IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL # 27817

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

JAMES LEWIS ROGERS,
Defendant and Appellant.

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

THE HONORABLE RANDALL L. MACY

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, James Rogers, will be referred to by name. Plaintiff and Appellee, the State of South Dakota will be referred to as "State." All references to the transcript of the evidentiary hearing held on November 24, 2015 related to the Defendant's motion to suppress shall be referred to as "SH" followed by the appropriate page number(s). All other documents within the settled record shall be referred to as "SR" followed by the appropriate number.

JURISDICTIONAL STATEMENT

On August 26, 2015, Mr. Rogers was indicted by a Lawrence County Grand Jury with one count of First Degree Murder Premeditated Design. (Attachment A). On September 1, 2015, Mr. Rogers was arraigned and entered a plea of not guilty. On September 24, 2015, Mr. Rogers filed a motion to suppress, challenging the warrantless entry into his home and the use of his pre-*Miranda* statements. SR 24. An evidentiary hearing was held on that motion on November 24, 2015. The trial court denied the motion to suppress and entered Findings of Fact and Conclusions of Law and Order

Denying Motion to Suppress on January 25, 2016. (Attachment B). Beginning March 28, 2016 and ending March 30, 2016 a jury trial was held in Lawrence County. Upon conclusion of the trial, the jury returned a verdict of guilty. The trial court then immediately sentenced Mr. Rogers to life imprisonment without parole. The judgment in this matter was filed on March 30, 2016. (Attachment C). Notice of appeal from the Judgment of Conviction was timely filed on April 4, 2016. SR 363. This appeal is brought as a matter of right pursuant to SDCL 23A-32-2.

STATEMENT OF THE LEGAL ISSUES

1. The trial court erred when it denied Mr. Rogers' motion to suppress the evidence that was obtained as a result of the warrantless entry into his home.

   The trial court denied Mr. Rogers' motion to suppress. SR 24.

   State v. Deneui, 2009 SD 99, 775 N.W.2d 221.
   State v. Max, 263 N.W.2d 685 (S.D. 1978).
   State v. Shearer, 1996 SD 548, N.W.2d 792.

2. The trial court erred when it denied Mr. Rogers' motion to suppress the pre-*Mirandized* statements that Mr. Rogers gave to law enforcement officers.

   The trial court denied Mr. Rogers' motion to suppress. SR 24.

   State v. Walth, 2011 SD 77, 806 N.W.2d 623.
   State v. Gesinger, 1997 SD 6, 559 N.W.2d 549.

STATEMENT OF THE CASE AND FACTS

On August 17, 2015, at approximately 4:45 p.m., the Lead Police Department received a call from Deborah Burrows of 116 Grand Avenue, Lead, SD, requesting an officer come to her home concerning an unknown complaint. Lead Police Officer Eric

Jandt (Officer Jandt) was assigned to answer the call. SH 5. Upon arrival Officer Jandt activated his pocket tape recorder and recorded the conversation. Deborah Burrows (Deborah) reported to Officer Jandt that her ex-husband, Kenny Burrows (Kenny), had told her that he suspected that a male individual who lived in an apartment building in Lead, SD, had killed his girlfriend and put her body in a suitcase. She was further told that there was blood all over the kitchen and the male individual wanted Kenny to help dispose of the body. SH 6-7, 38.

Officer Jandt then learned from Deborah that Kenny was still inside her house. Officer Jandt requested that Kenny come outside and speak directly to him. Kenny came outside and told Officer Jandt that Mr. Rogers, who lived in apartment 303 of the Galena Apartments, had killed his girlfriend, Caitlin Walsh (Caitlin), and then placed her in a suitcase. Kenny indicated that Mr. Rogers had wanted him to help dispose of the body. SH 8. Kenny informed Officer Jandt that he did not assist for fear that he would become an accessory to a murder. Id. Kenny also informed Officer Jandt that Mr. Rogers had shown him a suitcase wrapped in plastic that appeared to be leaking. Kenny explained that he also tried lifting the suitcase and that it was heavy and consistent with the weight of a body. SH 9 and 24. He further described that Mr. Rogers had a fan going because you could "definitely smell something" bad upon entering the apartment. SH 8. Kenny indicated that the body was in the closet in the bedroom of Mr. Rogers' apartment. Kenny described how Mr. Rogers had told him he had beat and stabbed Caitlin. While at Mr. Rogers' apartment, Kenny did not hear any cries for help or any other type of sound come from the suitcase. SH 24. Kenny did not report that Mr. Rogers was in any way injured. Id. Kenny also related that he was unsure if Mr. Rogers had actually killed

someone or if the whole matter was a hoax. SH 9. On cross-examination, Officer Jandt admitted that at that point in time he did not know if Kenny's report was true or not. SH 21. Officer Jandt also testified that he had never worked with Kenny in the past as far as law enforcement tips or information was concerned. SH 23.

After speaking with Kenny, Officer Jandt left Deborah's home and contacted the Lead Chief of Police, John Wainman (Chief Wainman), by phone and relayed what he has just been told and requested that Chief Wainman meet him at the Galena Street apartment building. SH 11-12. Officer Jandt then returned to Deborah's home to ask a few additional questions about the suitcase. SH 12.

Officer Jandt and Chief Wainman initially met at a nearby parking lot and Officer Jandt and Chief Wainman then drove separately and met at the rear entrance to the Galena Street apartments. Officer Jandt again told Chief Wainman what he had learned from his interviews of Kenny and Deborah. SH 15-16. Chief Wainman was familiar with Kenny from previous contacts. Specifically, Chief Wainman knew that Kenny had previous issues with methamphetamine addiction and that Kenny could be "dramatic." SH 66. Although Chief Wainman had spoken with Kenny in the past, Kenny had not previously been a police informant as far as Chief Wainmen knew. SH 56.

This investigation was deemed by the police to be of a high priority because of the seriousness of the accusation. However, rather than seek a warrant with the information from Kenny, Chief Wainman made the decision to travel to the apartment complex. Chief Wainman also made the decision that he would be entering apartment 303 to follow through with the investigation if Mr. Rogers did not voluntarily allow

entry. Chief Wainman's decision was made pursuant to his unwritten policy that he has related to these types of reports. SH 63, 76.

Upon arrival, Officer Jandt and Chief Wainman entered the apartment complex and walked down the hall towards apartment 303. Officer Jandt's recorder was active when law enforcement entered the building. SH 17. As the officers walked down the hallway they could hear a male crying. SH 26. Chief Wainman described that he could hear the male subject crying, "I'm sorry." SH 53. The closer the officers got to apartment 303 the louder the crying sounds became. SH 39. The officers did not hear any cries for help or sounds of distress. SH 26.

Very soon after the officers arrived at the apartment door, Chief Wainman shouted words to the effect that if Mr. Rogers did not open the door, law enforcement would break it down. SH 42. When Mr. Rogers declined to open the door, Chief Wainman attempted to forcibly open the door but was unable to accomplish that action. SH 69-70. Rather than seek a telephonic warrant, Chief Wainman instead contacted the apartment's property manager in an attempt to secure a key. The property manager was out of town and she was unable to provide a key to the apartment. SH 69. At no point did the officers seek the assistance of any other person to obtain a search warrant. After calling the property manager, Chief Wainman had Officer Jandt go to his police vehicle to retrieve a hammer and a screwdriver with the intent of taking the door off the hinges to gain entrance. SH 28.

At some point, Chief Wainman began to try to take the molding off the apartment door. Shortly after he started, Chief Wainman could hear the door being unlocked from the inside. When the door was unlocked he could then see Mr. Rogers. Chief Wainman

then instructed Mr. Rogers to step outside the apartment and to come into the hallway. Mr. Rogers asked Chief Wainman to come inside. Chief Wainman then grabbed Mr. Rogers by his clothes and pulled him from his apartment. The officers then placed Mr. Rogers on the ground and had him place his hands behind his back. Chief Wainman then questioned Mr. Rogers by asking him, "James, what did you do?" SH 30-31, 70. Mr. Rogers replied, "I did something very wrong." SH 71. When Chief Wainman entered the apartment he smelled decomposition but could not find a suitcase. SH 72, Chief Wainman came back out to the hallway and asked Mr. Rogers "where's Caitlin", Mr. Rogers indicated she was in the closet. SH 43-44.

Chief Wainman entered the apartment a second time, opened the closet and could smell a strong odor of decomposition. Chief Wainman could see a suitcase, and a liquid oozing out of the suitcase onto the carpet. He pulled on the suitcase and could tell that it contained a heavy object that could be consistent with the weight and size of the body of Caitlin Walsh. Chief Wainman took a picture of the suitcase, left the apartment, and directed Officer Jandt to take Mr. Rogers to the Lawrence County Jail. SH 44-46.

Chief Wainman then asked Officer McGruder (McGruder) of the Lead Police Department to come to the scene and take pictures of the apartment. Pictures were taken, but the suitcase was not searched. The officers left the inside of the apartment, secured it and then requested assistance from other law enforcement agencies. SH 47. Approximately five hours later a search warrant was obtained and the officers entered the apartment, opened the suitcase and found the remains of a female human being inside. SH 48. Due to decomposition, the remains were not identified as Caitlin Walsh until an autopsy was conducted several days later.

At the Lawrence County Sheriff's Office, Special Agent Brett Garland (Agent Garland) of the Department of Criminal Investigations (DCI) and Detective Joe Leveque (Detective Leveque) of the Lawrence County Sheriff's Office interviewed Mr. Rogers. Prior to reading the Miranda Warning Mr. Rogers volunteered, "I never meant to hurt her." As Agent Garland read the Miranda Warning he stated, "You have the continuing right to remain silent and to stop questioning at any time. Anything you say..." at that point Mr. Rogers interrupted and stated, "I'll tell you anything you want to know." TR 81.

Agent Garland then began to re-read the Miranda Warning from the beginning "You have the continuing right to remain silent and to stop questioning at any time. Anything you say can be used as evidence against you. You have the continuing right to consult with and have the presence of an attorney. If you cannot afford an attorney, an attorney will be appointed for you. Do you understand those rights James?" Mr. Rogers stated, "I think so, yes." Agent Garland then asked Mr. Rogers again "Do you understand those rights?" Mr. Rogers stated, "Yes sir." Agent Garland then stated "Okay. Um keeping those rights in mind, is it okay if Joe [another law enforcement officer] and I ask you some questions?" to which Mr. Rogers responded "Yes." Mr. Rogers was thereafter questioned about his actions. TR 82.

ARGUMENTS

1. The trial court erred when it denied Mr. Rogers' motion to suppress the evidence that was obtained as a result of the warrantless entry into his home.

Standard of Review: A motion to suppress presents a mixed question of law and fact, as such, "This Court reviews the denial of a motion to suppress alleging a violation of a constitutionally protected right as a question of law by applying the de novo

standard." *State v. Madsen*, 2009 SD 5, ¶ 11, 760 N.W.2d 370, 374 (internal citations omitted.) Under this standard, the Court reviews the circuit court's findings of fact under the clearly erroneous standard, but gives deference to its conclusions of law. *State v. Haar*, 2009 SD 79, ¶ 12, 772 N.W.2d 157, 162 (internal citations omitted).

Analysis related to exigent circumstances: The Fourth Amendment to the Constitution of the United States and Article VI § 11 of the Constitution of the State of South Dakota protect the rights of a citizen to be free from unreasonable search and seizure. "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639, 651 (1980). With the exception of a few well-defined exceptions, the warrantless entry into a home is presumptively unreasonable. Although warrantless searches are permissible under certain circumstances.

Generally, courts have found the following specific exceptions to the warrant requirement: (1) risk of bodily harm or death; (2) to aid a person in need of assistance; (3) to protect private property; (4) actual or imminent destruction or removal of evidence before a search warrant may be obtained; (5) hot pursuit; (6) exigent circumstances; and (6) consent. *Sloane v. State*, 686 N.E.2d 1287, (Ind.Ct.App.1997). Exigent circumstances are present when an emergency exists and the situation demands immediate attention and law enforcement officers do not have time to obtain a warrant. *State v. Meyer*, 1998 SD 122, ¶ 23, 587 N.W.2d 719. The State bears the burden of establishing, by a preponderance of the evidence, that the warrantless search satisfied a specific exception. *State v. Deneui*, 2009 SD 99, ¶14, 775 N.W.2d 221, 230.

In this matter, the State argued below that exigent circumstances warranted the warrantless entry into Mr. Rogers' home. While the presence of exigent circumstances permits the warrantless entry into home, probable cause must still be present for law enforcement officers to believe that the premises to be searched contains the sought-after evidence or suspects. *Id*. at ¶15. This protection is essential to prevent unwarranted intrusion into the privacy and seclusion each citizen expects to enjoy in his or her home. As Justice Jackson wrote, "When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant." *McDonald v. United States*, 335 U.S. 451, 460, 69 S.Ct. 191, 195-96 (1948).

This Court's test for whether exigent circumstances exist asks:

> whether police officers, under the facts as they knew them at the time, would reasonably have believed that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect's escape.

State v. Deneui, at ¶15, citing *State v. Hess*, 2004 SD 60, ¶ 25, 680 N.W.2d 314, 325.

When a court tests an officer's justification for acting as his own magistrate, it looks to the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Further, the Supreme Court of the United Sates has held that the totality of the circumstances may include information received by law enforcement from an informant—as opposed to personal observations—so long as the information is reasonably corroborated by other matters within the officer's knowledge. *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327(1959).

Additionally, this Court has held the following related to exigent circumstances:

Although the reasonableness of each case must be decided on its own facts and

> circumstances, some guidelines have been established for determining when exigent circumstances exist, justifying a warrantless intrusion for search or arrest. Considerations that are particularly relevant are as follows:
>
> 1. That a grave offense is involved, particularly a crime of violence;
> 2. that the suspect is reasonably believed to be armed;
> 3. that a clear showing of probable cause exists, including "reasonably trustworthy information," to believe that the suspect committed the crime involved;
> 4. that there is a strong reason to believe that the suspect is in the premises being entered;
> 5. that a likelihood exists that the suspect will escape if not swiftly apprehended;
> 6. that the entry, though not consented to, is made peaceably; and
> 7. time of the entry.

State v. Max, 263 N.W.2d 685 (S.D. 1978) citing *Dorman v. United States*, 140 U.S.App.D.C. 313, 320-21, 435 F.2d 385, 392-93 (1970); and *Salvador v. United States*, 505 F.2d 1348, 1351-52 (8th Cir. 1974).

In this case, law enforcement violated Mr. Rogers' Fourth Amendment rights when Chief Wainman invaded his home without a search warrant and without an applicable exception to the warrant requirement. It is undisputed that law enforcement entered Mr. Rogers' home without a search warrant. Affirming the search, the trial court relied upon the exigent circumstances exception. A review of the totality of the circumstances establishes that the State failed to establish that exigency existed to obviate the need for a warrant; this is so for three reasons: First, law enforcement lacked reliable information regarding an emergency, which might justify intrusion. Second, if law enforcement had any credible information of a crime, it was of a murder and not an ongoing emergency. Third, law enforcement had ample time to obtain, or attempt to obtain a warrant. These arguments are presented below respectively.

Officer Jandt and Chief Wainman lacked credible evidence to believe that an emergency existed because the tip received from Kenny was unreliable and uncorroborated. Chief Wainman candidly admitted that he knew Kenny and knew that

Kenny had a methamphetamine habit and that he was "excitable." TR 67. Furthermore, the information received from Kenny presented a dichotomy; either this was a hoax, or there was a dead body in the apartment.

If we stop here, momentarily, to examine the information presented to law enforcement the result is plain, the information is not credible. Law enforcement admits that the informant in question is a known drug user and that further he is "excitable." Beyond that, Kenny presents two options, one of which is that there is no crime whatsoever. The other option of course presents no ongoing emergency, as discussed further below.

Moving on, as reiterated above, the law requires that the information received from an informant be reasonably corroborated by other matters within the officer's knowledge. *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 327 (1959). In this case, law enforcement heard "crying" down a hallway and behind a door. Were it not for the fact that this is the sole corroboration relied upon by law enforcement, it would not be worthwhile pointing out the fact that crying is a common human behavior which is, *prima facia*, indicative of nothing in particular, let alone an emergency. People cry out of happiness. People cry out of sadness. People cry out of physical pain. People cry out of relief. Furthermore, at the hearing Chief Wainman's description of the crying was "sobbing" and included a remorseful "I'm sorry." SH 39, 53. Chief Wainman did not describe the hysterical crying often associated with an emergency. Further bolstering the argument that no emergency was indicated are the actions taken by Officer Jandt. Upon receiving the tip from Kenny, assuming, as law enforcement has now claimed, that he believed an emergency existed, he did not attempt to rush into the apartment. Rather,

he placed a telephone call to a superior to whom he relayed his information. That the "boots on the ground" did not react, indicates that no emergency existed.

Though law enforcement claims it heard "I'm sorry" from inside the home, the resulting conclusion that Mr. Rogers might have been injured is untenable. First, Chief Wainman admitted that at the time he heard this, he was unsure of any need of assistance. More importantly, neither Chief Wainman nor Officer Jandt claim to have heard any request for assistance, nor any cries of pain. Plainly, hearing the words "I'm sorry" does not provide probable cause that a person is in need of immediate aid or emergency service. This line of reasoning is further belied by the fact that as soon as Mr. Rogers opened the door Chief Wainmain grabbed him and forced him to the ground. TR 70-71. Chief Wainman would not have driven Mr. Rogers to the ground if he reasonably believed that aid needed to be rendered.

If the tip from Kenny reliably indicated anything at all, it was that a murder had occurred. However, even in this scenario, there was no reason to believe that an ongoing emergency existed. If law enforcement believed the statements received from Kenny, specifically that Mr. Rogers had killed his girlfriend and then placed her in a suitcase and that a fan was running to deal with the smell of decomposition, there would be no reason to believe that there was a living person to save inside the apartment. The claimed smell of decay, combined with the claim that Mr. Rogers had killed his girlfriend, does not reasonably lead to the conclusion that a victim is alive. On the contrary, such a conjunction reasonably leads to the conclusion that the victim has been deceased for a very significant period of time. Law enforcement should not be permitted to select some

of Kenny's statements to be credible and then disregard others simply to establish probable cause to enter a person's home.

If law enforcement reasonably believed that a murder had occurred, that might provide another avenue under which exigency might have existed. It is true that exigency can arise out of concerns for the dissipation of evidence. *State v. Fierro*, 2014 SD 62, 853 N.W.2d 235. However, this case presented no such concerns. Assuming law enforcement believed that a dead body lay rotting in the apartment in question—pursuant to Kenny's account—no occupant would have an opportunity to dispose of an entire human corpse from inside an apartment building, especially not in the exceedingly limited time it would have taken to merely attempt to obtain a search warrant.

Finally, law enforcement's refusal to simply attempt to obtain a warrant in this case, despite indicators that such an attempt was eminently feasible, indicates an unreasonable entry. Expeditious telephonic and electronic processing of search warrants are available in Lawrence County. SH 64. However, rather than seek a warrant before traveling to the apartment building, or seek a warrant by telephone after entering the building, law enforcement chose to act on its own.

At the motions hearing, Chief Wainman described that in general, obtaining a telephonic warrant was possible. He admitted that a magistrate judge was usually available, even in the middle of the night, for search warrants to obtain blood tests. Chief Wainman also testified that obtaining a telephonic search warrant was, "[m]uch quicker than a normal way." SH 64.

Clearly, law enforcement had time to obtain a search warrant. Shortly after arriving at the apartment building, Chief Wainman first attempted brute force to open the

door. When that failed, Chief Wainman admitted that he took the time to make a telephone call to the property manager of the building in order to obtain a key. Then Chief Wainman sent Officer Jandt outside to obtain tools to remove the door from its hinges. What Chief Wainman did while waiting for Officer Jandt to return with the tools is unclear, however, what is clear is what he did not bother to do. He did not use the very cellphone on which he had just been speaking on to attempt to obtain a warrant. Had law enforcement first attempted a telephone call to a magistrate judge, the subsequent actions taken would appear to be more reasonable.

Inevitable Discovery: In the alternative, the trial court below held that the inevitable discovery doctrine applied; however, the trial court relied upon the wrong legal standard and therefore the trial court utilized the incorrect elements, thereby applying the doctrine impermissibly. This Court reviews a decision to apply the doctrine of inevitable discovery under the "abuse of discretion" standard. *State v. Shearer*, 1996 SD 52, ¶ 12, 548, N.W.2d 792. Success on behalf of the State under the inevitable discovery exception to the exclusionary rule requires a showing by a preponderance of the evidence that (1) There was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) the government was actively pursuing a substantial and alternative line of investigation at the time of the constitutional violation. *United States v. Wilson*, 36 F.3d 1298, 1304 (5th Cir. 1994). In this case, there is no evidence suggesting that the State was pursuing a substantial alternative investigation at the time of the illegal entry into the home. That the elements were not met is not the only problem for the State in this matter. The lower court, in its findings of fact and conclusions of law held:

> Under the totality of the circumstances the officers would have continued this investigation and inevitably discovered the body of Caitlin Walsh. Eventually that evening the police officers would have entered the apartment whether the defendant opened the door or not. The statements and facts described by Kenneth Burrows were a serious concern to law enforcement and this matter would not have been concluded until the officers had, at a minimum, searched the apartment and spoken with the Defendant.

[Trial] Court's Findings of Fact and Conclusions of Law and Order Denying Motion to Suppress (attachment B, pg. 12, ¶12)

This Court has applied an inapposite totality of the circumstances test where a standard of "preponderance of the evidence" is required. This error of law alone insists upon reversal of this point. However, beyond the incorrect legal standard, the lower court applied the doctrine impermissibly.

Such an application of the doctrine has been rejected numerous times by appellate courts on the basis that such an application would atomize the warrant requirement itself. This Court has written:

> Automatic application of the inevitable discovery rule encourages law enforcement to use unconstitutional shortcuts to obtain evidence. Consequently, the inevitable discovery rule should not be applied in a loose and unthinking fashion. In carving out the 'inevitable discovery' exception to the taint doctrine, courts must use a surgeon's scalpel and not a meat axe.

State v. Shearer, 1996 SD 52, 548 N.W.2d 792 (rev'd on other grounds).

The trial court appears to have made just such an automatic application of this doctrine on the basis that it expects serious crimes will not go uninvestigated. However, the fact that a court expects tenacity and perseverance from law enforcement is not a substitute for a constitutionally correct police procedure, and it is certainly not a cure to constitutionally infirm police procedure. Given the failure of the State to meet the elements, the use of an improper legal standard to apply the doctrine, and the improper,

automatic application of the doctrine, the lower court abused its discretion and should be reversed.

Community Caretaker: Given the foregoing discussion regarding the exigency exception and the apparent collapse of the exigency exception and the community caretaker exception under *State v. Deneui*, 2009 SD 99, 775 N.W.2d 221, the response of Mr. Rogers to this alternative has been addressed above.

2. The trial court erred when it denied Mr. Rogers' motion to suppress the pre-Mirandized statements that Mr. Rogers gave to law enforcement officers.

Standard of review: Whether a suspect is in custody, and therefore entitled to *Miranda* warnings, presents a mixed question of law and fact qualifying for independent review. *State v. Gesinger*, 1997 SD 6, ¶ 7, 559 N.W.2d 549, 550 (internal citations omitted).

Argument and analysis: Independent of the arguments above, the statements made by Mr. Rogers when he was pulled into the hallway by Chief Wainman should have been suppressed because the statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Fifth Amendment right against self-incrimination is implicated whenever an individual is subject to custodial interrogation by law enforcement. *State v. Bowker*, 2008 S.D. 61, ¶ 26, 754 N.W.2d 56, 64.

When Chief Wainman pulled Mr. Rogers from his apartment, he did so by grabbing his clothes and then within in seconds, pushing him to the ground. After Mr. Rogers was on the ground, Chief Wainman asked Mr. Rogers, " What did you do?" to which Mr. Rogers responded "I did something very wrong?" SH 31, 70-71. When Chief Wainman was unable to find the suitcase after his first entry into the apartment, Chief

Wainman then came back to the hallway and asked, "Where is she? I need to find her." SH 43. Mr. Rogers replied "In the closet." SH 44. Mr. Rogers was handcuffed for at least the second statement if not also the first. SH 31, 43, but also see SH 71 (Chief Wainman testifying that Mr. Rogers was not to the floor during the first question of "What did you do?"). Mr. Rogers was not provided with his *Miranda* rights until some time later. 71.

Cleary in this matter Mr. Rogers was subject to police questioning. The real issue is whether or not Mr. Rogers was in police custody when the questioning by Chief Wainman occurred. The test for determining whether or not a Miranda violation has occurred is asking, "not whether the investigation has focused on any particular suspect, but rather, whether the person being questioned is in custody or deprived of his or her freedom to leave." *State v. Thompson*, 1997 SD 15, ¶23, 560 N.W.2d 535, 540. This Court has written:

> When analyzing whether an individual is "in custody" for purposes of activating the need for *Miranda* warnings, "a court must examine all of the circumstances surrounding the interrogation," *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528, 128 L.Ed.2d 293 (1994), but "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977)). "[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warning to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' " *Darby*, 1996 SD 127, ¶ 25, 556 N.W.2d at 319 (quoting *Oregon*, 429 U.S. at 495, 97 S.Ct. at 714, 50 L.Ed.2d at 719).

State v. Gesinger, 1997 SD 6, ¶ 17, 559 N.W.2d 549, 551-2.

This Court has also utilized a two-part test when determining whether or not an

individual is in custody.

> First, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

State v. Walth, 2011 SD 77, ¶12, 806 N.W.2d 623, 626 (internal citations ommited).

Being driven to the ground provides a sudden and unmistakable impression that one is not free to go about his business, and is not free to leave. This in conjunction with the failed attempts to forcibly open the door of the apartment suggests that Mr. Rogers was in custody for the purpose of *Miranda*. The lower court held that Mr. Rogers was being "detained but not arrested" (Attachment B pg 13, ¶15); however, under the *Miranda* rule as detailed by *State v. Thompson* above, this determination was incorrect. A reasonable person would in no way feel free to terminate an encounter with law enforcement officers after law enforcement had threatened to break down the door, started the process of breaking down the door and then grabbing the individual pulling them into a hall way and then to the floor. Mr. Rogers was clearly in custody for *Miranda* purposes. The trial court should have ordered his pre-*Miranda* statements suppressed from use at trial.

CONCLUSION

> Decisions under the Fourth Amendment, taken in the long view, have not given the protection to the citizen, which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike.

Draper v United States, 358 U.S. 307, 315, 79 S.Ct. 329, 334, 3 L.Ed.2d 327 (1959) (Justice Douglas dissenting).

Based on the foregoing, Mr. Rogers respectfully requests that this Court reverse the conviction in this matter and remand this action with an order directing the trial court to enter an order granting Defendant's Motion to Suppress.

REQUEST OF ORAL ARGUMENT

Mr. Rogers respectfully requests oral argument on all issues.

Dated this 7th day of July, 2016.

GREY &
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COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

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STATE OF SOUTH DAKOTA,
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Defendant.

CRI 15-754

I N D I C T M E N T

****

THE LAWRENCE COUNTY GRAND JURY CHARGES:

COUNT I: FIRST DEGREE MURDER PREMEDITATED DESIGN (Caitlin Kelly Walsh) (Class A Felony)

That on or about the 12th day of August, 2015, in the County of Lawrence, State of South Dakota, the Defendant, did without authority of law and with a premeditated design to effect the death of the person killed, did kill Caitlin Kelly Walsh. Contrary to SDCL 22-16-4.

Dated this 26th day of August, 2015, at Deadwood, South Dakota.

"A true Bill"
"A TRUE BILL"

THIS INDICTMENT IS MADE WITH THE CONCURRENCE OF AT LEAST SIX GRAND JURORS.

Grand Jury Foreman

WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY IN REGARDS TO THIS MATTER

John Wainman
Brett Garland
Robert Perry
Joe Leveque
Marty Goetsch
Eric Jandt

FILED
AUG 26 2015
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

A-1

STATE OF SOUTH DAKOTA)
: SS IN CIRCUIT COURT
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff,	CRI 15-754
vs.	COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW AND ORDER DENYING MOTION TO **SUPPRESS**
JAMES LEWIS ROGERS, JR., Defendant.	

A Hearing was held on November 24, 2015, before the Honorable Randall L. Macy, Circuit Court Judge. The State appeared by John Fitzgerald, Lawrence County State's Attorney and the Defendant appeared personally, with his attorney, Ellery Grey. The Court having heard the testimony of the witnesses, Lead Police Officer Eric Jandt, Lead Police Chief John Wainman, and South Dakota Division of Criminal Investigation Agent Bret Garland and being fully advised now makes its:

FINDINGS OF FACT

1. On August 17, 2015, at approximately 4:45 p.m., the Lead Police Department received a call from Deborah Burrows of 116 Grand Avenue, Lead, SD, requesting an officer come to her home concerning an unknown complaint. Lead Police Officer Eric Jandt was assigned to answer the call.
2. Upon arrival Officer Jandt activated his pocket tape recorder, and recorded the conversation. Deborah Burrows reported that her ex-husband, Ken Burrows had

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told her that a male individual who lived in an apartment building in Lead, SD, was suspected of killing his girlfriend, and putting her body in a suitcase. She further was told that there was blood all over the kitchen and the male individual wanted her ex-husband, Ken Burrows, to help him get rid of the evidence, by removing the body from the apartment. Upon learning this information, Deborah Burrows told her ex-husband, Ken Burrows, he had to call the police.

3. Officer Jandt then learned from Deborah Burrows that Ken Burrows was still inside her house. Officer Jandt requested that he come outside and speak directly to him.

4. Ken Burrows came outside and told Officer Jandt that in apartment 303 of the Galena Apartments, there was a suitcase wrapped in plastic and that James Rogers, the Defendant in this case, had told him that he had killed "Caitlin" Walsh. Ken Burrows indicated that the Defendant had wanted him to help him dispose of the body, but he did not assist for fear that he would become an accessory to a murder.

5. Ken Burrows indicated that he had been in the apartment about fifteen minutes ago, and had seen blood all over the carpet in the apartment that goes into the kitchen. He further described that the Defendant was crying. Ken

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Burrows said he had grabbed the suitcase in an attempt to lift it and found that it was very heavy. The suitcase was not that big and the defendant indicated to Ken Burrows that "Caitlin" barely fit inside the suitcase. He further described that the Defendant had a fan going because you could smell something bad upon entering the apartment. Ken Burrows indicated that the body was in the closet in the bedroom in apartment 303. He described how the Defendant told him he had beat and stabbed "Caitlin".

6. Ken Burrows indicated on several occasions to Officer Jandt that he was not completely sure if what the Defendant described was true or that the Defendant was making up a hoax. Burrows had never seen a body, but because of all of the observations that he had made, he wanted the police to check it out immediately.
7. At this point Officer Jandt contacted the Lead Chief of Police John Wainman and told him that he needed to meet him in person.
8. The two police officers met at the rear entrance to the Galena Street apartments. Officer Jandt told Chief Wainman what he had learned from his interviews of Ken Burrows and Deborah Burrows. Chief Wainman knew James Rogers and Caitlin Walsh and knew they had a volatile relationship.

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9. This investigation was deemed by the police to be of a high priority because of the seriousness of the accusation and the possibility that "Caitlin" was still alive, but seriously injured. The officers were likewise concerned about the potential for evidence to be destroyed in light of Ken Burrows declining to help the Defendant and suddenly leaving the apartment. That action may have alerted the Defendant that Burrows may have informed the police of the circumstances taking place in apartment 303.

10. The Lead Police Officers entered the third floor of the apartment complex and walked down the hall towards room 303. Officer Jandt had activated his tape recorder upon entering the hallway.

11. As the officers walked down the hallway they could hear a male subject crying. Chief Wainman described that he could hear the male subject crying "I'm sorry". The closer the officers got to apartment 303 the louder the crying sounds became. The officers thought Rogers saying he was sorry meant someone else may be in the apartment.

12. There was a belief that it was possible that "Caitlin" could still be alive, and that the Defendant was physically injured. It was obvious to the officers that

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this was an active crime scene and that action needed to be taken immediately.

13. The officers knocked on the apartment door and could still hear the Defendant crying in the background. Chief Wainman asked the Defendant if he was alright and asked several times to open the door. The Chief states that on the tape that he could not tell if he (the Defendant) was hurt. The Chief and Officer Jandt asked several more times for the Defendant to open the door. The Defendant did not open the door, but the crying sounds did stop.

14. Chief Wainman attempted to forcibly open the door but was unable to accomplish that action. The Chief then contacted the apartment's property manager in an attempt to secure a key. The property manager was out of town and that she was unable to obtain a key.

15. Chief Wainman had Officer Jandt go to his police vehicle and retrieve a hammer and a screwdriver with the intent of taking the door off the hinges to gain entrance. The chief began to try to take the molding off the door, and at that point he could hear the door being unlocked from the inside. When the door was unlocked he could then see the Defendant.

16. The Chief asked the Defendant to come outside. The Defendant asked the chief to come inside. Chief Wainman

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then pulled the defendant from the apartment he had been in.

17. Chief Wainman entered the apartment. He smelled decomposition but could not find a suitcase. The Chief came back out to the hallway and asked the defendant, "Where's 'Caitlin'?" The defendant indicated she was in the closet.

18. Chief Wainman entered the apartment a second time, opened the closet and could smell a strong odor of decomposition. The Chief could see a suitcase, and a liquid oozing out of the suitcase onto the carpet. The Chief pulled on the suitcase and could tell that it contained a heavy object that could be consistent with the weight and size of the body of Caitlin Walsh.

19. The Chief took a picture of the suitcase, left the apartment and directed Officer Jandt to take the defendant to the Lawrence County Jail.

20. Chief Wainman then asked Officer McGruder of Lead Police Department to come to the scene and take pictures of the apartment. Pictures were taken, but the suitcase was not searched. The officers left the inside of the apartment, secured it and then requested assistance from other law enforcement agencies.

21. Approximately five hours later a search warrant was obtained and the officers entered the apartment open the

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suitcase and found the remains of a female human being inside. Due to decomposition, the remains were not identified as Caitlin Walsh until an autopsy was conducted several days later.

22. At the Lawrence County Sheriff Office, Special Agent Brett Garland of the DCI and Detective Joe Leveque of the Lawrence County Sheriff Office interviewed the Defendant. Prior to reading the Miranda the Defendant volunteered that he "I never meant to hurt her".

23. As Agent Garland read the Miranda Warning, he stated "You have the continuing right to remain silent and to stop questioning at any time. Anything you say…" at that point the Defendant interrupted and stated "I'll tell you anything you want to know."

24. Agent Garland then began to re-read the Miranda Warning from the beginning "You have the continuing right to remain silent and to stop questioning at any time. Anything you say can be used as evidence against you. You have the continuing right to consult with and have the presence of an attorney. If you cannot afford an attorney, an attorney will be appointed for you. Okay. Do you understand those rights James?" Rogers stated "I think so, yes". Agent Garland than asked Rogers again "Do you understand those rights". Rogers states "Yes sir." Agent Garland states "Okay. Um keeping those

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rights in mind, is it okay if Joe and I ask you some questions?" to which the Defendant responds "Yes".

25. Defendant was thereafter questioned about his actions.

CONCLUSIONS OF LAW

1) The court has jurisdiction of both the parties and the subject matter of this action.

2) It is the State's burden to prove that the search at issue falls within a well-delineated exception to the warrant requirement. *State v. Fierro* 856 N.W.2d 235 S.D. 2014 citing *Hess*, 2004 S.D. 60 Para. 23, 680 N.W.2d at 324.

3) The exigent circumstances exception is one of the well-delineated exceptions to the warrant requirement. *State v. Fierro* 856 N.W.2d 235 S.D. 2014 citing *State v. Zahn*, 2012 S.D. 19 Para. 30, 812 N.W. 2d 490, 499. *State v. Meyer*, 587 N.W.2d 719 S.D. (1998) citing *Heumiller*, 317 N.W.2d at 129.

4) Exigent circumstances exist when there is an emergency, the situation demands immediate attention and there is no time to get a warrant. *State v. Meyer*, 587 N.W.2d 719 SD 1998 citing *Heumiller*, 317 N.W.2d at 129.

5) Some guidelines have been established for determining when exigent circumstances exist,

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justifying a warrantless intrusion for search or arrest. Considerations that are particularly relevant are as follows: 1) That a grave offense is involved, particularly a crime of violence; 2) that the suspect is reasonably believed to be armed; 3) that a clear showing of probable cause exists, including "reasonably trustworthy information," to believe that the suspect committed the crime involved; 4) that there is a strong reason to believe that the suspect is in the premises being entered; 5) that a likelihood exists that the suspect will escape if not swiftly apprehended; 6) that the entry, though not consented to, is made peaceably; and 7) time of the entry. *State v. Max*, 263 N.W.2d 685 S.D. (1978) and *State v. Meyer*, 587 N.W.2d 719 SD. (1998) citing *Dorman v. United States*, 140 U.S. App.D.C.313, 320-321, 435 F2d 385, 392-93 (1970) and *Salvador v. United States*, 505 F.2d 1348, 1351-52 (8th Cir. 1974).

6) On August 17, 2015, when the Lead Police Officers arrived at the Galena Street Apartments, they were faced with a grave situation. This situation necessitated immediate action. Ken Burrows had stated that "Caitlyn" had been murdered inside

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apartment 303, and believed that her body was inside the apartment. Ken Burrows indicated that he had not actually seen the body. Ken Burrows also indicated several times he was not sure that what the Defendant had said was true, or a hoax. Upon arrival at the apartment building the officers heard the Defendant crying inside his apartment. The Defendant refused to open the door at the request of the police and these actions heightened the police concern that an emergency existed.

7) Law enforcement officers with the knowledge that the Lead Police Officers would reasonably believe that immediate action was necessary. Caitlyn Walsh could have still been alive, but close to death. Additionally, the Defendant's crying could have been the result of some type of serious injury to himself. The failure of the Lead Police Officers to take decisive, immediate action could reasonably be viewed as having resulted in the loss of life.

8) The Lead Police Officers were faced with a urgent need for action and there was no time to secure a search warrant due to the immediate threat. The Lead Police Officers had specific articulable facts, obtained from Ken Burrows and Deborah Burrows. These facts were not hunches or

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speculation. Under the totality of the circumstances presented, a reasonable police officer would have deemed that an immediate warrantless entry of apartment 303 was necessary. It was reasonable for the officers to anticipate that the threatened injury would occur in such a short period of time that it was not feasible to obtain a search warrant.

9) The officers were presented with the most urgent type of emergency, namely, the rescue of human life. Quick action was essential. The fact that Caitlyn Walsh was in fact dead did not make the entry without a warrant unreasonable as that certain fact was unknown to the officers at the time the decision to enter the apartment and without a warrant was made.

10) The exigent circumstance doctrine "is to be applied to the facts as perceived by the police at the time of entry, not as subsequently uncovered." *State v. Meyer*, 587 N.W.2d 719 S.D. (1998) citing *Heumiller*, 317 N.W.2d at 129.

11) The Lead Police Officers were compelled to take immediate action as any delay to obtain a warrant could have been catastrophic to the life or health of the occupant(s) of apartment 303. The

Defendant's behavior posed an immediate threat to himself or others. "Police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury." Bingham City, *Utah v. Stuart* 547 US 398 (2006) (Supreme Court Case).

12) Under the totality of the circumstances the officers would have continued this investigation and inevitably discovered the body of Caitlin Walsh. Eventually that evening the police officers would have entered the apartment whether the Defendant had opened the door or not. The statements and facts described by Kenneth Burrows were a serious concern to law enforcement and this matter would not have been concluded until the officers had, at a minimum, searched the apartment and spoken with the Defendant.

13) Under the Community Caretaker Doctrine the Lead Police Officers were likewise justified in making a warrantless entry into apartment 303. "Modern society has come to see the role of police officers as more than basic functionaries enforcing the law. From first responders to the sick and injured to interveners in domestic disputes, and myriad

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instances too numerous to list, police officers fulfill a vital role where no other government official can. Lives often depend upon their quick exercise of pragmatic wisdom." *State v. DeNeui* at 242. Similarly as in *State v. Deneui* 775 N.W.2d, 221 S.D. (2009), if the Lead Police Officers did not enter the residence, "indeed these officers may have been justly criticized later had they failed to check for people inside and had an injured or dead person later been discovered." *State v. DeNeui* at 242.

14) Law enforcement is obligated to read the Miranda Warning to an individual who is under arrest or in a situation similar to an arrest when law enforcement initiates questioning.

15) The limited questions asked by Lead Police Chief Wainman of the defendant at apartment 303 were asked while the Defendant was being detained but had not been arrested.

16) The Defendant, while at the jail, prior to being read the Miranda Warning by DCI Agent Garland, voluntarily made statements. These voluntary statements were spontaneously made by the Defendant therefore, the reading of the Miranda Warning was not necessary.

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17) Any Conclusions of Law may be deemed a Finding of Fact, and any Finding of Fact may be deemed a Conclusion of Law.

Let an ORDER enter accordingly.

ORDER DENYING MOTION TO SUPPRESS

In accordance with the foregoing Findings of Facts and Conclusions of Law, IT IS HEREBY;

ORDERED that the motion to suppress is denied.

BY THE COURT:

Randall Macy
Circuit Court Judge

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA Plaintiff,	*	CRI 15-754
VS.	*	**JUDGMENT OF CONVICTION**
JAMES LEWIS ROGERS, JR. Defendant.	*	

An Indictment was filed with this Court on the 26th day of August, 2015, charging the Defendant with the crime of Count I: First Degree Murder Premeditated Design (SDCL 22-16-4).

On the 1st day of September, 2015, the Defendant, the Defendant's Attorney, Ellery Grey, and John H. Fitzgerald and Brenda Harvey as prosecuting attorney(s), appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges that had been filed against the Defendant. The Defendant requested a Jury Trial on the charge contained in the Indictment.

A Jury Trial commenced on the 28th through 30th days of March, 2016, in Deadwood, South Dakota, on the charge. On the 30th day of March, 2016, the Jury returned a verdict of guilty to the charge of Count I: First Degree Murder Premeditated Design (SDCL 22-16-4).

It is therefore, the JUDGMENT of this Court that the Defendant is guilty of Count I: First Degree Murder Premeditated Design (SDCL 22-16-4) a Class A Felony.

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S E N T E N C E

On the 30th day of March, 2016, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

COUNT I: FIRST DEGREE MURDER

IT IS HEREBY ORDERED that the Defendant shall be sentenced to life imprisonment without parole.

Signed: 3/30/2016 4:42:08 PM

BY THE COURT:

Randall R. Macy

Circuit Court Judge

Carol Latuseck, Clerk of Courts

DATE OF OFFENSE: AUGUST 12, 2015

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.

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: SS
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

JAMES ROGERS,
Defendant.

CRI 15-574

CERTIFICATE OF SERVICE

The undersigned, Lawrence County (Deputy) State's Attorney hereby certifies that on the 30th day of March, 2016 (s)he served a copy of the Judgment of Conviction and Sentence on the person named below by scanning a copy:

Mr. Ellery Grey
Attorney at Law
909 St. Joseph Street Ste 55
Rapid City SD 57701

Whose address is the last known address of addressee known to the subscriber.

Brenda K Harvey
Lawrence County State's Attorney

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27817

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JAMES LEWIS ROGERS,

Defendant and Appellant.

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

THE HONORABLE RANDALL L. MACY
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed April 4, 2016

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27817

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JAMES LEWIS ROGERS,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, State of South Dakota, Plaintiff and Appellee, will be referred to as "State." James Lewis Rogers, Defendant and Appellant, will be identified as "Defendant," or "Rogers." References to the transcripts of the November 24, 2015 motions hearing (suppression) and the March 28 through 30, 2016 jury trial will be designated as "SH" and "JT," respectively. Citations to the settled record, Defendant's brief and the exhibits will be identified as "SR," "DB," and "EX," respectively. All references will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

This appeal stems from a Judgment of Conviction, which was filed on March 30, 2016, by the Honorable Randall L. Macy, Circuit Court Judge, Fourth Judicial Circuit, Lawrence County. SR 119-20.

On April 4, 2016, Defendant filed a Notice of Appeal. SR 363-64. This Court has jurisdiction, as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE WARRANTLESS ENTRY INTO ROGERS' APARTMENT ON AUGUST 17, 2015, WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES, THE INEVITABLE DISCOVERY EXCEPTION, OR THE COMMUNITY CARETAKER DOCTRINE IN THIS CASE?

Judge Macy's determination was correct.

State v. Fischer, 2016 S.D. 12, 875 N.W.2d 40

State v. Smith, 2014 S.D. 50, 851 N.W.2d 719

Fifteen Impounded Cats, 2010 S.D. 50, 785 N.W.2d 272

State v. Deneui, 2009 S.D. 99, 775 N.W.2d 221

II

WHETHER THE TRIAL COURT ERRED WHEN IT REJECTED DEFENDANT'S MOTION TO SUPPRESS HIS PRE-MIRANDA REMARKS, WHICH ROGERS MADE TO CHIEF JOHN WAINMAN AT HIS APARTMENT ON AUGUST 17, 2015, WHEN THIS POLICE OFFICER WAS TRYING TO FIND THE VICTIM, WHO MIGHT HAVE BEEN INJURED OR DEAD?

Judge Macy's decision was appropriate.

State v. McCahren, 2016 S.D. 34, 878 N.W.2d 586

State v. Deal, 2015 S.D. 51, 866 N.W.2d 141

State v. Bowker, 2008 S.D. 61, 754 N.W.2d 56

State v. Helmer, 1996 S.D. 31, 545 N.W.2d 471

STATEMENT OF THE CASE

This matter arises from Defendant's inability to control his anger and jealousy with respect to the victim's relationships with other men. The Lawrence County State's Attorney filed an Indictment on August 26, 2015, which charged Rogers with: Count I--First Degree Murder Premeditated Design, Class A felony, in violation of SDCL 22-16-4. SR 5. On September 1, 2015, Defendant was arraigned, pled not guilty to his crime and requested a jury trial. DB 1; SR 119-20.

Rogers filed a Motion to Suppress (Fourth & Fifth Amendments) on September 24, 2015. SR 24-28. On November 24, 2015, the Honorable Randall L. Macy held a motions hearing (suppression). SH 1094-1183. State filed Proposed Findings of Fact, Conclusions of Law and Order Denying Motion to Suppress Evidence on December 18, 2015. SR 61-75. On December 22, 2015, Defendant filed his Proposed Findings of Fact, Conclusions of Law and Order Granting Motion to Suppress Evidence. SR 76-87. On January 25, 2016, the court filed its Findings of Fact, Conclusions of Law and Order Denying Motion to Suppress. SR 89-102.

Judge Macy conducted a jury trial on March 28 through 30, 2016. JT 397-1064; EX 1-63, 65-134, Defendant's EX A. The jury convicted Rogers of First Degree Murder. SR 303; JT 1061-64. At the conclusion of Defendant's trial on March 30, 2016, the court held a

sentencing hearing; listened to the victim's parents, Rogers and his defense attorney, before imposing any penalty; and required that Defendant serve a life sentence for brutally killing his girlfriend with a machete. SR 119-20, 303; JT 1064-67.

On the same date, Judge Macy filed a Judgment of Conviction. SR 119-20. Rogers filed a Notice of Appeal on April 4, 2016. SR 119-20. Additional procedural details will be presented where appropriate.

STATEMENT OF FACTS

The facts in this case were precipitated by Defendant's obsessive and volatile relationship with the victim, Caitlin Walsh (Caitlin), which resulted in her death from injuries inflicted by a Bear Grylls Machete. SH 1151-52, 1166-67; JT 632, 658, 715-31, 866-71; EX 6, 6A. In addition, Rogers had a history of making threating remarks about the fact that he wanted to kill the victim and several of her boyfriends, because he was jealous and wanted her exclusively for himself. SH 1151-52, 1166-67; JT 803-09, 813-20, 826-33, 852-58, 867-71. Defendant and Caitlin also fought a lot and frequently broke up, but they always got back together. SH 1151-52, 1167; JT 869-71.

During the suppression hearing, Eric Jandt, a police officer for the City of Lead, explained that he had investigated a telephone call from Deborah Burrows on August 17, 2015, at about 4:45 p.m., who claimed that her ex-husband (Kenny Burrows) knew about "a guy at the location of 8 North Galena, Apartment 303, [had] killed his girlfriend"

and put her dead body in the suitcase. SH 1097-1109, 1113-17. Jandt, who was using a digital audio recorder, indicated that he had met with Deborah and discovered that her ex-husband was inside of her home; that this officer had asked to talk to Kenny, who believed that Defendant had asked him to help move a suitcase, which was wrapped in plastic and supposedly contained his girlfriend's remains; and that Kenny had never seen an actual body, but that he did not "want to be an accessory to murder." SH 1101-03; JT 662-64, 681-84, 836-71; EX 3, 65. Jandt also stated that Kenny thought that Defendant might have been kidding around, or that some kind of hoax existed, but that he wanted the police to check out the situation. SH 1102-03, 1115-17, 1168; JT 836-71. This officer was not sure if Kenny's story was credible, so he contacted the supervisor (Chief John Wainman) by cell phone and they met up in the parking lot of the apartment complex. SH 1104-09, 1112-18.

Wainman (who took the stand during the suppression hearing and at trial), testified that he knew from past experience that Kenny Burrows could be "a bit dramatic about how he portrayed things" and that Kenny had a substance abuse problem, but that there was good reason to suspect that Defendant might have injured Caitlin, caused her death, or injured himself because of their turbulent relationship. SH 1030-34, 1151-52, 1166-67; JT 662-65, 680-81. In addition, this officer indicated that he and Jandt had entered the hallway of

Defendant's apartment building at approximately 5:03 p.m.; that they could hear loud crying coming from Rogers' apartment; and that Defendant had been repeatedly saying "I'm sorry," or "I'm so sorry." SH 1132-35, 1145-46, 1151-66; JT 664-68, 678; EX 3, 65. Wainman also stated that he had knocked several times, told "James [to] open the door," but that everything suddenly "just went quite"; that this officer could not kick in the apartment door, so he had contacted the manager of the building by cell phone, who was unable to provide a key because she was located in Sturgis; and that he had sent Jandt to get some tools from his truck. SH 1132-35, 1151-54, 1161-62; JT 665-69; EX 3, 65. Wainman further noted that it was imperative to get into Defendant's apartment for two reasons, which included the fact that Caitlin could have been injured but alive and unconscious, while trapped in a suitcase; and due to the fact that this officer "didn't know if Mr. Rogers was harming himself." SH 1133-35, 1146, 1150-52, 1154-56, 1158-59, 1166-69; JT 664-65, 678.

Providing more details, Wainman emphasized that he had just started to remove the doorframe from Defendant's apartment about six or seven minutes later, when Rogers clicked the deadbolt and opened the door. SH 1132-36, 1163-64; JT 668-70. Wainman described how he had had "a back and forth" verbal exchange with Defendant, while trying to get him to come out of the apartment, and that finally this officer had just "grabbed [Rogers] by his shirt and pulled him into the

hallway." SH 1136-37, 1163-64; JT 668-70; EX 3, 65. In addition, Wainman testified that he had asked Defendant "What did you do," and that Rogers replied "I did something very wrong." SH 1162-64; JT 670; EX 3, 65. This officer also sat Defendant in the hallway and handcuffed him before entering the apartment to look for Caitlin, but could not find her. SH 1136-37, 1163-64; JT 670, 682. Wainman further detected the "smell of decay," during this first sweep of Defendant's apartment; noticed a large spot of dried blood on the carpet; and saw a machete sitting on a kitchen chair, which was partially out of its sheath and had blood on it. SH 1165-66, 1169; JT 670-71, 678-80.

At this point, this officer indicated that he had run back into the hallway and exclaimed "Where is she [and] I need to find her," and that Rogers replied "She's in the closet." SH 1136-37; JT 672, 674; EX 3, 36. In addition, Wainman asked "Your's," and Rogers said "Yes." SH 1136-37; JT 671-72; EX 3, 36. Wainman also went back into the bedroom of Defendant's apartment and opened the closet door; this officer was hit by the overwhelming smell of "something deceased"; and he found a medium to large "suitcase wrapped in clear plastic," which had a discharge of fluids coming from it. SH 1137-39, 1165-66; JT 672-74, 679-80; EX 40. Wainman further lifted this suitcase "to check its weight," because Caitlin was "a slender gal"; took several photographs of this item, but did not open it; and participated in

another sweep of Rogers' apartment after a search warrant was obtained about "5 and 1/2 hours later." SH 1137-41; JT 673-75.

Contributing to this picture, Brett Garland, a DCI Agent (who testified during the suppression hearing and at trial), and Joe Leveque, a Detective (who testified at trial), interviewed Defendant at the Lawrence County Sheriff's Office at approximately 6:40 p.m. on August 17, 2015, and at about 8:57 a.m. on August 18, 2015. DB 7; SH 1170-77; JT 769-76, 779-81, 790-93, 795-98, 921-22; EX 69-72. In particular, Garland indicated that Defendant had volunteered, even before any *Miranda* advisement was given, that "I never meant to hurt her." SH 1170-74; JT 713, 792-93, 797-98; EX 69-70. Garland also related that Defendant had interrupted the first line of his *Miranda* warning, during the August 17, 2015 session, and proclaimed that "he would tell us whatever we wanted to know"; that this investigator had started over, "read the *Miranda* form in its entirety after that," and made sure that Rogers understood his rights; and that Defendant had admitted (during both of his interviews) that he had beaten and stabbed Caitlin with a machete, because she said "Welcome to the world of AIDS," after consensual sex together, which made him angry. SH 1174-77; JT 772-73, 792-93, 797-98, 852, 866-67; EX 69-72. *State v. Berhanu,* 2006 S.D. 94, ¶ 16, 724 N.W.2d 181, 185-86 (the design to effect death need only exist for an instant).

Moreover, Dr. Donald Habbe, a forensic pathologist, stressed that he had performed an autopsy upon Caitlin's body on August 19, 2015, at the Rapid City Regional Hospital; that Caitlin's decomposed remains had been removed from a blue suitcase and that the victim had several tattoos on her right foot and upper back (which were used to identify her body); that Caitlin had been wearing a bra, shirt and one sock; and that there was no way to tell exactly when her death had occurred. JT 675-76, 706-13, 739-43; EX 50-56. Dr. Habbe emphasized that he had discovered stab wound A, during Caitlin's autopsy, which was located over the victim's mid-chest area; that this injury had gone "right through [Caitlin's] sternum [and] almost sliced [her heart] in two pieces"; and that it could have been a potentially fatal wound. JT 714-21, 730-31, 744; EX 57-60. In addition, this expert indicated that he had identified stab wound B, which was located in Caitlin's "suprapubic" or vaginal area; that this injury had "a depth of 1 to 2 inches"; and that it would not have resulted in death. JT 723-25, 744-45. Dr. Habbe also stated that he had found stab wound C, which consisted of an "incised/chop" injury, and was located just above Caitlin's right ear; that this laceration had caused head trauma and fractured the victim's skull; and that it could have been a possibly fatal incision. JT 725-30, 745; EX 61-63. This expert further opined that there was no way to tell the precise sequence in which these injuries might have taken place, or if Caitlin had been beaten because of the

decayed condition of her body; that these three injuries were consistent with having been caused by a machete (EX 6A); that the victim did not have any defensive wounds; that Caitlin's blood alcohol level could have been caused by decomposition; and that no AIDS test could be performed on her degraded remains. JT 713-41, 746-51.

A number of other scientific experts testified for the prosecution at trial and provided information, which linked Defendant to Caitlin's death. JT 963-72, 986-92, 1002-07; EX 6A, 6B, 13, 76-77, 86, 109-12, 114. Heather Specht, a forensic scientist, explained that she had discovered the palm print of Defendant's right hand on the edge of the machete's handle. JT 971-72; EX 6A, 91, 114. In addition, Amber Bell, a forensic scientist, indicated that she had conducted a DNA analysis of the blood, which had been discovered on the blade of the machete, and found that it originated from Caitlin; that this expert had performed a DNA examination of the blood, which had been present on Rogers' ring, and found that the "major contributor" was the victim; and that Bell had conducted DNA testing, with respect to the blood that had been discovered on the sheath of the machete (EX 6B), and confirmed that it matched Caitlin's genetic profile; and that this expert had been unable to detect any spermicide, or seminal fluid in the victim's vaginal swabs (although the Defendant had admitted that he washed her body off in his bathtub). JT 933-34, 986-92, 1000-01; EX 6A, 6B, 80, 86, 109. Bell also stated that she had conducted a DNA analysis, with respect to

a series of swabs from Defendant's apartment, which revealed that Caitlin's blood was present on a lamp base; on a north wall above the window; on a spot on the ceiling; on a cutout of carpet; and on several samples of carpet pad. JT 992-96; EX 110-11. Brent Gromer, a DCI agent, further noted that he had extracted several photographs of Caitlin from Defendant's cell phone, which showed that the victim had been with Rogers on August 12, 2015, or about five days before the discovery of her body. JT 675-77, 1002-07; EX 13, 76-77; Defendant's EX A.

Finally, Linda Carmon, the manager of Bob's Silver Star, testified for the defense at trial, and detailed that Defendant (who had a substance abuse problem) and Caitlin had been drinking beer and playing pool at her place on the afternoon of August 12, 2015. JT 681, 1008-17. *State v. Owen,* 2007 S.D. 21, ¶ 37, 729 N.W.2d 356, 367-38 (intent to kill still exists if the perpetrator is in a state of anger or voluntary intoxication). In addition, this witness indicated that Rogers and the victim "weren't getting along" and that they had been fighting, during a game of pool. JT 681, 1011-17. Carmon also recalled that she had told Defendant and Caitlin "to knock it off," and that the bar's security footage confirmed that this couple had left together around 8:05 that evening. JT 1011-17. Additional factual matters will be presented where necessary.

ARGUMENTS

I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS BECAUSE WARRANTLESS ENTRY INTO ROGERS' APARTMENT ON JULY 15, 2015, WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES, THE INEVITABLE DISCOVERY EXCEPTION, OR THE COMMUNITY CARETAKER DOCTRINE IN THIS CASE.

A. Overview.

Defendant attacks Judge Macy in his first issue, because the court rejected the defense's Motion to Suppress. DB 7-16; SR 24-28, 89-102. In particular, Rogers contends that Wainman "invaded his home" without a search warrant and "without an applicable exception" to this requirement. DB 7-16. Defendant also professes that the State failed to establish exigent circumstances for three reasons, which included that: (1) no reliable information existed that an ongoing emergency had taken place because Kenny Burrows was untrustworthy, a known drug dealer and "excitable"; (2) that if there was any credible information about a crime, it consisted of "a murder rather than an ongoing emergency," and that Defendant's crying and remorseful "I'm sorry" was not the type of hysterical crying often associated with a crisis; and (3) that investigators had the ability to obtain a search warrant due to the fact that Jandt did not immediately rush into Defendant's apartment after talking to Kenny, but contacted his boss about how to proceed, even after this tipster said that Rogers

had killed his girlfriend, put her in a suitcase, and was using a fan to cover up the smell of decay. DB 10-13. Defendant further alleges that the exigent circumstances exception does not apply here because Wainman should have used his cell phone to obtain a telephonic warrant before entering Rogers' apartment; that there was no "reasonable probability" that the inevitable discovery exception justified any entry under these circumstances; and that the community caretaker doctrine "collapse[s]" for the same reasons, as the exigent circumstances exception in this case. DB 10-16.

B. Standard of Review.

This Court reviews "de novo a motion to suppress based upon an alleged violation of a constitutionally protected right." *State v. Olson,* 2016 S.D. 25, ¶ 4, 877 N.W.2d 593-94. It also evaluates the trial court's factual findings under the clearly erroneous standard. *Id.* "Once the facts have been determined, however, the application of a legal standard to those facts is a question of law," which is reviewed de novo. This Court is not restricted by the lower court's rational below. *State v. Wright,* 2010 S.D. 91, ¶ 8, 791 N.W.2d 791, 794.

The exigent circumstances exception "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under Fourth Amendment." *State v. Fischer,* 2016 S.D. 12, ¶ 13, 875 N.W.2d 40, 45. "The need to protect or preserve life or to avoid serious injury"

constitutes this type of emergency situation. *Fifteen Impounded Cats,* 2010 S.D. 50, ¶ 15, 785 N.W.2d 272, 278-79; *State v. Bowker,* 2008 S.D. 61, ¶ 19, 754 N.W.2d 56, 63; *State v. Christensen,* 2003 S.D. 64, ¶ 13, 663 N.W.2d 691, 695. The inevitable discovery doctrine "applies where evidence may have been seized illegally but where an alternative legal means of discovery" would have ultimately led to the same result. *State v. Smith,* 2014 S.D. 50, ¶ 25, 851 N.W.2d 719, 726. The community caretaker doctrine involves "circumstances short of a perceived emergency," which justify a warrantless entry, in order to preserve life, or protect property, and the applicable standard is one of reasonableness under the circumstances. *State v. Deneui,* 2009 S.D. 99, ¶ 46, 775 N.W.2d 221, 240-41.

C. Legal Analysis.

State counters that Judge Macy carefully evaluated Defendant's suppression request, in his January 25, 2016 Findings of Fact, Conclusions of Law, and Order Denying Motion to Suppress. DB 7-16; SR 24-28, 89-102. *Olson,* 2016 S.D. 25, ¶ 4, 877 N.W.2d at 594; *Wright,* 2010 S.D. 91, ¶ 8, 791 N.W.2d at 794. First, this judge determined that Wainman and Jandt had been faced with a critical emergency when they arrived at the Galeana Street Apartments on August 17, 2015, which required immediate action because Kenny Burrows claimed that Defendant had killed Caitlin and had hidden her body in a suitcase, which was located inside of Rogers' home. SR 89-

93, 96-100; SH 1101-18; JT 661-65, 678-82, 836-71; EX 3, 65. Judge Macy also stated that these officers reasonably believed that Caitlin still could have been alive and unconscious, or close to death, because Kenny had never seen a body and was not sure if Rogers was joking, or perpetrating a hoax about his girlfriend's murder. SR 89-93, 96-100; SH 1101-09, 1113-19, 1131-35, 1150-61, 1166-69; JT 663-68; EX 3, 65. *Fischer,* 2016 S.D. 12, ¶ 13, 875 N.W.2d at 45; *Fifteen Impounded Cats,* 2010 S.D. 50, ¶ 15, 785 N.W.2d at 278-79 (protecting life and limb counts).

Second, Judge Macy emphasized that Wainman's concerns were "heightened" by the fact that both officers could hear Defendant's loud crying from the hallway of his apartment building; that Rogers had been saying "I'm sorry" to someone inside his apartment, which suggested that Caitlin might still be alive; that Defendant had refused to open the door at Wainman's request and that at this point "it just went quiet [and] it was kind of errie"; and that Defendant could have been trying to injure himself, as well as the victim. SR 89-93, 96-100; SH 1109-21, 1130-35, 1144-47, 1150-52, 1154-59, 1166-69; JT 663-69, 678; EX 3, 65. *Bowker,* 2008 S.D. 61, ¶¶ 16-19, 754 N.W.2d at 63-64 (emergency entry was needed to check on occupants of apartment and officers needed to act quickly). The court also detailed that Wainman had been unable to break down the door to Defendant's apartment, so he contacted the property manager for a key, but was

unsuccessful; that the highest priority was to find out whether Caitlin might have been "just injured [and] may have appeared dead" to the Defendant, or if "Mr. Rogers was harming himself"; and that Defendant could have been destroying other evidence because he had already asked Kenny to help him get rid of the victim's remains. DB 13-14; SR 92-93, 96-100; SH 1101-02, 1113-21, 1125-26, 1130-35, 1144-47, 1150-52, 1154-59, 1166-69; JT 663-69, 678. *State v. Fierro,* 2014 S.D. 62, ¶¶ 15, 17 n.3, 853 N.W.2d 235, 240-41 (concerns about the destruction of evidence can constitute exigent circumstances).

Third, Judge Macy explained that Wainman and Jandt had been presented with the "most urgent type of emergency"; that "quick action was essential"; and the fact that Caitlin was already dead did not make entry without a warrant into Defendant's apartment pretextual or irrational in this case, because this reality "was unknown" to these officers before they tried to help the victim. SR 90-91, 99; SH 1109-21, 1130-35, 1144-47, 1150-52, 1154-59, 1166-69; JT 664-69, 678. *Fifteen Impounded Cats,* 2010 S.D. 50, ¶ 15, 785 N.W.2d at 278-79; *State v. Meyer,* 587 N.W.2d 719, 723-24 (S.D. 1998) (exigent circumstances are evaluated from the perspective of police officers at the time of the emergency and not in hindsight). In addition, this judge indicated that Wainman and Jandt had obtained specific and articulable facts from Deborah and Kenny Burrows that an immediate threat to Caitlin's life or well-being might exist; that Wainman knew

from prior experience that Defendant and the victim had a volatile relationship; and the fact that Kenny had smelled "something bad," in Rogers' apartment, but had never seen a dead body and was not sure if Caitlin might still be alive and in need of medical assistance, only reinforced the perilous nature of the situation. SR 89-92, 98-99; SH 1099-1105, 1110-13, 1125-27, 1130-32, 1144-69; JT 662-65. *Bowker,* 2008 S.D. 61, ¶¶ 16-23, 754 N.W.2d at 62-64. Judge Macy also disposed of Defendant's insinuations that there was not enough "hysterical crying" in this case, or that people cry for any number of reasons, by pointing out that Wainman had asked Rogers several times if he was alright based upon the audio recording of this emergency; that this office had told Rogers to open the door and not gotten any response; and that he could not tell if the Defendant was hurt, trying to injure himself, or if "either of the two [occupants of the apartment] required medical attention." DB 11-12; SR 93, 98-99; SH 1099-1105, 1110-13, 1119-20, 1125-27, 1130-34, 1144-49; JT 663-65, 678; EX 3, 65. The court further noted that Wainman and Jandt were afraid that Caitlin could have been comatose and drawing her last breaths, while trapped in a suitcase; that Defendant might have been hurting himself, or worse, when he stopped crying and became totally unresponsive; and that it was not "feasible" to obtain a search warrant, when immediate entry into Rogers' apartment was necessary, even though a telephonic warrant was "[m]uch quicker than the normal way." DB 13-

14; SR 89-93, 97-99; SH 1100-21, 1125-27, 1129-35, 1141, 1144-59, 1166-69; JT 662-64, 678; EX 3, 36, 65. *Fischer,* 2016 S.D. 12, ¶ 13, 875 N.W.2d at 45; *Christensen,* 2003 S.D. 64, ¶ 13, 663 N.W.2d at 695 (safety factors are valid concerns).

Fourth, Judge Macy found that the inevitable discovery exception applied here, because Wainman and Jandt would have investigated the reports, which Deborah and Kenny Burrows made to the police on August 17, 2015, with respect to Caitlin's disappearance and possible murder; and that it was logical to assume that the victim's body would have been discovered in Defendant's apartment. DB 14-16; SR 89-93, 100; SH 1098-1111, 1113-19, 1129-35, 1166-69; JT 662-66, 678. *Smith,* 2014 S.D. 50, ¶¶ 25-26, 851 N.W.2d at 726. In addition, this judge observed that Wainman and Jandt had checked out Kenny's account of a possible murder; that these officers realized that Caitlin's life could be hanging in the balance and that they needed to rescue her; and that Wainman and Jandt would have ultimately found the victim's remains whether Defendant opened his apartment door to the police or not, given Rogers' noisy sobbing and the natural consequences of a decomposing corpse in a public building. DB 14-16; SR 89-93, 100; SH 1098-1111, 1113-91, 1129-35, 1144-61, 1166-69; JT 662-66, 678. The court also held that Kenny's story posed a very dangerous situation for Wainman and Jandt and that their inquiry would not have reached any conclusion until after these officers had "at a minimum searched

[Defendant's] apartment and spoken with [Rogers]" about his girlfriend's welfare. DB 14-16; SR 89-93, 100; SH 1098-1111, 1113-19, 1129-35, 1144-61, 1166-69; JT 662-66, 678. *State v. Boll,* 2002 S.D. 114, ¶ 20, 651 N.W.2d 710, 716. This analysis further dovetails with the evidence presented by both parties at trial because DCI Agent Gromer testified that he had extracted several photographs of Caitlin from Defendant's cell phone, which were dated August 12, 2015; and defense witness, Linda Carmon, confirmed that Rogers and the victim had been fighting in Bob's Silver Star Bar, before they left together later that evening. JT 1002-07, 1008-17; EX 13, 76-77; Defendant's EX A. *Smith,* 2014 S.D. 50, ¶¶ 25-26, 851 N.W.2d at 726. Lastly, Judge Macy related that Wainman and Jandt were "likewise justified in making a warrantless entry" into Defendant's apartment pursuant to community caretaker doctrine, because the role of police officers includes resolving domestic disputes, protecting the sick and injured, and more than simply enforcing the law. DB 16; SR 89-93, 100-01; SH 1098-1111, 1113-19, 1129-35, 1144-61, 1166-69; JT 662-66, 678. *Deneui,* 2009 S.D. 99, ¶¶ 42-54, 775 N.W.2d at 239-44. In addition, this judge ruled that Caitlin's life and perhaps even that of the Defendant, might have depended upon Wainman and Jandt's "quit exercise of pragmatic wisdom," when they entered Rogers' apartment under emergency conditions. DB 16; SR 89-93, 100-01; SH 1098-1111, 1113-19, 1129-35, 1144-61, 1166-69; JT 662-66, 678. *Id.* (citing

Winter v. Adams, 254 F.3d 758, 763 (8th Cir. 2001)). The court also noted that these officers might have been "justly criticized" and derelict in their duties, if they had failed to check the well-being of both individuals. SR 89-93, 100-01; SH SH 1098-1111, 1113-19, 1129-35, 1144-61, 1166-69; JT 662-66, 678. Thus, no mistakes of constitutional significance exist on this score.

II

THE TRIAL COURT DID NOT ERR WHEN IT REJECTED DEFENDANT'S MOTION TO SUPPRESS HIS PRE-*MIRANDA* REMARKS, WHICH ROGERS VOLUNTARILY MADE TO CHIEF JOHN WAINMAN AT HIS APARTMENT ON AUGUST 17, 2015, WHEN THIS POLICE OFFICER WAS TRYING TO FIND THE VICTIM, WHO MIGHT HAVE BEEN INJURED OR DEAD.

A. Background.

Defendant argues, in his second issue, that he was in custody and deprived of his freedom to leave, when Wainman forcibly tried to breakdown Rogers' apartment door; grabbed Defendant by the shirt and pulled him into the hallway; and drove him "to the ground." DB 16-19; SR 24-28, 89-102; SH 1124, 1136-37, 1163-64; JT 670, 682. In addition, Defendant claims that Wainman should have provided him with a *Miranda* advisement before this officer inquired "What did you do," and Rogers replied "I did something very wrong." DB 16-19; SR 24-28, 101; SH 1124, 1136-37, 1163-64; JT 670, 682; EX 3, 36. Defendant also insists that he should have been read his *Miranda* rights when Wainman placed Rogers in handcuffs and entered Rogers' apartment to

look for Caitlin but could not find her; and that a formal arrest existed when Wainman returned to the hallway and asked "Where is she [and] I can't find her," so Rogers said "In the closet." DB 16-19; SR 24-28, 101; SH 1124, 1136-37, 1163-64; JT 670, 682; EX 3, 36.

B. Standard of Review.

Law enforcement officers are not required to administer a *Miranda* advisement to everyone whom they question. *State v. Deal,* 2015 S.D. 51, ¶ 13, 866 N.W.2d 141, 145. This Court utilizes a two-part test when making a custody determination, which includes: (1) what were the circumstances surrounding the interrogation; and (2) would a reasonable person have felt that he or she was not at liberty to terminate the interrogation and leave. *State v. McCahren,* 2016 S.D. 34, ¶ 30, 878 N.W.2d 586, 599. Investigators also are not required to deliver *Miranda* warnings when their questions constitute "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in this fact-finding process," or in emergency situations when safety concerns exist. *Bowker,* 2008 S.D. 61, ¶¶ 30-35, 754 N.W.2d at 65-67.

C. Legal Synopsis.

State replies that Judge Macy reached the right result when he explained that law enforcement officers are obligated to read *Miranda* warnings "to an individual under arrest or in a situation similar to an arrest," when they initiate questioning. DB 16-19; SR 24-28, 101;

SH 1124, 1136-37, 1163-64; JT 670, 682; EX 3, 65. *Deal,* 2015 S.D. 51, ¶¶ 13, 17-18, 866 N.W.2d at 145, 147; *State v. Johnson,* 2015 S.D. 7, ¶¶ 15, 28, 860 N.W.2d 235, 242, 244 (discussion was not overly coercive or physically intimidating). In addition, this judge indicated that the limited exchange between Wainman and Defendant, in the apartment hallway, when this officer was trying to find Caitlin under emergency conditions because she could have been injured or dying, did not amount to a custodial interrogation. SR 24-28, 101; SH 1124, 1136-37, 1163-64; JT 670, 682; EX 3, 65. *McCahren,* 2016 S.D. 34, ¶ 30, 878 N.W.2d at 599; *Bowker,* 2008 S.D. 61, ¶¶ 30-35, 754 N.W.2d at 66-67; *State v. Spence,* 2003 WL 21904788, at *5-6 (Ohio Ct. App. August 11, 2003) (defendant was not in custody for *Miranda* purposes, when he had been handcuffed for officer safety and the police were trying to find his wife, whose body had been hidden in a bedroom closet). The court also ruled that Rogers had been detained at this point, but that he had not been formally arrested. SR 24-28, 101; SH 1124, 1136, 1163-64; JT 670, 682. *Bowker,* 2008 S.D. 61, ¶¶ 30-35, 754 N.W.2d at 65-67 (no rigorous confrontation took place).

Finally, State maintains that Defendant's remarks to Wainman constituted harmless error, even if Rogers was somehow in custody, and "in no way" felt free to leave after this officer handcuffed Rogers and started asking questions about the victim's whereabouts during this crisis. DB 18; SR 24-28, 101; SH 1124, 1136-37, 1163-64; JT 670,

682. *McCahren,* 2016 S.D. 34, ¶¶ 31-32, 878 N.W.2d at 599-600; *State v. Medicine,* 2015 S.D. 45, ¶ 15, 865 N.W.2d 492, 499; *State v. Berget,* 2013 S.D. 1, ¶¶ 114-17, 826 N.W.2d 1, 36; *State v. Helmer,* 1996 S.D. 31, ¶¶ 36-40, 545 N.W.2d 471, 477-78. In addition, an abundance of other evidence at trial supported the jury's verdict, which included Defendant's admissions, during his two investigative interviews, that he had killed Caitlin by stabbing her with a machete; and Dr. Habbe's testimony that the victim had at least two fatal stab wounds in her heart and skull, as well as a nonfatal cut in her vaginal area. SH 1170-77; JT 714-31, 744-45, 769-76, 779-80, 790-93, 795-98, 921-22; EX 6A, 50-63, 69-72. *Berget,* 2013 S.D. 1, ¶¶ 114-17, 826 N.W.2d at 36; *State v. Zakaria,* 2007 S.D. 27, ¶¶ 19-21, 730 N.W.2d 140, 146. Several other experts also confirmed that Defendant's right palm print had been discovered in the blood on the handle of the machete; that Caitlin was a major contributor of the blood found on Rogers' ring; that the victim's blood had been detected on the machete and its sheath; and that the blood stains scattered throughout Rogers' apartment matched Caitlin's genetic profile. JT 969-72, 986-90; EX 6A, 6B, 80, 91, 110-11, 114. *Helmer,* 1996 S.D. 31, ¶¶ 36-40, 545 N.W.2d at 47-48. As such, no relief is justified on this record.

CONCLUSION

Based upon the foregoing arguments and authorities, State respectfully request that Defendants' murder conviction 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 5,278 words.

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

Dated this _____ day of August 2016.

_____
Ann C. Meyer
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of August 2016, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. James Lewis Rogers* was served via electronic mail upon Ellery Grey at ellery@ellerygreylaw.com.

_____
Ann C. Meyer
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL # 27817

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

JAMES LEWIS ROGERS,
Defendant and Appellant.

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

THE HONORABLE RANDALL L. MACY
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 27817

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

JAMES LEWIS ROGERS,
Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, James Rogers, will be referred to by name. Plaintiff and Appellee, the State of South Dakota will be referred to as "State." All references to the transcript of the evidentiary hearing held on November 24, 2015 related to the Defendant's motion to suppress shall be referred to as "SH" followed by the appropriate page number(s). All other documents within the settled record shall be referred to as "SR" followed by the appropriate number. The State's Appellee's Brief shall be referred to as "State's Brief" and shall be cited by the initials "SB" (State's Brief) followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Mr. Rogers reasserts the Jurisdictional Statement contained in his original Appellant's Brief and further, Mr. Rogers does not contest the Jurisdictional Statement contained within the State's Brief.

STATEMENT OF THE LEGAL ISSUES

1. The trial court erred when it denied Mr. Rogers' motion to suppress the evidence that was obtained as a result of the warrantless entry into his home.

   The trial court denied Mr. Rogers' motion to suppress. SR 24.

   State v. Deneui, 2009 SD 99, 775 N.W.2d 221.
   State v. Max, 263 N.W.2d 685 (S.D. 1978).
   State v. Shearer, 1996 SD 548, N.W.2d 792.

2. The trial court erred when it denied Mr. Rogers' motion to suppress the pre-*Mirandized* statements that Mr. Rogers gave to law enforcement officers.

   The trial court denied Mr. Rogers' motion to suppress. SR 24.

   State v. Walth, 2011 SD 77, 806 N.W.2d 623.
   State v. Gesinger, 1997 SD 6, 559 N.W.2d 549.

STATEMENT OF THE CASE AND FACTS

Mr. Rogers reasserts the Statement of the Case and Facts as contained in his original Appellant's Brief.

ARGUMENTS

1. The trial court erred when it denied Mr. Rogers' motion to suppress the evidence that was obtained as a result of the warrantless entry into his home.

Standard of Review: A motion to suppress presents a mixed question of law and fact, as such, "This Court reviews the denial of a motion to suppress alleging a violation of a constitutionally protected right as a question of law by applying the de novo standard." *State v. Madsen*, 2009 SD 5, ¶ 11, 760 N.W.2d 370, 374 (internal citations omitted). Under this standard, the Court reviews the circuit court's findings of fact under

the clearly erroneous standard, but gives deference to its conclusions of law. *State v. Haar*, 2009 SD 79, ¶ 12, 772 N.W.2d 157, 162 (internal citations omitted).

Reply to State's Legal Analysis. Mr. Rogers maintains that the trial court incorrectly denied his motion to suppress. In Mr. Rogers' Appellant's Brief, the argument was made that law enforcement officers illegally entered Mr. Rogers' home given that they did not have a warrant and that no credible factual basis existed to justify an exception to the warrant requirement. Additionally, Mr. Rogers argued that the entry into the home was unreasonable as law enforcement had sufficient time to secure a search warrant. The State has responded to these arguments in its brief by reiterating the trial court's written findings of fact and conclusions of law that are contained at SR 89. Essentially, the State has not raised any new arguments or analysis on appeal.

Under SDCL 15-26A-62 the contents of a reply brief are confined to the "new matter" raised in an appellee's brief. Given that Mr. Rogers has provided his arguments and analysis related to the trial court's findings of fact and conclusions of law in his appellant's brief, those arguments will not be reasserted at length here.

However, the State did argue or at least supplement the trial court's analysis by noting that several of the facts produced at the suppression hearing were also presented at trial. Specifically, the State wrote:

> This analysis further dovetails with the evidence presented by both parties at trial because DCI Agent Gromer testified that he had extracted several photographs of Caitlin from Defendant's cell phone, which were dated August 12, 2015; and defense witness, Linda Carmon, confirmed that Rogers and the victim had been fighting in Bob's Silver Star Bar, before they left together later that evening.

SB 19.

As the State correctly notes in its brief, exigent circumstances are evaluated from the perspective of police officers at the time of the emergency. SB at 16 citing *State v. Meyer*, 587 N.W.2d 719, 723-24 (S.D. 1998). Therefore, the evidence that was produced at trial (evidence the arresting officers could not have known about) should not be used after the fact to support a probable cause determination. If the officers did not have probable cause based upon Kenny's report and the crying the officers heard upon entering the apartment building, the State should not be permitted to supplement the probable cause determination with the additional information subsequently uncovered by the investigation, such as the photos from Mr. Rogers' phone and the statements of witnesses who were only interviewed much later.

Turning to the issue of the application of the inevitable discovery doctrine, the State in its brief does not address the two-part test for the application of this doctrine. Under *United States v. Wilson*, 36 F.3d 1298, 1304 (5th Cir. 1994), the inevitable discovery exception requires a showing that (1) there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) the government was actively pursuing a substantial and alternative line of investigation at the time of the constitutional violation. In his Appellant's Brief, Mr. Rogers argued that the State had failed to present any evidence during the suppression hearing that law enforcement was pursuing a substantial alternative investigation at the time of the warrantless entry into Mr. Rogers' home. Although the trial court noted that Chief Wainman and Officer Jandt would have eventually done a different type of investigation had they not made the illegal entry (SB at 18) this hardly amounts to the active independent pursuit required for the independent source doctrine to

apply. If the State's analysis were deemed to be correct, the inevitable discovery rule would apply to virtually every illegal warrantless entry into a home, thereby rendering the warrant requirement a nullity. Given that the State has failed to address the test set forth in *United States v. Wilson, supra*, the Court should find that the inevitable discovery doctrine does not apply in this case.

Ultimately, on this issue, the State needs to establish that exigent circumstances were present to justify entry into the home. However, as Chief Wainman candidly admitted at the suppression hearing, he knew that Kenny had a methamphetamine habit and that he was "excitable." TR 67. Furthermore, the information received from Kenny presented a dichotomy; either this was a hoax, or there was a dead body in the apartment. Neither scenario required an emergency entry, especially given how quickly a search warrant can now be obtained.

2. The trial court erred when it denied Mr. Rogers' motion to suppress the pre-Mirandized statements that Mr. Rogers gave to law enforcement officers.

Reply to State's Legal Synopsis: Mr. Rogers argues that law enforcement officers violated his Fifth Amendment and *Miranda* rights when he was questioned in the hallway of his apartment building but without having been given his *Miranda* warning. In response, the State argues that Mr. Rogers was not in police custody at the time he was questioned. SB 22. The State cites *State v. Spence*, 2003 WL 21904788 in support of its argument. However, *Spence* is an unreported decision of the Twelfth District, Court of Appeals of Ohio. See generally, SDCL 15-26A-87.1(E). This decision should be accorded little precedential value.

The State also cites *State v. Bowker*, 2008 S.D. 61, 754, N.W.2d 56 in support of its position. In *Bowker*, this Court declined to reverse a trial court's decision denying a

motion to suppress a defendant's un- *Mirandized* statements. The challenged statements in *Bowker* occurred when the defendant was in an apartment and ordered to sit on a couch while law enforcement officers searched for narcotics. After officers found meth pipes they asked the defendant about the pipes and how long she had been staying at the home. On review, this Court did note that the officers' questions were "general, on-the-scene" questions, not subject to *Miranda*. However, this Court also noted that a reasonable person would not have considered herself in custody while being seated on the couch. "While for officer safety she may not have been free to roam around the apartment at will, she was nevertheless free to leave up to the point of her arrest." *Bowker* at 67.

By contrast, Mr. Rogers was clearly in a position where no reasonable person would assume that he was free to leave. Mr. Rogers was handcuffed after being pulled into the hallway by law enforcement. Officer Jandt's testimony also indicates that Mr. Rogers was also forced to the ground. SH 31. *See United States v. Martinez*, 462 F.3d 903, 909 (8th Cir. 2006) (finding defendant in custody for *Miranda* purposes where defendant had been handcuffed and searched for weapons). Being forced into a hallway, handcuffed and forced to the ground would leave any person with the clear understanding that he was not free to leave police custody.

The State also argues that any error in failing to suppress Mr. Rogers' statements in the hallway was harmless. SB 22. This Court has written:

> In examining the admission of erroneous evidence, an appellate court must determine whether the defendant's case was prejudiced by the admission. *State v. Schuster*, 502 N.W.2d 565, 570 (S.D.1993). Prejudicial error can only be shown, if deletion of the erroneous evidence would cause the result of the trial to change. *Id.* at 570 (citing *State v. Blue Thunder*, 466 N.W.2d 613, 618–19 (S.D.1991) (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967))). The violation of a defendant's constitutional right may constitute harmless error and therefore not require reversal, if this Court can declare beyond

> a reasonable doubt that the erroneous admission was harmless and did not contribute to the verdict which was obtained. *Id.* at 570 (citing *State v. Michalek*, 407 N.W.2d 815, 819 (S.D.1987)).

In all candor, the defense at trial was that Mr. Rogers killed Ms. Walsh in the heat of passion. *See* SDCL 22-16-15(2) (defining manslaughter in the first degree and heat of passion). However, the statements uttered by Mr. Rogers outside of his apartment were arguably the most conclusive testimonial evidence against him at trial as no argument could be made that those statements were the result of undue police interrogation tactics. While other physical evidence was present, such as Mr. Rogers DNA and prints at the scene of the crime, it must be remembered that Mr. Rogers lived at the apartment and also owned the machete in question. Given those facts, the Court should not say beyond a reasonable doubt that the admissions of Mr. Rogers' statements in the hallway were harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, Mr. Rogers respectfully requests that this Court reverse the conviction in this matter and remand this action with an order directing the trial court to enter an order granting Defendant's Motion to Suppress.

REQUEST OF ORAL ARGUMENT

Mr. Rogers respectfully requests oral argument on all issues.

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