence
9 that he deleted anything; right?

10 **A** That is correct.

11 **Q** I want to talk about how you can obtain information about
12 location with regards to a digital mobile device download.
13 Okay?

14 **A** Mm-hmm.

15 **Q** Would you explain how you can get locations from that.

16 **A** Yeah, so there's multiple ways. Like I talked about,
17 there's different, I guess, levels of extractions. On an
18 advanced logical or file system extraction, the odds of me
19 being able to determine location off a cell phone are low
20 unless the user sends a message saying "I'm here."

21 If I'm able to use GRAYKEY and get a full file system
22 extraction and/or a Cellebrite physical extraction, I have
23 a lot better odds of getting that.

24 Really, like, there has to be almost, like, a perfect
25 storm in order to get some of that information. The user

1 has to have on the applications that they're using that
2 it's okay to track me, it's okay to know my location, it's
3 okay to do all of that.

4 So if I have a user that, I guess, didn't change the
5 stuff so they're not being tracked by their app or their
6 phone or by their health application, there's a possibly.
7 But there's a lot of, I guess, nuances to it. It has to
8 be, like, all of these things have to line up fairly
9 perfectly in order to have a really good picture of where
10 someone is at a specific time.

11 Q Sure. Do you get more information when someone gives you
12 a password?

13 A I guess, the black-and-white answer is yes. But it still
14 determines on the make and model of the cell phone -- if
15 they're compatible with the tools that I have access to.

16 Q There's also application data aside from location that can
17 be beneficial. And, of course, an example of that is the
18 Grindr messages that we went through; right?

19 A That's correct.

20 Q According to -- and, again, I don't pretend to be as
21 knowledgeable about this as you. So if I misspeak, of
22 course, you'll let me know?

23 A Yeah.

24 Q According to the Grindr website, it collects your precise
25 location to determine your distance from other users;

- 1 A Yes, it's possible.
- 2 Q Individuals use different kinds of apps, as well, when
3 they're having discussions; right?
- 4 A Yeah. Like, in this case, they used the Grindr
5 application as well as text messages.
- 6 Q Sure. And this is what you do for a living; right?
- 7 A Yes.
- 8 Q So you're constantly dealing with people trying to
9 communicate on -- for lack of a better word -- I'll call
10 them "shady" or "incognito" applications?
- 11 A I guess, give an example of one of those.
- 12 Q Well, this is an example of what I'm getting at. Maybe
13 they'll communicate on WhatsApp or Snapchat with the
14 belief they're avoiding detection; right?
- 15 A Yeah, people use those apps for various reasons. Like,
16 for example, your example WhatsApp, it's encrypted through
17 Meta. And those messages are recoverable on the person's
18 cell phone. They are not recoverable, like Grindr,
19 through a subpoena.
- 20 Q And that would all be information that we could have
21 obtained via the digital download?
- 22 A That is correct.
- 23 Q Other ways we can determine location, of course, would be
24 GPS; right?
- 25 A Yes.

1 and Donovan?

2 A Can you ask that again, please?

3 Q Yeah. I told you I would ask you a bad question and I'm
4 following through, so I apologize.

5 The basis of your knowledge in this case about the
6 penis would be the contents of the Grindr messages and
7 text messages?

8 A Yeah. So for that specific image, it shows that the photo
9 was taken with Alan's cell phone at a date and time that,
10 based on the text messages, would leave a person to
11 believe that those two people were together.

12 Q Sure. And there was a Google search on Alan Reddy's
13 phone; right?

14 A That is correct.

15 Q And that occurred between the hours of 1:00 a.m. and
16 2:00 a.m.?

17 A Correct.

18 Q And that was "Does meth make people — guys — does meth
19 make men not be able to cum?" or something like that?

20 A That is the gist.

21 Q And then at 1:23 a.m., there's this picture we've heard so
22 much about; right?

23 A That is correct.

24 Q Okay. And so maybe you know, maybe you don't, but the 911
25 call came in at 12:48 a.m.?

1 that area of rubbing. And then there's two more circular
2 areas of abrasion towards the interior part of the wound.

3 Q So let's walk through the areas of abrasion. First area
4 of abrasion -- and to point out to the jury, if you would,
5 please -- what is that area?

6 A So this is a close-up wound -- close-up photograph --
7 pardon me -- of the Decedent's right arm. This is where
8 the entrance was. This is the only defect in the autopsy.

9 So the red around the wound is the abrasion that the
10 bullet makes when it goes into the skin.

11 This, to me, is different -- this area from about -- I
12 think it was down -- this part of the wound over this
13 lateral part of the wound. You have these two areas,
14 which are different to me. Those are made by something
15 else.

16 Q Okay. And looking at those abrasions, do you have an
17 opinion as to what made those abrasions?

18 A I think this is a contact -- I think this is a very close
19 wound. I think when the trigger is pulled -- pardon me --
20 the gun is very close to her arm. And this mark here and
21 these two marks here are caused by the tip of the barrel.

22 Q So the barrel was against -- the barrel of the gun was
23 against the shoulder when the bullet was triggered; am I
24 correct, in your opinion?

25 A Yes.

1 Q What about the other areas?

2 A I think those are the same thing. I think they're related
3 to the tip of the barrel.

4 Q Okay. All right. Continuing on then. Walk me through
5 what you did after you started the autopsy and examined
6 the body and found the wound on the shoulder.

7 A So that was the only thing significant externally, as it
8 relates to injury. Yeah, that was it.

9 So the only — you know, the only traumatic thing that
10 I found externally, as it relates to this autopsy
11 examination, was this gunshot wound.

12 Internally, of course, this becomes the cause of
13 death. So this is a gunshot wound involving predominantly
14 the chest portion of the body. It involves the right
15 lung; it involves the aorta; it involves the esophagus and
16 the left lung. So it's a gunshot wound that goes across
17 this portion of her body.

18 Q So you have before you several autopsy pictures that I
19 understand show the course of the bullet when it entered
20 the body. Can you please review those?

21 A (Peruses documents.)

22 Q Let's start with State's Exhibit 26. Please take a look
23 at that.

24 A Okay.

25 Q What is that picture?

1 millimeter base. Someone to do with ballistics can tell
2 you where that fits. There's all sorts of calibers.

3 Q Would a .45 caliber be consistent with that?

4 MR. ROHL: I'm going to object. He said he didn't know,
5 Your Honor.

6 THE COURT: Sustained.

7 Q (By Mr. Haivala, continuing) When you took the bullet out
8 of the body, what did you do with it?

9 A I gave it to the police officers investigating the case.

10 Q After performing the autopsy on January 25, 2022, of
11 Destiny Rogers, were you able to ascertain or come up with
12 a reasonable medical certainty the cause of death in this
13 case?

14 A Yes.

15 Q And can you tell the jury, in your opinion, what was the
16 medical cause of death?

17 A The cause of death in Destiny Rogers is a gunshot wound to
18 her chest.

19 Q Okay. I'd like to have you take a look at Exhibit 32.
20 I'm giving you a pair of gloves, if you would like to use
21 them. Those are latex gloves.

22 I'd ask you to take a look at the exhibit. Is this
23 the box that you gave the bullet to the Spearfish Police
24 Department?

25 A To be honest, I don't know. I gave the bullet to them.

1 spell it.

2 **A** My name is Bincy Thankachan. Last name spelled
3 T-h-a-n-k-a-c-h-a-n.

4 **Q** And how are you employed, ma'am?

5 **A** I am a forensic examiner with the Rapid City Police
6 Department.

7 **Q** How long have you been with the RCPD?

8 **A** I have been with the department for about five years and
9 three months.

10 **Q** Can you describe to me the training of -- I'll take a step
11 back. Can you describe to me your experience as an
12 evidence tech. Did I get that right?

13 **A** Forensic examiner.

14 **Q** Thank you. Can you describe to me your experience.

15 **A** I have a bachelor's degree in forensic science and a
16 master's degree in forensic medicine. I graduated from
17 the University of Maryland. After my graduation, I was
18 hired by the Rapid City Police Department as a forensic
19 examiner.

20 As a forensic examiner, I specialize in crime scene
21 investigations in fingerprint analysis. I respond to
22 major crimes, such as homicides, aggravated assaults,
23 sexual assaults, armed robbery, et cetera.

24 I go to crime scenes; I examine them; I document them
25 using photography. I collect evidence. I also examine

1 vehicles. I examine individuals involved and I attend
2 autopsies. I document autopsies, collect evidence from
3 autopsies as well.

4 Q And how many cases — how many times have you had to do
5 this in your career?

6 A Hundred-plus times.

7 Q What exactly — when you do your profession, as a forensic
8 examiner, walk me through — for example, when you take
9 evidence — DNA. What precautions do you do? What
10 protocols do you follow?

11 A Maybe evidence collection from the crime scene or from
12 people. It doesn't matter. I make sure that I wear a
13 pair of disposable gloves. I change them out as and when
14 it's necessary. I also wear an N95 mask.

15 Q And that is the proper protocol when taking DNA evidence?

16 A Yes.

17 Q And who establishes those protocols? Is there a national
18 organization?

19 A Yes. These are standard crime scene practices and we also
20 have internal standard operating procedures and the RCPD
21 policies.

22 Q When you take — when you're doing your examination,
23 taking a DNA sample, you do wear the mask then?

24 A Yes, sir.

25 Q Okay. I would like you to look at Exhibits 113 and 114,

1 which are in front of you.

2 A (Witness complies.)

3 Q Are you familiar with those exhibits?

4 A Yes.

5 Q I would like to take you back to the 22nd of January. Did
6 you come to Spearfish, South Dakota, to take some
7 evidence -- DNA evidence?

8 A Yes, I did.

9 Q Please describe to the jury what the circumstances were
10 that brought you to Spearfish from Rapid City.

11 A Yes.

12 Q Please tell the jury what happened.

13 A So I got a call from my supervisor. He said that
14 Spearfish Police Department required my assistance. When
15 I asked him the details, he told me there has been a
16 possible homicide and they would like me to come over and
17 process an individual.

18 Q And about what time of day was that?

19 A About 1448 hours, which is about 2:48 p.m.

20 Q In the afternoon?

21 A Yes, sir.

22 Q And so you drove from Rapid City to Spearfish. Where in
23 Spearfish?

24 A Spearfish Police Department.

25 Q What did you do when you got to the police department?

1 Q So, essentially, the position says the forensic examiner
2 is responsible for the collection and forensic analysis of
3 crime scene evidence on location; right?

4 A Yes.

5 Q So that means you know how to collect this stuff; right?

6 A Yes.

7 Q And you know how to do it in a scientifically sound way;
8 right?

9 A Yes, sir.

10 Q And I'm just going to come up here because this is
11 impressive. I want you to just go through a lot of those
12 duties. Really explain to the jury what it is that you
13 do.

14 A Okay. Level one or two?

15 Q Level two, please.

16 A Okay. So just the ones that are marked?

17 Q Whatever you're comfortable with.

18 A Okay. So these are the level two responsibilities of a
19 forensic examiner, as listed by RCPD. Completes all
20 essential duties listed under level one, provides
21 training, evidence collection, preservation, processing of
22 the scene and a laboratory setting, speaks to public
23 organizations on evidence or forensic-related topics,
24 performs technical/administrative reviews of casework —

25 MR. HAIVALA: May I have you slow down a lit bit? I know

1 the reporter is trying to take this down.

2 **THE WITNESS:** I apologize.

3 **MR. ROHL:** I should have spoke up.

4 **THE WITNESS:** Do you want me to start from the beginning?

5 **A** Speaks to forensically related topics, performs
6 technical/administrative reviews of casework, performs
7 administrative work to include monthly statistics,
8 accreditation reports, and other reports as necessary,
9 assists in training level one examiners to competency.

10 **Q** (By Mr. Rohl, continuing) Thank you.

11 I also brought a copy — you testified about the Rapid
12 City Police Department rules and procedures; right?

13 **A** Yes.

14 **Q** And there are rules and procedures as to how you're
15 supposed to collect evidence at a crime scene; right?

16 **A** Yes.

17 **Q** And so I brought a copy of those. I'm going to hand you
18 what's been marked Defendant's Exhibit G. Would you mind
19 telling the jury what that is.

20 **A** So this is the Rapid City Police Department's rules and
21 procedures particularly pertaining to collection and
22 preservation of evidence.

23 **Q** And what specific policy are you looking at in front of
24 you there? It's in the top left-hand corner.

25 **A** It is policy number 621-02.

1 rules and procedures manual is for evidence collection and
2 preservation, according to the rules and procedures
3 manual?

4 **A** In order to make sure we're all collecting any evidence
5 properly, you know, which includes maintaining integrity
6 of the same.

7 **Q** And so it actually uses the word there; right? "Integrity
8 of the evidence."

9 **A** Yes.

10 **Q** What is that?

11 **A** Integrity could mean a few things when it comes to
12 evidence. I can talk about contamination,
13 cross-contamination, chain of custody, et cetera.

14 **Q** I'd really like to zero in on contamination and
15 cross-contamination, if you could.

16 **A** Yes.

17 **Q** Can you please tell us more about that.

18 **A** Yes. Contamination generally means what the word stands
19 for. When we're collecting the sample, we want to make
20 sure we're collecting it and packaging it and securing it
21 properly so that foreign particles are not introduced into
22 it because that interferes with further testing.

23 **Q** And would it be fair for me to say that during the
24 evidence collecting process, if it's not done right,
25 there's exposure to contamination or cross-contamination?

1 A Yes.

2 Q And that's why these exist; right?

3 A Yes.

4 Q To make sure that we zealously guard that scene; right?

5 A Yes.

6 Q So that it doesn't happen?

7 A Yes.

8 MR. ROHL: I want you to scroll down a little bit, Jods,
9 to number 4, if you would. Okay. Right there. Number 4.

10 Q (By Mr. Rohl, continuing) That says "protection of
11 evidence." Right?

12 A Yes.

13 Q And when it says "employees," that means law enforcement;
14 right?

15 A Yes.

16 Q And it's law enforcement's obligation to take all
17 precautions to prevent contamination; right?

18 A Yes. And since this -- since this document -- this
19 document was particularly made for RCPD employees, so that
20 would be any law enforcement working with Rapid City
21 Police Department, yes.

22 Q Sure. And, of course, you're well-studied in this field;
23 right?

24 A Yes. I try my best to keep up with it and obtain any
25 knowledge there is, yes.

1 Q Absolutely you do. And you've reviewed this and there's
2 nothing in here that's not scientifically valid. Would
3 that be fair?

4 A That's fair.

5 Q Great. So I want you to turn to the next page of this for
6 me. If you would go to page 2 of 5.

7 So number 1 says "Officers, whether working
8 individually or in cooperation with others, are
9 responsible for preserving and protecting the scene of the
10 crime and the evidence contained therein." Right?

11 A That is correct.

12 Q And just so I can be super clear, that's this table's
13 responsibility here; right? Prosecution and law
14 enforcement.

15 A Law enforcement, yes. This particular -- number 1 is
16 talking about, particularly, people who are coming in
17 contact with that evidence item or people who are
18 handling -- physically handling -- that item.

19 Q Sure. Or going into the crime scene?

20 A Yes.

21 Q Does that include that?

22 A That's fair.

23 Q Okay. Now I want to go to number 2. Because number 2
24 throws quite a bit of information at us. Okay?

25 A Okay.

- 1 Q I'm sorry. Not number 2. I want to go to number 4.
- 2 A Okay.
- 3 Q I have it highlighted on your copy there.
- 4 A Yes.
- 5 Q And I'm going to read what I think is the relevant
6 portion. And if I misstate, of course, you'll let me
7 know. Okay?
- 8 A Yes, sir.
- 9 Q So this says "All evidence, particularly that which may
10 bear" — and I'm going to skip to "DNA."
- 11 A Okay.
- 12 Q "DNA or other types of trace evidentiary particles shall
13 be properly handled in such a way to prevent destruction
14 or contamination of evidence." Right?
- 15 A Yes, sir.
- 16 Q So the idea of contamination of evidence — this isn't
17 something I'm making up. This is well-known in the law
18 enforcement community?
- 19 A Yes, sir.
- 20 Q Fair?
- 21 A That's fair.
- 22 Q And then it says "If it is suspected that forensic testing
23 of any type will be requested, the items must be packaged
24 separately."
- 25 A Yes.

1 what I think is the crux of what I'm getting at. Would it
2 be fair for me to say that the beginning of Exhibit H —

3 A Yes.

4 Q — deals with integrity of the evidence?

5 A Yes.

6 Q That's super important?

7 A Yes, sir.

8 Q So if you would turn with me to page 4 of 8.

9 A (Witness complies.)

10 Q We're going to go to number 16 there. And there is
11 writing on it. And it is mine. And if there's anything
12 on there that's incorrect, you're going to let us know?

13 A Yes, sir.

14 Q Okay. All suspected DNA evidence must be protected from
15 possible cross-contamination; right?

16 A Yes, sir.

17 Q And so if there is DNA evidence collected at the scene in
18 this case, it needs to be protected from
19 cross-examination?

20 A Contamination, yes.

21 Q Or contamination. Thank you.

22 And I included a word here next to "gloves." I said
23 clean gloves should be worn at all times?

24 A Yes.

25 Q Is that scientifically accurate?

- 1 A That's fair.
- 2 Q Okay. Because if you're handling evidence with dirty
3 gloves —
- 4 A Yes.
- 5 Q — what does that mean?
- 6 A Contamination issues, yes.
- 7 Q Okay. So what happens if I show in this case that
8 evidence is being handled with dirty gloves?
- 9 A There would be possible contamination.
- 10 Q Sacrifices the integrity of the evidence; right?
- 11 A It does.
- 12 Q That's why these exist?
- 13 A Yes, sir.
- 14 Q It also states that you should never lay evidence directly
15 upon any surface without first putting down a clean
16 disposable piece of paper?
- 17 A Yes.
- 18 Q Is that scientifically valid?
- 19 A Yes, sir.
- 20 Q What if it didn't happen in this case?
- 21 A Then it would be possibly contaminated by whatever is on
22 that particular surface.
- 23 Q Sure. So if the surface is, say, Dreau Rogers's house,
24 his DNA is probably all over it, isn't it?
- 25 A Yes.

1 A Good afternoon.

2 Q Is that the right call, Agent?

3 A Yes.

4 Q It's important to me to get your name right and give you
5 the respect you need.

6 A Thank you.

7 Q Of course.

8 Would it be a fair characterization for me to say that
9 the majority of your involvement in this case is crime
10 scene processing?

11 A Absolutely, yes.

12 Q Obviously, you didn't interview Dreau or you didn't
13 interview Donovan; right?

14 A No.

15 Q So the majority of what you did is process the scene;
16 right?

17 A Yes.

18 Q And you took pictures of the processing — the photograph
19 process; right?

20 A Yes.

21 Q That was such a poorly worded question.

22 You photographed the processing of the crime scene?

23 A Yes.

24 Q Okay. And so I'm going to approach with what's been
25 marked — I believe it's Defendant's Exhibit D, but I

1 better confirm that. Defendant's Exhibit E. What I have
2 done is I've selected some photographs that I'm going to
3 ask you about. I would like you to review those for me,
4 if you would.

5 **A** Sure. (Peruses documents.) Okay.

6 **Q** Do those appear to be true and accurate depictions of some
7 of the photographs you took of the crime scene?

8 **A** Yes.

9 **MR. ROHL:** Your Honor, I would move to introduce
10 Defendant's E on that basis.

11 **THE COURT:** Any objection?

12 **MR. ROHL:** No, Your Honor.

13 **THE COURT:** Defendant's Exhibit E will be received.

14 **MR. ROHL:** Thank you, Your Honor.

15 **Q** (By Mr. Rohl, continuing) The — before we work through
16 the crime scene, I just want to confirm a couple things.

17 **A** Sure.

18 **Q** You testified on that holster there was what's referred to
19 as, like, a belt loop shelf; right?

20 **A** Yeah, maybe I didn't explain that real well.

21 **Q** Would you?

22 **A** Yeah. Basically, it's the part of the holster designed so
23 that when it slides into your — part of the holster goes
24 into your pants and the other part will be on the outside.
25 It will grip if you're wearing a belt.

1 Q Okay. So there's not, like, a separate attachment?

2 A No. I could look at it again here, but it would appear
3 that — my understanding is a paddle holster is just that
4 paddle that slides inside your pants and then there's that
5 shelf —

6 Q I think that's fair. I didn't know if there was another
7 attachment.

8 A No, I didn't mean to imply that. I apologize.

9 Q Okay. When you went through the evidence that Mr. Haivala
10 just presented you with, was that similar to the way you
11 processed the crime scene?

12 A I guess, can you be more specific?

13 Q Well, you put on a pair of gloves; right?

14 A Yes.

15 Q And then you began to go through different pieces of
16 evidence; right?

17 A Yes.

18 Q So do you know -- can nitrile gloves transfer DNA?

19 A I don't know.

20 Q Would you agree that's an important thing that you
21 probably should know?

22 A It's certainly an important thing, yes.

23 Q So there was an article in the *Capital Journal* where the
24 director of the State Forensic Laboratory was interviewed.
25 And within that interview, she states — well, let me back

- 1 **A** Right.
- 2 **Q** And so I'm going to have you come down off the witness
3 stand for me, if you would.
- 4 **MR. ROHL:** Jodi, will you zoom in right there. Top left.
5 If you can really get in on that glove for me.
- 6 **Q** (By Mr. Rohl, continuing) And now I'm just going to ask
7 you do those gloves right there look clean to you?
- 8 **MR. HAIVALA:** I am going to object. Lack of foundation.
9 We're not sure what we're looking at.
- 10 **MR. ROHL:** He's looking at Defendant's Exhibit E, 694, to
11 confirm that he saw it.
- 12 **THE COURT:** Overruled.
- 13 **Q** (By Mr. Rohl, continuing) Do those gloves look like
14 they're clean to you?
- 15 **A** Appears to be something white on them.
- 16 **Q** Well, let's really make a record here. Does there appear
17 to be a smudge on the palm here?
- 18 **A** Yes, some white specks and a smudge of some sort.
- 19 **Q** And then on this right hand over here. Would that be...
- 20 **A** Specks. I don't know.
- 21 **Q** Are pieces of DNA small?
- 22 **A** They can be, yeah.
- 23 **Q** And so are you telling this jury right here that those are
24 clean gloves that that piece of forensic evidence is being
25 handled with?

- 1 A I don't know whose gloves those are.
- 2 Q But you took the picture?
- 3 A I did take the picture, yes. And I do see white
- 4 substances on there.
- 5 Q And let me start off by saying I don't want to come after
- 6 you. I hope you know that. I'm not trying to do that.
- 7 I'm just seeking your confirmation that those are not
- 8 clean gloves.
- 9 A I do see something foreign on them.
- 10 Q And so do you agree that forensic evidence needs to be
- 11 handled with clean gloves?
- 12 A I do agree.
- 13 Q And so could you agree with me that forensic evidence that
- 14 is not handled with clean gloves is what we would call
- 15 mishandled forensic evidence?
- 16 A If it was dirty gloves, yes.
- 17 Q So do I have your permission to put your initials right
- 18 here under number 3: Mishandled forensic evidence?
- 19 A My permission?
- 20 Q Yes. I'm asking you, based off of what you just testified
- 21 to, I can put your initials here?
- 22 A I have no idea what that substance is on those gloves.
- 23 Q Well, it's your crime scene, though; right?
- 24 A I'm participating in it, yeah.
- 25 Q Well, collectively, it's law enforcement's crime scene?

1 A Yes.

2 Q Somebody should be able to tell me that those are clean
3 gloves; right?

4 A Presumably, yeah.

5 Q And, again, we're just looking at the same image; right?

6 A Yes.

7 Q And those don't appear to be clean?

8 A They appear to have something on them.

9 Q "BL"?

10 A That would be correct.

11 MR. ROHL: Jodi, would you go to 401 for me.

12 Q (By Mr. Rohl, continuing) Okay. So what is that picture?
13 It's Bates stamped 401, for the record, on the bottom
14 right-hand corner. What is that?

15 A That's a wooden box and a pack of cigarettes.

16 Q Okay. And do you know whose brand of cigarettes those
17 are?

18 A Camel, I believe.

19 Q Do you know who — if you know, who smokes those — that
20 brand of cigarettes?

21 A I have no idea.

22 Q Is it possible Dreau Rogers smoked that brand of
23 cigarettes?

24 A Potentially. I don't know if he smokes.

25 MR. ROHL: Jods, will you go to 403 for me?

1 Q Okay. Thank you.

2 So the difference between the picture we just saw and
3 the picture now is that the pack of cigarettes was moved
4 up to the top right-hand corner; right?

5 A That's one of them, yeah.

6 Q The bag was brought out of the box; correct?

7 A Yep.

8 Q The bullets were brought out of the bag; correct?

9 A Yes.

10 Q And the bullets were set on the bag; right?

11 A That's correct.

12 Q Can you tell this jury if there was any glove changes
13 during that process?

14 A I can't tell them if there was or wasn't.

15 Q Okay. Thank you for bearing with me.

16 MR. ROHL: Jodi, can you please put image 331 up. Okay.

17 Now, if you can zoom in on the bottom right-hand corner --

18 Q (By Mr. Rohl, continuing) Before we do, can you please
19 tell the jury what that is a picture of.

20 A Yes. It's a gloved hand holding a box of .22 rifle
21 bullets.

22 Q Okay. And so that picture that is being published to the
23 jury -- is that what that is?

24 A Yes.

25 MR. ROHL: And would you zoom in on that glove?

1 **THE WITNESS:** Stand up?

2 **MR. ROHL:** Yes, please do.

3 **Q** (By Mr. Rohl, continuing) Same question. Is that a clean
4 glove?

5 **A** I do see some material on the glove.

6 **Q** Okay. And, specifically, if we look down on the
7 right-hand corner, there seems to be a powdery substance
8 there. Fair?

9 **A** I see -- yeah. I see what you're pointing out there, yes.

10 **Q** Okay. And so the rules and procedures manual says it
11 should be handled with clean gloves; right?

12 **A** What rules and procedures manual?

13 **Q** Well, the Rapid City Police Department --

14 **A** Yeah. Handling with clean gloves makes sense, yeah.

15 **Q** Okay. So can we agree there's more forensic evidence sent
16 in for testing to handle the dirty gloves?

17 **A** Yeah, whatever is on there.

18 **MR. ROHL:** Jodi, could you pull up 681 for me.

19 **Q** (By Mr. Rohl, continuing) So image 681 -- that's a picture
20 of the pistol right in front of you there; correct?

21 **A** Yep.

22 **MR. ROHL:** And would you zoom in on the gloves there for
23 me?

24 **Q** (By Mr. Rohl, continuing) Would it be fair for me to
25 characterize that bullet as a piece of material evidence?

- 1 **A** Yes.
- 2 **Q** And that's the bullet Mr. Haivala had you testify about;
3 right?
- 4 **A** That's correct.
- 5 **Q** Okay. And, again, can we agree those gloves there are
6 dirty?
- 7 **A** There is some substance on those gloves, yeah.
- 8 **Q** So to cut to the chase, the rules and procedures manual
9 exists to avoid cross-contamination; right?
- 10 **A** Yes.
- 11 **Q** And the purpose of clean gloves is to avoid what's called
12 cross-contamination; right?
- 13 **A** I would agree, yes.
- 14 **Q** Can we agree that Dreau Rogers's DNA is going to be all
15 over his house?
- 16 **A** It would be safe to assume it would, yeah.
- 17 **Q** And that's why it's important to change gloves; right?
- 18 **A** Yes.
- 19 **Q** I'm just going to grab a marker here real quick, Agent
20 Larson. I just want to darken this.
- 21 **MR. ROHL:** I have no further questions, Your Honor.
- 22 **THE COURT:** Thank you.
- 23 Mr. Haivala?
- 24 **MR. HAIVALA:** A couple questions.
- 25 Do you mind if I use your exhibits?

1 right?

2 **A** That's why we try to change gloves as much as possible
3 while we're on scene dealing with biological stuff with
4 DNA on it, I guess.

5 **Q** Sure. Because you gotta protect it from
6 cross-contamination; right?

7 **A** Yes.

8 **Q** Super important; right?

9 **A** Yes.

10 **Q** If a guy like me shows there's potential for
11 cross-contamination, that's a big problem for the case;
12 right?

13 **A** If there was cross-contamination, yes.

14 **Q** Sure. Or even the potential for it?

15 **A** Correct.

16 **Q** And I just want to know, in general — certainly, as it
17 relates to Mr. Rogers, he's entitled to a thorough
18 investigation; right?

19 **A** Yes.

20 **Q** He's entitled to that?

21 **A** Yes.

22 **Q** That's a duty you have to complete a full and fair
23 investigation?

24 **MR. HAIVALA:** Objection. Asked and answered.

25 **THE COURT:** Sustained.

1 Q (By Mr. Rohl, continuing) And that would include adhering
2 to proper procedure and protocol; right?

3 A Correct.

4 Q Okay. So before we go through some pictures, I want to go
5 through number 16 with you on Exhibit H, page number 4.

6 A Yes.

7 Q I just want to know do you agree that all suspected DNA
8 evidence must be protected from possible
9 cross-contamination? Do you agree with that?

10 A Yes.

11 Q And do you agree that clean gloves should be worn at all
12 times?

13 A Yes.

14 Q And do you agree that you should never lay evidence
15 directly upon a surface without first laying down clean,
16 disposable paper?

17 A Yes, that's the best practice.

18 Q Okay. So we are going to start with image 680. Of
19 course, 680 is an important piece of evidence in this
20 case; right?

21 A Can I get it turned a little bit?

22 Q I'm going to actually bring you a copy of that.

23 A Oh, got ya. Yes.

24 Q Okay. And so doesn't Exhibit H state that that should be
25 set on a clean piece of paper?

- 1 A That's what it says on this document, yes.
- 2 Q Okay. And that would be the best practice; right?
- 3 A That would be -- yeah. Some agencies do that, yes.
- 4 Q Okay. Because science has shown that DNA can transfer
- 5 from surface to another surface? It's called indirect
- 6 transfer; right?
- 7 A Yes, I'm aware of that. Yeah.
- 8 Q And then if we go to image 681. That's this picture right
- 9 here; right?
- 10 A Yes.
- 11 Q And just to make sure the jury can see that. That's a
- 12 fair reproduction of this?
- 13 A Yep.
- 14 Q Do you know whose hand that is?
- 15 A I am not -- not my hand. I don't know whose hand that is.
- 16 Q Okay. So I think we can probably agree that those gloves
- 17 are dirty; right?
- 18 A Can I see the --
- 19 Q Yeah. I think it shows up better on the HD screen.
- 20 A There is some dust marks on the gloves, yes.
- 21 Q And, look, I get it. It's dirty outside; right?
- 22 A Yeah.
- 23 Q But for purposes of scientific contamination and rules and
- 24 procedures, there's no exception if it's dirty outside;
- 25 right?

1 **THE COURT:** Sustained.

2 **Q** (By Mr. Rohl, continuing) Just to make sure I don't miss
3 anything, Agent Agers, the extent of your investigation in
4 this case would be crime scene processing; fair?

5 **A** Correct, yeah.

6 **Q** Okay. You didn't interview anybody or anything like that?

7 **A** No.

8 **Q** So you process this crime scene and the collection of
9 evidence was done by yourself; right?

10 **A** Some of it, yes.

11 **Q** Mr. — Agent Larson; right?

12 **A** Yes.

13 **Q** Agent Cody Lineberger; right?

14 **A** Correct.

15 **Q** Sergeant Tom Derby?

16 **A** Yes.

17 **Q** Detective Schumacher?

18 **A** Yes.

19 **Q** Detective Dustin Ruvolo; right?

20 **A** I don't recall if he was helping with the actual crime
21 scene or not. He may have been in there at some point.

22 **Q** I'm approaching with the crime scene entry log.

23 **A** Okay.

24 **Q** That should have everybody on there; right?

25 **A** Yes.

1 **A** Correct. I've not been there present during the training.

2 **Q** So if I showed you pictures of how this occurred, you
3 couldn't even say whether or not it was done right?

4 **A** No, I have no crime scene training.

5 **Q** Do you know what the number one cause of wrongful
6 incarceration is in the country?

7 **MR. HAIVALA:** Objection, Your Honor. This is far outside
8 the scope of this witness.

9 **THE COURT:** It is. Sustained.

10 **Q** (By Mr. Rohl, continuing) Do you know what misleading
11 forensic science is?

12 **A** In what way? Can you be more specific with the question.

13 **Q** Sure, I can. Certainly, we can agree that it's very
14 important that evidence be collected properly; right?

15 **A** Absolutely.

16 **Q** And if it's not collected properly, it could lead to
17 misleading results?

18 **MR. HAIVALA:** Objection. Again, outside the scope of this
19 witness.

20 **THE COURT:** Overruled.

21 You can answer.

22 **A** Correct.

23 **Q** (By Mr. Rohl, continuing) And so it's absolutely crucial
24 that the evidence be collected properly?

25 **A** Absolutely.

1 Q And if it's not, your testimony could be misleading?

2 MR. HAIVALA: Objection, Your Honor. Grounds it's almost
3 argumentive.

4 THE COURT: Overruled. It's cross-examination.

5 A Can you repeat the question, please?

6 Q (By Mr. Rohl, continuing) I'll try. I'm sorry...

7 (WHEREUPON, the court reporter read the
8 previous question back.)

9 A Yes. The grounds of the information that I'm receiving is
10 not correct, yes.

11 Q (By Mr. Rohl, continuing) And so you pick this evidence up
12 with the assumption that everything up to it coming into
13 your contact has been done perfectly?

14 A Absolutely.

15 Q And if it's been shown in this case that it hasn't been
16 done perfectly or that's it's been done in violation of
17 rules and procedures, that would be a problem; right?

18 MR. HAIVALA: Objection. Again, way outside the scope of
19 this witness.

20 MR. ROHL: Your Honor, that has been testified to. There
21 has been —

22 THE COURT: Let's not argue objections. State your legal
23 objection. If I ask for a response, I'll ask for a
24 response.

25 So what's your legal objection?

1 grateful to you for clarifying that.

2 Cross-contamination is a big deal; right?

3 A Yes, it is.

4 Q Well-known fact that evidence needs to be handled with
5 clean gloves; right?

6 A Yes.

7 Q In addition to that, it is a well-known fact that DNA can
8 transfer from surface to surface; right?

9 A Correct.

10 Q And that is why a clean sheet, for example, is laid down
11 and evidence set on it; correct?

12 A Correct.

13 Q I have in my possession some rules and procedures that
14 have been admitted in this trial. And I just want to know
15 the soundness of the science associated with them. Okay?

16 A Okay.

17 Q I'm going to stand right next to you. I am going to
18 represent to you that this is Exhibit H.

19 A Okay.

20 Q And we're on page 4. And I want to know if you believe
21 this to be true. "All suspected DNA evidence must be
22 protected from possible cross-contamination."

23 A Yes.

24 Q Do you agree that clean gloves should be worn at all
25 times?

1 A Yes.

2 Q Do you agree that never lay such evidence directly upon
3 any surface without first putting down clean, disposable
4 paper?

5 A Yes.

6 Q Do you agree that this will help prevent the transfer of
7 DNA on the surface to the piece of evidence?

8 A Yes.

9 Q And all of this is done to protect the integrity of the
10 evidence; correct?

11 A Yes.

12 Q What is the integrity of the evidence?

13 A Making sure that nothing additional is added or
14 contaminated to that piece of evidence. Making sure -- as
15 my understanding in this concept -- is making sure that
16 that piece of evidence arrives to the lab the same way it
17 was found at the scene and not changed in any way before
18 it's gotten to me.

19 Q Simply put, would it be fair for me to say it's the way
20 that these folks can know they're doing the right thing,
21 based on the evidence collected?

22 A Yes.

23 MR. ROHL: I have no further questions, Your Honor.

24 Thank you.

25 THE COURT: Mr. Haivala?

1 Q So let's just jump to the second page. And I am looking
2 at paragraph -- I believe it's four -- which starts with
3 Item 1. Do you see that?

4 A Yes.

5 Q And I just want your confirmation that, essentially, what
6 you did in this case is you tried to match the bullet that
7 was retrieved from Destiny Rogers to the .45; correct?

8 A I examined the two to see if they were fired -- if it was
9 fired from this admitted pistol.

10 Q And you and Mr. Haivala had some back and forth on class
11 characteristics and that kind of thing. But, when push
12 comes to shove, the result was inconclusive; right?

13 A For the bullet, yes.

14 Q And you're not telling this jury that you can state as a
15 forensic scientist that, yes, I matched those two?

16 A I cannot.

17 Q Okay. And then the same is true with the cartridge case;
18 right?

19 A It is also inconclusive. But it's a different class -- a
20 different category. There was some agreement, but there
21 just wasn't enough to call it an identification.

22 Q So fair for me to say what you're telling this jury right
23 here is that the result was inconclusive?

24 A Yes.

25 Q All of your results were inconclusive?

1 A All of the microscopic comparison results were
2 inconclusive.

3 Q And, if you know, there has been some recent scientific
4 advancement studies in the -- particularly analyzing
5 inconclusive results. Are you familiar with any of that?

6 A I am familiar with some of it, yes.

7 Q And so the studies that have been conducted try to predict
8 with some type of numerical certainty what inconclusive
9 evidence -- or inconclusive results means; right?

10 A I have heard some articles that discuss that.

11 Q And so those articles are peer-reviewed; right?

12 A Some are. I don't know which ones you're referring to.

13 Q And, essentially, what they seem to agree and conclude on
14 is that approximately 80 percent or better of the time
15 there's inconclusive findings, in fact, it's not a match?

16 MR. HAIVALA: Excuse me, Your Honor. I am going to
17 interject an objection at this time. The objection is,
18 Your Honor, this is improper cross-examination.

19 If defense is going to cross-examine this witness with
20 some type of authority or some type of study, he's
21 obligated, as I understand the rules, to disclose what the
22 study is, ask if the Defendant has reviewed the study, and
23 then he can go forward and ask if the -- I said
24 "Defendant." Apologies. Witness has accepted the
25 findings of the study as authority. Thank you.

1 Q How can you tell that?

2 A My initials and date are on the lab barcode that we have
3 on it.

4 Q And this specifically is the shell casing. And the
5 process that you just explained to us in order to
6 determine if there's fingerprints — was that done with
7 regards to State's Exhibit 132?

8 A It was.

9 Q And what did you determine through your process?

10 A I did develop one latent print that was suitable for
11 comparison and identification. I did identify that to the
12 left little finger from Dreau Rogers.

13 Q So first you identify there is a latent print — that
14 there's enough characteristics to compare?

15 A Yes. I'm always looking at the latent prints first for
16 suitability and then I'm looking for those unique
17 identifying characteristics that are needed in order to do
18 a comparison when making an identification.

19 Q And you had Mr. Rogers as a named individual in this case?

20 A Yes.

21 Q So you sought out his fingerprint records?

22 A I did.

23 Q And can you tell us if you were able -- to which finger --
24 you're able to determine which fingerprint was on that
25 piece of exhibit?

1 **MR. ROHL:** Thank you, Your Honor.

2 **CROSS-EXAMINATION**

3 **BY MR. ROHL:**

4 **Q** Is it is Walti or Walti?

5 **A** It's Walti.

6 **Q** Ms. Walti, it's nice to meet you. I think I have,
7 possibly, just one question for you.

8 **A** Okay.

9 **Q** If Mr. Rogers told on-scene law enforcement that he
10 touched the expired cartridge, Item 3, would that be a
11 reasonable explanation as to how his fingerprint got on
12 it?

13 **A** Absolutely.

14 **MR. ROHL:** I have nothing further, Your Honor. Thank you.

15 **THE COURT:** Ms. Harvey, anything further?

16 **MS. HARVEY:** No, Your Honor.

17 **THE COURT:** Is this witness excused and released?

18 **MS. HARVEY:** Yes, Your Honor.

19 **MR. ROHL:** Yes, Your Honor.

20 **THE COURT:** Thank you, ma'am.

21 Members of the jury, we're going to take a recess.
22 It's your duty not to discuss the case amongst yourselves
23 nor should you allow anyone to discuss the case with you
24 nor are you to form or express any opinion about the case
25 until it's finally submitted to you for your

1 Q (By Mr. Rohl, continuing) Okay. So what is that document
2 or that picture of there in front of you? If you just
3 explain it for the record.

4 A It would appear to be taking a close-up photograph of what
5 appears to be bruising to the right thigh and using a
6 scale to measure the size of that bruising.

7 Q Why would you measure the size of the bruising?

8 A Just important to the crime scene investigation as a
9 whole.

10 Q Sure. You testified to different observations you make as
11 an officer; right?

12 A Correct.

13 Q And different injuries you come across in the course of
14 the scope of your work as an officer; right?

15 A Correct.

16 Q You certainly dealt with victims of trauma and assault;
17 right?

18 A Correct.

19 Q And those could be corroborative of that type of thing, as
20 well; fair?

21 A It's fair to say, yeah.

22 Q Spontaneously, I believe you said that Mr. Derrek
23 mentioned that all of his injuries were from
24 methamphetamine abuse; is that correct?

25 A Those aren't the verbatim words that he used. But

- 1 Q Mr. Derrek, if I reverse your name, I've been doing it the
2 whole trial. I apologize in advance.
- 3 A That's okay.
- 4 Q What do you do for a living?
- 5 A I'm a maintenance man at two hotels in Spearfish.
- 6 Q You live in Spearfish?
- 7 A Yes.
- 8 Q How long have you been in Spearfish?
- 9 A My whole life. Since I was 12.
- 10 Q You went to Spearfish High School?
- 11 A Since I was a junior.
- 12 Q What year was that?
- 13 A '94.
- 14 Q Sir, we'll get some things out of the way right away. You
15 are a convicted felon?
- 16 A Yes, sir.
- 17 Q And you also use meth?
- 18 A Yes, sir.
- 19 Q And you are headed to treatment for that meth addiction?
- 20 A Yes.
- 21 Q When do you do the treatment?
- 22 A The 20th of this month.
- 23 Q Where at?
- 24 A Compass Point in Sturgis.
- 25 Q Okay. Do you know Destiny Rogers?

1 agreements, whatever, that he may have with the State.

2 **MR. ROHL:** Understood, Your Honor.

3 **THE COURT:** Let's bring the jury back in.

4 (WHEREUPON, the jurors entered the courtroom.)

5 **THE COURT:** Mr. Haivala, you may continue.

6 **MR. HAIVALA:** Thank you.

7 **Q** (By Mr. Haivala, continuing) Mr. Derrek, let's walk
8 through the day of January 21, 2022. You remember that
9 day?

10 **A** Yes, I do.

11 **Q** Walk me through starting in the early morning hours of the
12 day. Did you have contact with an Alan Reddy?

13 **A** Yes, I did.

14 **Q** What time was that?

15 **A** 5:30 in the morning.

16 **Q** Tell me what the nature of the contact was.

17 **A** Sexual encounter.

18 **Q** And did you at some point that morning go over to Alan
19 Reddy's house?

20 **A** Yes, I did.

21 **Q** Okay. And can you tell me when you got there —
22 approximately what time you got to Alan's house.

23 **A** Around 5:30, I'd say.

24 **Q** And this was after you had several texting messages with
25 him?

1 A Yes, I did.

2 Q About what time was that?

3 A 11:00 in the morning. 10:30.

4 Q All right. Why did you stop there? Strike that. What
5 were you looking for when you went to Dreau Rogers's
6 house?

7 A Well, I was looking for Dreau, because I hadn't seen him
8 in a while or heard from him. It's very odd for me and
9 him to not have contact for that long.

10 Q And did you at that point go look for some oil for your
11 car?

12 A There was some in the breezeway, yes.

13 Q When you stopped at Dreau's house that morning, did you
14 talk to him?

15 A No, I did not.

16 Q Did you see him?

17 A No, I did not.

18 Q Was he at the house?

19 A I assumed he was. Both of his vehicles were there. I
20 didn't know if he was or not.

21 Q Okay. What did you do next?

22 A After I left Dreau's, I went to my friend Ed's house
23 and — which is down by my house on Lower Valley. Talked
24 to him about Dreau. He said he had been there the night
25 before. He had a different phone number for him, so I got

1 that phone number and just kept it, because I had to get
2 ahold of Dreaun that morning. So I held on to it.

3 After I left Ed's, I went up to Walmart, I believe.

4 Q Where is that?

5 A Kind of was just looking around for drugs all day is what
6 I was doing.

7 Q Okay. And I didn't hear that last part. Sorry.

8 A I was looking for drugs all day.

9 Q Did there come a time when you had another contact with
10 Mr. Reddy?

11 A Later that night, yes. Oh, no. There was earlier that
12 day. I borrowed 20 bucks from him.

13 Q Then you went to his house to get the money?

14 A Yes.

15 Q About what time was that?

16 A 2:30, maybe.

17 Q Then did you head to Deadwood?

18 A Yes, I did.

19 Q Why did you go to Deadwood?

20 A I made some food. I had a friend up here that was
21 working, so I brought her some food.

22 Q And you came back from Deadwood about what time?

23 A 6ish at night.

24 Q Okay. And where did you go after you came back from
25 Deadwood?

- 1 A Yes.
- 2 Q After you went to Alan Reddy's house, what did you do?
- 3 A After I went to Alan's?
- 4 Q Yeah.
- 5 A I went home.
- 6 Q Excuse me. Let me rephrase. You said you went to Alan's
- 7 house about 11:30 — excuse me. I misspoke. 11:30,
- 8 11:35.
- 9 A Right.
- 10 Q Did you have your phone with you?
- 11 A Yes, I did.
- 12 Q Then you went into Alan's house?
- 13 A Yes.
- 14 Q When you went into Alan's house and met with him, what did
- 15 you do?
- 16 A He performed oral sex on me and we talked. I guess that's
- 17 that.
- 18 Q About what time did you leave Alan's house?
- 19 A 1:30, 1:20. Somewhere in there.
- 20 Q And what did you do when you went to — left Alan's house?
- 21 A I went home.
- 22 Q And that, again, is the residence at the end of Evans
- 23 Lane?
- 24 A Yes.
- 25 Q And walk through with me, then, the morning — now it's

1 Q This accurately depicts your car?

2 A Yes, it is my car.

3 MR. HAIVALA: Offer 115.

4 MR. ROHL: No objection.

5 THE COURT: Exhibit 115 will be received.

6 Q (By Mr. Haivala, continuing) Did you have a fight with
7 Dreau Rogers on January 21st or 22nd?

8 A No, I did not.

9 Q Okay. And it's been introduced into evidence —

10 MR. ROHL: Mr. Haivala, would you direct your witness not
11 to stare at my client?

12 MR. HAIVALA: I will.

13 MR. ROHL: I really appreciate that.

14 MR. HAIVALA: Mr. Derrek, will you look at me, please?

15 THE WITNESS: Yes.

16 Q (By Mr. Haivala, continuing) Handing you what's been
17 marked Exhibit 107.

18 A That is from my shooting methamphetamine and missing.

19 Q Okay. So was this picture accurately taken of you at the
20 police station on January 22nd?

21 A Yes, it is.

22 Q Okay. And tell me what 107 shows.

23 A It shows me with a big Band-Aid on — right here where I
24 have scars from that from shooting meth. (Indicating.)

25 MR. HAIVALA: May the record reflect that the witness is

1 your body on the morning of January 22nd?

2 **MR. ROHL:** Same objection.

3 **THE COURT:** Overruled.

4 Go ahead and answer.

5 **A** Yes, I did.

6 **Q** (By Mr. Haivala, continuing) And did you have any bruises
7 on the lower end of your body?

8 **A** On my legs, yes, I did.

9 **Q** Can you tell the jury what those bruises were.

10 **A** They were from trying to shoot dope. And the best way to
11 do it, if you can't find a vein, is use a flashlight and
12 try to find a vein somewhere. You end up missing and that
13 blood goes and causes a bruise.

14 **Q** At that time in your addiction, were you shooting up a
15 lot?

16 **A** Yes.

17 **Q** How much were you shooting at the time every day?

18 **A** About a half gram at a time, maybe. Maybe a little less a
19 day. More than a gram easy.

20 **Q** How many separate times would you shoot it up?

21 **A** Three, four. Three, four a day.

22 **Q** And, for the record, what was your drug of choice?

23 **A** Methamphetamine.

24 **Q** Okay. And do you have trouble finding a vein when you
25 shoot up?

1 Q Right,

2 A I have,

3 Q Now, sometime shortly before January 21st, I would say
4 that weekish, you were released from jail; right?

5 A I guess so, yes.

6 Q You were in jail for a grand theft; right?

7 A Yes.

8 Q And that would be File 21-1391?

9 A I don't know what the file number is.

10 Q And you were charged with a Class 5 felony?

11 A Yep.

12 Q And the State —

13 **MR. HAIVALA:** I'm going to object at this point, Your
14 Honor. I think that violates the Court's ruling on 609.

15 **THE COURT:** No. He opened the door on his criminal
16 history. Said he was a felon. So I'm going to allow it.

17 **MR. ROHL:** Thank you, Your Honor.

18 Q (By Mr. Rohl, continuing) And in that case, you were
19 accused of stealing different items; right?

20 A Yes.

21 Q And one of the items that the victim accused you of
22 stealing a gun, wasn't it?

23 A No.

24 Q So in that police report, there's no mention of —

25 A I didn't say that. I didn't get accused of stealing a

- 1 **A** Yes.
- 2 **Q** And your bond was not revoked?
- 3 **A** No.
- 4 **Q** And then, after that, you were charged with two more
- 5 felonies; right?
- 6 **A** Possibly.
- 7 **Q** I don't want to put words in your mouth.
- 8 **A** Yes.
- 9 **Q** What are those felonies?
- 10 **MR. HAIVALA:** Again, relevancy, Your Honor.
- 11 **THE COURT:** Overruled.
- 12 **A** What did you say?
- 13 **Q** (By Mr. Rohl, continuing) What charges?
- 14 **A** Failing to register as a sex offender.
- 15 **Q** And the other one?
- 16 **A** Restrictions on residence within community safety zone.
- 17 **Q** And that's all just since January of 2022; correct?
- 18 **A** That's because of January, 2022.
- 19 **Q** And so you've represented to these folks over here that
- 20 your testimony today has absolutely nothing to do with
- 21 your pending sentencing?
- 22 **A** Not at all, sir.
- 23 **Q** Is your attorney going to ask for probation?
- 24 **A** Wouldn't any attorney? Yes.
- 25 **Q** And you're expecting to get that?

1 A I'm expecting to get whatever the Court hands down. I
2 don't expect anything.

3 Q You testified that you are in the process of going to go
4 to treatment?

5 A Yep.

6 Q Are you under the influence right now?

7 A No.

8 Q Have you ever been diagnosed with any mental health
9 conditions?

10 A Yes.

11 Q Have you ever been diagnosed with schizophrenia?

12 A Yes.

13 Q Do they know that?

14 A Yes.

15 Q Did you advise them of that?

16 A I believe we talked about it at some point maybe.

17 Q Who did you talk about it with?

18 A Possibly just my attorney.

19 Q So you can't say that that table over there knows that?

20 A I don't 100 percent know that, no.

21 Q The day in question — I believe you testified that you
22 started communicating with Mr. Reddy approximately
23 4:30 a.m. on Grindr; right?

24 A Around there, yes.

25 Q The messages would show the time. You wouldn't dispute

- 1 that?
- 2 **A** No.
- 3 **Q** Had you gone to bed?
- 4 **A** When?
- 5 **Q** Before you started communicating with Mr. Reddy.
- 6 **A** That early morning?
- 7 **Q** Yeah.
- 8 **A** I believe so, yeah.
- 9 **Q** What time did you wake up?
- 10 **A** 1:30, 2:00 in the morning.
- 11 **Q** What time did you go to bed?
- 12 **A** I don't know. 10:00, 11:00.
- 13 **Q** So you begin this communication with Mr. Reddy. Had you
- 14 ever met him before?
- 15 **A** No.
- 16 **Q** So if Mr. Reddy indicated you had met a week before, that
- 17 would be incorrect?
- 18 **A** Yes.
- 19 **Q** You went to Dreau's house; right? At about 10:00 or 11:00
- 20 in the morning?
- 21 **A** Yes.
- 22 **Q** Unannounced?
- 23 **A** Yep.
- 24 **Q** And you banged on the back door?
- 25 **A** I knocked.

- 1 Q Same thing with the windows?
- 2 A I knocked.
- 3 Q Let yourself into his garage?
- 4 A No, there's no door. It's a breezeway.
- 5 Q You let yourself into the breezeway?
- 6 A That's the only way to get to the back door.
- 7 Q Helped yourself to some oil?
- 8 A It was my oil. I left it there so he could change the oil
- 9 in his car.
- 10 Q Okay. So you took your oil?
- 11 A Yep.
- 12 Q And then you said you put it in the trash; right?
- 13 A In the front, yes.
- 14 Q You went from Dreau's house to Ed Moore's house; right?
- 15 A Yes.
- 16 Q Because you wanted to get Dreau's phone number?
- 17 A That's not why I went to Ed's. That's just the cause of
- 18 going to Ed's. I got Dreau's phone number.
- 19 Q That is what you told law enforcement; right? You went to
- 20 Ed's to get Dreau's number.
- 21 A No, that's not what I said.
- 22 Q Okay. So you get his number?
- 23 A Yep.
- 24 Q And you're looking for drugs?
- 25 A Yep.

1 Q And you call Dreau at approximately 10:00 p.m.; right?

2 A Yes.

3 Q And there's about a four-minute phone conversation; right?

4 A I don't know how long it is. Didn't seem that long to me.

5 Q Or shorter.

6 And you testified that the content of the phone call
7 was — you're trying to check up on him; right?

8 A Yeah.

9 Q And then you followed that phone call up with a text
10 message; right?

11 A I might have.

12 Q And the content of the text message was we, quote — "we
13 need to meet face to face...ASAP" —

14 A Absolutely.

15 Q — end quote?

16 A Yes.

17 Q And that was at approximately 10:00 p.m.?

18 A Yes.

19 Q And during this process, you continue to be looking for
20 drugs. Where did you find them?

21 A I don't think that's relevant.

22 Q Where did you find them?

23 A A friend's.

24 Q Who?

25 A I'm not saying who I got them from that night. I'm not

- 1 A At some point, yeah. Somebody has.
- 2 Q If I have no reports of that, that would be weird to you?
- 3 A I don't know how that all works.
- 4 Q And same thing for Mr. England. Did Mr. England, to your
- 5 knowledge, get spoken to?
- 6 A I don't know.
- 7 Q And, of course, your kids; right?
- 8 A Yes.
- 9 Q Told your daughter you were going to Dreau's house?
- 10 A Yes.
- 11 Q Said, "I'm leaving. I'm going to Dreau's." Right?
- 12 A Yep.
- 13 Q And did they ever talk to her?
- 14 A I don't believe so.
- 15 Q The phone calls you made after you got home at 1:42 a.m.,
- 16 according to your Grindr messages — you dialed star 67;
- 17 right?
- 18 A Possibly, I could have, yes.
- 19 Q You called that at 1:52 a.m.; right?
- 20 A Star 67? I would have to call someone beyond that. Star
- 21 67 doesn't do anything.
- 22 Q That's a number somebody calls to try to figure out if
- 23 their phone is being tapped by the FBI?
- 24 A No, absolutely not. Star 67 shows when you call them, it
- 25 doesn't show up as your name on their phone.

- 1 Q Oh, so you do know what it is?
- 2 A Star 67, absolutely. It's like star 69.
- 3 Q So you dialed star 67 to shield your number from someone?
- 4 A I must have. I don't know what number it was.
- 5 Q Either do I.
- 6 A Well, then how do you know I dialed star 67?
- 7 Q You dialed star 21 at 1:45 a.m.; right?
- 8 A I don't know. I don't know what that means.
- 9 Q You dialed it.
- 10 A Okay. I don't know what it does.
- 11 Q According to testimony, it's a number that's dialed to try
- 12 to figure out if your phone is being tapped?
- 13 Does that sound like something you would have tried to
- 14 do?
- 15 A Okay. Sounds like a meth paranoia. Yeah, absolutely.
- 16 Q Somebody that's nervous about law enforcement —
- 17 A When you're on meth, absolutely.
- 18 Q And you dialed pound 004; right?
- 19 A I guess.
- 20 Q Same question.
- 21 A I don't know what it's for.
- 22 Q And you dialed that, actually, at 10:18 p.m.; right?
- 23 A 10:18 p.m.?
- 24 Q Yeah.
- 25 A I guess.

1 Q You don't remember, though?

2 A Dialing star -- no, I don't.

3 Q You told law enforcement that -- and I do want you to know

4 I don't mean this to be offensive --

5 A I'm sure you don't.

6 Q I take no position as it relates to sexual -- any of that

7 stuff --

8 MR. HAIVALA: Objection. Defense is testifying -- defense
9 attorney.

10 THE COURT: It is.

11 Q (By Mr. Rohl, continuing) You told law enforcement that
12 you're not gay and you're not bisexual; correct?

13 A I don't believe so, no.

14 Q But you told them when you're on methamphetamine, that
15 changes?

16 A Yes.

17 Q Okay. And so when you're on methamphetamine, you do
18 things that you normally wouldn't do?

19 A Yes, sexually. Not shoot somebody.

20 Q You told law enforcement multiple times that you were
21 using a needle that night; right?

22 A Yes.

23 Q And that you fell asleep next to the needle?

24 A Yes.

25 Q Where did you hide the needle when they searched your

1 house?

2 **A** I don't know that it's relevant.

3 **Q** They never found it?

4 **A** They didn't find a bunch of them.

5 **Q** Did you tell them that?

6 **A** No, why would I do that?

7 **Q** So you were able to successfully hide drugs from their
8 search?

9 **A** A needle.

10 **Q** Multiple needles, you said; right? And so if I suggested
11 that you were able to successfully hide other things, that
12 would be asinine; right?

13 **A** No.

14 **MR. ROHL:** May I have a moment, Your Honor?

15 **THE COURT:** You may.

16 **MR. ROHL:** I think I just have two more, Your Honor.

17 **THE COURT:** Go ahead.

18 **Q** (By Mr. Rohl, continuing) Law enforcement asked you to do
19 a polygraph test and you refused; correct?

20 **A** I originally brought it up to take one.

21 **Q** But you refused to do it?

22 **A** Yes.

23 **MR. HAIVALA:** I am going to object, Your Honor. That's
24 irrelevant.

25 **THE COURT:** Overruled.

1 pistol. I am not going to dig it out. It's already in
2 evidence. It's -- it was one of the -- it was a gun that
3 was found at the murder scene. Have you ever touched a
4 .45 Hi-Point pistol?

5 A No, I have not.

6 Q Would you know how to use it?

7 A I know how to pull a trigger. That's about it.

8 Q Not how to lock and load?

9 A No.

10 Q All right. Question was asked didn't you tell your
11 daughter that you were going to Dreau Rogers's house that
12 night?

13 A Yes.

14 Q About what time was that?

15 A Around 11:15. 11:30.

16 Q Why didn't you tell her you were going to Alan Reddy's
17 house?

18 A Because I don't have very many friends. She wouldn't have
19 understood, "Hey, I'm going out at 11:30 at night to get
20 my dick sucked by some gay guy." If I said, "I'm going to
21 Alan's," she would have questioned it.

22 Q Would you agree it would be embarrassing to tell a
23 16-year-old --

24 A Absolutely, yeah.

25 Q 16-year-old girl you're going to go have sex with a man?

- 1 A Yes.
- 2 Q Have you gotten rid of it?
- 3 A I had to get a new one. It took so long to get it back.
- 4 I got a new one before they got it back to me.
- 5 Q What did you do with the other phone?
- 6 A I think I turned it into the Walmart kiosk for \$2.
- 7 Q This is the phone that you confirmed over and over to law
- 8 enforcement corroborated everything you said; right?
- 9 A Absolutely.
- 10 Q And you got rid of it?
- 11 A No. They had it for two months and they gave it back to
- 12 me. I figured they had everything off of it.
- 13 Q You got rid of a phone that you said exonerated you from a
- 14 shooting?
- 15 A They said they didn't need it anymore, yes. That didn't
- 16 work.
- 17 Q Other question I would like to ask you has to do with,
- 18 specifically, the last time you used.
- 19 A The last time I used?
- 20 Q Yeah.
- 21 A About four days ago.
- 22 Q Where were you?
- 23 A That doesn't matter.
- 24 Q Where were you?
- 25 MR. HAIVALA: Objection. Relevancy.

1 A I didn't have any prior ones. Not in my eyes at that
2 time.

3 Q So your testimony is that you had no prior sexual
4 encounters with Mr. Reddy prior to the night of?

5 A In my eyes, no, I did not.

6 Q You're going to have to explain what you mean by that.

7 A When you're on meth and you're up for so long, that is one
8 big, long day. So early Thursday — late Thursday night
9 to early Friday morning to the night of Friday night to
10 Saturday morning, that is one long day to somebody that's
11 been up that whole time.

12 So did I have prior encounters? To me, no. I said
13 what I meant in that day. To me, that was that day.

14 Q So you had been up for a long time?

15 A At that time, yeah.

16 Q And you had not gone to bed?

17 A I might have caught a nap here and there somewhere.

18 Q The text messages indicate prior sexual encounters?

19 A That morning. Same day.

20 Q And they indicate another meeting around midday?

21 A To borrow 20 bucks.

22 Q And after you left his house, he -- being Mr. Reddy --
23 indicated that he loved the sexual encounter?

24 A From that morning.

25 Q You testified about the difficulty you have with finding

1 fight?

2 **A** No, I didn't. I did not. That wasn't the same time.

3 When I went over to Alan's house unannounced is when I got

4 done being interrogated by the Spearfish PD.

5 **Q** Did you tell Alan Reddy you were in a fight with Dreau?

6 **A** Never.

7 **Q** You never said that?

8 **A** Never said that.

9 **Q** And so if Mr. Reddy said that over seven times to law

10 enforcement, he's making that up?

11 **A** Absolutely or he misunderstood something I said. But I

12 never said that to him, no.

13 **Q** The information that shows where you were that night is

14 exclusively limited to your testimony?

15 **A** No.

16 **Q** I want you not to look at him when you answer those

17 questions. Okay?

18 **MR. HAIVALA:** I object, Your Honor.

19 **THE COURT:** Sustained.

20 **Q** (By Mr. Rohl, continuing) What other information is there?

21 **A** I believe there was FBI pinging.

22 **Q** But that occurred after. There was nothing during the

23 relevant time period that shows where you were at at that

24 time that you're aware of?

25 **A** I don't understand what you're trying to say.

1 Mr. Derrek.

2 A Early morning hours. No, like -- no contact in the early
3 morning hours. And we had contact later on that evening.
4 I was out just in Rapid City hanging out with friends,
5 things like that. And then later --

6 Q I apologize.

7 A Am I speaking too low?

8 Q Yeah. Move in a little bit. The best you can. Terrible
9 acoustics.

10 A Okay. No contact early in the morning. I was hanging out
11 with friends in Rapid City. Just -- I was in -- kind of
12 in between jobs. I was hanging out with friends in Rapid
13 City. Looking for jobs and stuff.

14 We didn't come into contact until later on in the
15 evening. And there was some text messages that we had
16 exchanged saying -- hanging out -- things like that. We
17 didn't come into contact until later in the evening.
18 Closer to midnight.

19 Q Let's take a step back. Okay. Early morning hours of the
20 21st. Not the 22nd, but the 21st.

21 A Oh, before that. Okay. 21st.

22 Q Okay. Did you have contact with Derrek Donovan?

23 A Donovan Derrek?

24 Q Did he come to your trailer house that early morning of
25 the 21st?

1 A No, he did not.

2 Q Okay. So you did not have contact with him?

3 A Hm-mm.

4 Q Okay. And, again, walk me through the day. Did you go to
5 work in Rapid City?

6 A I was — like I said, I was not working. I had left — I
7 had separated from the VA. And I was in between jobs,
8 like, waiting on applications, things like that. And I
9 was not working at the time.

10 Q Okay. And seems to be some confusion. Did you tell law
11 enforcement Donovan Derrek had come over to your house on
12 the morning of the 21st? If you remember.

13 A Morning of the 21st? 22nd was the evening we hung out.
14 21st. I don't recall if I had -- I honestly don't recall
15 if I had told them he had come over, but I don't --

16 Q Let me ask it this way. Maybe this would help you. The
17 homicide -- the murder in this case happened in the early
18 morning hours of January 22nd. Past midnight. So when
19 I'm asking you this question, I'm talking about the day
20 before that happened. That morning before.

21 MR. ROHL: Asked and answered.

22 THE COURT: Overruled.

23 A Okay. So --

24 Q (By Mr. Haivala, continuing) Go ahead.

25 A No, we had never hung out in the morning time. There was

1 no hanging out in the morning the day before it happened.

2 Q Okay. All right. So you had separated from the VA, you
3 said?

4 A Yeah, I had — I quit working at the VA.

5 Q What were you doing at the VA?

6 A I was a psychiatric nurse's assistant.

7 Q Then who did you go work for?

8 A I was not working until I went to work with TSA. And that
9 was in April.

10 Q To clarify that, then, on January 22, 2022, you were
11 unemployed?

12 A Yeah; correct.

13 Q So you went to Rapid City. About what time was that?

14 A Earlier — on the day of the 22nd or the 21st?

15 Q 21st.

16 A 21st, I was — I don't recall any times. I was hanging
17 out with friends. And — yeah. It would have been, like,
18 earlier in the day. Earlier in the day after I got up and
19 stuff. But I was going to Rapid City and hanging out with
20 friends.

21 Q Then after you're in Rapid City hanging out with friends,
22 did you come back to Spearfish, South Dakota, at some
23 point?

24 A Yeah. I came home, probably, later in the evening and was
25 just at home on the evening of the 21st.

1 said "Oh LoL Door to your house." That he was walking out
2 of his door.

3 Q All right. So what time -- approximately what time did he
4 get to your house?

5 A Very shortly after that. Just probably a few minutes
6 after midnight, maybe.

7 Q After the text messages were sent?

8 A Yeah, because he didn't live very far from me. It was a
9 few minutes after that.

10 Q So he's knocking at your door about --

11 A I would say probably around midnight. He was only around
12 five or six blocks away from my house.

13 Q All right. Then, Mr. Reddy, do you have a sexual
14 encounter with Mr. Derrek?

15 A Yes, yeah.

16 Q And then he left after the sexual encounter?

17 A Mm-hmm, yes.

18 Q Can you tell me approximately what time he left? If I
19 gave you the exhibit, would that help you?

20 A Maybe. So it would have been probably -- I would say
21 probably around 1:30 in the morning. Somewhere just
22 before he had arrived home at 1:42 a.m.

23 Q And this is the text message and the exhibit from
24 Mr. Donovan Derrek. What does it say?

25 A He says "Goodnight...thanx and i apologize for not

1 cumming, you were terrific so dont for one second think it
2 was your fault, u went above and beyond..."

3 Q So that was said at 1:42 a.m. on the 22nd?

4 A Correct.

5 Q Now, this is going to get a little embarrassing. I don't
6 mean to embarrass you, sir. But during this sexual
7 encounter, were you able to — let me put it this way.
8 Was Mr. Donovan Derrek able to climax? Do you know what I
9 mean by that term?

10 A Yeah, I know that term. No, he was not.

11 Q Handing you what has been marked previously 61 and 71. Do
12 you recognize those exhibits?

13 A Yes, I do.

14 Q First, this has been admitted into court already. What is
15 71?

16 A 71 is a picture that I had taken at 1:23 a.m. of Donovan's
17 genitalia.

18 Q Donovan's penis?

19 A Correct.

20 Q And that was taken at what time?

21 A 1:23 a.m. on January 22nd.

22 Q Just so I'm getting my timeline straight. He's at your
23 door, I think you testified, ten to 12:00. Somewhere in
24 there.

25 A Ten to 12:00.

1 Q Your cell phone had been taken by the police?

2 A Yes, they had subpoenaed my cell phone. I went there
3 to -- I don't quite remember all of the details of what we
4 talked about. But I just -- I had given him more
5 information about the day after Donovan was released. He
6 stopped by my house to apologize to me for all of --
7 everything that had happened and caught me up to speed,
8 because I had no idea who Dreau or Destiny were. And he
9 said he was sorry and kind of just did, like, a rundown
10 of, like, I guess, that -- of what happened to him. Being
11 arrested and things like that.

12 Q In your statement, do you remember saying something to
13 Detective Fox about Mr. Donovan Derrek being in a fight
14 with Dreau Rogers?

15 A The morning he had come over, he told me that he had had
16 an argument with Dreau and he didn't tell me what it was
17 about. He just said he and Dreau had an argument and that
18 was pretty much all he said about it. I didn't push too
19 many questions. I was upset about the whole thing.

20 Q Did he say when this argument was?

21 A He didn't, no. He didn't say when the argument was. My
22 assumption -- I was thinking it was probably, like, before
23 -- before him and I had met up on the 22nd.

24 Q Okay. So as you stand here today, you made some
25 assumptions as to the date and time is that what you're

1 into an argument.

2 Q And there is no room in your mind to the contrary?

3 A I don't recall if I told them different.

4 Q Okay. So I have a copy of your transcript --

5 A Mm-hmm.

6 Q — from the second interview. Alan Reddy tells Detective
7 Fox, quote, "Him and Dreau got into a physical altercation
8 that day or whatever." Did you say that?

9 A I don't recall saying "physical altercation," but if they
10 say I did, then I must have. But I don't recall saying a
11 "physical altercation."

12 Q Well, that's what you testified to?

13 A Mm-hmm.

14 Q You also said, quote, "I don't know if he said they were
15 at his house or Dreau's house or what." But they said
16 they got into, like, a quote, "physical altercation." Do
17 you see that?

18 A I see it, yes. Like I said, I don't remember if those
19 were the exact words. This was a long time ago.

20 Q Well, these are the exact words.

21 A In my head, I don't remember.

22 Q Detective Fox asks you when you say there was a physical
23 altercation, "Did he go into much detail about it?" Your
24 response "He said it was earlier. Before he had contacted
25 me about hanging out." Right?

1 A Mm-hmm.

2 Q And then, again, you said "We got into it and things got
3 physical"?

4 MR. HAIVALA: Can you give me a page number, please,
5 Counsel?

6 MR. ROHL: Yeah, it's page 5 of his second interview,
7 specifically, line 23.

8 MR. HAIVALA: Thank you.

9 A Okay. I know that was said there and you're showing it to
10 me. But I don't remember those exact words about it being
11 physical.

12 Q (By Mr. Rohl, continuing) You said it again. "And he said
13 they just got physical and Dreau was pissed at him." And
14 that is on page 6, lines 18 through 19.

15 A Okay. I do see it, yes. Like I said, I don't recall
16 those exact words. But he had mentioned an argument. I
17 don't recall exactly if he said they had got physical with
18 each other.

19 Q Well, you testified he said there was no mention of
20 physical.

21 A Correct. I testified at that time. Like I'm saying to
22 you right now, I don't remember exactly saying it was
23 physical.

24 Q Well, I appreciate that. But we're going to keep on
25 working through this here. And then you said it again.

1 "And then he started talking about Dreau. How they got
2 into it and got physical." Right?

3 **A** Mm-hmm.

4 **Q** And that is page 11, lines 11 through 13.

5 I have made a list of statements that you have made
6 candidly that I feel are not accurate. And I am going to
7 confront you with them. And I'm just being —

8 **MR. HAIVALA:** Again, defense is testifying.

9 **THE COURT:** He is. Sustained.

10 **Q** (By Mr. Rohl, continuing) Okay. When law enforcement came
11 to your house, you understood that it was important to be
12 honest with them?

13 **A** Mm-hmm; correct.

14 **Q** Fair? You told law enforcement that you met Donovan
15 online about a week ago?

16 **A** Mm-hmm; correct.

17 **Q** Is that true?

18 **A** Yeah, I had met him that week. Yeah.

19 **Q** So the Grindr messages that are in evidence start on the
20 21st at 4:30 in the morning; right?

21 **A** Yeah, I guess. I didn't — I don't remember the times of
22 the Grindr messages. I mean, we had met that week.

23 **Q** How did you meet him?

24 **A** On Grindr.

25 **Q** Okay. Are there Grindr messages that you deleted?

1 "And then he started talking about Dreau. How they got
2 into it and got physical." Right?

3 A Mm-hmm.

4 Q And that is page 11, lines 11 through 13.

5 I have made a list of statements that you have made
6 candidly that I feel are not accurate. And I am going to
7 confront you with them. And I'm just being —

8 **MR. HAIVALA:** Again, defense is testifying.

9 **THE COURT:** He is. Sustained.

10 Q (By Mr. Rohl, continuing) Okay. When law enforcement came
11 to your house, you understood that it was important to be
12 honest with them?

13 A Mm-hmm; correct.

14 Q Fair? You told law enforcement that you met Donovan
15 online about a week ago?

16 A Mm-hmm; correct.

17 Q Is that true?

18 A Yeah, I had met him that week. Yeah.

19 Q So the Grindr messages that are in evidence start on the
20 21st at 4:30 in the morning; right?

21 A Yeah, I guess. I didn't — I don't remember the times of
22 the Grindr messages. I mean, we had met that week.

23 Q How did you meet him?

24 A On Grindr.

25 Q Okay. Are there Grindr messages that you deleted?

1 A No. I mean, the Grindr app, I assume, eventually deletes
2 them, because they're no longer — they were no longer in
3 there after a while.

4 Q Okay. So according to the Grindr app, you met Donovan on
5 the 21st, as you're being interviewed on the 22nd; right?

6 A Like, I don't remember the exact day on Grindr that I met
7 him.

8 Q But you told law enforcement that you met him online about
9 a week ago?

10 A Correct.

11 Q And it would have been literally yesterday?

12 A Okay. Yeah.

13 Q You told law enforcement that you suspected Donovan was on
14 drugs?

15 A Mm-hmm.

16 Q But you, in fact, knew he was on drugs?

17 A Yeah, I knew he was when I met him. After I saw the marks
18 on his arm.

19 Q Right. But when law enforcement asked you, you told them
20 that you just suspected he was on drugs?

21 A Mm-hmm.

22 Q You didn't tell him you knew he was on drugs; right?

23 A Yeah.

24 Q You didn't tell him that you gave him money to buy drugs?

25 A No, because I never did.

1 specific on it at all? Was it, like, after midnight,
2 before midnight?" What was your response?

3 A "It was after midnight."

4 MR. HAIVALA: Page, please?

5 MR. ROHL: Page 9.

6 Q (By Mr. Rohl, continuing) Right?

7 A Yeah.

8 Q And then in relation to when he left, what did you say?

9 A About ten to 1:00. A quarter to 1:00. It was around
10 there. And then — yeah, I was flabbergasted with
11 everything they told me.

12 Q Well, you were referring to —

13 A And I said I guess my suspicions were right.

14 Q Referring to you pretending to have ignorance about his
15 drug use?

16 A I didn't pretend to have ignorance. I originally
17 suspected when I met him and saw his arms. But I'm not
18 going to just throw that on him and say he was a rampant
19 drug user.

20 Q He told you he was an IV drug user?

21 A Later on, he did. Like, we didn't discuss drugs that
22 night.

23 Q When you met with law enforcement on the 22nd —

24 A Mm-hmm.

25 Q — you knew he was an IV drug user?

- 1 A Mm-hmm. (Peruses document.)
- 2 Q Do you see that green bubble there?
- 3 A Yeah, the one telling him to drive down Evans?
- 4 Q Yeah. Who is telling him to drive down Evans?
- 5 A Me. I am telling him to drive down Evans. It will be on
- 6 the left. Lantern Estates. Where I was living at the
- 7 time.
- 8 Q What time was it?
- 9 A Looks like January 21st at 5:15 a.m.
- 10 Q Does that refresh your recollection about whether or not
- 11 you met up before the night of the 22nd?
- 12 A (Peruses document.) It does not. Because -- I mean, the
- 13 biggest feeling I'm getting about this -- the reason I'm
- 14 not remembering. A lot of our meetings ended up being
- 15 talk. Never meeting in person. This one, I told him
- 16 where to go. I don't recall if he came over on that day.
- 17 Q I'm going to have you look at page 1 now of Exhibit 70, if
- 18 you would be so kind. I want you to look -- what time of
- 19 day is that?
- 20 A That is at 8:18 a.m.
- 21 Q On what day?
- 22 A On January 21st.
- 23 Q And so that would be, like, what, an hour and a half, two
- 24 hours after that Grindr message you just read?
- 25 A Mm-hmm.

- 1 A That's at 11:07.
- 2 Q A.m.?
- 3 A Yes.
- 4 Q You guys exchange texts sexual in nature. I don't want
- 5 you to read those.
- 6 A Mm-hmm.
- 7 Q Okay. Page 9. Yep. What does Donovan tell you right
- 8 there and what time is it?
- 9 A The one on the bottom of page 8 or 9? Sorry.
- 10 Q Don't be sorry. The one on the bottom of page 8 --
- 11 A He says "Im gonna be 100% honest with you.... I still
- 12 shoot meth and it gets me SUPER fucking horny and thats
- 13 when i have the biggest/best orgasms...i dont even
- 14 masturbate sober and i dont let guys suck it if im
- 15 sober...i never share my needles and im clean of
- 16 everything...if u still wanna play with me great, if not i
- 17 completely understand...im telling you this cause im
- 18 playing with it watching my you tube and i could bust it
- 19 if i wanted to but ill save it if u still want it."
- 20 Q What time of day is that?
- 21 A That is at 2:40 p.m. on the 21st.
- 22 Q Okay. What day?
- 23 A On January 21st.
- 24 Q So you have not been interviewed by law enforcement yet;
- 25 correct?

- 1 A Correct, I have not. So he told me, so I knew then.
- 2 Q At this point, it's unambiguous you know this man is an IV
3 meth user?
- 4 A From what he said in this text.
- 5 Q Okay. We'll get to the interview. And — okay. On mine,
6 it's page 11. What does Donovan tell you in that text
7 message and what time is it there?
- 8 A At 3:02 on January 21st — 3:02 p.m. — he says "Im also
9 out of shit and since i cant access my \$ im fucked till
10 tomorrow...i would love nothing more than to do a blast
11 and then go directly to your house and let you have at
12 it!!!!!"
- 13 Q And what do you say back?
- 14 A I said "I'd love that!"
- 15 Q And what do you say after that?
- 16 A The same page?
- 17 Q No, next page.
- 18 A Page 12.
- 19 Q Sorry. Go back to page 11. Pages are just a little bit
20 different here.
- 21 If you recall, do you tell Mr. Derrek — do you ask
22 him if you won't let him — you ask him why he won't let
23 you perform oral sex when he's sober. Do you remember
24 that?
- 25 A Mm-hmm.

1 you about this text.

2 A Mm-hmm.

3 Q When he said he was going to stop by to grab that, you
4 knew he was referring to money -- your money; right?

5 A Mm-hmm.

6 Q And then when he said he was going to run to Deadwood to
7 get it, you knew he was referring to meth; right?

8 A I assumed he was referring to his drug, yeah. On that
9 time here, he actually didn't -- he actually didn't make
10 it and I never gave him money there. I gave him money on
11 a later date. And I did have -- I thought you guys had
12 grabbed those text messages as well. I gave him money on
13 a later date. It was \$20. I never gave him money here at
14 a later time. He ended up not coming by until later that
15 night.

16 Q So when you say you gave him money at a later date, do you
17 mean on the 21st or sometime --

18 A Sometime -- it was after the shooting. After the murder.
19 That's the only time I gave him ever money.

20 Q You're telling us you gave Donovan Derrek money after this
21 happened?

22 A \$20 because he said he didn't have any money to eat and he
23 didn't have anything to get anything to eat or drink and
24 that was later on I gave him money. That was after.

25 Q How many times have you met with him since this happened?

1 **A** Since that happened, a few times after. And those are in
2 my text messages, as well, that you guys have acquired.

3 **Q** Who are "you guys"? I --

4 **A** The police, the Government, whoever.

5 **MR. HAIVALA:** I am going to object. This is getting
6 argumentive.

7 **THE COURT:** All right. You guys are talking over each
8 other horribly. Just ask a question and give an answer.

9 **Q** (By Mr. Rohl, continuing) Does that table right there know
10 that you have met with Donovan Derrek after the shooting
11 occurred?

12 **A** Yes. We talked about it, yes. Because they -- I -- after
13 everybody had taken my phone and seen my text messages, I
14 just talked about everything. And every time I met, I --
15 it is in the text messages that we have met again after
16 that.

17 **Q** Have you guys had or maintained a sexual relationship
18 since this occurred?

19 **A** Yes, a few times. A couple times.

20 **Q** After?

21 **A** Yes.

22 **Q** Would it be fair to say that it's hard to keep track of
23 everything?

24 **A** Not as hard to keep track of everything, no. It wouldn't
25 be fair to say that.

1 **RECROSS-EXAMINATION**2 **BY MR. ROHL:**3 **Q** When we went through your messages in relation to prior
4 meetups -- do you remember that?5 **A** Just a little bit ago when we talked about it? Yeah, yes.6 **Q** And there were messages that seemed to indicate there was
7 a meet-up that you said didn't happen; right?8 **A** Yes. And, like I told you, there were times that we just
9 talked about meeting, but we never did. Many, many times.10 **Q** Sure. But the night of question, that couldn't have
11 happened; right?12 **A** Yeah. On the 21st, we did not meet up, because he didn't
13 end up showing up.14 **Q** Sure.15 **A** And I left to go to Rapid City, like I said.16 **MR. ROHL:** You answered my question. Thank you.17 **THE COURT:** Is he excused and released?18 **MR. ROHL:** He's excused and released from my subpoena,
19 Your Honor.20 **MR. HAIVALA:** He's excused from the State.21 **THE COURT:** Thank you, sir. You're free to go.

22 Counsel, approach, please.

23 (WHEREUPON, an off-the-record bench conference
24 was held.)25 **THE COURT:** Does the State have any more witnesses?

1 **MR. HAIVALA:** Your Honor, after thinking about making a
2 record on an earlier issue of the immunity issue that we
3 talked about earlier, I decided we will not go forward
4 with the record.

5 **THE COURT:** All right. Thank you.

6 Mr. Rohl, you would like to make motions?

7 **MR. ROHL:** I would, Your Honor.

8 **THE COURT:** Please proceed.

9 **MR. ROHL:** Thank you.

10 This motion applies to Count I, Count IA, Count IV,
11 and V. I am going to read this into the record.

12 As this Court knows well, the State is tasked with
13 disproving every single reasonable doubt of guilt in this
14 case.

15 Dreau Rogers presented a third-party perpetrator
16 defense, which has demonstrated the potential culpability
17 of another while simultaneously highlighting the failures
18 of law enforcement to follow rules and procedures with
19 respect to the entirety of investigation.

20 Shortly after Destiny Rogers's death, Dreau Rogers
21 immediately and promptly hailed emergency services to
22 dispatch to his home.

23 Upon arrival, Dreau Rogers clearly and unambiguously
24 articulated who the responsible party was. Law
25 enforcement obtained the aid of SWAT or SRT to apprehend

1 Donovan Derrek and bring him in for questioning and
2 gunshot residue testing.

3 Both Dreau Rogers's and Donovan Derrek's gunshot
4 residue tests yielded positive results.

5 These findings corroborated every single way exactly
6 what Dreau Rogers stated occurred. The results rebut and
7 further incriminate in every way what Donovan Derrek told
8 law enforcement.

9 Gunshot residue. Approximately six months before
10 trial, the State undertook efforts to try and prove that
11 Mr. Derrek's gunshot residue tests were the result of
12 transference. Keyword, "try."

13 The State did not send the gloves at issue in for
14 forensic testing. And as they lay there in evidence,
15 there is absolutely zero forensic testing that has taken
16 place on these gloves.

17 Sure, the State will say, "Well, we didn't have to
18 test them, because we realized this over a year after it
19 had taken place." Doesn't matter. They have the burden.

20 At a minimum, they should have sent the gloves in for
21 testing to at least confirm or deny whether the glove's
22 natural course of use — they could have gunshot residue
23 on them. They didn't. They shouldn't even be allowed to
24 argue transference in the absence of the testing.

25 It is pure and complete speculation by the State to

1 make that argument.

2 A reasonable person could not find -- a reasonable
3 person could find in any way that this set of
4 circumstances in relation to gunshot residue is anything
5 other than exculpatory evidence, plain and simple.

6 Two, cell phone evidence. The entirety of the
7 at-issue cell evidence is another fact upon which
8 reasonable minds could not disagree.

9 The call detail records do not in any way evince guilt
10 of Defendant Dreau Rogers. Those records do not support
11 in any way a finding that Donovan Derrek was not at Dreau
12 Rogers's during the relevant time period shortly before
13 12:48 a.m., January 22nd. No reasonable mind could defer
14 in that regard.

15 Further, law enforcement's violation of law to
16 preserve material evidence is another factor upon which
17 only exculpatory conclusions can reasonably be drawn.

18 The jury was told that the CDR data would objectively
19 show that Donovan Derrek was not at Dreau Rogers's. They
20 did not. They do not.

21 They show that Donovan Derrek called Dreau Rogers
22 after going out of his way to get his number.

23 The CDR records show that Donovan Derrek texted Dreau
24 Rogers at 10ish p.m. Hours before the 911 call was made
25 by Dreau. Quote, "We need to meet face-to-face ASAP," end

1 quote. They show that.

2 Then, finally, they show that Donovan Derrek was
3 dialing code pound 21 at 1:42 a.m. and seeking to learn
4 whether or not the FBI was tracing his phone. That is
5 what the objective CDR records show.

6 Text messages between Alan Reddy and Donovan Derrek
7 regarding sexual encounter number four on the day in
8 question are not indicative of anything.

9 They are representations made by these two guys and
10 their reliability rests exclusively on the credibility of
11 these two. The credibility, which I suggest is only
12 exculpatory evidence after today's testimony.

13 Fact three, DNA evidence. Every single witness who is
14 capable of testifying to it unanimously agreed that
15 evidence collection and the integrity of the evidence was
16 key to this case.

17 Bincy Thankachan, forensic examiner, testified exactly
18 how forensic evidence is to be collected in a way that
19 prevents cross-contamination.

20 The evidence in this case was corrupted to such extent
21 that the State's expert Ashley Bullock was forced to admit
22 on numerous occasions that she didn't understand how
23 evidence was supposed to be collected and if it was
24 collected improperly, the results are meaningless.

25 Based on the testimony received by the jury, no

1 reasonable juror could come to a conclusion that the State
2 has proved beyond a reasonable doubt that Dreau Rogers
3 committed the crimes.

4 Beyond a reasonable doubt means, in this case, that
5 the State must disprove all reasonable possibility that
6 Donovan Derrek committed the crime.

7 How do they do that? I can't tell you that.

8 I can tell you how they don't do it. They don't
9 disprove it with admittedly mishandled DNA evidence. They
10 don't do it by breaking the law, and in conjunction with
11 the statutory violation, losing cell phone evidence, which
12 would further incriminate Mr. Derrek. And, finally, they
13 don't do it by having on the record forensic evidence that
14 further implicates Donovan Derrek as the killer, i.e.,
15 gunshot residue. I know that is not how they do it.
16 Point being, no reasonable juror could find guilt.

17 Thank you.

18 **THE COURT:** And so I'm clear, Mr. Rohl, your judgment of
19 acquittal is referencing Count I, IA, IV, and V; is that
20 correct?

21 **MR. ROHL:** I, IA, II, which is possession of a firearm by
22 a person with a prior drug-related conviction. I believe
23 that count to be in relation to the .45 caliber. I am not
24 making that argument in relation to the .22 and in
25 relation to the ingestion charge, Your Honor.

1 **THE COURT:** Okay. So I, IA, II, IV, and V?

2 **MR. ROHL:** Yes.

3 **THE COURT:** Correct?

4 **MR. ROHL:** Yes, Your Honor.

5 And, for the record, can I actually read in the crimes
6 that I'm referencing?

7 **THE COURT:** Please, please.

8 **MR. ROHL:** Count I, first-degree murder; Count IA,
9 second-degree murder; Count II, possession of a firearm by
10 a person with a prior felony drug-related conviction,
11 .45 caliber; possession of a firearm with an altered
12 serial number, again, .45 caliber; commission of a felony
13 while armed with a firearm, to wit, murder.

14 **THE COURT:** All right. Thank you.

15 Who is making the argument response from the State?

16 **MR. HAIVALA:** I'm sorry?

17 **THE COURT:** Who is responding from the State to the
18 motion?

19 **MR. HAIVALA:** Oh, I will.

20 **THE COURT:** Okay. Please proceed.

21 **MR. HAIVALA:** Your Honor, what Mr. Rohl is making is an
22 argument to the jury, but he's making it to you in the
23 form of a motion to dismiss.

24 I am not going to go through every one of them. He
25 has made his motions. He makes it clear this is his

1 position.

2 However, I will say there's more than enough unrefuted
3 evidence in the file to show that all of these crimes
4 should go to a jury -- alleged crimes -- should go to a
5 jury. The jury should decide that based on the evidence
6 presented.

7 Mr. Rohl brings up things about contamination. He
8 quotes some witnesses, I think out of context, in my
9 opinion, and incorrectly -- I don't mean that
10 disrespectfully -- as to the evidence presented.

11 So, therefore, we think there is more than enough
12 evidence to take this matter to the jury.

13 **THE COURT:** Thank you.

14 Any response?

15 **MR. ROHL:** No, Your Honor.

16 I would rely on my prior submission.

17 **THE COURT:** Thank you.

18 The law requires that in a judgment of acquittal --
19 requests for a judgment of acquittal -- the evidence must
20 show the defendant committed all the elements of the
21 underlying offenses in this case.

22 The test is whether the evidence was sufficient to
23 sustain a conviction.

24 The Court must decide whether after reviewing the
25 evidence in light most favorable to the prosecution that

1 any rational trier of fact could have found the essential
2 elements of the crimes beyond a reasonable doubt.

3 In this case, the Court finds that the State has
4 submitted sufficient evidence on which this jury, who is
5 the trier of fact, could reasonably find Mr. Rogers guilty
6 of the crimes charged.

7 The motion for judgment of acquittal on those counts
8 is denied.

9 **MR. ROHL:** Thank you, Your Honor.

10 **THE COURT:** Since we don't have the jury here, how would
11 you like to proceed, since the State has rested?

12 **MR. HAIVALA:** State rested.

13 **MR. ROHL:** I — I don't think I'm going to call any
14 witnesses, Your Honor. But could I maybe have just a
15 ten-minute opportunity to talk to my client about —

16 **THE COURT:** Of course —

17 **MR. ROHL:** — moving forward?

18 **THE COURT:** Just let me know when you're ready. Thank
19 you.

20 **MR. ROHL:** Could we have access to some privacy?
21 Mr. Rogers and I?

22 **THE COURT:** I assume that can be arranged.

23 **MR. HAIVALA:** Absolutely.

24 (WHEREUPON, a brief recess was taken.)

25 **THE COURT:** Are we ready to bring in the jurors?

1 law of the case.

2 Now, here, the Defendant's not objecting. The State
3 is objecting and they want theirs — I don't think -- it's
4 up to the jury to weigh those things. I think the jury —
5 they must — it's for their sole and exclusive
6 determination whether returning the property to — in this
7 case — the alleged third-party perpetrator without a
8 Court order — what weight that is given on guilt or
9 innocence of Mr. Rogers. That's my position.

10 But what I will do is I'm going to mark yours "State's
11 Proposed Number 1." And I'm going to deny it.

12 **MR. HAIVALA:** Okay.

13 **THE COURT:** The reason is I think that the Court's
14 proposed Instruction Number — it would be 48 — correctly
15 states the law. And when this instruction and all of the
16 instructions are taken as a whole, it correctly states the
17 law of the case.

18 So I'm going to deny. And I'm going to say "See
19 Court's Instruction Number 48." And I'm going to sign my
20 name. Today's the 6th. And I will file this proposed
21 instruction from the State.

22 **MR. HAIVALA:** Thank you, Judge.

23 **MR. ROHL:** Thank you, Judge.

24 One last thing. I just want to make sure that I'm not
25 waiving my spoliation jury instruction requests by

1 agreeing with the Court as to its Instruction 48.

2 **THE COURT:** All right. Should we make a record on that?

3 **MR. ROHL:** Well, the only record I want to make, Your
4 Honor, is that, of course, the case law -- this is in my
5 position -- the case law needs to be addressed. I think
6 that in order to get a spoliation argument, I basically
7 have to prove that law enforcement intentionally
8 mishandled evidence in a crime.

9 I think that, if I prove that, the case should be
10 thrown out. And it's almost impossible the way the law is
11 written to get that instruction.

12 And I just want to preserve my client's ability to
13 make that argument.

14 **THE COURT:** All right. And I'm going to make a record on
15 this. Because the issue is what remedy is available to
16 Mr. Rogers, because the Spearfish Police Department
17 released the undownloaded cellular phone of Donovan
18 Derrek, which is contrary to 23A-37-15. More
19 specifically, what -- whether a due process violation
20 occurred. And, if not, whether a jury instruction about
21 how the jury should deal with the lost evidence is
22 appropriate.

23 And, of course, we've been talking about *State v*
24 *Zephier* or *Zephier*. However you want to pronounce it.

25 But the Supreme Court noted that there were two types

1 of cases involving the constitutionally guaranteed access
2 to evidence that arise under the due process clause of the
3 14th Amendment.

4 The two types are -- the two types of cases are that
5 which the exculpatory value of the undisclosed evidence is
6 known in cases that it's not.

7 The Court further indicates that in cases where the
8 exculpatory value of undisclosed evidence is known is also
9 Brady evidence. And such evidence is exculpatory when it
10 is identifiable and intact and is material to the guilt of
11 the defendant.

12 Supreme Court also said, furthermore, evidence is
13 material if there is a reasonable probability that, had
14 the evidence been disclosed to the defense, the result of
15 a proceeding would have been different.

16 Finally, if the evidence shows exculpatory value, the
17 good faith or bad faith intent of the Government is
18 irrelevant.

19 In this case, the Court finds that the defense has not
20 shown and cannot do so that the evidence on Derrek --
21 Donovan Derrek's phone is exculpatory, and, thus,
22 material, because it is impossible to show that the
23 proceeding would operate any differently than it has
24 operated because what is on the phone is unknown.

25 The evidence on Mr. Derrek's phone could be entirely

1 unhelpful to the defense by showing that Donovan Derrek
2 was not anywhere near the scene of the crime,
3 nevertheless, the evidence on his phone could also show
4 that he was physically present at or near the scene of the
5 crime.

6 The proceeding thus far has not clearly identified
7 where exactly Donovan Derrek was during the period in
8 which it is alleged that Destiny Rogers was shot.

9 Since it cannot be shown that the contents of Derrek's
10 phone is material, let alone exculpatory, because the
11 phone is lost — the information on the phone is lost,
12 really — there is no remedy available here.

13 However, the second line of cases involving due
14 process rights involve where the exculpatory value of
15 undisclosed evidence is not shown.

16 In those situations, it is potentially useful that a
17 defendant must show that law enforcement officers acted in
18 bad faith to establish a due process violation.

19 Here, it could reasonably be argued that the evidence
20 on the alleged third-party perpetrator or cell phone is
21 the most accurate way to prove the physical location of
22 the individual owner of that phone.

23 However, the defense cannot show that the Spearfish
24 Police Department, the State's Attorney's Office, or the
25 Rapid City Police Department engaged in any bad faith.

1 Rather, the State, through the State's Attorney's
2 Office, would have a reason to obtain the data off the
3 phone to further their theory that Donovan Derrek was not
4 the alleged murderer. But, instead, the opposite, which
5 is the opposite of the Defendant's argument.

6 The State has shown that it was negligent in returning
7 the phone to Donovan Derrek because when the phone was
8 returned to the police department with a report indicating
9 that nothing had been downloaded off the phone -- if
10 nothing had been downloaded, the State could not have
11 known the contents and, thus, could not have acted in bad
12 faith to destroy the evidence that was known to be useful
13 to the defendant, i.e., bad faith.

14 It can be argued that the police department from
15 Spearfish engaged in clearly negligent conduct, as found
16 by this Court in this case, by releasing the phone
17 contrary to SDCL 23A-37-15, which, of course, is the
18 notice to the defendant when evidence is going to be
19 released statute.

20 Additionally, the Spearfish Police Department released
21 the phone when they knew or should have known, based upon
22 the report by Rapid City police, that the phone was unable
23 to be downloaded.

24 It was a potentially useful source of evidence for the
25 defense. Thus, it can be said negligence occurred, but it

1 cannot be said that it was done in bad faith.

2 So the remedy of a due process violation is generally
3 a new trial. However, a due process violation did not
4 occur in this case. Therefore, the remedy of a new trial
5 is not appropriate for failure to preserve the content of
6 Donovan Derrek's phone.

7 Nonetheless, the issue turns to whether a jury
8 instruction would be appropriate to remedy the negligent
9 loss of the evidence by the Spearfish Police Department.

10 Jury instructions are sufficient when, as considered
11 as a whole, they correctly state the applicable law and
12 inform the jury.

13 Trial court has the duty to instruct the jury on the
14 law applicable to this case.

15 The jury instruction that has now been proposed by the
16 Defendant has been withdrawn in favor of Court's jury
17 Instruction 48.

18 So I believe Instruction 48 properly states the law to
19 which the Trial Court has a duty to present to the jury
20 under 23A-37-15, which is the notice provision.

21 It is the province of the jury to weigh all of the
22 evidence presented that was properly before it.

23 No objection has been made about the fact that the
24 State made the mistake of failing to provide notice to the
25 jury, rather, it was presented uncontroverted.

1 In other words, both sides agreed it was a mistake,
2 you know? That the evidence was lost because it was a
3 mistake.

4 The State attempted to rehabilitate their case and had
5 the opportunity effectively to show how such conduct
6 should not have an affect upon the decision whether the
7 defense had the exact same inverse opportunity.

8 The jury, again, must weigh the evidence presented,
9 including the mistake by the State, meaning the facts that
10 the jury must find are true.

11 And, also — and I want to say it was *Engesser*, but
12 I'm not sure. But they — the Court in *Engesser* said bad
13 faith is not simply bad judgment or negligence. Rather,
14 it implies the conscious doing of a wrong because of a
15 dishonest purpose and that is not the evidence in this
16 case.

17 Do you want to make a record, Mr. Rohl?

18 **MR. ROHL:** I mean, of course, the Court made a record,
19 which was very good, because you're a very good judge.

20 I agree with you that that is the status of the law
21 right now. I briefed this issue. I would incorporate my
22 brief into the objection that I would like to preserve.
23 So, if necessary, I can take a run at trying to explain
24 why I think the law should be modified.

25 The jury instruction — I mean, the way that the law

1 is written, the Court essentially has to find bad faith.
2 And then the proposed jury instruction says "Well, if you
3 find bad faith, it shouldn't even be a question for the
4 jury, then, about bad faith." Because the Court has to
5 make that expressed finding before they even give the jury
6 the option.

7 And that's what I would like to be able to argue
8 upstairs, if necessary.

9 **THE COURT:** Right. And I'll give you a chance,
10 Mr. Haivala.

11 **MR. HAIVALA:** Sure.

12 **THE COURT:** If we have a finding of bad faith here, we
13 probably wouldn't be sitting here today.

14 **MR. ROHL:** Right.

15 **THE COURT:** Because it would have been a mistrial. In
16 other words, new trial, as the *Zephier* court talked about.

17 The other thing that the *Zephier* decision did not
18 address was whether or not the trial court made a finding
19 at all. He — I think the words was the trial court was
20 concerned about giving the guns back the day of the
21 incident. And later on, it was discovered that the
22 state's attorney told the officer, "Yeah, it's okay. Give
23 the guns back."

24 **MR. ROHL:** Go ahead.

25 **THE COURT:** I'm not even sure if *Zephier* was arrested at

1 that point. Could have been. I'm not sure if there was
2 notice to be given to anybody because the co-defendant
3 took off and they had to go try to find him.

4 So I agree to some extent with Mr. Rohl. There's no
5 finding in that case of negligence or bad faith. There
6 were concerns by the judge.

7 The judge, however, did give this instruction, which
8 is now 48, and let the jury decide whether it has an
9 effect on the guilt or innocence, in this case, of
10 Mr. Rogers.

11 Any record?

12 **MR. HAIVALA:** Just thinking this through, Judge. I don't
13 want to violate any type of order or instructions.

14 The Court is not finding bad faith or good faith or
15 anything like that?

16 **THE COURT:** I found no bad faith. I found negligence.

17 **MR. HAIVALA:** So given the finding of the Court — where
18 I'm going with it when I do my closing argument — I don't
19 think — or can I say "The Court has found no bad faith
20 and would ask the jury to consider it"? That's where I'm
21 going.

22 I don't want to run that tightrope of saying something
23 like that and Mr. Rohl will ask for a mistrial.

24 **THE COURT:** This case, a big issue — one of the biggest
25 issues that has been raised in this case is that the cell

1 throughout my phone."

2 In addition, you heard from Detective Almeida from
3 Rapid City who had a chance to go through all the
4 downloads. He gave his opinion on where Donovan was
5 during that fateful time.

6 He was asked on the stand "Where was Donovan at
7 12:48?" Obvious. He was over at Alan's house.

8 The FBI — FBI Officer Sean Kennedy testified that he
9 took what information was available off of Donovan's
10 CDR — Donovan's call detail records — and he pinpointed
11 that arc. He used the cell phone towers to determine
12 where Donovan was during that time. Putting him nowhere
13 near the Rogers's residence, but over by his house, over
14 by Alan's house.

15 Now, is there a gap in there? I'll give you. There's
16 a gap, because he wasn't texting during that time. I
17 submit to you that the witnesses testified what was going
18 on during that time gap. Why there wasn't any texting.
19 They were together, so they weren't texting with each
20 other anymore.

21 Would it be nice to have had Donovan's phone to
22 further corroborate his story? It would have been nice.
23 Would that have yielded any difference in the outcome?
24 We're not sure. We don't know what evidence.

25 The witnesses said — Detective Almeida wasn't even

1 able to get to crack his phone. So if he doesn't have the
2 technology to crack Donovan's phone, what would be
3 available? We didn't hear any testimony about where any
4 of the other individuals were; that there was GPS that can
5 follow a map that says everywhere anyone was that day.
6 Everybody's hoping — they're all wishing that was
7 available.

8 There was the next best thing. They had the mirror
9 images of Donovan's messages on Alan's phone. They had
10 those.

11 Now, law enforcement told you their bad. They
12 apologized. They should not have done that. But was that
13 an evidence — was that a piece of evidence of a crime?
14 It wasn't evidence of a crime. It was argued to be
15 evidence of an alibi. Evidence of not having committed a
16 crime.

17 When they inadvertently thought that they had had that
18 information, it had been downloaded. They felt bad for
19 Alan too. They already had all of Alan's information.
20 They returned his phone. They had these gentlemen's
21 phones who had done nothing wrong and they had their
22 phones for two months.

23 Should they have done it? No. They returned the
24 phones because they felt bad, because Alan specifically
25 said he was harping on law enforcement. He wanted his

1 remember, when he does that, he doesn't know what's going
2 to come back. As Mr. Rohl pointed out, it could be
3 exculpatory. It could be used by the State.

4 Big thing to note is Collin Smith doesn't know. All
5 he knows is "I've got to try to do some justice here, so
6 I'm sending to the FBI. Give me some location. You tell
7 me, Sean Kennedy." So he does. He sends it out to
8 Portland to Special Agent Kennedy.

9 You heard him testify. It's interesting that defense
10 in closing wants to say, "Well, you know, Sean Kennedy --
11 there's a gap there." But remember what Sean Kennedy
12 said. He said, "I can't ignore the text messages. And in
13 my opinion, the phone of Donovan Derrek was not at the
14 crime scene at the time the murder was committed."

15 Again, go off your memory. Don't trust mine. Okay.

16 So, yes, was there a mistake made that this man made?
17 Yes. But what they tried to do is rectify the problem.

18 The other thing that Mr. Rohl did not bring up -- it
19 kind of irritated me at the time. But I kind of thought
20 through it.

21 Remember he said that -- and I'm, again,
22 paraphrasing -- the police broke the law again. Broke the
23 law again? Yeah, mandatory reporting. Didn't report
24 Donovan Derrek to the Department of Social Services. You
25 all remember that?

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30588

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DREAU LESTER ROGERS,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHAEL W. DAY
CIRCUIT COURT JUDGE

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Notice of Appeal filed January 8, 2024

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Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Appellant, Dreau Lester Rogers, is referred to as “Rogers.” Appellee, the State of South Dakota, is referred to as “State.”

References to documents are designated as follows:

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JURISDICTIONAL STATEMENT

Rogers appeals the Judgment of Conviction entered by the Honorable Michael W. Day, Circuit Court Judge, Fourth Judicial Circuit, on January 3, 2024. SR 1556-60. Rogers filed his Notice of Appeal on

January 8, 2024. SR 1596. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE CIRCUIT COURT PROPERLY DENIED ROGERS'S MOTION FOR JUDGMENT OF ACQUITTAL?

The circuit court denied Rogers's motion for judgment of acquittal finding there was sufficient evidence presented at trial for the jury to find Rogers guilty.

State v. Ahmed, 2022 S.D. 20, 973 N.W.2d 217

State v. Bolden, 2024 S.D. 22, 6 N.W.3d 238

State v. Seidel, 2020 S.D. 73, 953 N.W.2d 301

II

WHETHER THE CIRCUIT COURT PROPERLY DENIED ROGERS'S REQUEST FOR A SPOILIATION JURY INSTRUCTION?

The circuit court denied Rogers's request for a spoliation jury instruction because the contents of the phone are unknown, so Rogers could not show that the phone's contents would have been material or exculpatory.

State v. Bousum, 2003 S.D. 58, 663 N.W.2d 257

State v. Engesser, 2003 S.D. 47, 661 N.W.2d 739

State v. Mulligan, 2007 S.D. 67, 736 N.W.2d 808

III

WHETHER ROGERS'S DUE PROCESS RIGHTS WERE VIOLATED?

The circuit court found Rogers's due process rights were not violated because law enforcement acted negligently but not

in bad faith when they returned Donovan Derrek's phone without an extraction.

Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)

State v. Jackson, 2020 S.D. 53, 949 N.W.2d 395

State v. Schweitzer, 2021 N.D. 109, 961 N.W.2d 310

State v. Zephier, 2020 S.D. 54, 949 N.W.2d 560

STATEMENT OF THE CASE

The Lawrence County Grand Jury indicted Rogers on the following:

- Count 1: First-Degree Murder, a Class A felony, contrary to SDCL 22-16-4, or in the alternative;
- Count 1A: Second-Degree Murder, a Class B felony, contrary to SDCL 22-16-7;
- Count 2: Possession of a Firearm by a Person with a Prior Felony, a Class 6 felony, contrary to SDCL 22-14-15.1;
- Count 3: Possession of a Firearm by a Person with a Prior Felony Drug Conviction, a Class 6 felony, contrary to SDCL 22-14-15.1;
- Count 4: Possession of a Firearm with Altered Serial Number, a Class 6 felony, contrary to SDCL 22-14-5;
- Count 5: Commission of a Felony Armed with a Firearm, a Class 2 felony, contrary to SDCL 22-14-12;
- Count 6: Commission of a Felony Armed with a Firearm, a Class 2 felony, contrary to SDCL 22-14-12;
- Count 7: Possession of a Controlled Substance (Methamphetamine), a Class 5 felony, contrary to SDCL 22-42-5 and 34-20B;
- Count 8: Possession of More Than Five Grams of Methamphetamine with the Intent to Distribute, a Class 3 felony, contrary to SDCL 22-42-4.3 and 34-20B-16(6);
- Count 8A: Possession of a Controlled Substance (Methamphetamine) with the Intent to Distribute, a Class 4 felony, contrary to SDCL 22-42-2 and 34-20B-14(10);
- Count 9: Possession of a Controlled Substance (Clonazepam), a Class 5 felony, contrary to SDCL 22-42-5 and 34-20B;

- Count 10: Ingestion of a Controlled Substance (Methamphetamine), a Class 5 felony, contrary to SDCL 32-42-5.1 and 34-20B;
- Count 11: Possession of a Controlled Substance (Amphetamine), a Class 5 felony, contrary to SDCL 22-42-5 and 34-20B.

SR 131-34. The State also filed a Part II Information, alleging four prior felony convictions. SR 7-8. Upon Rogers's motion, the circuit court severed counts 6, 7, 8, 9, and 11. SR 457.

The State filed a Motion in Limine asking Rogers to disclose any third-party perpetrator evidence before trial. SR 497-98. In his response to the motion, Rogers disclosed Donovan Derrek as the third-party perpetrator. SR 509-11. The circuit court held a hearing on the matter and determined evidence of Derrek being the third-party perpetrator was admissible under SDCL 19-19-401 and 19-19-403. SR 524-26.

A two-week jury trial commenced on November 27, 2023. During the trial, Rogers filed a Brief in Support of Due Process Violation Dismissal - Brady Violation. SR 973-79. Rogers argued his case should be dismissed, in part, because law enforcement gave Derrek his phone back without the data being properly extracted. *Id.* The circuit court denied Rogers's motion and found law enforcement did not act in bad faith when they returned Derrek's phone. JT 578.

The jury found Rogers guilty of:

- Count 1A: Second-Degree Murder;
- Count 2: Possession of a Firearm (.45 caliber pistol) by a Person with a Prior Drug Felony;
- Count 3: Possession of a Firearm (.22 caliber pistol) by a Person with a Prior Drug Felony;

- Count 4: Possession of a Firearm (.45 caliber pistol) with Altered Serial Number;
- Count 5: Commission of a Felony while Armed with a Firearm;
- Count 10: Unauthorized Ingestion of a Controlled Substance

SR 1381-82. The circuit court sentenced Rogers to life in prison for his Second-Degree Murder conviction, two years in prison for each of the gun related offenses, and five years in prison for his drug related conviction. SR 1557-60. Each of the sentences were ordered to run consecutive to one another. *Id.*

STATEMENT OF FACTS

At 12:48 a.m., on January 22, 2022, Rogers called 911 asking for an ambulance at 713 North Saint Joe Street in Spearfish. JT 293, EX 1. He refused to give the dispatcher any additional information, and instead he said he would provide more details when help arrived. JT 294, EX 1. During the call to dispatch, Rogers did not ask for police assistance. JT 294.

Officer Hunter Bradley¹ heard the 911 request for an ambulance and responded to the location. JT 300. When he arrived, he went inside the residence and saw a woman, later identified as Destiny Rogers,² laying on the living room floor, motionless. JT 301. Destiny had a small amount of blood near her upper arm and was not breathing. JT 301. Rogers told Bradley he attempted CPR, but when Bradley began

¹ Bradley worked for the Spearfish Police Department. JT 299.

² Rogers and Destiny were married. JT 328.

compressions it felt like compressions had not been done.³ JT 303. Destiny was transported to the hospital where she was declared dead. JT 310, 329.

Rogers told Bradley that Donovan Derrek⁴ came over to the house and Derrek and Rogers fought. JT 304. Rogers claimed to hear a noise, and saw Destiny fall to the ground.⁵ JT 304. Derrek left and that is when Rogers called for help. JT 304. Rogers did not know where Derrek was going but said he left in a Mazda. JT 305. While at the house, Bradley noticed Rogers was sweating and out of breath, despite it being cold outside. JT 315.

Rogers told law enforcement that Derrek came over and the two were fighting about Derrek “creeping”⁶ on Destiny and then the fight progressed into an argument about Rogers not wanting to work with Derrek anymore. JT 325-26. Rogers claimed he and Destiny were in the living room and Derrek was standing by the doorway. JT 326. Rogers said Derrek used a pistol and was trying to shoot him, but he missed and hit Destiny. JT 326, 328. Rogers also told Bradley that he had found a .45 caliber shell casing on the floor by the couch so he had

³ Typically, when someone performs compressions for the first time on an individual, that person can feel the cartilage and ribs popping under their hands. JT 303-04. Bradley felt the popping when he started compressions on Destiny. *Id.*

⁴ Derrek and Rogers had been friends since 2003. JT 438.

⁵ Rogers told officers Destiny had been sitting on the couch when she got shot. JT 418.

⁶ Officers thought “creeping” in the context of the conversation meant “unwanted attention.” JT 326.

picked it up. JT 328. Rogers said the shell casing smelled like gun powder so he put it back where he found it. *Id.*

While searching the residence, officers found two firearms: a .45 caliber semiautomatic handgun, located under the wooden landing in the backyard, and a .22 revolver, found in the dresser. JT 892, 969. Also found at the residence was a box with a bag of .45 caliber bullets. JT 1115-18, EX 52-54.

Law enforcement transported Rogers to the law enforcement center for questioning. JT 311. At the time, officers did not believe Rogers was a suspect; instead, he was questioned merely to determine what happened that night to Destiny. JT 311.

Detective Sergeant Steve Hoffman⁷ interviewed Rogers three times that night. Over the course of the interviews, Rogers's story changed. First, he said Derrek was standing by the door and Destiny was on the couch when Derrek shot her. JT 418. Rogers said Derrek did not typically carry a gun and he did not see Derrek pull the gun. JT 420. But in a later interview, Rogers said he watched Derrek pull the gun out of his coat pocket. JT 429.

Rogers said he had suspicions that Derrek and Destiny were together. JT 414. He claimed he and Destiny did not fight that night. JT 429. They had been together for ten years, and recently got back together after some time apart. JT 429. Rogers also told Hoffman he did

⁷ Hoffman worked for the Spearfish Police Department. JT 399.

not have any guns or ammunition at his residence. JT 420. Rogers said that after the shooting, Derrek left the house and went down the steps to the left of the carport on the south side of the house. JT 414.

The Special Response Team (SRT)⁸ was called in to assist in the apprehension of Derrek at his home. JT 534. The SRT was told there was a homicide earlier that morning and Derrek was a suspect. JT 534. The SRT believed there were two children present in the home. JT 534. Detective Chad Sayles,⁹ as part of the SRT, arrested Derrek. JT 534.

Hoffman interviewed Derrek, along with Detective Shawn Fox.¹⁰ JT 436. Derrek told the officers he couldn't believe SWAT was used for a dope¹¹ offense. JT 436. Hoffman and Fox believed Derrek knew why they were questioning him, so they did not initially tell him about Destiny's murder. JT 437. When asked where he was the previous night, Derrek said he was with Alan Reddy between 11:30 p.m. and 1:30 a.m. JT 438, 440. Derrek provided Reddy's address and told officers his phone would have his location for that night. JT 440, 680.

After interviewing Derrek, Hoffman and Fox went to Reddy's home. JT 682. Reddy told the officers he met Derrek on the dating app, Grindr. JT 485, 682. He said the two were together the previous night and that he had messages on his phone from Derrek. JT 683. At 11:53 p.m., the

⁸ SRT was described as similar to SWAT. JT 529.

⁹ Sayles worked for the Rapid City Police Department. JT 528.

¹⁰ Fox is employed with the Spearfish Police Department. JT 673.

¹¹ Dope referred to methamphetamine. JT 436.

previous night, Derrek sent Reddy a message that said he was “walking out the door.”¹² JT 686, EX 60. Then at 1:42 a.m., Derrek sent Reddy a message thanking him for the evening and telling him goodnight. JT 686, EX 60. Reddy also had an explicit photograph of Derrek’s penis he admitted to taking while they were together. JT 683. The metadata for the photograph showed the picture was taken at 1:23 a.m. JT 685.

Because of his alibi, Derrek was no longer deemed a suspect in the case. JT 499. Officers interviewed Rogers a fourth time. JT 446. During this interview, Rogers changed Derrek’s location in the house. JT 447. This time rather than placing Derrek by the door, he placed Derrek closer, stating he was where the kitchen linoleum met the living room carpet. JT 447. Rogers also told Hoffman he’s seen Derrek with a gun before. In fact, he claimed Derrek tried selling him three firearms in the past. JT 448.

During the interview, Hoffman received notification that the .45 caliber gun had been found at Rogers’s home. JT 447. When he confronted Rogers about the gun, Rogers said his DNA would be on the weapon, unless it had already been wiped clean. JT 448. He claimed he touched the firearm when Derrek showed it to him about a month ago. JT 448. He admitted taking the gun apart. JT 448. Rogers also claimed Derrek was wearing gloves that night. JT 449, EX 19.

¹² Throughout the night, leading up to this message, the two discussed meeting up at Reddy’s house. EX 60.

Forensic analysis showed the bullet recovered from Destiny matched the .45 caliber gun found at the scene. JT 1069. And there was a latent fingerprint from Rogers on the shell casing found at the scene. JT 1069. Rogers's DNA was on the handgun as well as on bullets. JT 1017. Derrek was excluded as a DNA contributor on the spent shell casing and the data was too complex to determine whether his DNA was on the gun. JT 1010, 1016.

As part of the investigation, Fox also reviewed surveillance footage from Juneks Incorporated and Common Cents, both located in Spearfish.¹³ The video from Juneks showed the intersection of Saint Joe and West Jackson Boulevard. JT 696. Fox was looking for Derrek's Mazda that Rogers claimed he was driving. JT 698. Fox reviewed the footage from around the time¹⁴ of the 911 call and never saw a Mazda¹⁵ drive by. JT 700.

While reviewing the video from Common Cents, Fox saw Destiny arrive at the store around 9:00 a.m. and leave around 10:00 a.m. the day before. JT 703. She went in and out of the store several times. JT 704. Carolyn Niemi, a Common Cents' employee said Destiny got a call while she was in the store. JT 1202. Destiny put the call on speaker phone

¹³ Fox spoke with business owners near Rogers's home on Saint Joe. JT 693.

¹⁴ Fox reviewed the surveillance video, starting at more than twenty minutes before the 911 call. JT 702.

¹⁵ Fox did see law enforcement drive by in response to the 911 call. JT 699.

and Niemi recognized the voice on the other end as Rogers's. JT 1202. Destiny told Rogers his attitude wasn't right, and she would not be going to Rapid City with him later to get her car. JT 1202. Rogers showed up at Common Cents around 9:30 a.m. JT 704. He spoke with a store employee, then got back in his car. JT 704. Destiny went to Rogers's vehicle to speak to him; she went back into the store and Rogers left. JT 704.

Rogers sent Destiny messages on Facebook on January 21, 2022, at 4:26 p.m. JT 778, EX 126. He sent five messages in a row that went unanswered: "Hy I'm still in town baby[.] Where u at? This if fucking stupid. U blocked me so I guess ur sure about ur decision? I will drive by in 8 minutes if ur not at ur house I will leave and never contact you again my lovely wife." EX 126. He followed up the messages by calling her at 4:50 p.m. *Id.* Destiny did not answer the phone call. *Id.*

Law enforcement arrested Rogers in connection with Destiny's death. SR 1.

ARGUMENT

I

THE CIRCUIT COURT PROPERLY DENIED ROGERS'S MOTION FOR JUDGMENT OF ACQUITTAL.

A. Background.

Rogers argues there was insufficient evidence to convict him of counts 1A, 2, 4, and 5. AB 9. He relies on "five facts" he believes give

reasonable doubt sufficient to acquit him of his convictions. AB 9. But whether some amount of alleged reasonable doubt may have been cast for the jurors is not the same question as whether there was enough evidence to send the charges to the jury for consideration. Rogers's arguments are not facts, and they skirt around the standard of review applicable to this issue. In the end, the State presented sufficient evidence to support Rogers's convictions.

B. Standard of Review.

This Court reviews the denial of a motion for judgment of acquittal de novo. *State v. Bolden*, 2024 S.D. 22, ¶ 39, 6 N.W.3d 238, 246-47 (citing *State v. Seidel*, 2020 S.D. 73, ¶ 32, 953 N.W.2d 301, 313). “A motion for a judgment of acquittal attacks the sufficiency of the evidence.” *Id.* “When reviewing the sufficiency of the evidence, [this] Court considers ‘whether there is evidence in the record, which if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt.’” *State v. Ahmed*, 2022 S.D. 20, ¶ 14, 973 N.W.2d 217, 221 (quoting *State v. Wolf*, 2020 S.D. 15, ¶ 13, 941 N.W.2d 216, 220). This Court “accepts the evidence and the most favorable inferences that can be fairly drawn from it that support the verdict.” *Id.* “This Court does not ‘resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence on appeal.’” *Id.* Further, a “conviction may be supported by circumstantial evidence even when all the elements of the crime are established

circumstantially.” *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342 (citing *State v. Shaw*, 2005 S.D. 105, ¶ 45, 705 N.W.2d 620, 633).

C. The Circuit Court Properly Denied Rogers's Motion for Judgment of Acquittal Because There was Sufficient Evidence Presented at Trial to Support Rogers's Conviction for Second-Degree Murder.

Rogers's theme throughout trial was that it would be impossible for a jury to convict him based on five things:

1. The police broke the law during the investigation.
2. The police gave away material evidence.
3. The police contaminated important forensic evidence.
4. The third-party perpetrator's alibi was unquestionably weak.
5. There were material omissions of evidence.

See generally JT. Rogers carried that theme throughout his brief. AB 8-22. But the issues he raises go to the credibility and weight of the evidence. And this Court does not “resolve conflicts in the evidence, assess the credibility of witnesses, or evaluate the weight of the evidence.” *Bolden*, 2024 S.D. 22, ¶ 39, 6 N.W.3d at 247 (quoting *Seidel*, 2020 S.D. 73, ¶ 32, 953 N.W.2d at 313).

Rogers argues law enforcement broke the law during the investigation by returning Derrek's phone without notifying Rogers.¹⁶ SDCL 23A-37-14 and -15, require law enforcement to notify the defendant before returning potentially material evidence. Not notifying Rogers before returning Derrek's phone does not mean the State did not present sufficient evidence to support Rogers's conviction at trial.

¹⁶ This evidentiary issue is discussed more in depth in Issues II and III of this brief.

Rogers was given ample opportunity to question Hoffman about the improper disposal of Derrek's phone. JT 470-83. Hoffman admitted that he did not follow the statutory requirements before returning Derrek's phone. JT 470-71. As for the materiality of Derrek's phone, Rogers can only speculate what the phone's contents might have revealed. But again, Rogers was able to ask witnesses what data could be extracted from Derrek's phone and what information might be learned in terms of his location. JT 660-65. Ultimately, it was up to the jury to determine how much weight to give Hoffman's testimony, the cell phone data (or lack thereof), and to determine witnesses' credibility.

Throughout trial, Rogers questioned law enforcement's handling of evidence. He spent a lot of time on proper procedures to follow in the collection of evidence, photographing evidence, and the avoidance of cross-contamination. *See* JT 373-74, 376, 380-81, 523, 857-58, 859, 871, 888, 897-98, 918, 919, 922, 924, 926, 933, 936, 941, 942, 964, 967, 970, 999-1000, 1019; EX G, H. Rogers questioned several witnesses about proper procedure and if it was followed throughout the investigation. One officer admitted to transferring gunshot residue from his shooting gloves onto Derrek when he placed Derrek in handcuffs. JT 583. But Rogers's attempts to cast doubt on the handling of evidence does not justify the trial court's decision to grant his motion for judgment of acquittal.

Rogers also attacked the credibility of Derrek and Reddy's

testimony. During trial he pointed out inconsistencies in Reddy's interviews with law enforcement, inconsistencies in the timeline of when Reddy and Derrek were together and challenged Derrek's location at the time of the murder. JT 484, 659-65, 715-18. But again, this was an issue for the jury to determine: whether they believed Derrek and Reddy were together at the time of the murder.

Ultimately, Rogers's claims are questions for the factfinder to resolve. When determining the sufficiency of the evidence, this Court views the evidence in a light most favorable to the State. The question is whether there was sufficient evidence for a jury to find Rogers guilty. The State presented ample evidence that Rogers shot and killed his wife.

Second-Degree Murder

For the jury to convict Rogers of Second-Degree Murder, the State needed to prove: 1. Rogers caused the death of Destiny, 2. He did so by an act imminently dangerous to others, evincing a depraved mind, without regard for life, 3. He acted without the design to effect the death, and 4. The killing was not excusable or justifiable. SDCL 22-16-7. At trial the State presented ample evidence for the jury to convict Rogers of second-degree murder.

Viewing the evidence in the light most favorable to the verdict, it was not unreasonable for the jury to determine Rogers was Destiny's killer. Right after the shooting, when Rogers called 911, he only requested an ambulance; he never requested help from law enforcement

to find his wife's alleged murderer. JT 294, EX 1. He refused to tell dispatch what happened, just insisting on needing an ambulance. JT 294, EX 1. When Bradley arrived, Rogers told him he tried CPR. JT 303. But when Bradley started compressions, he felt the bones and cartilage popping, which typically occurs when compressions are first administered. JT 303.

Throughout the investigation, Rogers was adamant that Derrek shot Destiny, but Derrek had an alibi; he was with Reddy. JT 438, 440. Not only did Reddy confirm Derrek was with him at the time of the murder, but there were messages between Derrek and Reddy about Derrek going to Reddy's house that night. JT 683, 686; EX 60. After their rendezvous, Derrek sent Reddy a message when he got home, thanking him for the evening. *Id.* Reddy also had a photograph he took of Derrek's genitals, that was taken at 1:23 a.m., which is during the timeframe Reddy and Derrek said they were together. JT 438, 686.

As for the physical evidence, forensic evidence showed Rogers's DNA on the gun and bullet, and his fingerprint was on the shell casing recovered at the scene. JT 1017, 1069. Derrek was excluded as a DNA contributor on the spent shell casing, and it was undetermined if his DNA was on the gun. JT 1010, 1016. Officers checked the surveillance footage on the route Derrek would have most likely taken to get from Rogers's residence to his home. Officers did not see Derrek's Mazda drive by during the timeframe of the murder. JT 700.

As for motive, Rogers and Destiny were spotted fighting earlier that day. Niemi, the clerk from Common Cents, said she overheard the two arguing on the phone. JT 1202. Destiny told Rogers he had an attitude and she would not be going with him to Rapid City. *Id.* Then, Rogers arrived at the store and the two spoke in his car, but Destiny did not leave with him. JT 1203. Surveillance footage from that day confirmed Niemi's observations of the encounter. EX 65.

The State also presented evidence that Rogers sent threatening text messages to Destiny. EX 7. The messages read:

Im gonna fucking kill u. I hate u and I wanna make u feel the same as I do u little bitch. I wanna punch u in the fucking face intel all ur teeth are in ur stomach. U better watch ur fucking self cause I sware im gonna get u bitch. I hope u know u hurt me and im tierd of hurting I think beating ur fucking face in is the only thing that's gonna make u stop hurting everyone around u. I wanna put u in the ground where u belong. Is that crazy enough for u yet. Do u need me to actually do that shit to get my point across. I can be that guy if u need.¹⁷

EX 7, JT 1196-97. Rogers also sent Destiny messages the day before he killed her leading to the conclusion they had been fighting. *See* EX 126.

Finally, Rogers was the only other person present, besides Destiny, when she was killed. Again, his DNA was found on the gun and bullet, and his fingerprint was on the shell casing.

This Court has historically found sufficient evidence existed to support a second-degree murder conviction on the defendant's previous

¹⁷ The text messages were found on Destiny's phone from October 2020. JT 1197, EX 137.

verbal and physical abuse of the victim, the defendant and the victim arguing earlier in the day, defendant's inconsistent statements to law enforcement, and the defendant's failure to render aid to the victim. *State v. Harruff*, 2020 S.D. 4, ¶¶ 43-48, 939 N.W.2d 20, 31, *State v. Frias*, 2021 S.D. 26, ¶ 24, 959 N.W.2d 62, 69.

Further, no physical or reliable circumstantial evidence¹⁸ and no motive tied Derrek to Destiny's murder. And again, Derrek had an alibi, and it was corroborated by Reddy and their messages and picture. The State presented ample evidence to support the jury's guilty verdict on Second-Degree Murder.

Possession of a Firearm (.45 caliber pistol) by a Person with a Prior Drug Felony

To prove Rogers possessed a firearm by a person with a prior drug felony, the State needed to prove 1. Rogers possessed or controlled a firearm, 2. Rogers had a previous conviction of conspiracy to distribute marijuana, and 3. Rogers was discharged from prison, jail, probation, or parole for his conspiracy to distribute marijuana within fifteen years of January 21, 2022. SDCL 22-14-15.1.

While possession is not defined in statute, "[t]his Court has held that possession signifies dominion or right of control over" a firearm.

¹⁸ The only evidence to support Derrek killing Destiny are self-serving statements made by Rogers. *See Thornell v. Jones*, 602 U.S. --, 144 S. Ct. 1302, 1313 (2024) (Stating self-serving statements should be viewed with skepticism).

State v. Barry, 2004 S.D. 67, ¶ 9, 681 N.W.2d 89, 92 (citing *State v. Goodroad*, 442 N.W.2d 246, 251 (S.D. 1989)). And “possession can either be actual or constructive and need not be exclusive.” *Id.* Further, when someone has “dominion or control over the firearm or the premises upon where the firearm was found, constructive possession is shown.” *Id.*

Further, “circumstantial evidence of possession alone may support a verdict.” *United States v. Cross*, 888 F.3d 985, 991 (8th Cir. 2018). Rogers’s DNA found on the gun supports he was in possession of the firearm. *See id.* (Finding “[t]he DNA evidence, even if not conclusive, supported other evidence of possession.”).

At trial, the State presented evidence Rogers possessed the .45 caliber pistol. It was the weapon he used to kill his wife. His DNA was on the grip of the gun. JT 1012-15. The gun was found underneath the wooden landing, outside Rogers’s home. JT 892. And the bullet that killed Destiny matched the bullets from the .45 caliber gun. JT 1069.

As to his previous conviction, on December 17, 2013, the circuit court sentenced Rogers after he plead guilty to Conspiracy to Distribute More than One Pound of Marijuana. EX 74. The court entered an amended judgment on January 21, 2014. *Id.* Rogers was sentenced to prison for the offense and discharged from Department of Corrections custody on October 18, 2018. EX 74-75. Thus, his discharge from prison was within fifteen years of the date alleged in the indictment. The

State presented sufficient evidence to support Rogers's conviction for Possession of a Firearm by a Person with a Prior Drug Felony.

Possession of a Firearm (.45 caliber pistol) with Altered Serial Number.

To convict Rogers of Possession of a Firearm with an Altered Serial Number, the State must establish Rogers possessed a firearm and the manufacturer's serial number on the firearm had been changed, altered, removed, or obliterated. SDCL 22-14-5. Rogers possessed the gun, based on the evidence presented above, when he shot and killed Destiny. *See Supra*. Further, law enforcement testified that the .45 caliber gun did not have a serial number it. JT 912. In fact, Adam Dolezal, a state laboratory forensic scientist, described most of the serial number was "obliterated" from the gun. JT 1074. Therefore, the State provided adequate evidence to support Rogers's conviction.

Commission of a Felony while Armed with a Firearm

To prove Rogers guilty of commission of a felony while armed with a firearm, the State needed to prove 1. Rogers committed or attempted to commit a felony (murder) and 2. Rogers did so while armed with a firearm. SDCL 22-14-12. The State presented sufficient evidence to prove Rogers murdered Destiny. *See Supra*. The State also proved Rogers did so while armed with a firearm. Destiny's cause of death was a gunshot wound to the chest. JT 833. The spent shell casing found at the scene, was fired from the .45 caliber gun found at Rogers's residence. JT 940, 945. The spent shell casing also matched the bullets found in

the gun's magazine. *Id.* The State presented sufficient evidence that Rogers killed Destiny and did so with a firearm.

Rather than attack the sufficiency of the evidence for each of Rogers's convictions, he uses his appellate brief to reiterate his trial strategy of casting doubt on the investigation. But this Court will not entertain such arguments and instead asks itself whether, when viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have convicted Rogers. The evidence was sufficient for each conviction and they should be affirmed.

II

THE CIRCUIT COURT PROPERLY DENIED ROGERS'S REQUEST FOR A SPOILIATION JURY INSTRUCTION.

A. *Background.*

Law enforcement seized Derrek's phone and obtained a search warrant for the contents. JT 451. Derrek provided the password for his phone. JT 477. Once officers had Derrek's phone, it was sent to Internet Crimes Against Children (ICAC) in Rapid City. JT 451-52. After ICAC processed Derrek's phone, it was sent back to law enforcement along with an extraction report. JT 452. Typically, after a phone has been downloaded, it is kept in law enforcement's evidence storage. JT 452-53. But officers told Derrek he could have his phone back after the extraction was complete. JT 453. Law enforcement did not read the extraction report before returning Derrek's phone. JT 453. A few months later, when they read the extraction report, officers discovered a

phone extraction could not be completed on Derrek's phone because they forgot to send the phone's password with the phone. JT 453.

Rogers argues the circuit court erred by refusing to give a spoliation jury instruction. AB 22. He requested the instruction because law enforcement returned Derrek's cell phone before performing a full extraction. Months after returning Derrek's cell phone, law enforcement discovered they forgot to relay the password for the phone when they sent the phone's data to be extracted by ICAC and was therefore unable to recover the phone's contents.

B. *Standard of Review.*

This Court reviews a circuit court's denial of a particular jury instruction under the abuse of discretion standard. *State v. Black Cloud*, 2023 S.D. 53, ¶ 50, 996 N.W.2d 670, 683 (citing *State v. Schumacher*, 2021 S.D. 16, ¶ 25, 956 N.W.2d 427, 433–34). “An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.” *State v. Abraham-Medved*, 2024 S.D. 14, ¶ 12, 4 N.W.3d 436, 440 (quoting *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109). But whether the court properly instructed the jury on the correct law, is reviewed under the de novo standard. *Id.* The instructions, when reviewed as a whole, must provide the full and correct statement of the law. *Id.*

- C. *A spoliation instruction was not appropriate because there is no evidence the sought-after evidence existed and law enforcement did not act in bad faith when they returned Derrek's cell phone.*

To determine whether the circuit court gives a spoliation instruction, there must be "substantial evidence of four specific considerations." *State v. Mulligan*, 2007 S.D. 67, ¶ 43, 736 N.W.2d 808, 822 (citing *State v. Engesser*, 2003 S.D. 47, ¶ 46, 661 N.W.2d 739, 755).

An instruction on the inference that may be drawn from the spoliation of evidence is proper only when substantial evidence exists to support a conclusion that the evidence was in existence, that it was in the possession or under the control of the party against whom the inference may be drawn, that the evidence would have been admissible at trial, and that the party responsible for destroying the evidence did so intentionally and in bad faith.

Id.

- i. There is not substantial evidence to support the conclusion the evidence existed.

One purpose of obtaining Derrek's cell phone data was to show his location during the murder. Rogers believes that had Derrek's phone been properly downloaded, the information would show he was at Roger's residence and not with Reddy. But this belief is based on speculation and not supported by substantial evidence that such location information existed.

At trial, Special Agent Sean Kennedy, with the FBI, testified about how historical cell site analysis is used to determine the general location of a cell phone at a certain date and time. JT 634. He explained that when a cell phone is turned on, it constantly scans the environment to

determine what cell towers it can see and ranks those towers to figure out which one provides the best signal to the phone. JT 640-41.

Kennedy also explained timing advance data, which provides not only the cell tower but the distance a phone is from the tower. JT 643. With this information, he can determine a general location of a phone. JT 644-45.

Kennedy looked at the activity for Derrek's phone from January 21, 2022, at 10:18 p.m. to January 22, 2022 at 1:52 a.m. JT 652. The data activity was consistent with the phone being at or near his residence,¹⁹ JT 654. This information was based off when Derrek's phone connected to a tower when making a call or sending a message.²⁰ JT 597. But Kennedy could not say for certain if Derrek's phone had been properly downloaded it could provide information as to Derrek's whereabouts during the timeframe in question. JT 663. While the data from the cell phone and the data provided by the phone company are two sets of data, it does not necessarily mean the data will yield different results. JT 663-65. In fact, Kennedy explained that the GPS location that can be gathered from a phone does not guarantee accurate results. It can provide a general location, but not a precise location. JT 664.

¹⁹ Kennedy's opinion, based on having reviewed data for hundreds of cell phones, Derrek's phone was likely at Reddy's house at the time of the murder. JT 668.

²⁰ While a phone does send signals to towers even when not making phone calls, Verizon only keeps that information for seven days and the search warrant was not served until after that seven-day period had lapsed. JT 655.

Rogers has not shown that data on Derrek's phone would definitively provide his location.

- ii. The evidence was in the possession or under the control of law enforcement.

The evidence sought was not Derrek's phone, but the location data of the phone. Law enforcement had possession of Derrek's phone, but never possessed the location data of the phone. Law enforcement did not have the capabilities to download the location data and that is why the phone was sent to ICAC for a data extraction. And while ICAC is part of a law enforcement agency, ICAC also did not have possession of the location data because they were unable to extract such data without the phone's password.

- iii. The evidence may have been admissible at trial.

Derrek's location at the time of the murder is material to the case. JT 578. Had the phone data been properly extracted and had it actually provided Derrek's location at the time of the murder, the evidence would presumably be admitted at trial.

- iv. Law enforcement did not destroy the evidence intentionally and in bad faith.

To show law enforcement acted in bad faith when they failed to preserve the data on Derrek's phone, Rogers must show law enforcement's failure was intentional – that they intended to deprive him of the contents of the phone extraction. *State v. Bousum*, 2003 S.D. 58, ¶ 16, 663 N.W.2d 257, 263. It is not enough to show mere negligence

caused the loss of the evidence. *Id.*

When law enforcement returned Derrek's phone, they were not acting in bad faith.²¹ Officers thought ICAC extracted the data from the phone and there was no reason to keep the phone longer than necessary. No evidence suggests that officers returned Derrek's phone, knowing a proper cell phone extraction was not completed, solely to keep the contents from Rogers.

In *Bousum*, the day after Bousum kicked out a window of a patrol car, the window was repaired without notice to Bousum. *Id.* at ¶ 12, 663 N.W.2d at 262. Bousum argued that repairing the window before he had a chance to evaluate the damage violated his constitutional rights. *Id.* ¶ 13, 663 N.W.2d at 262. But this Court found repairing the window was "clearly more negligent than an act of bad faith." *Id.* ¶ 17, 663 N.W.2d at 263. In making its determination, this Court recognized the police department was anxious to get the vehicle repaired because it was expensive to keep secured inside, and the department only had four vehicles for officers to use. *Id.* Additionally, there was no indication the prosecutor was aware of the repair to the vehicle. *Id.*

Here, law enforcement knew Derrek was anxious to get his phone back. Also, there is no indication in the record the prosecutor was aware the phone was returned to Derrek before a proper extraction was

²¹ The circuit court found law enforcement was negligent for returning Derrek's phone, but they did not act in bad faith. JT 578.

completed.

Simply put, whether law enforcement shouldn't have returned Derrek's phone is not the determinative factor in deciding to give a spoliation jury instruction. Instead, there must be substantial evidence that evidence existed, it was in possession of law enforcement, the evidence would have been admissible, and the evidence was destroyed in bad faith. These four factors are not present here, particularly because it is unknown whether beneficial location evidence existed, and there is no evidence suggesting law enforcement acted in bad faith. Because the four factors are not met, a spoliation jury instruction was not appropriate. Therefore, the circuit court did not err when it denied Roger's request.

III

ROGERS'S DUE PROCESS RIGHTS WERE NOT VIOLATED

A. Background.

Rogers argues he was denied his constitutional right to evidence because law enforcement failed to properly preserve the contents of Derrek's phone. AB 24-30.

Rogers claims the phone data would completely exonerate him, showing Derrek was at Rogers's house and not with Reddy at the time of the murder. AB 28. But Rogers's belief about what the data may have shown is purely speculative, and once again, he fails to show law enforcement acted in bad faith in failing to preserve the evidence.

B. *Rogers was not denied his right to access evidence.*

The Due Process Clause of the Fourteenth Amendment requires the State “ensure that ‘criminal prosecutions comport with prevailing notions of fundamental fairness.’” *State v. Zephier*, 2020 S.D. 54, ¶ 20, 949 N.W.2d 560, 565 (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532, 81 L. Ed. 2d 413 (1984)). This includes a defendant’s right to present a defense. *Id.* Encompassed in the right to present a defense is a constitutional guarantee to the access of evidence. *Id.*

Rogers argues his constitutional rights were violated due to the destruction of evidence which was material and which was destroyed in bad faith. This Court has explained what material evidence is:

Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense. To meet this standard of constitutional materiality ... evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Zephier, 2020 S.D. 54, ¶ 23, 949 N.W.2d at 566 (quoting *Trombetta*, 467 U.S. at 491, 104 S. Ct. at 2535). And without bad faith on law enforcement’s part, there is no due process violation. *Id.*

When property is seized by law enforcement for the purpose of criminal prosecution, it must be preserved, maintained, or stored in the county where the crime occurred. SDCL 23A-37-14. And before any

property is returned, law enforcement must notify the defendant the property is being given back to the owner. SDCL 23A-37-15. The court may order law enforcement to keep the property if the defendant has shown that the property contains exculpatory evidence. *Id.* But failure to comply with SDCL 23A-37-15, “does not automatically vitiate the conviction.” *Bousum*, 2003 S.D. 58, ¶ 15, 663 N.W.2d at 263 (quoting *State v. Arguello*, 502 N.W.2d 548, 550 (S.D. 1993)).

Rogers’s argument is similar to one made in *State v. Jackson*, 2020 S.D. 53, 949 N.W.2d 395. Jackson was accused and ultimately convicted of raping a woman, K.S., who was incapable of consenting because of a physical or mental incapacity.²² *Id.* ¶ 1, 949 N.W.2d at 398. Jackson argued the State violated his due process rights when law enforcement failed to interview K.S. on or around the time the rape occurred. *Id.* ¶ 23, at 403. He claimed had a timely interview taken place, K.S. would have provided exculpatory and material evidence. *Id.* This Court found Jackson assumed K.S. would have provided evidence favorable to his defense, but it was just as likely K.S. would have provided evidence favorable to the State. *Id.* ¶ 32, at 405. Because the evidence was only possibly potentially useful, Jackson had to show law enforcement acted in bad faith by not interviewing K.S. *Id.* ¶ 33.

²² K.S., the victim, was diagnosed with a rare form of dementia that affected her verbal, visual, and motor skills. *Jackson*, 2020 S.D. 53, ¶ 1, 949 N.W.2d at 398.

Jackson could not do so, and this Court rejected his due process claim. *Id.*

Similarly, Rogers cannot show that law enforcement acted in bad faith. While Rogers claims Derrek's cell phone extraction would provide material evidence — Derrek's location at the time of the murder — the phone's location data is merely speculative. At trial, Kennedy testified that it was uncertain the phone extraction could give a person's exact location at an exact time. JT 663. And while the data from the cell phone extraction was "potentially useful," it also had a strong probability of blowing Rogers's entire defense out of the water. Reddy and Derrek both testified that they were together that night, during the time of Destiny's murder. Text messages between the two places Derrek at Reddy's house at the time of the murder. Also, the metadata from Reddy's phone shows the photo he took of Derrek's penis coincides with the timeframe Derrek and Reddy claimed they were together. And after analyzing the cell phone tower data, Kennedy believed Derrek's phone to be at Reddy's house during the time of the murder. Thus, Derrek's unextracted phone data did not clearly "possess an exculpatory value that was apparent before the evidence was destroyed," so Rogers's argument fails. *Jackson*, 2020 S.D. 53, ¶ 28, 949 N.W.2d at 404.

Not only is the materiality of the phone extraction speculative²³ at

²³ By his own admission, Rogers argues the phone extraction evidence "*could have* completely exonerated him . . ." AB 28 (emphasis added).

best, but there is also no showing that law enforcement acted in bad faith. Detective Sergeant Hoffman testified that he gave the phone back because Derrek was no longer a suspect, and he did not want to deprive him of his property longer than necessary. JT 499. And while Hoffman received the extraction report which stated an extraction could not be performed when he received Derrek's phone, he did not look at the report until months later. JT 453. It was not his intent to deprive Rogers or the State of any potentially useful evidence.

Rogers tries to persuade this Court to blend bad faith with gross negligence and willful and wanton misconduct. AB 28. But that is not the appropriate legal standard:

Whether a law enforcement officer's action could be termed reckless, intentional, negligent, or merely that of following or failing to follow regular police procedure, the evidentiary standard necessary to prove bad faith by the state with regard to the destruction or loss of evidence is quite high. Bad faith, as used in cases involving destroyed evidence or statements, means that the *state deliberately destroyed the evidence with the intent to deprive the defense of information; that is, that the evidence was destroyed by, or at the direction of, a state agent who intended to thwart the defense.*

State v. Schweitzer, 2021 N.D. 109, ¶ 3, 961 N.W.2d 310, 312 (citing *State v. Ostby*, 2014 N.D. 180, ¶ 15, 853 N.W.2d 556, 561)(emphasis added).

In short, Rogers fails to show law enforcement acted in bad faith. Because neither materiality nor bad faith are demonstrated, this Court should find no due process violation occurred.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Rogers's convictions and sentences be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 7,445 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 16th day of July 2024.

/s/ Erin E. Handke

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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of July 2024, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Dreau Lester Rogers* was served electronically through Odyssey File and Serve on Robert J. Rhol at robert@605legal.com.

/s/ Erin E. Handke

Erin E. Handke

Assistant Attorney General

IN THE SUPREME
COURT OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30588

**DREAU LESTER ROGERS,
Defendant/Appel**

lant, v.

**STATE OF SOUTH DAKOTA,
Plaintiff/Appellee.**

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

HONORABLE MICHAEL DAY, PRESIDING JUDGE

**REPLY BRIEF OF
APPELLANT**

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Notice of Appeal filed on January 8, 2024

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ARGUMENT

1. A Reasonable Jury Would Have Found Reasonable Doubt.

As this Court has articulated, “we ask if there was sufficient evidence in the record that, if believed, would be adequate to sustain a conviction beyond a reasonable doubt.” *State v. Guthrie*, 2001 SD 61, ¶ 47. In this case, the Court’s focus should be viewing the evidence cumulatively to see “whether in its totality it is enough to rule out any reasonable hypothesis of innocence.” *State v. Guthrie*, 2001 SD 61, ¶ 49 (citing *State v. Hage*, 532 N.W.2d 406, 411 (S.D. 1995)). The State’s Brief concedes, “some amount of alleged reasonable doubt may have been cast for the jurors.” *Appellee Brief*, pg. 12. Viewing this record in totality demonstrates sufficient evidence was not presented to rule out the reasonable hypothesis of Roger’s innocence.

The State is correct, the thrust of Roger’s argument is centered around five facts: (1) the police broke the law during the investigation; (2) the police gave away material evidence; (3) the police contaminated important forensic evidence; (4) the third-party perpetrator’s alibi was weak; and (5) there were material omissions of evidence. The underlying record reveals that these are facts, not arguments. In conjunction, these facts forbid a reasonable fact finder from concluding the State proved its case beyond a reasonable doubt. Some amount of reasonable doubt, as indicated in the *Appellee’s Brief*, is more than is necessary to grant the Motion for Judgment of Acquittal. *Appellee Brief*, pg. 12.

(a) Facts (1) and (2)

Despite the State’s assertions, witness credibility has nothing to do with police breaking the law and giving away material evidence. According to Detective Hoffman (lead investigator) and all relevant State witnesses, the evidence was material and could have

exonerated Rogers. JT 470:3-25; 471:1-11. The police gave it away, i.e. destroyed it. It is the Government's burden, constitutional obligation, and legislative imposed duty to preserve all relevant evidence. There is no argument that these facts are anything other than exculpatory. There is no argument that these facts do anything other than reflect negatively upon the credibility of the investigation and the State's case against Rogers. A reasonable juror properly applying these facts to the State's burden could not conclude otherwise.

(b) Fact (3)

It is an admitted and proven fact that the police contaminated important forensic evidence by failing to follow forensic evidence acquisition rules. These rules are not advisory; these rules are grounded in science. JT 625:10-17 (expert testifying, "[o]nce something is contaminated, there is very little that can be spoken towards its validity or legitimacy of results"); JT 859:1-18; JT 872:3-22. Failure to follow the scientific rules compromised the integrity of the evidence the State presented at trial. The underlying record prevents any reasonable conclusion to the contrary. The integrity of all important forensic evidence provided to the jury in this case was compromised. There is no argument that this fact does anything other than reflect negatively upon the credibility of the investigation and the State's case against Rogers. A reasonable juror properly applying this fact to the State's burden could not conclude otherwise.

(c) Fact (4)

There is only misleading expert testimony corroborating Derrek's purported "alibi". The expert testimony was sufficiently misleading such that the Government is mistaken as to its meaning. According to both Detective Almeida and Agent Kennedy, their "opinions" about the "likely" location of Derrek and his phone at the time of the shooting were based on

“text message content.”¹ JT 668:4-8; JT 813:16-18; *see also* JT 1397: (State’s closing argument, “you heard from Detective Almeida [...] He gave his opinion on where Donovan was during that fateful time. He was asked on the stand ‘Where was Donovan at 12:48?’ Obvious. He was over at Alan’s”).

One of the creators of the text message content, Alan Reddy, testified as follows:

- Q And there were messages that seemed to indicate there was a meet-up that you said didn’t happen; right?
- A Yes. **And, like I told you, there were times that we just talked about meeting, but we never did. Many, many times.**

JT 1319:6-13 (Emphasis added). Accordingly, the text message content relied upon by state experts did not reliably reflect Derrek’s location. The Derrek “alibi” rests exclusively on the credibility of Derrek and Reddy, who had maintained a sexual relationship through the time of trial. JT 1313:1-21. A reasonable juror properly applying these undisputed circumstances to the State’s burden could not conclude Derrek’s alibi was credible.

(d) Fact 5

There are sufficient facts in the underlying record supporting Roger’s theory of the defense and his rational hypothesis of innocence. Consideration of these facts, amid facts (1) through (4), precludes a reasonable juror from reaching a conclusion of guilt as to Counts IA, II, IV, and V.

Forensic evidence, gunshot residue, ties Donovan Derrek to the crime as the shooter. The State argued a theory of contamination as the source of the gunshot residue, but proper application of the State’s burden by a reasonable juror supports Rogers’ hypothesis of

¹ Agent Kennedy testifying, “But based on the *text message content*, in my opinion [...] the phone is likely at 311 Evans Lane, because I was told that is actually where the person he was texting lived.” JT 668:4-8.

innocence.² CDR Data collected from Verizon demonstrates that Derrek called Rogers hours before the shooting. Derrek also texted Rogers hours before the shooting, “they needed to meet face to face ... ASAP.” JT 1255:12-14. Before leaving his home within an hour of the shooting, Derrek advised his daughter he was going to Rogers’ residence. JT 1257:9-10. Shortly after the murder, Derrek was typing codes in his phone to ascertain whether the “Government” was tracking him, i.e. guilty conscience. JT 1258:7-15. Derrek also had bruising on his body corroborating Rogers’ theory of innocence, physical altercation between Rogers and Derrek just prior to the gunshot. JT 1145:1-21.

The State’s entire case to rebut Rogers’ theory of innocence was destroyed at trial. In violation of law, the State destroyed the one material piece of evidence which would have completely exonerated Rogers, Derrek’s mobile phone. The integrity of all forensic evidence was lost due to law enforcement’s failure to follow proper forensic evidence collection and scientific protocol, i.e. evidence collection with dirty gloves (contact transfer) and failure to lay down sterile mats (contact transfer). JT 1028:2-23. Donovan Derrek’s purported alibi accounting for his whereabouts at the exact time of the shooting is unquestionably weak. A reasonable jury could not have convicted Rogers of Counts IA, II, IV, and V. The Motion for Judgment of Acquittal was properly granted.

2. Bad Faith for the Spoliation Instruction

Rogers could not have more clearly communicated to law enforcement that Donovan Derrek shot Destiny Rogers. JT 337:5-14. Rogers begged law enforcement to investigate Derrek more closely. Law enforcement knew Donovan Derrek was a “suspicious” character and they knew he was recently accused of stealing a handgun, a

² This fact also corroborates fact (3), the police contaminated important forensic evidence.

habitual intravenous meth user, at the Rogers' home uninvited on the day in question, and sexually deviant. Law enforcement also knew Rogers' entire claim of innocence was based on the exact location of Derrek at the time of the shooting. In response to this known information, law enforcement gave Derrek's phone away in violation of law, contaminated and destroyed the integrity of all relevant forensic evidence, and presented two witnesses (Reddy and Derrek) who could not possibly be more impeachable and unreliable with the aid of imagination.

If this does not constitute sufficient bad faith for spoliation, then the law needs to be revisited. At the same time the phone evidence was destroyed, the court determined that law enforcement intentionally violated Roger's Sixth Amendment rights. If spoliation is not appropriate now, when is it?

3. Dreau Rogers was Denied Due Process

The State's focus is misplaced. Their entire argument centers on Roger's inability to prove that the phone, which the State failed to preserve in violation of law, certainly would have certainly exonerated him. The proper analysis to engage in for this issue is "potentially exculpatory evidence permanently lost." *State v. Zephier*, 2020 SD 54, ¶ 22 (citing *State v. Lyerla*, 424 N.W.2d 908, 910-11 (S.D. 1988)).

In response to all the material shortcomings in this case the State's response is, it was only negligent or willful and wanton conduct/behavior, i.e. who cares. Donovan Derrek's phone was material, as acknowledged in trial by all relevant State witnesses and in the Appellee Brief, i.e. it either showed Derrek was at Rogers' or corroborated the State's theory. Had the State not contaminated all the forensic evidence, for instance the gunshot residue on Donovan Derrek's hands, perhaps the materiality of the phone would

not have been so crucial.

The United States Supreme Court precedent relied upon by this Court in developing South Dakota's jurisprudential history does not so easily close the door as the State suggests. By State action, i.e. forensic evidence contamination, Rogers has no alternative means by which to prove his innocence. The State knew of the phone's evidentiary value because Rogers expressly told them. Further, law enforcement drafted Affidavits in Support of the Search Warrant for the Derrek phone expressly delineating the apparent materiality, i.e. expected to play a significant role in the suspect's defense. Everyday prosecutors and law enforcement across this country draft warrants and affidavits requesting courts to give authority to seize individual's cell phones. Everyday they painstakingly detail for courts the apparent materiality and relevance of the cell phones, which includes location data. Of course the Government knew the phone was material!

As stated by the United States Supreme Court in *Riley v. California*, 573 US 373, 396 (2014), "Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." The United States Supreme Court made this statement in the year 2014, analyzing conduct which occurred well before that time. This occurred in the year 2022. As stated above with respect to spoliation, if not now, when?

CONCLUSION

This case resulted in a life sentence. The stakes could not be higher. In a cavalier fashion, the State asks this Court to ignore serious and inexcusable Government conduct.

The reasonable hypothesis of innocence was never disproven. The ramifications of affirming the convictions in this case will significantly erode constitutional protections guaranteed to all South Dakota citizens.

Dated this 9th day of August, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL §15-26A-66(b), Robert J. Rohl, counsel for the Appellee does hereby submit the following:

The foregoing brief is 7 pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 7 pages, 1,777 words in the body of the brief.

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