IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL #30353

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

ARNSON ABSOLU,
Defendant and Appellant

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT GUSINSKY

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Throughout this brief Defendant/Appellant Arnson Absolu will be referred to as "Defendant" or "Appellant" or by name. Plaintiff/Appellee, the State of South Dakota, will throughout this brief be referred to as "State" or "Appellee". All other individuals involved in the trial shall be referred to by name. Reference to the transcript of the trial shall be referred to as follows: JT and the page. Reference to other transcripts shall be by type of hearing and date. Reference to documents filed herein under the Settled Record shall be referred to as "SR", and the number. Separate exhibits will be referred to by either "State's" or "Defendant's" Exhibit and the number.

JURISDICTIONAL STATEMENT

On September 4, 2020, Defendant/Appellant, was charged by way of Complaint with two counts of First Degree Murder (SDCL 22-16-4(1)), for the killing of Charles Red Willow and Ashley Nagy. SR: 1. On January 6, 2021, an Indictment was issued for three counts of First Degree Murder (SDCL 22-16-4 (1)) alleging the killing of killing of Charles Red Willow, Ashley Nagy, and Dakota Zaiser. SR: 16. On February 16, 2021,

Absolu was arraigned on that Indictment. He entered a not guilty plea to the charges. 01/16/21 Arraignment, p 7. For much of the pretrial period the defense used a mitigation specialist to investigate Arnson Absolu's background to defend against the possible death penalty. After the prosecution received defense mitigation information, spoke to the families of the alleged victims, and upon a deadline of the circuit court to declare an intention to seek the death penalty, the State opted to forego seeking the death penalty, and on June 2, 2022, the State abandoned any attempt to seek the death penalty. SR 217. This case was tried before a jury in Rapid City, South Dakota from January 9, 2023 through January 26, 2023, before the Honorable Robert Gusinsky. On January 26, 2023, Absolu was convicted of three counts of First-Degree Murder (SR: 961) and thereafter was sentenced to life imprisonment on February 24, 2023 (SR: 998). A Motion for New Trial (SR: 1283; Appx.) was timely filed on March 6, 2023, which Motion was denied on May 12, 2023 (SR: 1614; Appx.). Notice of Appeal was timely filed on May 15, 2023. SR: 2955.

STATEMENT OF LEGAL ISSUES

1. **Whether the circuit court erred when it denied Defendant's Motion for a New Trial, when the key witness for the State was a suspect/person of interest in another murder case and such information was not provided to the defense in violation of the discovery order and *Brady v. Maryland*, as well as Fair Trial and Due Process rights.**

   State v. Sahlie, 90 S.D. 682, 245 N.W.2d 476

   State v. Birdshead, 2015 S.D. 77, 871 N.W.2d 62

   Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

STATEMENT OF THE CASE AND FACTS

On August 24, 2020, at 10:41 pm, the Rapid City Police Department was summoned by a neighbor to Thompson Park in North Rapid City. JT: 48, 68, 117. A horrific scene awaited the responding officers and first responder EMTs. JT: 79. On arrival and approach of a Tahoe SUV the officers found one person, Charles Red Willow (passenger), shot to death and one person, Ashley Nagy (driver), alive but dying, head hanging, covered in blood and brain matter, and breathing agonally. JT: 79, 80, 100. Red Willow had been shot numerous times about the left side of his head, face, and upper torso. JT; 80, 96, 119, 142. Nagy had been shot once in the very top of her head. The electrical impulses to her brain caused her lungs to breath and heart to pump, but there was no saving her nor any ability to provide effective first aid due to the gunshot wound through her brain; she passed away about 45 minutes later. JT: 80, 84, 95, 97, 120, 145. 40-caliber shell casings were found in and around the driver's side of the Tahoe (one under Nagy's thigh) and the parking lot. JT: 82. The reporting party, a retired police officer, heard several people arguing and then heard six gunshots. JT: 47, 73, 286.

At the inception there were no suspects and no witnesses who could identify anybody. JT: 86, 103. The investigators ferreted out several videos of neighbors and businesses which recorded a dark late model Chevy Malibu driving up near Thompson Park. JT: 191, 192. One set of videos captured the lights of the Tahoe the victims were in backing into the small parking lot off in the distance at Thompson Park, the dark Chevy Malibu parking on a side street, and two people, one black and one white (with a red shirt), getting out of the Malibu, walking towards the Tahoe, and then running back

and fleeing minutes later. State's Exhibit 8, JT: 195-199, 283, 284, 613; *See*, also, Defendant's Exhibit 8.1 which is an outtake of State's Exhibit 8; JT: 1398. The video only captured 15 frames per second and thus the figures appeared jerky and ghostlike, and did not display the killings because distance and foliage obscured the view. JT: 284, 288, 777.

On the same evening prior to the killings, Dakota Zaiser, the third alleged victim, was released from jail in a red Nike t-shirt and baggy pants. JT: 165, 210. Videos between the jail and North Rapid showed him walking up to East North Street talking on his phone. Several of his calls were to Charles Red Willow. JT: 290. Shortly after the killings a passerby saw a person matching his description running from the scene. JT: 52, 53. After that night he was never heard from again and was reported missing by his mother who, prior to that point, regularly received calls from him. JT: 165, 166. Investigators began reviewing background information about Charles Red Willow and knew him to be a small time heroin dealer and searched out friends to interview. They learned Red Willow had been working with Arnson Absolu, the defendant, and possibly owed him some money. JT: 408. They also learned he had ties with Dakota Zaiser, Maddie Zeigler, and Breeze Stock, all of whom were involved in the heroin scene and had connections with Arnson Absolu.

Other investigators began looking into the number of dark Chevy Malibus in the area, and found that there were 89 of them. JT: 1386. On a hunch a person on the team noticed that a local car rental agency owned two such vehicles and contacted Casey's Auto to see if they had rented any recently and if so to whom. JT: 227. The police

learned that on the morning of the killings in Thompson Park Arnson Absolu rented just such a vehicle. There was video of him doing this, and he was accompanied by Maddie Ziegler, who lived at 405 East Watertown Street in North Rapid up by East North Street and relatively close to Thompson Park. JT: 230, 240. The Chevy Malibu had a tracker which recorded the location of the vehicle every 13 hours showing a breadcrumb trail of the location of the vehicle. JT: 242, 303. The tracker could also be pinged on demand.

As the investigation progressed investigators learned that Arnson Absolu had come to town some months earlier and had been fronting heroin called "China White" to Charles Red Willow, Dakota Zaiser, Breeze Stock, Maddie Ziegler, and others, and that he had guns and was telling people that Charles Red Willow would pay for ripping Absolu off and not paying him for heroin. JT: 327, 328, 330, 331, 332, 333, 336, 337, 364, 409. He had been staying with Maddie Zeigler at 405 East Watertown Street, and sometimes with Breeze Stock. JT: 409, 413.

From the early morning hours of August 25, 2020, the early morning hours immediately after the killings, video evidence was also collected from the Stumer Road apartment building in South Rapid where Breeze Stock lived. JT: 256. In the videos collected Arnson Absolu is seen in a Chevy Malibu talking to Breeze Stock, opening the trunk and giving her a bag of garbage to throw away. State's Exhibit 12; JT: 1334. Later that day and night, and into the early morning hours of June 26, 2020, the videos also showed Absolu meeting with Shamar Bennett, looking in the trunk, arguing, and leaving the Stumer Road apartments together but in separate vehicles, and returning several hours later. JT: 261, 786, 789.

Shortly thereafter Arnson Absolu abruptly left Rapid City and traveled east across the country to his home town, the Bronx area of New York City, as shown by the tracker on the Chevy Malibu he had rented the morning of the killings. JT: 242. He was surveilled on the east coast by New York and New Hampshire law enforcement seeking to arrest him for murder. JT: 721. He was arrested for the Red Willow and Nagy murders — 23 days after the Thompson Park killings — in the Chevy Malibu and a unique 9mm black semi-automatic pistol was found in the car as well as his cell phone and cylindrical packages of heroin. JT: 252, 723, 726, 1329.

Maddie Zeigler, the young lady who was with Arnson Absolu when he rented the Malibu told the authorities she had been dealing for Arnson Absolu and that the day after the killings she had come home to her 405 East Watertown apartment and found Arnson Absolu in the apartment. JT: 417, 419. The large carpet in the living room and a recliner had been replaced by a smaller carpet and chair. There was also a head-sized hole in the bathroom wall, the shower curtain was gone, and the apartment smelled strongly of a cleaning solution. JT: 419, 420, 422. When she asked Arnson Absolu what had happened he told her he had diarrhea and had made a big mess and had cleaned it up, replacing the items ruined by his diarrhea. JT: 421. The apartment was later processed by criminologists and no DNA, blood, nor hair of Dakota Zaiser was found.

Zeigler testified at trial how Arson Absolu was angry with Red Willow and had made statements about what he was going to do with him for not paying, including countless statements he was going to kill him. JT: 427. Maddie Zeigler was impeached

with prior statements that he had threatened to beat people up but never kill anybody, and that his anger at Red Willow only lasted a couple days and then died down. JT: 434, 435.

Shamar Bennett, the person who appeared with Arnson Absolu in the Stumer Road videos, initially and persistently denied to the police any involvement, despite his appearances in the Stumer Road videos. JT: 265, 476, 477, 485, 486. Bennett took investigators into the Black Hills claiming he helped Arnson Absolu bury China White but had no knowledge of Zaiser or the Thompson Park murders. JT: 476. Ultimately after a long time with the investigators and even meeting the Pennington County State's Attorney, Mark Vargo, about how he may not be charged, Shamar Bennett told the authorities that Arnson Absolu had given him some heroin to help dispose of a carpet and recliner from Maddie Ziegler's apartment, as well as the body of Dakota Zaiser which was in a tote in the trunk of the Malibu. JT: 467, 468, 470, 471.

He also told of how Arnson Absolu confessed to the murder of Dakota Zaiser, that he thumped him, because Zaiser would not be able to keep his mouth shut about the Thompson Park killings, JT: 481, 482, 483, and saying Absolu admitted the Red Willow and Nagy killings "without really admitting it". Shamar Bennett then took the police to the scene of Dakota Zaiser's decomposing body in a shallow grave out by Sheridan Lake in the Black Hills. JT: 267, 268, 269. In so doing Shamar Bennett pointed out a stump with which Arnson Absolu had collided on the highway near the shallow grave. JT: 473. There were still plastic pieces by the stump which, along with the body, were collected as evidence. JT: 271, 272. Upon seizure in New York the Chevy Malibu Arnson Absolu was driving had undercarriage damage and a leaking oil pan. JT: 254.

On September 28, 2020, a silver and black 40 caliber semi-automatic pistol was found by a graduate student from South Dakota Mines as he was conducting a study of Rapid Creek. JT: 1035, 1036. The gun was unloaded and had no clip or ammunition nearby. The gun matched the description given by witnesses as one of the guns Arnson Absolu had possessed. The prosecution claimed it was the same gun Arnson Absolu had pictures of on his phone side by side with the unique 9mm black gun found in the Malibu when Absolu was arrested. While rusty, the gun was cleaned up and test fired and a firearms expert determined the casings found at the Thompson Park murder scene were fired by that very gun. JT: 1247. Law enforcement maintained the photos of these guns on Absolu's phone proved Absolu had possessed each and such tied him to the murder of Red Willow and Nagy.

An F.B.I. agent also testified that it is possible Arnson Absolu's phone was in the area of Thompson Park and 405 East Watertown around the time of the killings but could not pin point the exact location. JT: 923, 941. No texts or phone calls had been made by Absolu though and the large arc of possible locations encompassed much of North Rapid. JT: 942. Dakota Zaiser's phone was also in North Rapid City. And as to Shamar Bennett and Arnson Absolu taking a trip to Sheridan Lake the cell phone towers pinged by their respective phones were nearly identical showing a trip from Breeze Stock's Stumer Road apartment on the south side of Rapid City out Sheridan Lake Road to Sheridan Lake and back to Rapid City via Highway 16, with times approximately corresponding to the videos showing Shamar Bennett and Arnson Absolu in the parking lot of the Stumer Road apartments. JT: 927-931.

The theory of the defense was that because of a video of the perpetrator and Dakota Zaiser walking to the park immediately before the murders there was absolute proof Absolu was not the killer. JT: 1472. The reason for this was because the video clip in Defendant's Exhibit 8.1 (SR: 2959, page 3), which was a video clip form State's Exhibit 8, showed Zaiser walking with a dark man who was much taller than Zaiser who was 5' 10" or thereabouts. JT: 1469-1470. The dark man in the video was a head or so taller than Zaiser. It could not have been Absolu because he was roughly the same height as Zaiser. JT: 1471. But it could have been Shamar Bennett because he is a 6' 1" African American with hair which rose two inches above his head. *See*, Defendant's Exhibit 8.1, SR: 2959, page 3. The video shows Zaiser walking past a shiny post and he does not obscure the top portion of the post, but when the black man walks by he obscures the entirety of the top portion of the post, thus proving a height difference inconsistent with Absolu. JT: 1471; Defendant's Exhibit 8.1; SR: 2959. A careful review of the video, channel 7, (Defendant's Exhibit 8.1) between 10:35:08 to 10:35:21 with focus on the shiny post across the street just before the stop sign by the chain link fence proves this. JT: 1473; Defendant's Exhibit 8.1; SR: 2959. And if Bennett did this he could have killed Red Willow, Nagy, and Zaiser for the very same reasons he claimed Absolu had done it, which could have accounted for his knowledge of the situation, the location of the body, and his efforts to pass this on to Absolu, and which constituted reasonable doubt of Absolu's guilt. JT: 1495, 1496, 1498.

The balance of the theory of the defense rested upon the lack of Absolu's DNA or fingerprints at the Thompson Park scene, the 40 caliber handgun, the lack of Zaiser's

blood or DNA at Maddie Ziegler's apartment or in the Malibu and that Absolu's purported admissions were from witnesses who had earlier maintained the opposite, received substantial consideration, and who were currying favor with the State. JT: 298, 299, 300, 302, 304, 1498, 1499. In sum, those who provided information against Absolu were not worthy of belief beyond a reasonable doubt, in that they received consideration for their testimony, were currying the State's favor, were biased, had motivations to lie, had lied, had received sentencing considerations, outright dismissals, and favorable treatment from the prosecution.

The jury trial lasted approximately two weeks and late in the second day of deliberation the jury convicted Absolu of the three First Degree Murders.

After the trial and verdict the undersigned emailed the State and inquired if Shamar Bennett had been involved in the killing of a young child prior to the trial. SR: 993, 1275; *See* also generally 02/23/23 Sealed MH: 2-23. Kevin Krull, a prosecutor who helped try the case, and a recent former circuit court judge, responded that in the pretrial preparation it had come to the prosecution's attention that Shamar Bennett was a "person of interest" in said case. *Id.* The lead prosecutor on the case then confirmed that Bennett had been listed as a "suspect" in A&N filings and Department of Social Services emails between the Department of Social Services and the Pennington County State's Attorney's office but apparently after the trial was over. 02/23/23 Sealed MH: 6, 10, 11.

The undersigned asked to review the reports at the state's attorney's office and Mr. Krull provided reports related to the matter for the defense to review in the state's attorney's office. SR: 993, 1275. The documents detailed the November, 2022, death of

an infant from head trauma in the home Bennett shared with his girlfriend, these two being the only adults present at the time. *Id.* Upon review, and understanding none of this had been disclosed to the defense, the undersigned filed Defendant's Motion for Review and Preservation of Undisclosed Primary Witness Information (SR: 993) as well as Description of Basis for Request for Review and Preservation (SR: 1275). On February 23, 2023, a hearing was held on this issue and the court ordered the state to produce all police reports, records, criminal files, DSS reports, and A&N pleadings and reports filed related to the homicide of the child so the court could review the records *in camera*. SR: 1279; 02/23/823 MH: 23-24. On February 24, 2023, Defendant was sentenced to three consecutive life terms. SR: 998. A Motion for New Trial and a Brief in Support were then filed by the defense. SR: 1283, 1545; Appx. The State responded with a Brief and Affidavit in Support (SR: 1527) and the court ruled that the information should have been turned over to the defense but since Bennett's testimony was consistent with his grand jury testimony, there was no prejudice, and thus denied Defendant's Motion for New Trial (SR: 1614; Appx.).

ARGUMENT

1. Whether the circuit court erred when it denied Defendant's Motion for a New Trial, when the key witness for the State was a suspect/person of interest in another murder case and such information was not provided to the defense in violation of the discovery order, *Brady v. Maryland*, as well as Fair Trial and Due Process rights.

The Motion for New Trial was brought per SDCL 23A-29-1. SR: 1283; Appx. The standard of review for a denial of a new trial is abuse of discretion:

> We review rulings on motions for new trials for an abuse of discretion. *State v. Rolfe*, 2014 S.D. 47, ¶ 9, 851 N.W.2d 897, 901 (citing *State v. Zephier*, 2012 S.D. 16, ¶ 15, 810 N.W.2d 770, 773). "We review a circuit court's denial of a motion for a new trial under SDCL 23A-29-1, the same as its civil counterpart SDCL 15-6-59(b)." *State v. Muhm*, 2009 S.D. 100, ¶ 43, 775 N.W.2d 508, 523.

State v. Shelton, 2021 S.D. 22, ¶27, 958 N.W.2d 721.

The circuit court in this case described the material from the *in camera* review as follows:

> The court has carefully reviewed the materials provided for *in camera* inspection. Those materials will be made a part of the record and will be sealed. The materials include police investigative records as well as Abuse and Neglect (A&N) records. The State argues that records involving A&N proceedings are confidential and are not accessible except to the attorneys and staff directly involved in the A&N proceeding. The description provided herein is from the police investigation. The A&N records rely on the same police investigative records. While the A&N records offer opinions and conclusions by Family Service Specialists and the civil State's Attorney in charge of A&N cases, for the reasons set forth below, they are not relevant.
>
> The criminal investigation involves the death of an infant, AW. The records indicate that on November 14, 2022, police arrived at AW's mother's residence in response to a report that AW was having trouble breathing, had blue lips, and a bump on her head. AW was transported to the Monument Health emergency room in Rapid City. The treating physician discovered that AW had a serious skull fracture that was caused by non-accidental trauma. AW was in the care of Bennett and CM[1]. They were the only adults in the household. Initially, CM informed the police that the only people present were her and two two-year-old children. Later, Bennett informed the police that he was also present, but was asleep in another room and did not know what had happened to AW. CM believed that the two two-year-olds were trying to give AW a bath and

[1] CM is an adult

> accidently dropped her. Later, doctors opined that the extensive injuries suffered by AW could not have been caused by two toddlers playing with AW or dropping her. Detectives tried to interview Bennett, but he requested counsel and did not provide a statement.
>
> Investigators believed that Bennett and CM communicated about the investigation and possibly the mechanism of injury that ultimately caused the death of AW. Accordingly, investigators sought and received a search warrant for electronic devices and communications between Bennett and CM. Investigators also collected evidence to be examined by the South Dakota Forensic Laboratory (SDFL). The packing slip to the SDFL, which was electronically completed, listed Bennett and CM as suspects. The packing slip to SDFL was sent on March 7, 2023. As of the latest briefs provided to the Court, neither Bennett nor CM have been charged in A W's death.

SR: 1614; Appx., Memorandum Opinion and Order Denying Motion for New Trial pp 4-6. The November incident was just two months prior to trial and contains material required to be disclosed per *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), but also matters which should have been disclosed by a specific discovery order. The available evidence in the police reports, without reference to the information in the A&N files and pleadings was as follows:

> The evidence available to the State was that AW's fatal injuries were not accidental nor due to rough play with toddlers. The adults with responsibility for the care of AW were Bennett and CM. Moreover, Bennett and CM were the only adults present when AW suffered her injuries. Initially, CM lied about the whereabouts of Bennett. While the classification as a suspect in and of itself is not determinative, it is nevertheless difficult to understand why CM and Bennett would not be classified as suspects based on the information available. Indeed, law enforcement executed search warrants on their communication devices, and classified Bennett and CM as suspects in its submission to the SDFL, albeit not until March of 2023. While it

> appears from the affidavits that there was insufficient evidence for the investigators to charge Bennett or CM with a crime, there was sufficient evidence to consider them as suspects.

SR: 1614. *Id.* at 9. And "suspect" is not the only matter which goes to bias, motivation, and consideration. The consideration of each fact therein individually and together shows several areas which fall into the definition of consideration and required disclosure.

Paragraphs 17 and 18 of the circuit court's Order Granting Defendant's First Motion for Discovery required the State to provide the following to the defense:

> 17. Any and all consideration or promises of consideration given to or on behalf of each witness or expected or hoped for by the witness. "Consideration" means absolutely anything, whether bargained for or not, which arguably could be of value or use to the witness or to person of concern to the witness, including but not limited to formal or informal, direct or indirect leniency, favorable treatment or recommendation or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, social services matter, civil matter, administrative matter or other dispute involving the State of South Dakota; (emphasis added)
>
> 18. Any other evidence, statements, or materials known to the prosecution, including law enforcement officers or investigators, which is exculpatory in nature or favorable to the Defendant or which may lead to exculpatory material or which aids in the preparation of the defense, including evidence relevant to guilt or innocence of said Defendant not otherwise specifically requested by this motion; (emphasis added)

Order Granting Defendant's First Motion for Discovery. SR: 334. ". . .[O]nce the trial court, in its discretion, has ordered production of certain evidence, these orders must be expeditiously carried out and obeyed." *State v. Sahlie*, 90 S.D. 682, 684, 245 N.W.2d

476, 478. Consideration with respect to social services matters and potential criminal matters were ordered to be turned over pre-trial. And "consideration" was defined by the order in part as "absolutely anything, whether bargained for or not, which arguably could be of use to the witness . . .." That Bennett was a suspect and had been referred to as such by both DSS workers and the lawyer for DSS, a Pennington County Deputy State's Attorney, who worked for the same prosecuting authority mandated disclosure to the defense. There may be affidavits in the sealed *in camera* materials regarding the A&N matter and the course of the pleadings where a Deputy State's Attorney swears under oath that such is true. An independent review of the sealed material at SR: 1627, 1667, 1740, 1758, 1833, 1848, 1901, 2159, and 2435 is hereby requested. *State v. Birdshead*, 2015 S.D. 77 ¶49, 871 N.W.2d 62. The defense does not know what is contained therein and can only rely on the circuit court's inventory and report which excluded A&N matters as irrelevant. Absolu contends excluding consideration of the A&N files and pleadings is error by the circuit court when such was clearly ordered in discovery and constitutes an abuse of discretion. Also the delay in arresting and charging Bennett, and/or taking Bennett's children out of the home was of value to him. The little baby died of non-accidental head trauma which occurred at his home. Were Bennett not the key witness for the State no such delay could ever have been envisioned. Every other abusive head trauma case regarding the death of an infant is pursued with lightning speed. Bennett exercised his right to silence about the child's death. And the A&N lawyers and workers knew he was a suspect. The police viewed him as a suspect and named him as such in a form transmitting evidence, albeit post trial. The word "suspect"

was used to describe him after the Absolu case was over. The trial court herein found Bennett and his girlfriend to be suspects. But what changed from November (child's death) to January 30 (date DSS called him a suspect in an email)? The only thing that changed was the Absolu guilty verdict. Now the police were free to look. All of this should have been fair game before the jury and should have been available for cross examination. It is true after trial the State provided sworn affidavits from law enforcement stating the Shamar Bennett was never a suspect. But the circuit court's review proved otherwise.

The trial court found a discovery violation, a suppression of information which should have been turned over to the defense, and determined that a reasonable view of the information was that Bennett and his girlfriend were in fact suspects. The court stated the A&N records were irrelevant and no new trial would be granted as Bennett's grand jury testimony was consistent with his trial testimony and thus it was not impeaching as Bennett had no motivation to lie. But this ruling completely ignores the fact that the discovery order requires the disclosure of exactly this type of information and designates "consideration" to include favorable treatment in social services matters as well as potential criminal matters. And the court found a *Brady* violation also. Thus the determination of the court to exclude information gleaned from the *in camera* review of DSS files, pleadings, and reports in the analysis of what the State had on Bennett, when they had it, and in the characterization of Bennett's position in the fact pattern is against reason and evidence and an abuse of discretion, among other things.

The circuit court limits "impeaching information" to inconsistent statements, or non-variance between grand jury and trial testimony without giving meaningful weight to the hope for consideration by a witness to curry favor, expose a bias, quantify consideration, or provide a reason for a fact-finder to question the believability of a witness:

> Simply stated, Bennett did not testify more favorably at trial. Had he done so, Defendant would have been permitted to raise an inference that Bennett's testimony is motivated by a desire to please the same authorities that are now investigating his involvement in the death of an infant. But absent such variance, what occurred in November of 2022 is not relevant in establishing Bennett's motivation to testify.

Memorandum Opinion and Order Denying Motion for New Trial SR: 1614 at 12; Appx. The circuit court in essence said Bennett was still believable because no variance was brought up between grand jury and trial testimony. But this ignores that Bennett's trial testimony did bring up variances between Bennett's statements to investigators and his trial testimony, as well as variances between his trial testimony before the jury as well. For example Bennett admitted on cross about how Absolu never said about killing anybody or anything like it, reference his direct wherein he used the word "killed". JT: 483. Bennett said on cross he received no benefits at all from the state on this whole deal, JT: 483, then the defense points out the many benefits he received: dismissal of a bond violation charge on July 13, 2022 (JT: 500); dismissal of a SADV on the same date (*Id.*); possession/manufacture of drugs and a Part II (*Id.*) on December 9, 2022; as well as the fact that Bennett faces no charges out of his participation in the Absolu case. On redirect Bennett states his recent felony was dismissed for successful completion of

diversion. JT: 594. This was three or so weeks after a baby died of abusive head trauma in his home and he was an obvious suspect, but still allowed to complete the diversion. The court's characterization of consistency between grand jury and trial testimony ignores the real test, i.e. whether there was a reasonable probability that the result would have been different had the information been disclosed. It also ignores that the prior inconsistent statements exposed in cross, redirect, and recross still required the jury to judge Bennett's credibility. His fear of the child death case and the fact that the remained uncharged and had not been arrested are relevant to evaluating the credibility of his trial testimony and would constitute impeachment by contradicting regarding the wholly incredible claims he made that he had received no consideration whatsoever. This nondisclosed information would have changed the entire flavor of his testimony, and probably would have changed the outcome, and was critical impeachment, bias, consideration, and motive evidence, especially in light of the theory of the defense.

"A defendant's right to present a defense is fundamental. *State v. Huber*, 2010 S.D. 63, ¶ 37, 789 N.W.2d 283, 294. 'When a defendant is denied the ability to respond to the State's case against him, he is deprived of "his fundamental constitutional right to a fair opportunity to present a defense." [*State v*]. *Lamont*, 2001 S.D. 92 ¶16, 631 N.W.2d at 608-09 (quoting *Crane* [*v. Kentucky*], 476 U.S. at 687, 106 S.Ct. at 2145). 'This right is "generally satisfied when the defense is given a full and fair opportunity to probe and expose a witness' infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to witness' testimony." ' [*State v.*]

Carter, 2009 SD 65 ¶32, 771 N.W.2d 329, 339 (quoting *State v. Carothers*, 2006 SD 100, ¶16, 724 N.W.2d 610, 617)." *State v. Birdshead*, 2015 S.D. 77, ¶37, 871 N.W.2d 62. ". . .[T]he United States Supreme Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The prosecution commits a *Brady* violation when (1) "[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching;" (2) the "evidence [has] been suppressed by the State, either willfully or inadvertently;" and (3) "prejudice [has] ensued." *Thompson v. Weber*, 2013 S.D. 87, ¶ 38, 841 N.W.2d 3, 12 (alterations in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999))." *State v. Birdshead*, 2015 S.D. 77, ¶44, 871 N.W.2d 62 (2015) (citing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

In the present case Absolu was denied due process and a fair trial because favorable evidence was hidden by the State through nondisclosure and not considered by the trial jury along with the myriad of other benefits he received and the hundreds of admitted lies of Shamar Bennett. The fact that he had not been charged in this child's death would have been the straw that broke the camel's back. As the circuit court said:

> There cannot be a reasonable dispute that Bennett was a key witness for the State. The Defendant admitted to Bennett that he killed Zaiser and that he did so because he did not believe that Zaiser would stay quiet regarding Red Willow and Nagy. Bennett helped Defendant hide Zaiser's body and disposed of physical evidence. Clearly any evidence that would allow Defendant to impeach Bennett would have been critical.

Memorandum Opinion and Order Denying Motion for New Trial SR: 1614 at 13; Appx.. (emphasis added).

"A violation of a defendant's due process rights occurs when the State suppresses evidence favorable to the defendant when the evidence is material either to guilt or punishment. *Birdshead I*, 2015 S.D. 77, ¶ 44, 871 N.W.2d at 77 (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196–97, 10 L.Ed.2d 215 (1963). 'Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ' *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). As the United States Supreme Court noted in *Strickler*,

> There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Id. at 281–82, 119 S.Ct. at 1948. See also *Thompson v. Weber*, 2013 S.D. 87, ¶ 38, 841 N.W.2d 3, 12. 'Prejudicial error is that which in all probability must have produced some effect upon the final result and affected rights of the party assigning it.' *State v. Spiry*, 1996 S.D. 14, ¶ 11, 543 N.W.2d 260, 263 (quoting *K & E Land & Cattle, Inc. v. Mayer*, 330 N.W.2d 529, 533 (S.D.1983))." *State v. Birdshead*, 2016 S.D. 87, ¶18, 888 N.W.2d 209 (2016).

Considering the theory of the defense and the fact that the video in Defendant's Exhibit 8.1; JT: 1398, (which was a specific portion of State's Exhibit 8) as previously described showed the perpetrator to be taller than Absolu, and that Bennett's presence at

the scene of the crime walking with the very victim to which he led the authorities, the discovery, *Brady*, and *Giglio* violations were so massive that inclusion of the suppressed information at trial in all probability would have produced some "effect upon the final result and affected rights" of Arnson Absolu.

The lead investigator acknowledged on cross that no comparison of the respective heights of Dakota Zaiser and the perpetrator as they appeared on video had been made. JT: 284. Absolu and Zaiser were "roughly the same height." JT: 284. Bennett was taller at around 6' 1", plus tall hair as shown by Defendant's Exhibit N. JT: 284, 285, 1399. And the lead investigator agreed height matters:

> Q: (By Mr. Rensch) Now, if Arnson Absolu is approximately the same height as Dakota or maybe within an inch or two of his height, if there was evidence that those two individuals out there that we see on the video were walking and one person was substantially taller than the other, that would be something you would want to know. Isn't that so?
> A: (By Sergeant Barry Young) Correct. Right.
> Q: Could you tell the jury why you'd want to know something like that?
> A: Just to help with identification purposes eventually.
> Q: You didn't have any information that Arnson Absolu was wearing like big platform shoes or anything that day making him taller, did you?
> A: No.

JT: 287-288. Detective Luke Lang, the main detective on the case, characterized the height difference as follows:

> Q: (By Mr. Rensch) Now, when they come into the doors, if you look at the doors in the Maverik, there are rulers on the doors to tell how high people are. Isn't that true?
> A: (By Detective Luke Lang) Most gas stations have that. I can't tell you if that specific one does.

Q: And what is the purpose for convenience stores and gas stations to have those height markers on the doors?
A: So when a crime is committed, such as an armed robbery, the clerk can get an idea of approximately how tall the suspect was.
Q: For example, if someone were charged with an armed robbery and the clerk said that they were, say, six foot five, six foot four, and it turned out that they were only five nine or five ten, we might want to question why the height difference would be when there are rulers. True?
A: Yes.
Q: Meaning that height and physical descriptions of an individual are very important in connection with identifying the person who's the culprit of a crime. Is that not so?
A: They're important to a degree.
Q: Okay. Well, if, for example, a person is seen on video as they're supposedly in the process of committing this crime and that person turns out to be much taller than the person who's charged with the crime and it can be seen on video, that would be important, would it not?
A: Yes.
Q: And why is that?
A: Because the person appears taller than the original suspect or if we analyze the video and determine they were, in fact, taller, than they're taller than the suspect.
Q: And that means what?
A: It's probably not the same person

JT: 1392, 5-25, 1393, 1-12.

When Shamar Bennett's testimony is viewed in this light, additional motive, bias, consideration, and impeaching information goes directly to the heart of evaluating what is motivating his trial testimony, biases his view, quantifies the consideration he received, and exposes his hopes for leniency. And the fact that he received a benefit regarding a pending or potential social services or criminal matter is fair game. The question is not whether his factual testimony between grand jury and trial is the same before and after,

because an early motivation to lie to curry favor can be augmented by additional consideration. The circuit court reasoned:

> Defendant argues that Bennett was motivated to give favorable testimony against the Defendant to gain favor with the State with respect to the AW case. As described above, during the early stages of the investigation in this case Bennett lied to law enforcement on numerous occasions, and Defendant was able to thoroughly cross-examine him regarding his lies. But at trial, Bennett testified in a manner consistent with his grand jury testimony following his meeting with State's Attorney Vargo. Bennett's trial testimony was not more favorable to the State than his grand jury testimony. Bennett provided his grand jury testimony on January 6, 2021. Therefore, he could not have been motivated by the events that were about to occur in November 2022.

Memorandum Opinion and Order Denying Motion for New Trial SR: 1614 at 12; Appx.

" 'A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial', *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (emphasis added). After reviewing the entire line of cases stemming from *Brady*, we stated: 'Thus, where [the defendant] was not aware of the evidence, if the evidence is both favorable and material, and he has made a request for the evidence, there has been a due process violation.' *Ashker v. Solem*, 457 N.W.2d 473, 477 (S.D.1990)." *State v. Steele*, 510 N.W.2d 661, 665 (1994). Here, the worry of being charged with another murder by the very office with whom Bennett was cooperating goes directly to bias and consideration and, when added with the witnesses' admitted 350 lies, would have proved devastating. And the question posed by the U.S. Supreme Court in *Agurs*, supra, is whether the information suppressed "might have affected the outcome." *Id.* at

427, U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342. Given the height similarity of Absolu and Zaiser, and the taller height of Shamar Bennett along with the increase made by his taller hair, and the video evidence, this case was not nearly so over overwhelming so as to negate the value of the undisclosed bias, motivation, consideration received and/or hoped for, and impeaching evidence. This was a case which the defense could have won as is shown by the lengthy deliberation.

"Evidence is favorable where it creates a reasonable doubt that did not otherwise exist. *Ashker* [*v. Solem*], 457 N.W.2d at 477 (citing *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 2402, 49 L.Ed.2d 342 (1976)). The U.S. Supreme Court has stated that 'The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (emphasis added)." *State v. Steele*, 510 N.W.2d 661, 665. "Again, credibility was a key issue in the trial, and this information may well have raised a reasonable doubt in the minds of jurors." *Id.* at 661.

A reasonable doubt exists for a witness in a murder case and his credibility when he is facing the possibility of his own prosecution for another murder. Here, that information was in the hands of the State prior to trial. The state admitted that it did not seek out the A&N evidence. 02/23/23 MH:13. This is a *Giglio* violation because it is the duty of the prosecutor to find it out and the discovery order, which went in without objection on that point, required potential social services and criminal matters. *Giglio v.*

United States, 405 U.S. 150, 92 S.Ct. 793 (1972); Order Granting Defendant's First Motion for Discovery, SR: 334 ¶17-18; 02/23/23 MH: 13. Inadvertent or not, the failure to turn it over is violative of this Court's discovery order, and of the case law cited in relation to this issue, not to mention the important Due Process, Fair Trial and Confrontation Clause rights. A reasonable doubt would have existed if the baby death information was inquired of on cross-examination. If Bennett's hope for leniency in the Absolu case combined with his hope for leniency in the baby murder case were such that it could cause a juror to pause or hesitate in accepting Bennett's testimony, then prejudice exists depriving Absolu of a meaningful opportunity to be heard and to present a defense.

CONCLUSION

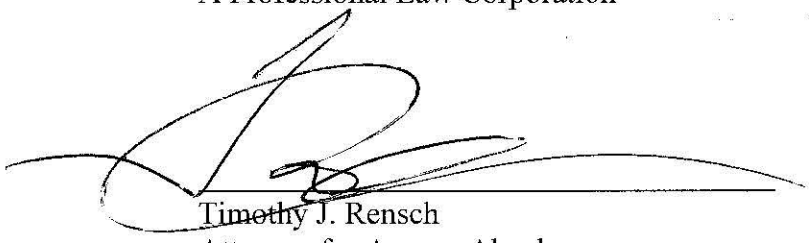
In the end the circuit court abused its discretion in denying Defendant's Motion for a New Trial for the reasons stated herein. Appellant respectfully requests that the decision of the circuit court be reversed, the Judgment and sentence be vacated, and this matter be remanded for a new trial.

REQUEST FOR ORAL ARGUMENT

Request is respectfully made for oral argument.

Dated this 15 day of September, 2023.

RENSCH LAW OFFICE
A Professional Law Corporation



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APPENDIX

Table of Contents

STATE OF SOUTH DAKOTA,	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON.	)	SEVENTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH DAKOTA,	)	File No. CRI 20-3825
	)	
Plaintiff,	)	
	)	**JUDGMENT**
vs.	)	
	)	
ARNSON ABSOLU,	)	
DOB: 6/29/84	)	

Appearance at sentencing:
Prosecutor: Roxanne Hammond Defense attorney: Tim Rensch
Date of sentence: February 24, 2023

Date of offense: Counts 1-2: August 24, 2020, Count 3: between August 24, 2020, and August 25, 2020
Charge: Counts 1-3: First Degree Murder
Class A Felony SDCL: 22-16-4(1)
Guilty by jury of all counts on January 26, 2023

CRIME QUALIFIER: (CHECK IF APPLICABLE):
☐ Accessory 22-3-5 ☐ Aiding or Abetting 22-3-3 ☐ Attempt 22-4-1
☐ Conspiracy 22-3-8 ☐ Solicitation 22-4A-1

Habitual offender admitted on: _____
☐ SDCL 22-7-7 ☐ SDCL 22-7-8 ☐ SDCL 22-7-8.1

Part 2 Information (DUI) admitted on _____
☐ Third Offense; SDCL 32-23-4 ☐ Fourth Offense; SDCL 32-23-4.6
☐ Fifth Offense; SDCL 32-23-4.7 ☐ Sixth or Subsequent Offense; SDCL 32-23-4.9

Part 2 Information (ASSAULT) admitted on _____
☐ SDCL 32-23-4.9

☒ The Defendant having been found guilty at jury trial and the Court having asked whether any legal cause existed to show why judgment should not be pronounced, and no cause being offered:

IT IS HEREBY ORDERED THAT the Defendant is sentenced to serve:
On Count 1: Life in the South Dakota State Penitentiary with 883 days credit plus each day served in the Pennington County Jail, and that the Defendant pay fines imposed in the amount of $50,000.

On Count 2: Life in the South Dakota State Penitentiary with 883 days credit plus each day served in the Pennington County Jail, and that the Defendant pay fines imposed in the amount of $50,000.

On Count 3: Life in the South Dakota State Penitentiary with 883 days credit plus each day served in the Pennington County Jail, and that the Defendant pay fines imposed in the amount of $50,000.

J

Check if applicable:

☐ The sentence in Count 2 shall run concurrent with _____.

☒ The sentence in Count 2 shall run consecutive to Count 1.

☐ The sentence in Count 3 shall run concurrent with _____.

☒ The sentence in Count 3 shall run consecutive to Count 2.

☒ That Defendant pay court costs of $116.50.

☒ That Defendant's attorney's fees will be a civil lien pursuant to SDCL 23A-40-11.

☒ That Defendant pay prosecution costs: UA $___, Drug Test $240.00, Blood $___, SART Bill $___; Transcript $375.00; Extradition $3,690.68.

☐ That Defendant pay prosecution costs from dismissed file ___: UA $___, Drug Test $___, SART Bill $___; Blood $___, Transcript $___.

☐ That Defendant pay the statutory fee of $___ DUI, $___ DV.

☐ That Defendant pay fines imposed in the amount of $___.

☐ That the Defendant pay restitution through the Pennington County Clerk of Courts in the amount of $___ to ___.

Other Conditions:

☒ That the Defendant shall have no contact with victims' families.

☐ _____

ATTEST:

Ranae Truman
Clerk of Courts

BY_____
Deputy Clerk

BY THE COURT:

2/24/2023

HON. ROBERT GUSINSKY, CIRCUIT COURT JUDGE

You are hereby notified you have a right to appeal as provided for by SDCL 23A-32-15. Any appeal must be filed within thirty (30) days from the date that this Judgment is filed.

Pennington County, SD
FILED
IN CIRCUIT COURT

FEB 24 2023

Ranae Truman, Clerk of Courts
By_____ Deputy

A-02

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	FILE NO. 51CRI20-003825
	)	
Plaintiff,	)	
	)	DEFENDANT'S MOTION
vs.	)	FOR NEW TRIAL
	)	
ARNSON ABSOLU,	)	
	)	
Defendant.	)	

COMES NOW the Defendant, Arnson Absolu, by and through his attorney of record, Timothy J. Rensch, and hereby moves this court for a new trial, pursuant to SDCL 23A-29-1, as well as the Due Process Clause and Fair Trial Rights in the Fifth and Sixth Amendments of the United States Constitution, as well as the counterparts thereto in the South Dakota Constitution. This motion is made upon the following grounds and reasons.

1. After a jury trial spanning approximately two weeks in the middle of January, 2023, the Defendant above-named was convicted of three counts of First Degree Murder. He was sentenced to three consecutive life terms and Judgment was entered on February 24, 2023.

2. At that trial a primary witness for the state gave testimony and was cross-examined. He is further identified in a sealed document filed by the defense entitled Description of Basis for Request for Review and Preservation, which supported Defendant's Motion for Review and Preservation of Undisclosed Primary Witness Information. Both documents are incorporated herein as if set forth in full by this reference. This court granted Defendant's Motion for Review and Preservation of Undisclosed Primary Witness Information, after a hearing and arguments of counsel on February 23, 2023, one day before sentencing.

3. Said primary witness played a most important part in the trial in that he led the authorities to the body of the third alleged victim, which body had been missing for approximately a month, and provided testimony of a purported confession by the defendant.

4. This court is to review the files and records referred to in the sealed pleading, Description of Basis for Request for Review and Preservation per its Order Granting Defendant's Motion for Review and Preservation of Undisclosed Primary Witness Information.

5. The information argued at the hearing on February 23, 2023, one day before sentencing about said witness, is material to guilt, exculpatory, and significantly impeaching since it would naturally go towards the witness's bias, hope to curry favor, and provide yet another reason why what he was saying was not true. The witness was at least a "person of interest" in a November, 2022, homicide, and at most was "suspect of the same", with the investigation ongoing. This type of information was requested by the defense and required to be turned over in the Order Granting Defendant's First Motion for Discovery, which provided in pertinent part the State shall provide:

> 17. Any and all consideration or promises of consideration given to or on behalf of each witness or expected or hoped for by the witness. "Consideration" means absolutely anything, whether bargained for or not, which arguably could be of value or use to the witness or to person of concern to the witness, including but not limited to formal or informal, direct or indirect leniency, favorable treatment or recommendation or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, social services matter, civil matter, administrative matter or other dispute involving the State of South Dakota;
>
> 18. Any other evidence, statements, or materials known to the prosecution, including law enforcement officers or investigators, which is exculpatory in nature or favorable to the Defendant or which may lead to exculpatory material or which aids in the

preparation of the defense, including evidence relevant to guilt or innocence of said Defendant not otherwise specifically requested by this motion.

6. "A defendant's right to present a defense is fundamental. *State v. Huber,* 2010 S.D. 63, ¶ 37, 789 N.W.2d 283, 294. 'When a defendant is denied the ability to respond to the State's case against him, he is deprived of "his fundamental constitutional right to a fair opportunity to present a defense." [*State v]. Lamont*, 2001 SD 92 ¶16, 631 N.W.2d at 608-09 (quoting *Crane*, 476 U.S. at 687, 106 S.Ct. at 2145). 'This right is "generally satisfied when the defense is given a full and fair opportunity to probe and expose a witness' infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to witness' testimony." ' [*State v.] Carter*, 2009 SD 65 ¶32, 771 N.W.2d at 339 (quoting *State v. Carothers*, 2006 SD 100, ¶16, 724 N.W.2d 610, 617)." *State v. Birdshead*, 2015 SD 77, ¶37, 871 N.W.2d 62.

7. " . . .[T]he United States Supreme Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The prosecution commits a Brady violation when '(1) "[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching;" (2) the "evidence [has] been suppressed by the State, either willfully or inadvertently;" and (3) "prejudice [has] ensued." ' *Thompson v. Weber*, 2013 S.D. 87, ¶ 38, 841 N.W.2d 3, 12 (alterations in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999))." *State v. Birdshead*, 2015 SD 77, ¶44, 871 N.W.2d 62 (2015) (citing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

8. " '[I]n order to find error, the defendant must establish that the belated disclosure of evidence was material to the issue of guilt, because if it was not material, it could not be violative of due process.' *State v. Moeller*, 2000 S.D. 122, ¶ 76, 616 N.W.2d 424, 446 (internal citation omitted)." *State v. Birdshead*, 2016 SD 87, ¶14, 888 N.W.2d 2099.

9. "A violation of a defendant's due process rights occurs when the State suppresses evidence favorable to the defendant when the evidence is material either to guilt or punishment. *Birdshead I*, 2015 S.D. 77, ¶ 44, 871 N.W.2d at 77 (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196–97, 10 L.Ed.2d 215 (1963)). 'Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ' *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). As the United States Supreme Court noted in *Strickler*,

> There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Id. at 281–82, 119 S.Ct. at 1948. See also *Thompson v. Weber*, 2013 S.D. 87, ¶ 38, 841 N.W.2d 3, 12. 'Prejudicial error is that which in all probability must have produced some effect upon the final result and affected rights of the party assigning it.' *State v. Spiry*, 1996 S.D. 14, ¶ 11, 543 N.W.2d 260, 263 (quoting *K & E Land & Cattle, Inc. v. Mayer*, 330 N.W.2d 529, 533 (S.D.1983))." *State v. Birdshead*, 2016 SD 87, ¶18, 888 N.W.2d 209 (2016).

10. The information about the prime witness which is the subject of this motion is important, substantive, exculpatory, and impeaching evidence. That he was a person of interest/suspect in an ongoing homicide investigation by the same prosecuting agency/authority

is the type of information which goes to bias, motivation, and consideration. This type of information was specifically required in paragraph 18 of the discovery order in paragraph 5 above. This information changes the entire flavor of the prime witness's testimony and provides favorable arguments for the accused that this witness was saying what he was saying in part to avoid additional charges and/or curry government favor. This information was known to the State prior to the trial. And the events which gave rise to this status occurred nearly two months prior to the Absolu trial.

11. Prejudice ensued because these arguments and questions were unavailable to the defense as the information was unknown and could not have reasonably been uncovered or found by the defense prior to or during the trial. This information flows hand in hand with contentions of the defense at trial that the witness was lying about what he received and his testimony was thus not believable and subject to reasonable doubt.

12. The Defendant was greatly prejudiced without said information and argument and the long deliberation process shows the evidence was not overwhelming, and that another reason for the witness to testify the way he did would have a reasonable probability to change the verdict and likely would have resulted in an acquittal.

13. " 'A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial, *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (emphasis added). After reviewing the entire line of cases stemming from *Brady*, we stated: 'Thus, where [the defendant] was not aware of the evidence, if the evidence is both favorable and material, and he has made a request for the evidence, there has been a due process violation.'

Ashker v. Solem, 457 N.W.2d 473, 477 (S.D.1990)." *State v. Steele*, 510 N.W.2d 661, 665 (1994). Here, the worry of being charged with another murder by the very office with whom he was cooperating goes directly to bias and consideration and, when added with the witnesses' admitted 700 lies, would have proved devastating.

14. "Evidence is favorable where it creates a reasonable doubt that did not otherwise exist. *Ashker*, 457 N.W.2d at 477 (citing *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 2402, 49 L.Ed.2d 342 (1976)). The U.S. Supreme Court has stated that 'The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (emphasis added)." *State v. Steele*, 510 N.W.2d 661, 665. A reasonable doubt exists for a witness in a murder case and his credibility when he is facing the possibility of his own prosecution for another murder. Here, that information was in the hands of the State prior to trial. Inadvertent or not, the failure to turn it over is violative of this Court's discovery order, and of the case law cited in relation to this issue, not to mention the important Due Process, Fair Trial and Confrontation Clause rights.

15. "Again, credibility was a key issue in the trial, and this information may well have raised a reasonable doubt in the minds of jurors." *State v. Steele*, 510 N.W.2d 661, 666.

16. Based on the foregoing, the arguments of the undersigned at the hearing on the motion for review of the documents by the Court, the Affidavit of Counsel of even date herewith, and SDCL 15-6-59(a)(1), (4),SDCL 15-6-59(b), as well as Due Process violations, Fair Trial violations, *Brady* violations, *Giglio* violations, the information which was not provided by the

State regarding the prime witness warrants a new trial and greatly undermines confidence in the verdict. Such information would in all reasonable probability have had an impact upon the verdict and caused a different result.

Dated this 6 day of March, 2023.

RENSCH LAW OFFICE
A Professional Law Corporation

Timothy J. Rensch
Attorney for Defendant
832 St. Joseph Street
Rapid City, SD 57701
(605) 341-1111
tim@renschlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of Defendant's Motion for New Trial upon the person herein next designated all on the date shown by electronic service through Odyssey File and Serve to said addressee, to-wit:

Roxanne Hammond
Pennington County Deputy State's Attorney
130 Kansas City Street, #300
Rapid City, SD 57701
mark.vargo@pennco.org

Kevin Krull
Pennington County Deputy State's Attorney
130 Kansas City Street, #300
Rapid City, SD 57701
kevin.krull@pennco.org

Trevor Thielen
South Dakota Attorney General's Office
P.O. Box 70
Rapid City, SD 57709

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

Dated this 6 day of March, 2023.

RENSCH LAW OFFICE
A Professional Law Corporation

Timothy J. Rensch
Attorney for Defendant

STATE OF SOUTH DAKOTA COUNTY OF PENNINGTON	)))	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. ARNSON ABSOLU, Defendant.	)))))))))	FILE NO. 51CRI20-003825 DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL

COMES NOW the Defendant, Arnson Absolu, by and through his attorney of record, Timothy J. Rensch, and hereby submits the following in support of Defendant's Motion for New Trial

1. **Incorporation of previous authority**. Defendant Absolu hereby reasserts and incorporates herein as if set forth in full Paragraphs 1 through 16 of Defendant's Motion for New Trial, as well as all of the authority and propositions contained therein.

2. **Paragraph 17 of the discovery order stands unrefuted**. The discovery order entered of record in the above-captioned matter and properly noticed to the State states in pertinent part at paragraph 17, the State is to provide:

> Any and all consideration or promises of consideration given to or on behalf of each witness or expected or hoped for by the witness. "Consideration" means absolutely anything, whether bargained for or not, which arguably could be of value or use to the witness or to person of concern to the witness, including but not limited to formal or informal, direct or indirect leniency, favorable treatment or recommendation or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, social services matter, civil matter, administrative matter or other dispute involving the State of South Dakota.

In looking at what is required under Paragraph 17 it states that, "any and all consideration

or promises of consideration given to or on behalf of each witness or expected or hoped for by the witness." The order goes on to say that "'consideration' means absolutely anything, whether bargained for or not, which arguably could be of value or use to the witness . . .". And the Order goes on to state, "including but not limited to formal or informal, direct or indirect leniency, favorable treatment or recommendation or other assistance with respect to any pending or potential criminal . . . social services matter, civil matter, administrative matter or other dispute involving the State of South Dakota." While the undersigned has not been privy to the Department of Social Services (DSS) records concerning Shamar Bennett and his live-in girlfriend, certainly the DSS was dealing with the children of Shamar Bennett as such a death had occurred in his home. Also reference by DSS to what Shamar Bennett may or may not have been, the information would emanate from someplace, likely within law enforcement and within the knowledge and purview of the State's Attorney's office. The State's Attorney's office is separately handling abuse and neglect matters, and the DSS is looking into those very matters; as such the fact pattern involves a dispute with the State of South Dakota, via Social Services. All of these matters are ultimately dealt with in court by the State's Attorney's office in the A&N matters. Just because the criminal prosecutor did not know exactly what the A&N prosecutor was doing, they are both in the same office, and the criminal prosecutor is obligated to find out matters which would be required to be produced by way of the discovery order. If in fact there was reference in the files, affidavits, and/or reports to Shamar Bennett being a "suspect" or "person of interest" that is something which should have been disclosed. Just because it appears in an email after the jury trial does not mean that the tag "suspect" or "person of interest" did not exist prior to the time of the email. It goes back to the initial action. Also, the information that

the DSS had regarding Shamar Bennett may have been such that it contradicted what he said on the stand about his use of drugs, about his activities, and about the fact that he did not expect anything in return for his testimony. This could put his testimony in a different light and is exculpatory. The case law both the defense and the State has forwarded shows that the failure to disclose need not be intentional but could be inadvertent as well. It is also clear from the Affidavit of Roxanne Hammond that she knew prior to the trial that Shamar Bennett was involved in the fact pattern. It is also clear based upon the Affidavit of Timothy J. Rensch that Chief Deputy Kevin Krull also knew of the situation and confirmed in an email that at the very least he had heard Bennett being referred to as a "person of interest" in the weeks leading up to the trial during witness preparation. And it is also important to note that the State does not even address Paragraph 17 of the Order in any way in its response.

3. **Paragraph 18 of the discovery order requires production of exculpatory evidence**: The Order further goes on and additionally requires that any exculpatory evidence be provided in Paragraph 18, which provides as follows:

> Any other evidence, statements, or materials known to the prosecution, including law enforcement officers or investigators, which is exculpatory in nature or favorable to the Defendant or which may lead to exculpatory material or which aids in the preparation of the defense, including evidence relevant to guilt or innocence of said Defendant not otherwise specifically requested by this motion. (Emphasis added).

Concerning exculpatory information, it was set forth in the Motion for New Trial the various reasons this could be exculpatory. The undersigned does not have access to the content of the documents which were provided to the Court for an *in camera* review. But the undersigned has handled several shaken baby cases. In those cases it is the child abuse

pediatrician camp's party line that the person who was last caring for the child must be able to explain why the injuries occurred, or such, with the constellation of symptoms, ends up with a determination that the last caregivers were the people who inflicted the abuse. Bennett fits within this category.

The reason the State does not respond to Defendant's arguments about the Court Order or even refer to the Court Order is because that Order becomes the law of the case and sets forth what is to be provided. Orders are supposed to be followed:

> While it is settled that the state is not required to make available to the defendant all of its investigations in a case, *State v. Pickering*, 1973, 87 S.D. 331, 207 N.W.2d 511, once the trial court, in its discretion, has ordered production of certain evidence, those orders must be expeditiously carried out and obeyed. The record shows that in the instant case the state failed to do so.

State v. Sahlie, 90 S.D. 682, 245 N.W.2d 476. Such is true herein, and the State cannot now complain of the terms of the order.

4. **Bennett was the primary witness and the prosecutors had the duty to learn of the evidence**. Finally it is also uncontested that Shamar Bennett was a primary witness and played the most important part in this trial based upon his testimony. Please consider that argument unrefuted. The full power of the defense revolved around a video which showed the perpetrator walking beside Dakota Zaiser and proved the perpetrator was much taller. Absolu was about the same height as Zaiser. Bennett was taller than both. This could explain why Bennett knew where the body was. The jury deliberated two days before convicting Absolu. This extra information about Bennett would have changed the entire tenor of his testimony and raised even more reasonable doubt.

The evidence concerning the facts surrounding the death of the child and Shamar Bennett's hopes in relation thereto, along with the fact that he was not charged, not to mention the timeline of activity referring to him as a suspect "after" the trial, are all something which show consideration to Shamar Bennett. In any other situation one present like he was would have been questioned and investigated. It is also possible that those very contentions made their way into affidavits in the abuse and neglect file, which affidavits would be signed by an attorney from the State's Attorney's office. And because law enforcement now says Bennett is not a suspect does not negate the fact that DSS got the information from someone; and DSS is encompassed in the Order and is an arm of the State working hand in hand with law enforcement and represented in court via the State's Attorney's office.

The prosecutors in the criminal case had a duty to learn of said favorable evidence, not shy away from and remain intentionally ignorant of the facts.

> In Order to comply with *Brady* [*v. Maryland*, 73 U.S. 83 (1963) 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215], therefore, "the individual **prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf** in this case, including the police. *Kyles* [*v. Whitley*], 514 U.S. at 437, 115 S.Ct. at 1567, 131 L.Ed.2d 490. (Emphasis added).

Erickson v. Weber, 2008 SD 30 ¶18, 748 N.W.2d 739 (2008).

> In order to comply with *Brady* [*v. Maryland*, 373 U.S. 83 (1963) 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215], therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."

State v. Leisinger, 2003 SD 118, 670 N.W.2d 371 (2003).

5. **The information supports the theory of the defense and thus is not something to be *in limined*.**

Some contention that the information could be *in limined* out and thus error has not occurred, is a false contention. In a murder case when there is a key witness the right to confront and cross-examine carries the day. That type of information goes to weight and not admissibility. The Court would be hard pressed to *in limine* out such information in light of Defendant's confrontation clause rights and constitutional rights to due process and fair trial through the crucible of cross-examination. Keeping the information from the defense prevented the defense from using it at trial.

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> The principle of *Mooney v. Holohan* [294 U.S. 103, 55 S. Ct. 340, 79 L.Ed. 791] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169.

Brady v. Maryland, 373 U.S. 83 (1963) 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215. Absolu has suffered prejudice and injustice when Bennett was protected from answering to these matters because the State did not disclose it.

And this information as it could be used in Bennett's cross-examination would have been devastating and would have changed the flavor of his testimony.

6. **Prejudice resulted which requires new trial**. It is prejudicial that the information was not disclosed and the lack of the information overall in this trial undermines confidence in the verdict:

> Prejudice ensues when " 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *See Erickson v. Weber*, 2008 S.D. 30, ¶ 18, 748 N.W.2d 739, 745 (emphasis omitted) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)). A "reasonable probability" exists when evidence reasonably could "be taken to put the whole case in such a different light [so] as to undermine confidence in the verdict." *Kyles* [*v. Whitley*], 514 U.S. at 434–35, 115 S.Ct. at 1566. The test is not for sufficiency of the evidence, but instead, an examination of the cumulative effect of the suppression, viewing the error in the context of the entire record. *Id.* We must ask ourselves if we are confident the verdict would be the same. *See id.* at 453, 115 S.Ct. at 1575.

Thompson v. Weber, 2013 SD 87, 841 N.W.2d 3 (2013).

> [*United States v.*] *Bagley*'s [473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in

> the outcome of the trial." *Bagley,* 473 U.S., at 678, 105 S.Ct. at 3381.

Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. at 1555, 1566, 131 L.Ed.2d 490. The suppression of this evidence which goes to Bennett's motivation and bias brings into question the entire verdict.

> The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555, 1566, 1566, 131 L.Ed.2d 490. Coupled with the defense arguments about Bennett being at the scene of the double murder, the hope to avoid yet another murder charge puts his testimony in a different light.

This describes the present situation:

> Thus, in each case, the trier of fact was left unaware of powerful reasons to question the credibility of the witnesses. "[T]he truth-seeking process is corrupted by the withholding of evidence favorable to the defense, regardless of whether the evidence is directly contradictory to evidence offered by the prosecution."

U.S. v. Bagley, 473 U.S. 667, 692, 105 S.Ct. 3375, 3388, 87 L.Ed.2d 481 (1985). This information contained exactly the sort of "powerful reasons" to question Bennett's credibility and the exclusion of such by nondisclosure undermines the reliability of the verdict.

> When the state does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict.

U.S. v. Bagley, 473 U.S. 667, 693, 105 S.Ct. 3375, 3389, 87 L.Ed.2d 481 (1985). The State is

literally in the following position:

> The State of Louisiana would prefer an even more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, Brief for Respondent 25, 27, 30, 31, and it suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor. To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 1568, 131 L.Ed.2d 490. The excuses about how the information was walled off within the A&N section of the State's Attorney's office are a claim that the State had no duty to find it or disclose it. Under this analysis there is no arbiter at all who considers this material as the law requires. The information should have been turned over.

> ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Kyles v. Whitley, 514 U.S. 419, 439-440, 115 S.Ct. 1555, 1568, 131 L.Ed.2d 490.

CONCLUSION

For all the reasons stated in all the defense submissions relating to a new trial it is respectfully requested that the relief sought be granted.

Dated this 14 day of April, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of Brief in Support of Defendant's Motion for New Trial upon the person herein next designated all on the date shown by electronic service through Odyssey File and Serve to said addressee, to-wit:

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Dated this 14 day of April, 2023.

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Attorney for Defendant

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
		51CRI20-3825
STATE OF SOUTH DAKOTA	)	
	)	
Plaintiff,	)	**MEMORANDUM OPINION AND**
vs.	)	**ORDER DENYING MOTION FOR NEW**
	)	**TRIAL**
ARNSON ABSOLU	)	
	)	
Defendant.	)	

Pending before the court is Defendant's Motion for New Trial ("Motion"). For the reasons set forth below the Motion is **DENIED**.

BACKGROUND

On or about August 24, 2020, at approximately 10:40 pm, Rapid City police responded to Thomson Park after receiving a call describing six gunshots. Upon arrival, the police found two gunshot victims in a parked SUV, Charles Red Willow and Ashley Nagy. Both Red Willow and Nagy were deceased.

Also, on the night of August 24, 2020, Dakota Zaiser was released from the Pennington County jail. On August 25, 2020, Zaiser's mother called the police concerned that she had not heard from him. The police determined that Zaiser's phone was used to make a call to Red Willow shortly before the homicides. But the whereabouts of Zaiser remained unknown to the police for several weeks.

A few weeks after the homicides the police contacted Shamar Bennett. Bennett was familiar with the Defendant as both were involved with the sale of heroin in Rapid

City. Bennett debriefed twice with police detectives. Detectives believed that Bennett had information regarding the Thomson Park homicides and Zaiser's disappearance. During the first debrief, Bennett lied extensively to the detectives and told them that he and the Defendant went to the forest to bury drugs. During the second debrief, Bennett continued to lie to the detectives. But while driving around with them, Bennett decided to tell the truth. Before he did so, the detectives had Bennett speak with Pennington County State's Attorney Mark Vargo. According to Bennett, Vargo did not make any promises to him. Bennett then took the detectives to where he and Defendant left Zaiser's remains near the intersection of Sheridan Lake Road and Highway 385. The following is from Bennett's grand jury testimony on January 6, 2021. Bennett told detectives that Defendant had asked him to dispose of a blood-stained rug and chair. Following the disposal of the rug and chair, Defendant requested that Bennett help him with the disposal of a body. The body was in a tub in Defendant's rental car. Bennett observed the body in the tub. Defendant told Bennett whose body it was. Bennett refers to the body as Dakota. Defendant admitted to Bennett that he killed Dakota because he was scared that he was going to tell about Ashley and Charles. Bennett admitted helping Defendant locate the spot where Zaiser's body was left.

At trial, Bennett testified in a manner consistent with his grand jury testimony. Bennett was thoroughly cross-examined regarding his initial lies to detectives. But at no

time was he challenged regarding the consistency of his post Vargo debrief,[1] his grand jury testimony, and his testimony at trial. On January 26, 2023, the jury returned a verdict of guilty on all three counts.

On February 17, 2023, Defendant filed a Motion for Review and Preservation of Undisclosed Preliminary Witness Information ("Motion for Review"). Defendant argued that a key witness[2] for the prosecution was a "person of interest" as well as a suspect in a murder that occurred in November of 2022. Defendant claimed that information was critical for impeachment purposes and that the State's failure to disclose such information amounted to a *Brady* violation. Also on February 17, 2023, Defendant moved to continue his sentencing which was set for February 24, 2023, until the Motion for Review could be heard. At a hearing on February 23, 2023, the court denied the motion for continuance and informed the parties that the Motion for Review is essentially a precursor to a motion for new trial and that it will be considered upon its filing. The court also ordered that the information requested in the Motion for Review be preserved and provided to the court for an *in camera* inspection. On February 24, 2023, Defendant was sentenced to three mandatory life sentences to be served consecutively.

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[1]The record does not contain a police report detailing Bennett's post Vargo debrief. At trial, Defendant cross examined Bennett in great detail regarding his statements to police prior to his meeting with Vargo. But Defendant did not raise any variance between anything Bennett said in his post Vargo debrief and his testimony at trial.

[2] Later identified as Shamar Bennett.

Defendant filed a timely Motion for New Trial on March 6, 2023. On March 9, 2023, the court set a briefing deadline and extended the deadline in SDCL 15-6-59(b) to May 31, 2023. Defendant argues that Bennett's status as a person of interest or suspect in a murder investigation conducted by the same prosecuting authority provides him with motivation to give testimony favorable to the State in an effort to gain the State's favor in the ongoing murder investigation.

In response, the State argues that Bennett was not a suspect in the November 2022 murder and that any information regarding Bennett's involvement in the murder investigation would be inadmissible. According to the State, Bennett was never a suspect nor is he a suspect now. However, the case is still ongoing.

The court has carefully reviewed the materials provided for *in camera* inspection. Those materials will be made a part of the record and will be sealed. The materials include police investigative records as well as Abuse and Neglect (A&N) records. The State argues that records involving A&N proceedings are confidential and are not accessible except to the attorneys and staff directly involved in the A&N proceeding. The description provided herein is from the police investigation. The A&N records rely on the same police investigative records. While the A&N records offer opinions and conclusions by Family Service Specialists and the civil State's Attorney in charge of A&N cases, for the reasons set forth below, they are not relevant.

The criminal investigation involves the death of an infant, AW. The records indicate that on November 14, 2022, police arrived at AW's mother's residence in response to a report that AW was having trouble breathing, had blue lips, and a bump on her head. AW was transported to the Monument Health emergency room in Rapid City. The treating physician discovered that AW had a serious skull fracture that was caused by non-accidental trauma. AW was in the care of Bennett and CM[3]. They were the only adults in the household. Initially, CM informed the police that the only people present were her and two two-year-old children. Later, Bennett informed the police that he was also present, but was asleep in another room and did not know what had happened to AW. CM believed that the two two-year-olds were trying to give AW a bath and accidently dropped her. Later, doctors opined that the extensive injuries suffered by AW could not have been caused by two toddlers playing with AW or dropping her. Detectives tried to interview Bennett, but he requested counsel and did not provide a statement.

Investigators believed that Bennett and CM communicated about the investigation and possibly the mechanism of injury that ultimately caused the death of AW. Accordingly, investigators sought and received a search warrant for electronic devices and communications between Bennett and CM. Investigators also collected evidence to be examined by the South Dakota Forensic Laboratory (SDFL). The packing slip to the

[3] CM is an adult.

SDFL, which was electronically completed, listed Bennett and CM as suspects. The packing slip to SDFL was sent on March 7, 2023. As of the latest briefs provided to the Court, neither Bennett nor CM have been charged in AW's death.

LEGAL DISCUSSION

A. Motion for a New Trial.

"Whether a new trial should be granted is left to the sound judicial discretion of the trial court, and [the Supreme Court] will not disturb the trial court's decision absent a clear showing of abuse of discretion." *State v. Hoadley*, 2002 S.D. 109, ¶ 16, 651 N.W.2d 249, 254. "To succeed on a motion for a new trial based on after-discovered evidence, a defendant must prove that '(1) the evidence was undiscovered by the movant at the time of trial; (2) the evidence is material, not merely cumulative or impeaching; (3) that it would probably produce an acquittal; and (4) that no lack of diligence caused the movant to fail to discover the evidence earlier.'" *State v. Timmons*, 2022 S.D. 28, ¶ 25, 974 N.W.2d 881, 889 (quoting *State v. Corean,* 2010 S.D. 85, ¶ 18, 791 N.W.2d 44, 51).

But a motion for a new trial based on a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), includes suppression of impeaching evidence. In *State v. Leisinger*, 2003 S.D. 118, 670 N.W.2d 371, our Supreme Court cited with approval to *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

> In [*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)], this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request

> violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence. Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."
>
> * * *
>
> ... There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Leisinger, 2003 S.D. 118, ¶ 14, 670 N.W.2d 371 (quoting *Strickler*, 527 U.S. at 280-282, 119 S.Ct. 1936 (some citations omitted)). "Prejudicial error is 'that which in all probability must have produced some effect upon the final result and affected rights of the party assigning it.'" *State v. Birdshead*, 2016 S.D. 87, ¶ 18, 888 N.W.2d 209, 215 (internal citation omitted).

B. The evidence regarding AW's death should have been disclosed.

Of the three elements required to establish a *Brady* violation, neither party argues that the evidence was not suppressed. Therefore, the court will focus on the first and third prongs, whether the evidence was favorable and whether prejudice ensued.

To begin with, the evidence which was suppressed is wholly unrelated to the offenses of which Defendant was convicted and thus has no exculpatory value. Its only value is potential impeachment. In other words, did the suppressed evidence have any relevance on Bennett's motivation to testify falsely, if he indeed did so. *State v. Piper*, 2006 S.D. 1, ¶19, 709 N.W.2d 783, 795 ("[E]vidence that could be used to impeach a witness for the prosecution falls within the *Brady* rule.")

Both sides rely heavily on whether Bennett was a "suspect" in AW's death. Defendant claims that he was and therefore was motivated to provide testimony favorable to the State to gain its favor. The State focuses on law enforcement's determination that Bennett was not a suspect, and therefore there was no need to disclose his connection to the AW case. "Suspect" is defined as "[a] person believed to have committed a crime or offense; someone thought to be guilty of malfeasance." Black's Law Dictionary (11th ed. 2019).

In the court's opinion, both parties' reliance on Bennett's classification as a suspect is misplaced. *Brady* is not dependent on a subjective analysis of whether someone is a suspect. Whether a person is deemed a suspect is a factor to be considered, but it is not the only factor. *Brady* focuses on the actual information relating to the individual, not just the individual's classification. Nor is *Brady* dependent on law enforcement's classification of persons. "In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others

acting on the government's behalf in this case, including the police.'" *Leisinger*, 2003 S.D. 118, ¶ 14, 670 N.W.2d 371 (quoting *Strickler*, 527 U.S. at 280-282, 119 S.Ct. 1936 (some citations omitted)).

The evidence available to the State was that AW's fatal injuries were not accidental nor due to rough play with toddlers. The adults with responsibility for the care of AW were Bennett and CM. Moreover, Bennett and CM were the only adults present when AW suffered her injuries. Initially, CM lied about the whereabouts of Bennett. While the classification as a suspect in and of itself is not determinative, it is nevertheless difficult to understand why CM and Bennett would not be classified as suspects based on the information available. Indeed, law enforcement executed search warrants on their communication devices, and classified Bennett and CM as suspects in its submission to the SDFL, albeit not until March of 2023. While it appears from the affidavits that there was insufficient evidence for the investigators to charge Bennett or CM with a crime, there was sufficient evidence to consider them as suspects.

The Court does not suggest that failure to classify Bennett as a suspect was intentional. Clearly, prosecutors and law enforcement officials are entitled to their opinions regarding classification of persons, nor has the court been able to locate any authority that clearly defines when a person of interest becomes as suspect. That is why the focus must be on the information available regarding the person, rather than a subjective classification. This is also why opinions of those involved in the A&N case

are not relevant. What is relevant is the actual information available to the prosecutor to make an informed decision whether *Brady* is implicated. The information described above clearly could be impeaching under the right circumstances and should have been provided to the Defendant. Specifically, this information could have been used to explain Bennett's motivation to testify in the event his testimony at trial is more favorable than his grand jury testimony or post Vargo debrief.

The State argues that the evidence regarding AW's death would not have been admissible. Whether the evidence would have been admissible is only one factor to be considered. The Third Circuit explained: "...[W]e believe, as do the majority of our sister courts of appeals, that inadmissible evidence may be material if it could have led to the discovery of admissible evidence." *Johnson v. Folino*, 705 F.3d 117, 130 (3rdCir. 2013). "Thus, the admissibility of the evidence itself is not dispositive for *Brady* purposes. Rather, the inquiry is whether the undisclosed evidence is admissible itself or could lead to the discovery of admissible evidence that could make a difference in the outcome of the trial sufficient to establish a 'reasonable probability' of a different result." *Id.* "Suppressed evidence that would be cumulative of other evidence or would be used to impeach testimony of a witness whose account is strongly corroborated is generally not considered material for *Brady* purposes." *Id.* at 396–97. Conversely, however, undisclosed evidence that would seriously undermine the testimony of a key witness may

be considered material when it relates to an essential issue or the testimony lacks strong corroboration." *Id.* at 129 (internal citations omitted).

There cannot be a reasonable dispute that Bennett was a key witness for the State. The Defendant admitted to Bennett that he killed Zaiser and that he did so because he did not believe that Zaiser would stay quiet regarding Red Willow and Nagy. Bennett helped Defendant hide Zaiser's body and disposed of physical evidence. Clearly any evidence that would allow Defendant to impeach Bennett would have been critical. The State's belief that evidence regarding AW's death would not have been admissible does not absolve it from its duty to disclose such evidence pursuant to *Brady*.

C. Suppression of evidence related to AW was not prejudicial.

Having determined that the information regarding Bennett's involvement in the death of AW constituted *Brady* material, the court must now resolve whether suppression of such evidence prejudiced Defendant.

Evidence that Bennett is a suspect in a murder investigation in and of itself is not admissible as impeachment. SDCL 19-19-609. Nor is such evidence admissible pursuant to SDCL 19-19-404 because it is not relevant to the case at hand and whatever minimal relevance it would have is outweighed by its prejudicial effect. SDCL 19-19-403. No doubt, if the jury were privy to the suppressed evidence, it would be unfairly prejudicial because it would do nothing but arouse the juries' hostility without regard to

the probative value of the evidence. *State v. Moeller*, 2000 S.D. 122, ¶ 94, 616 N.W.2d 424, 450.

Defendant argues that Bennett was motivated to give favorable testimony against the Defendant to gain favor with the State with respect to the AW case. As described above, during the early stages of the investigation in this case Bennett lied to law enforcement on numerous occasions, and Defendant was able to thoroughly cross-examine him regarding his lies. But at trial, Bennett testified in a manner consistent with his grand jury testimony following his meeting with State's Attorney Vargo. Bennett's trial testimony was not more favorable to the State than his grand jury testimony. Bennett provided his grand jury testimony on January 6, 2021. Therefore, he could not have been motivated by the events that were about to occur in November 2022. At no time did Defendant raise any variance between Bennett's post Vargo debrief, his grand jury testimony, and his trial testimony. Simply stated, Bennett did not testify more favorably at trial. Had he done so, Defendant would have been permitted to raise an inference that Bennett's testimony is motivated by a desire to please the same authorities that are now investigating his involvement in the death of an infant. But absent such variance, what occurred in November of 2022 is not relevant in establishing Bennett's motivation to testify. Therefore, the Court finds that suppression of the November 2022 evidence was not prejudicial.

CONCLUSION

Information regarding AW's investigation falls within the *Brady* rule and should have been provided to the Defense. Under the right circumstances, such as Bennett testifying more favorably at trial, evidence regarding Bennett's involvement in AW's death would have been relevant and could have been used by the Defendant to explain Bennett's motivation to testify more favorably than his and grand jury testimony. However, in this case, there was nothing in Bennett's trial testimony that was more favorable to the State than Bennett's grand jury testimony. Accordingly, the evidence regarding AW's death would not have been admissible. Therefore, suppression of the evidence was not prejudicial. The Motion for New Trial is DENIED.

ORDER

For the reasons set forth above, Defendant's Motion for New trial is hereby **DENIED.**

Dated this 12 day of May 2023.

BY THE COURT:

Robert Gusinsky
Circuit Court Judge

ATTEST:

/s/ Ranae Truman
Clerk of Courts
By:_____
Deputy
(S E A L)

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30353

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ARNSON ABSOLU,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT GUSINSKY
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Notice of Appeal filed May 15, 2023

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30353

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ARNSON ABSOLU,

Defendant and Appellant.

PRELIMINARY STATEMENT

Arnson Absolu murdered Ashley Nagy, Charles Red Willow, and Dakota Zaiser. Absolu shot Red Willow over a drug debt. Absolu shot Nagy because she was in the car with Red Willow and was a witness to his murder. Zaiser was with Absolu during those murders. And fearing Zaiser wouldn't keep quiet, Absolu stabbed Zaiser and dumped his body in the woods. A jury convicted Absolu of three counts of first-degree murder and he was sentenced to three consecutive life sentences.

Absolu now appeals, claiming he is entitled to a new trial because one of the prosecution's witnesses was named in police reports during the investigation of the death of a child, about two months before trial. The police reports and information about that witness's connection to the child's death were not disclosed to the defense. Thus, Absolu believes his right to a fair trial and his rights under *Brady v. Maryland* were

violated. These claims must fail because the information in those police reports was neither "favorable" nor "material" under the *Brady* analysis.

In this brief the State of South Dakota is referred to as "the State." The child and their family members that are the subjects of Absolu's new trial claim are referred to by their initials. All other individuals are referred to by name. Documents are referenced as follows:

Settled Record (Pennington Co. Criminal File 20-3825)..... SR

Grand Jury Transcript (January 6, 2021)..... GJ

Motions Hearing Transcript (July 12, 2022)..... MH1

Jury Trial Transcript Volume 1 (January 9 and January 10, 2023)..... JT1

Jury Trial Transcript Volume 2 (January 11, 2023)..... JT2

Jury Trial Transcript Volume 3 (January 12, 2023)..... JT3

Jury Trial Transcript Volume 4 (January 13, 2023)..... JT4

Jury Trial Transcript Volume 5 (January 18, 2023)..... JT5

Jury Trial Transcript Volume 6 (January 19, 2023)..... JT6

Jury Trial Transcript Volume 7 (January 20, 2023)..... JT7

Jury Trial Transcript Volume 8 (January 24, 2023)..... JT8

Jury Trial Transcript Volume 9 (January 25, 2023)..... JT9

Sealed Motion Hearing Transcript (February 23, 2023).. SMH

Absolu's Appellant's Brief..... AB

All document designations are followed by the appropriate page numbers. All relevant jury trial exhibits are referred to as "Exhibit" followed by the appropriate identifiers.

JURISDICTIONAL STATEMENT

On February 24, 2023, the Honorable Robert Gusinsky, Pennington County Circuit Judge, filed a Judgment ordering Arnson Absolu to serve three consecutive life sentences for first-degree murder. SR:998-99. Absolu filed a motion for a new trial on March 6, 2023. SR:1283-90. After reviewing the parties' briefs and documents submitted for an *in camera* review, Judge Gusinsky denied Absolu's motion for a new trial. SR:1614-26. Absolu filed his Notice of Appeal on May 15, 2023. SR:2955-56.

On May 26, 2023, the State moved to dismiss Absolu's appeal for failure to comply with SDCL 23A-32-15's thirty-day deadline for filing a notice of appeal. This Court denied that motion, concluding the thirty-day filing deadline was tolled by Absolu's new trial motion. While the State disagrees with that interpretation of the criminal appellate jurisdictional statutes, it does not press the issue and limits this brief to addressing the merits of Absolu's new trial issue.

STATEMENT OF THE LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT PROPERLY DENIED ABSOLU'S MOTION FOR A NEW TRIAL?

Absolu claimed he was denied a fair trial and *Brady v. Maryland* was violated when the prosecution did not

disclose police reports that placed one of the prosecution's witnesses in an apartment where a child was killed about two months before Absolu's trial. The circuit court determined that the police reports should have been disclosed to the defense, but it denied Absolu's motion because he was not prejudiced by the nondisclosure. According to the court, Absolu was not prejudiced because the witness's trial testimony tracked his grand jury testimony, which he provided almost two years before the incident with the child. The court also determined that Absolu was not prejudiced because the information in those undisclosed police reports would have been inadmissible at trial.

Kyles v. Whitley, 514 U.S. 419 (1995)

Moore-El v. Luebbers, 446 F.3d 890 (8th Cir. 2006)

United States v. Amiel, 95 F.3d 135 (2d Cir. 1996)

Wong v. Belemontes, 558 U.S. 15 (2009)

SDCL 19-19-404

SDCL 19-19-609

SDCL 19-19-801(d)(1)(B)

SDCL 23A-29-1

STATEMENT OF THE CASE

A. Absolu's charges and the parties' pretrial motions practice.

A Pennington County Grand Jury indicted Absolu on three counts of First-Degree Murder, in violation of SDCL 22-16-4(1), for the August 2020 killings of Charles Red Willow, Ashley Nagy, and Dakota Zaiser. SR:16-17. The State also filed a Part II Information alleging that Absolu had been convicted of two prior felonies: possession of marijuana in Texas and possession of a weapon in New York. SR:19.

Absolu moved for disclosure of "[a]ny and all consideration or promises of consideration given to or on behalf of each witness or expected or hoped for by the witness." SR:229. Absolu also made a general request for *Brady* evidence by moving for disclosure of:

> [a]ny other evidence, statements, or materials known to the prosecution, including law enforcement officers or investigators, which is exculpatory in nature or favorable to the Defendant or which may lead to exculpatory material or which aids in the preparation of the defense, including evidence relevant to guilt or innocence of said Defendant not otherwise specifically requested by this motion.

SR:230. The circuit court granted the defense's discovery motion. SR:334-36. The State and the defense had a good relationship during the discovery process, and the prosecution team promptly provided Absolu and his attorney with any new information learned during witness preparation. SMH:4 (sealed proceeding).

The State also made specific discovery requests before trial. The State moved for Absolu to disclose any third-party perpetrator evidence he intended to use at trial. SR:224. The circuit court granted that motion.[1] SR:339-41. The defense filed its witness list about three weeks before trial, which identified four police officers and "[a]ny person on State's witness list or mentioned in the discovery to relate any necessary contention not yet

[1] Absolu objected to having to provide any third-party perpetrator evidence that was already contained in the discovery materials that the State provided to the defense. MH1:8-9. The circuit court overruled that objection. MH1:9.

contemplated." SR:484-85. But the defense filed no written notice about third-party perpetrators. *See generally* SR:1-5194.

B. Absolu's jury trial.

Absolu's jury trial lasted about three weeks. During those three weeks, the jury heard testimony from forty-nine witnesses that ranged from the victims' families to police officers to medical examiners to anthropologists to forensic scientists. The jury also received 233 exhibits that ranged from bullets and shell casings to autopsy and crime scene photos to cell tower location data. SR:571-82.

The State's theory of the case was that Absolu was a New York City drug dealer that came to Rapid City in mid-2020 to sell heroin and fentanyl. JT9:1425. While recruiting locals to push his drugs to users, Absolu was ripped off by Charles Red Willow. JT9:1426. Absolu devised a plan to lure Charles to Thompson Park under the pretense of a drug deal. JT9:1426. Absolu put that plan in motion with help from Dakota Zaiser. JT9:1426. Minutes before the drug deal was to happen, Absolu and Dakota waited for Charles in the darkened park. JT9:1426-27.

When Charles arrived at the park he was not alone: he rode there with Ashley Nagy. JT9:1427. As soon as Ashley parked the car, Absolu shot Charles seven times and killing him instantly. JT9:1427. Absolu then shot Ashley in the head because he needed to eliminate one of the witnesses to Charles's murder. JT9:1427.

After the bullets started flying, Dakota, the only other witness to the murders, ran back to the car he and Absolu brought to the park. JT9:1427-28. Eventually Dakota and Absolu made their way back to the apartment of one of Absolu's dealer's, Maddie Ziegler. JT9:1429. There, Absolu decided Dakota had to die because he "cannot be trusted to keep his mouth shut" about the murders of Charles and Ashley. JT9:1430. So Absolu stabbed Dakota to death. JT9:1430.

Needing to hide Dakota's murder, Absolu recruited Shamar Bennett to help him get rid of Dakota's body and dispose of bloody evidence. JT9:1431-32. Shamar, one of the State's main witnesses at trial, helped Absolu dump Dakota's body in the Black Hills near Sheridan Lake, where it was found a month later. JT9:1432-33.

For its part, the defense's theory of the case wasn't that Charles, Ashley, and Dakota were not murdered. Nor was its theory that the three were killed in self-defense. Absolu's defense was that police had the wrong man, that someone else killed the victims. *See* JT9:1467-75, 1494-96. And that person was either Shamar Bennett, because of a claimed height difference between him and Absolu, or Cory Staab, who had threatened Charles for ripping him off. JT9:1486, 1494-95. According to the defense, the police put blinders on and focused on Absolu, while ignoring evidence that pointed to someone else or refusing to test evidence that would reveal the true killer. *See* JT9:1467-75, 1484-86.

After deliberating for a day and a half, the jury found Absolu guilty of all three counts of first-degree murder. SR:961-62.

C. Absolu's motion for new trial.

In November 2022, about two months before trial, Shamar Bennett was mentioned in the investigation of a child that died from a skull fracture. SR:1618. That child was the niece of Shamar's girlfriend, C.M. SR:1618. C.M. told police that the child was injured when two other children tried giving her a bath. SR:1618. C.M. also told the police Shamar was not home at the time. SR:1618. But Shamar was home, asleep in the bedroom; he reported as much to the police. SR:1537, 1618. During the investigation, police got a search warrant for Shamar's and C.M.'s electronic devices and submitted evidence to the State Forensic Lab for testing. SR:1618. The packing slip for the evidence sent to the Forensic Lab listed Shamar and C.M. as suspects. SR:1618. Despite that packing slip, investigators stated that Shamar was not a suspect in the child's death and preliminary review of his electronic data did not implicate him in the death. SR:1535-40 (sealed documents).

Neither Shamar nor C.M. have been charged or convicted in the child's death. SR:1618. The prosecution did not disclose this death investigation to the defense, nor provide the defense with the police reports.

After trial, and sentencing, Absolu moved for a new trial, claiming that this undisclosed information violated the circuit court's discovery order, his rights under *Brady v. Maryland*, and his right to a fair trial under

the federal and state constitutions. SR:1283-90. The circuit court ordered the parties to brief the issue and conducted an *in camera* review of police reports and Department of Social Services records for an Abuse and Neglect file that was opened because of the child's death. SR:1295.

The circuit court determined that the Social Services documents were irrelevant, but concluded the police reports should have been disclosed to the defense. SR:1617, 1620-24. Despite that determination, the court denied Absolu's new trial motion because he was not prejudiced by the lack of disclosure. SR:1624-26. It reasoned that no prejudice existed because Shamar's trial testimony tracked his grand jury testimony, which occurred almost two years before the child's death. SR:1625. That consistency and time lag led the court to conclude that Shamar did not somehow alter his testimony against Absolu to curry favor with the State in the child death case. SR:1625. The court also determined Absolu was not prejudiced by the undisclosed information because it would not have been admissible at trial under either SDCL 19-19-609 or SDCL 19-19-404. SR:1624-25.

D. Absolu's sentencing hearing and notice of appeal.

The circuit court sentenced Absolu to three consecutive life sentences. SR:998-99. Almost two months after the circuit court filed its written Judgment, and three days after the court denied his motion for a new trial, Absolu filed his Notice of Appeal. SR:1627.

STATEMENT OF FACTS

The Rapid City heroin scene was quiet and non-violent until Absolu came to town. JT2:226. Absolu shattered that status on August 24 and August 25, 2020, when he made a "New York example" by murdering Ashley Nagy, Charles Red Willow, and Dakota Zaiser. JT9:1452.

Absolu came to Rapid City in mid-2020 to sell heroin and fentanyl. JT2:325-26, 328; JT3: 407. While recruiting locals, like Maddie Ziegler, Breeze Stock, and Antonio Cadena, to push his drugs to users, Absolu was ripped off by Charles Red Willow. JT2:328, 331-32, 336, 376-77. Absolu was angry with Charles to the point that he started threatening Charles's life and vowing to get even. JT2:331-32, 336; JT3:407, 427-29. Eventually, Absolu's words turned into a gun when he hatched a plan to lure Charles into an ambush.

Absolu knew that Charles wouldn't answer his phone calls, so he recruited Dakota Zaiser to call Charles and have him come to Thompson Park for a drug deal. JT6:909-11, 916; JT9:1426; Exhibit 57, pg. 10 and 15. Minutes before the drug deal was to happen, security video shows two men hiding, waiting for Charles. JT9:1426-27; Exhibits 8 and 8.1. The police determined the men in the video were Dakota and Absolu given how they were dressed and cell tower location data. JT6:916-18, 922-24; Exhibit 57, pg. 16-17, 21. Dakota was wearing a distinctive red tank top, which he was wearing when he was released from jail, about ninety minutes earlier. JT3:514; Exhibits 31, 32, 33. Absolu was wearing dark

clothing and white shoes, which he was also seen wearing earlier in the day when he returned a rental car to the airport. JT1:196-97; JT3: 530; Exhibits 8, 8.1, 38, 184. The police also identified Absolu by determining that the car he and Dakota drove to the park was a dark colored 2016 to 2018 Chevy Malibu. JT3:536-37, 544; JT8:1320-21; Exhibits 9 and 37. Absolu had rented a 2018 dark blue Malibu from Casey's Auto Rentals earlier in the day. JT4:576-77; JT8:1320-21; Exhibits 40 and 42.

When Charles arrived at the park he was not alone; he rode there with Ashley Nagy. JT1:77, 202; JT9:1427. As soon as Ashley parked the car, Absolu shot Charles seven times. JT9:1427; Exhibits 71, pg. 2. Absolu then shot Ashley in the head because he needed to eliminate her as a witness. JT9:1427; Exhibit 72. Charles was killed instantly, but Ashley's wound, while fatal, caused her body to do agonal breathing for forty-five minutes. JT1:96-97. A paramedic that responded to the park described Ashley's condition in a succinct yet grim manner: "She was dead, her body just didn't know it yet." JT1:145.

After the shooting started, Dakota ran back to Absolu's Malibu; but he waited for Absolu before they fled in Absolu's car together. JT1:202-03; Exhibits 8 and 8.1. Dakota and Absolu made their way back to Maddie Ziegler's apartment, which is just a few blocks from Thompson Park. JT1:210-11; JT6:913, 918-19; JT9:1429; Exhibit 57, pg. 12 and 17.

It was at Ziegler's apartment that Absolu decided Dakota had to die because he "cannot be trusted to keep his mouth shut" about Charles's and

Ashley's murders. JT3:481; JT9:1430. Absolu "thumped" Dakota in the face, breaking his nose, and put his head through the bathroom wall. JT3:481; JT7:1155, 1157; Exhibits 25 and 83. Then Absolu stabbed Dakota in the back and the throat. JT7:1161-69, 1173-83; JT9:1430; Exhibit 83.

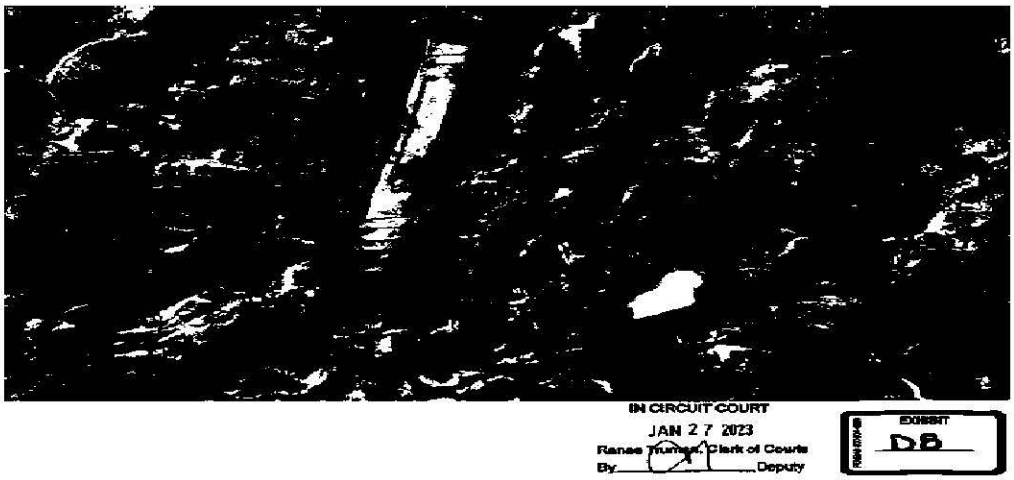
Needing to hide Dakota's murder, Absolu recruited Shamar Bennett to help him dispose of bloody evidence. JT3:467-68. The pair drove to different parts of Rapid City to dump a bloody rug and bloody chair. JT3:467-68; Exhibits D11 and D12. They then made their way to Breeze Stock's apartment complex, where Absolu showed Shamar Dakota's body, which was in a blue tote in the trunk of Absolu's Malibu. JT2:261; JT3:469-70. Absolu asked Shamar if he knew where they could hide the body. JT3:469. While Shamar initially refused to help, he ultimately drove out to the Black Hills, near Sheridan Lake, while Absolu followed in his Malibu. JT3:470-71; JT8:1331-35.

When the pair got to Sheridan Lake, they parked in a highway pull-off, where Absolu struck a tree stump, damaging the front end and oil pan of his car. JT2:254, 271-74; JT3:473; Exhibits 13-19, 170-73. They dragged the tote, with Dakota's body still inside, across the highway and up a hill, until they reached a shallow depression from a fallen tree. JT3:473-75. Absolu and Shamar dumped Dakota's body in that depression and covered it with sticks and logs. JT3:474-75. Shamar left the clandestine

grave after a couple of minutes. JT3:474-75. He waited at the vehicles for about ten minutes before Absolu returned. JT3:474-75.

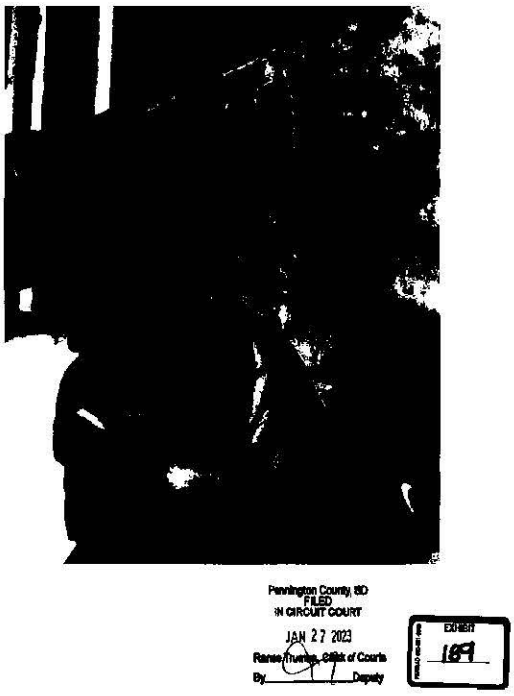
The next day, Absolu fled back to his native New York, thinking he had gotten away with three murders. JT2:229-30; JT9:1460. But thanks to old-fashioned police work and a spot of luck, the truth about the murders unraveled. JT9:1437.

The investigation eventually led detectives to interview Shamar, who took detectives to Dakota's clandestine grave and explained how he helped Absolu get rid of the bloody chair and rug. JT3:467-68, 476-78. The gun used to kill Charles and Ashely—a .40 caliber, black and silver Smith and Wesson—was found in the creek by the Central States Fairgrounds in Rapid City:

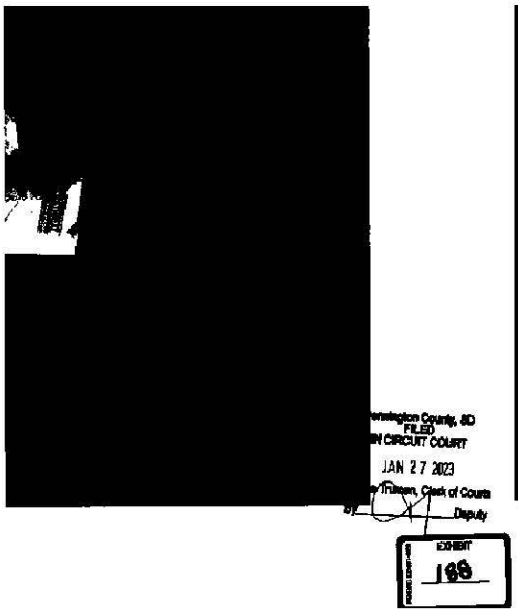


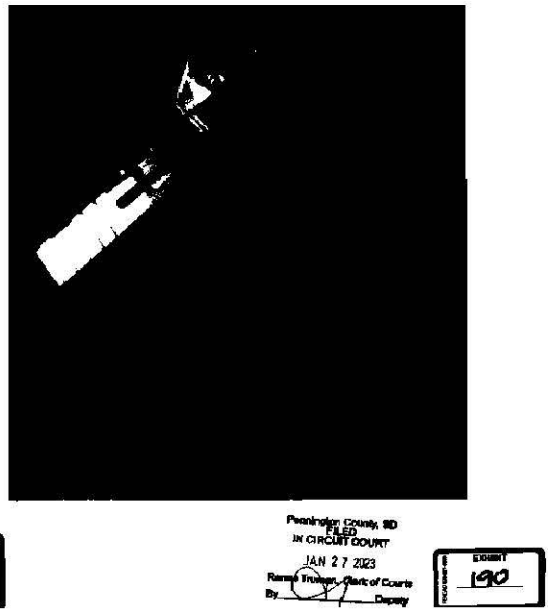
JT6:1030-31, 1038; JT7:1230-33, 1246-49; Exhibits 169, 179, D8. Absolu was arrested in New York, where the police found drugs and a black pistol hidden in his rented Chevy Malibu. JT2:243, 250; JT8:1328-29, 1354; Exhibits 11, 50, 188, 189. That gun matched photos of a gun that Absolu

negotiated to buy sometime before the murders, which were found during a search of Absolu's cellphone:



JT8:1353-54, 1356; Exhibits 50, 189, 199. There were also photos on Absolu's phone of a .40 caliber Smith and Wesson that resembled the murder weapon, which Absolu was also negotiating to buy:





JT8:1354-61; Exhibits 188, 190, 191, 199, D8. Finally, cell tower location data put Absolu around Thompson Park during the murders and near Sheridan Lake at the time Shamar told detectives he helped Absolu dump Dakota's body. JT6:929-31; Exhibit 57, pg. 26-28.

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED ABSOLU'S MOTION FOR A NEW TRIAL.

Absolu claims that the circuit court wrongly denied his new trial motion that turned on both state law and constitutional principles. Yet his arguments fail. As to the state law aspect of Absolu's motion, the circuit court had to deny it. The undisclosed information was, at most, potential impeachment evidence, which cannot be the basis for a new trial under SDCL 23A-29-1.

As for the constitutional law aspect of Absolu's motion, the circuit court was right to deny the motion. The undisclosed child death investigation reports were not "favorable" under *Brady v. Maryland*, because the conclusion that Shamar Bennett being named in the reports was impeaching information is speculative at best. Similarly, any unilateral hope for leniency in the child death case that Shamar may have had does not create a *Brady* disclosure obligation. There must be an agreement between the witness and the prosecution about leniency for a disclosure obligation to attach.

Nor were the child death investigation reports "material" under *Brady*. Even if those reports had been given to the defense, there is no "reasonable probability" that the verdicts would have been different. First, the information in those reports was inadmissible under SDCL 19-19-609 and SDCL 19-19-404. Second, Shamar's trial testimony tracked his grand jury testimony, so there is no basis for Absolu's claim that Shamar tailored his testimony to gain favor in the child death case. Third, Shamar was already impeached by the defense, so tacking on another avenue of impeachment would have been ineffective and cumulative. Finally, there was extensive evidence of Absolu's guilt that was not derived from Shamar's testimony. Besides that, Shamar's testimony that points to Absolu's guilt cannot be discounted because it is corroborated by other independent evidence.

A. Standard of review.

The denial of a motion for a new trial is reviewed using the abuse of discretion standard.[2] *State v. Timmons*, 2022 S.D. 28, ¶19, 974 N.W.2d 881, 888 (quoting *State v. Zephier*, 2012 S.D. 16, ¶15, 810 N.W.2d 770, 773). An abuse of discretion is "'a fundamental error of judgment, a choice outside the range of permissible choices, a decision,

[2] The abuse of discretion standard is used no matter if the motion for new trial depends on SDCL 23A-29-1 or on an alleged *Brady* violation. *Timmons*, 2022 S.D. 28, ¶19 (applying abuse of discretion standard to an SDCL 23A-29-1 motion for new trial); *State v. Leisinger*, 2003 S.D. 118, ¶14, 670 N.W.2d 371, 374 (applying abuse of discretion standard to the "'denial of a motion for a new trial based on a *Brady* claim. . . .'" (quoting *United States v. Carman*, 314 F.3d 321, 324 (8th Cir. 2002))).

which, on full consideration is arbitrary or unreasonable.'" *Timmons*, 2022 S.D. 28, ¶19 (quoting *State v. Miller*, 2014 S.D. 49, ¶11, 851 N.W.2d 703, 706). Ruling on a motion for new trial is left to the circuit court's discretion because the court's "'superior knowledge of all the facts and circumstances of the case enables him to know the requirements of justice.'" *Timmons*, 2022 S.D. 28, ¶19 (quoting *State v. Lodermeier*, 481 N.W.2d 614, 626 (S.D. 1992)).

B. The basics of due process and Brady v. Maryland.

The federal and state Constitutions guarantee criminal defendants the right to a fair trial. U.S. Const. Amend. XIV; S.D. Const. Art. 6, § 2; *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *State v. Hankins*, 2022 S.D. 67, ¶38, 982 N.W.2d 21, 34. Under that fair trial umbrella this Court and the United States Supreme Court have developed case law in the area "that 'might loosely be called the area of constitutionally guaranteed access to evidence.'" *State v. Zephier*, 2020 S.D. 54, ¶20, 949 N.W.2d 560, 565 (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

That evidentiary guarantee was given teeth by recognizing that if the prosecution "suppresses" "favorable" evidence that is "material" to a defendant's guilt or punishment, then a due process violation has occurred.[3] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *State v.*

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[3] Absolu mentions in passing that because he believes a *Brady* violation occurred, his Sixth Amendment confrontation right was also violated. **Continued...**

Birdshead, 2016 S.D. 87, ¶18, 888 N.W.2d 209, 215 (*Birdshead II*). At first, *Brady's* holding only applied to exculpatory evidence that was suppressed after disclosure of the evidence was requested by the defendant. *Brady*, 373 U.S. at 87. *Brady's* reach was expanded to also require disclosure of impeachment evidence. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). And the defense request requirement was scuttled. *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995).

Under the current formulation of *Brady*, to prove a due process violation, Absolu must show three things: (1) the evidence was favorable to the defense; (2) the evidence was suppressed by the State; and (3) that suppression prejudiced the defense. *Birdshead II*, 2016 S.D. 87, ¶18 (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Evidence is "favorable" to the defense if it is exculpatory or impeaching. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). As for the "suppression" element, *Brady* does not require a conscious decision or active suppression by the

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AB:25. The Supreme Court rejected an identical claim in *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-53 (1987). It determined that "the Confrontation Clause only guarantees 'an opportunity for effective cross-examination, not cross-examination in whatever way, and to whatever extent, the defense might wish.'" *Id.* at 53 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)(per curiam)). But "[t]he ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Ritchie*, 480 U.S. at 53. As shown in Section E.3., despite not having the police reports from the child death investigation, Absolu's counsel thoroughly cross-examined Shamar Bennett and challenged his credibility and motive for testifying. That is exactly what the Confrontation Clause guarantees. *Fensterer*, 474 U.S. at 22. So this Court can easily reject Absolu's subtly asserted Sixth Amendment claim.

prosecution. It can be done "either willfully or inadvertently[.]" *Banks*, 540 U.S. at 691. For evidence to be "suppressed" it must be in the possession of the prosecution itself, or in the possession of someone acting on the prosecution's behalf, like investigating officers. *See Kyles*, 514 U.S. at 437. And suppressed evidence is "material" if it "'might have affected the outcome of the trial.'" *United States v. Bagley*, 473 U.S. 667, 674-75 (1985)(quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976)). That means Absolu must show a "'reasonable probability' of a different result[,]" meaning "the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). In other words, Absolu must establish that suppression of favorable evidence prejudiced the defense. *Strickler*, 527 U.S. at 284; *Birdshead II*, 2016 S.D. 87, ¶18.

When addressing the materiality/prejudice issue, the suppressed evidence must be "considered collectively, not item by item." *Kyles*, 514 U.S. at 436. And those suppressed items must be considered within the totality of the evidence. *Wong v. Belemontes*, 558 U.S. 15, 20 (2009). That means:

> In evaluating th[e] question [of prejudice], it is necessary to consider all the relevant evidence that the jury would have had before it if [the defense] had pursued [a] different path—not just the mitigation evidence [the defense] could have presented, but also the [other] evidence that almost certainly would have come in with it.

Id.

In the sections that follow, the State discusses why the circuit court properly denied Absolu's motion for a new trial. But because the police reports at issue were not disclosed to the defense, there is no dispute that *Brady's* "suppression" element is satisfied. The State focuses on only the favorable evidence and prejudice elements.

C. State law required denial of Absolu's motion for new trial that hinged on the procedure set out in SDCL 23A-29-1.

While *Brady* and this Court's precedent adopting its standards do not distinguish between exculpatory and impeachment evidence, the precedent applying SDCL 23A-29-1 does. There are four elements a defendant must prove to succeed on a motion for new trial under that statute: "'(1) the evidence was undiscovered by the movant at the time of trial; (2) the evidence is material, *not merely cumulative or impeaching*; (3) that it would probably produce an acquittal; and (4) that no lack of diligence caused the movant to fail to discover the evidence.'" *Timmons*, 2022 S.D. 28, ¶25 (quoting *State v. Corean*, 2010 S.D. 85, ¶18, 791 N.W.2d 44, 51)(emphasis added). These elements must be "'strictly met'" because "'[n]ew trial motions based on newly discovered evidence request extraordinary relief[,]'" that "'should be granted only in exceptional circumstances. . . .'" *Timmons*, 2022 S.D. 28, ¶25 (quoting *Corean*, 2010 S.D. 85, ¶18).

The police reports in the child death investigation were not exculpatory for Absolu; at most they were potentially impeaching to

Shamar's credibility.[4] SR:1621. The circuit court reached this conclusion when denying Absolu's motion, and he does not challenge it. SR:1621; *see generally* AB:11-25. Additionally, as shown in Section E.3., below, any impeachment of Shamar that might have resulted from disclosure of the child death investigation reports would have been cumulative to the impeachment evidence Absolu already presented. And as shown in Section E.4., below, the child death investigation reports would not have led to an acquittal in the murders of Ashley, Charles, and Dakota.

Simply put, the circuit court had to deny Absolu's new trial motion to the extent that it turned on SDCL 23A-29-1. *Timmons*, 2022 S.D. 28, ¶25 (quoting *Corean*, 2010 S.D. 85, ¶18). But because a motion for new trial is also the constitutionally recognized procedure for an alleged *Brady* violation, the next sections detail why Absolu's motion fails under the strictures of *Brady* as well.

D. The police reports from the child death investigation were not "favorable" under Brady, so the prosecution was not required to disclose them.

While the circuit court ultimately denied Absolu's new trial motion, it agreed with Absolu that the child death investigation reports should have been disclosed to the defense because they were potentially

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[4] "Exculpatory evidence" is "[e]vidence tending to establish a criminal defendant's innocence." *Black's Law Dictionary*, 637 (9th ed. 2009). "Impeachment evidence" is "[e]vidence used to undermine a witness's credibility." *Id.*

impeaching against Shamar. SR:1620-24. Yet the State disagrees with that determination.[5]

The mere fact that Shamar was named in those child death investigation reports does not automatically make them "favorable" under *Brady*, requiring disclosure. The Second Circuit faced a similar claim in *United States v. Amiel*, 95 F.3d 135 (2d Cir. 1996). There, three art dealers, the Amiels, were convicted of peddling fraudulent works by famous painters, like Chagall, Dali, and Picasso. *Id.* at 137. Another art dealer, Thomas Wallace, testified under a cooperation agreement with the government. *Id.* at 139. After trial, like Absolu, the Amiels moved for a new trial, based on *Brady*, claiming that Lawrence was part of homicide cases and was connected to the mob. *Id.* at 145. The court rejected this claim because, while the allegations against Lawrence were investigated, "he was not a suspect in any investigation and was not arrested in connection with any organized crime activity." *Id.* at 145. It reasoned that the police reports did nothing but "'communicate preliminary, challenged, or speculative information[,]'" which there is no *Brady*

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[5] This Court can review the circuit court's erroneous "favorability" determination even though it ultimately, and properly, denied Absolu's new trial motion. This situation is like *State v. Kihega*, where the circuit court allowed questions Kihega's wife asked him on a recorded phone call to be admitted as adoptive admissions. 2017 S.D. 58, ¶¶27-29, 902 N.W.2d 517, 526. This Court determined the circuit court was wrong to label those questions as adoptive admissions, but still affirmed the decision to admit them into evidence because they were not hearsay and they provided context for Kihega's answers. *Id.* ¶¶29-31.

obligation to disclose. *Amiel*, 95 F.3d at 145 (quoting *United States v. Diaz*, 922 F.2d 998, 1006 (2d Cir. 1990)).

Now apply *Amiel* to Absolu's case. The officers involved in the child death investigation have said, under the penalty of perjury, that Shamar is not, and has not been, a suspect in that child's death. SR:1535-40 (sealed documents). So the idea that just because Shamar is named in those police reports is somehow impeachment evidence is speculative at best. The same goes for the claim that because an evidence packing slip listed Shamar and C.M. as "suspects," then the police reports are impeaching. That too must fail as being both speculative and challenged information, given the affidavits to the contrary, which creates no *Brady* obligation to disclose. *Amiel*, 95 F.3d at 145.

Even more speculative is Absolu's claim that the child death investigation reports are "favorable" because Shamar may have tailored his trial testimony to win favor with the State and to try to get out of the child death case unscathed. AB:17-18. Absolu bases this argument partly on the wording of his discovery motion and the circuit court's discovery order that required the State to disclose

> [a]ny and all consideration or promises of consideration given to or on behalf of each witness *or expected or hoped for by the witness*. "Consideration" means absolutely anything, *whether bargained for or not*, which arguably could be of value or use to the witness or to person of concern to the witness, including but not limited to formal or informal, direct or indirect leniency, favorable treatment or recommendation or other assistance with respect to any pending or potential criminal, parole, probation, pardon,

> clemency, social services matter, civil matter, administrative matter or other dispute involving the State of South Dakota[.]

SR: 230, 335 (emphasis added). That speculative bent cannot be the basis for a favorability determination under *Brady*.

The Eighth Circuit explicitly rejected the idea that a witness's hope that his testimony in one case might result in favorable treatment in his own criminal case was "favorable" evidence under *Brady*. The court rejected that notion because "[a] witness's 'nebulous expectation of help from the state is not *Brady* material[.]'" *Moore-El v. Luebbers*, 446 F.3d 890, 900 (8th Cir. 2006)(quoting *Hill v. Johnson*, 210 F.3d 481, 486 n.1 (5th Cir. 2000)). Instead, a *Brady* obligation arises only when "the State communicated an agreement that it would consider rewarding [the witness's] testimony. . . ." *Moore-El*, 466 F.3d at 900.[6]

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[6] *See Akrawi v. Booker*, 572 F.3d 252, 262 (6th Cir. 2009)("'*Brady* is not limited to formal plea bargains, immunity deals or other notarized commitments. It applies to less formal, unwritten, or tacit agreements, *so long as the prosecution offers the witness a benefit in exchange for his cooperation*. . . .'" (quoting *Harris v. Lafler*, 553 F.3d 1028, 1034 (6th Cir. 2009)))(cleaned up)(emphasis added); *Middleton v. Roper*, 455 F.3d 838, 857 (8th Cir. 2006)(rejecting a confrontation clause challenge to a prosecutor's out-of-court statement that an unrelated case against a prosecution witness was dismissed because the evidence was weak, not because there was a deal of favorable treatment if the witness testified, because "there was no other evidence, beyond mere speculation, to support the existence of such a deal."); *United States v. Rushing*, 388 F.3d 1153, 1158 (8th Cir. 2004)(no *Brady* obligation to disclose a plea agreement offered to a witness in exchange for her testimony when the witness rejected that plea agreement (citing *Collier v. Davis*, 301 F.3d 843, 849-50 (7th Cir. 2002); *Alderman v. Zant*, 22 F.3d 1541, 1555 (11th Cir. 1994))).

The only "deal" Shamar had with the State was his immunity agreement, which was disclosed to the defense and admitted into evidence for the jury to consider when assessing Shamar's credibility. Exhibit 30. The terms of this immunity agreement, and Shamar's testimony about his understanding of the agreement also contradict Absolu's claim that there was some implicit or "hoped for" agreement on Shamar's part in connection to the child death investigation. His immunity agreement explicitly detailed that it "constitutes the full and complete agreement of the parties." Exhibit 30. The immunity agreement also specifically stated Shamar had no immunity for crimes of violence. Exhibit 30. Shamar explicitly told the jury he knew these were the limits of his immunity agreement. JT3:463-64. He even confirmed that no promises outside of what is in the immunity agreement were made to him. JT3:464. Ultimately, Shamar testified at trial because it was the right thing to do, not because he had some undisclosed promise from the prosecution. *See* JT3:494.

Even if the specifics of Shamar's immunity agreement did not contradict Absolu's claim that some type of hope was imputed to Shamar in the child death case, that claim still fails. In *Knox v. Johnson*, Knox claimed that his cellmate Smith's hope for a benefit from the government for testifying against Knox created an implicit agreement that had to be disclosed under *Brady*. 224 F.3d 470, 481-82 (5th Cir. 2000). The Fifth Circuit rejected that argument because Smith's "statement that he hoped

that the State would recognize his assistance . . . reflects a unilateral hope on Smith's part rather than a deal, whether implicit or explicit, between Smith and the State." *Knox*, 224 F.3d at 482. *See Akrawi v. Booker*, 572 F.3d 252, 263 (6th Cir. 2009)("[T]he mere fact that a witness desires or expects favorable treatment in return for his testimony is insufficient; there must be some assurance or promise from the prosecution that gives rise to a mutual understanding or tacit agreement.").

This Court should follow the Fifth and Sixth Circuits' lead and reject Absolu's claim that an amorphous agreement existed between Shamar and the State regarding the child death investigation, based solely on some unstated hope for leniency or a benefit.

E. The police reports from the child death investigation were not "material" under Brady and failure to disclose them did not prejudice Absolu.

It is undisputed that Shamar was a key witness for the State's case given that he led the police to Dakota's body, connecting Absolu to his death, and testified that Absolu admitted "without admitting" that he killed Ashley and Charles. JT3:481-83. The State also recognizes that the importance of Shamar's testimony to establish Absolu's guilt is a major factor under the prejudice analysis. *Evenstad v. Carlson*, 470 F.3d 777, 784 (8th Cir. 2006). Even if the police reports from the child death investigation had been disclosed, there are four reasons why those police reports would not "have resulted in a markedly weaker case for the

prosecution and a markedly stronger one for the defense." *Kyles*, 514 U.S. at 441.

First, those reports and the information within them were inadmissible under SDCL 19-19-609 and SDCL 19-19-404. Second, Shamar's trial testimony tracked his grand jury testimony, which came almost two years before the child died. Third, because Shamar's credibility was already attacked on cross-examination, the police reports were not "material" under *Brady*. Finally, even without Shamar's testimony, there is a glut of evidence establishing Absolu's guilt. The next subsections discuss these points in detail.

1. *The information in the police reports is inadmissible under the Rules of Evidence.*

The circuit court determined that Absolu was not prejudiced by the undisclosed police reports because they would have been inadmissible under SDCL 19-19-609 and SDCL 19-19-404. SR:1624-25. Absolu does not specifically challenge this ruling. *See generally* AB:11-25. In fact, SDCL 19-19-609 and SDCL 19-19-404 are mentioned nowhere in Absolu's brief.[7] *See generally* AB:iii, 1-25. But for the sake of

[7] Because Absolu does not brief whether the circuit court's Rule 609 and Rule 404 analysis, within the broader prejudice analysis, was correct or not, he has forfeited appellate review of that ruling. *Giesen v. Giesen*, 2018 S.D. 36, ¶23, 911 N.W.2d 750, 756 ("'an assignment of error not briefed and argued is deemed abandoned.'" (quoting *Sabhari v. Sapari*, 1998 S.D. 35, ¶1 n.3, 576 N.W.2d 886, 888 n.3)); *Looks Twice v. Whidby*, 1997 S.D. 120, ¶8 n.2, 596 N.W.2d 459, 461 n.2 (when challenging an evidentiary ruling, failing to cite supporting authority waives the argument on appeal).

completeness, the State addresses why the circuit court's evidentiary analysis is correct.[8]

The Rule 609 analysis can be handled quickly. Witnesses can be impeached with felony *convictions* or *convictions* for crimes that involve dishonesty or false statements, no matter if they are felonies or misdemeanors. SDCL 19-19-609(a). No matter what the information contained in the police reports about the child's death is, and no matter what Shamar's involvement may have been, Shamar has not been convicted of any crime stemming from that investigation, let alone one that meets the criteria of an impeachable conviction.[9] *See* SDCL 19-19-609(a). So that information is inadmissible under SDCL 19-19-609. Even if Shamar had a conviction from that investigation, the gist of the

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[8] A circuit court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Malcolm*, 2023 S.D. 6, ¶31, 985 N.W.2d 732, 740. That review is done by first asking "'whether the trial court abused its discretion in making an evidentiary ruling[.]'" *Hankins*, 2022 S.D. 67, ¶20 (quoting *State v. Thoman*, 2021 S.D. 10, ¶41, 955 N.W.2d 759, 772). In this context, "'an abuse of discretion occurs when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence.'" *State v. Stone*, 2019 S.D. 18, ¶22, 925 N.W.2d 488, 497 (quoting *State v. Asmussen*, 2006 S.D. 37, ¶13, 713 N.W.2d 580, 586). If the circuit court did not abuse its discretion, the analysis ends. But if it abused its discretion, this Court considers whether that error "'was prejudicial error that in all probability affected the jury's conclusion.'" *Hankins*, 2022 S.D. 67, ¶20 (quoting *Thoman*, 2021 S.D. 10, ¶41). And this Court presumes that evidentiary rulings are correct. *Hankins*, 2022 S.D. 67, ¶20.

[9] Pending criminal charges can be fodder for cross-examination of a witness on the theory that they will tailor their testimony to favor the government to try to gain some benefit in their pending case. *See Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). Yet Shamar has not been charged in connection with the child death investigation. SR:1535-40 (sealed document); SR:1622.

conviction and the facts underlying it are inadmissible. *See State v. Swallow*, 405 N.W.2d 29, 36-37 (S.D. 1987).

Now for the Rule 404 analysis. When considering the admissibility of "other acts" evidence under SDCL 19-19-404(b), the circuit courts use a two-part test. *State v. Otobhiale*, 2022 S.D. 35, ¶24, 976 N.W.2d 759, 769. "The court must first determine that the 'other-act evidence is relevant to some material issue in the case other than character (factual relevancy). Second, the court must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice (logical relevancy).'" *Id.* (quoting *State v. Birdshead*, 2015 S.D. 77, ¶57, 871 N.W.2d 62, 81 (*Birdshead I*)).

While this Court's "other acts" cases are typically geared toward evidence offered against a defendant, other acts evidence can be introduced against witnesses as well. *See State v. Loeschke*, 2022 S.D. 56, ¶30, 980 N.W.2d 266, 276 ("It is well established that Rule 404(b) allows admission of evidence of a separate crime or other act if used for a purpose other than 'to prove *a person's* character in order to show that on a particular occasion acted in accordance with the character. . . .'" (quoting SDCL 19-19-404(b)(1)))(emphasis added). Within that, as a general point, a defendant can use Rule 404(b) evidence to point out a witness's motive for testifying, like working as an informant or their receipt of an immunity agreement. *United States v. Green*, 617 F.3d 233,

250 (3rd Cir. 2010); *State v. Riley*, 684 P.2d 896, 901-02 (Ariz. Ct. App. 1984); *State Lovato*, 580 P.2d 138, 140-41 (N.M. Ct. App. 1978).

Now, Absolu claims that the child death investigation gives Shamar a motive to lie to the benefit of the State because he was trying to win favor and avoid a murder charge. AB:17-19. He claims that had he been able to present this information to the jury it would have acquitted him of the triple murders in this case. AB:19-23. There is also an unstated reason why Absolu would surely try to use the child death investigation had it been disclosed. He already tried to paint Shamar as Ashley, Charles, and Dakota's killer, despite violating the circuit court's discovery order on third-party perpetrator evidence. SR:340; JT9:1468-75, 1493-96. The next logical step is to argue that the only person who could carry out these three cold and calculated murders is a person capable of also killing a child.

But such a use of the child death investigation reports would be no more than an appeal to the jury about an alleged generally violent nature, which is propensity evidence that is inadmissible under SDCL 19-19-404. *See State v. Lassiter*, 2005 S.D. 8, ¶22, 692 N.W.2d 171, 178 (quoting 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 3:18 at 103 (Rev. Ed. 1999 & Supp. 2004)). The only way around that propensity issue is to show some similarity or connection between the victims. For example, being the abused former romantic partner of a defendant has a sufficient nexus to the new romantic partner that the

defendant is charged with abusing to allow evidence of the prior abuse to be admitted under Rule 404(b) to prove motive. *State v. Evans*, 2021 S.D. 12, ¶¶32-33, 956 N.W.2d 68, 81. Yet if there is no "striking[] similar[ity]" between the two, evidence of the other acts is not admissible under Rule 404(b). *State v. Fisher*, 2010 S.D. 44, ¶29, 783 N.W.2d 664, 673-74.

Rule 404(b) evidence can also be used to prove the identity of the defendant when there is a similarity between the crimes committed. *Lassiter*, 2005 S.D. 8, ¶16. That similarity cannot be too superficial, like simply stating that the crimes are the same type of offense, like aggravated assaults or homicides. *Id.* ¶17. There must be something more: "Where a court allows a prior act to be admitted to prove identity, it generally will look for common features that make it highly probable that the unknown offender and the accused are the same person." *Id.* ¶18. Here that similarity is missing. There are no similarities between the drug-fueled and witness-eliminating killings of Ashely, Charles, and Dakota, and the skull fracture death of the child.

Finally, the information in the child death investigative reports was inadmissible under the "logical relevancy" portion of the Rule 404(b) balancing test. As the circuit court succinctly stated, that information "would do nothing but arouse the juries' hostility without regard to the probative value of the evidence." SR:1624-25 (citing *State v. Moeller*, 2000 S.D. 122, ¶94, 616 N.W.2d 424, 450 (*Moeller II*)). Indeed, that

information would lead to only one mental picture for the jury, despite that Shamar has not been charged or convicted of hurting the child: If Shamar is able to kill an innocent child, then he can kill three adults because he felt slighted by a fellow drug user. Yet that is exactly the unfair prejudice the Rule 404(b) analysis seeks to prevent. *See Moeller II*, 2000 S.D. 122, ¶94 (quoting *State v. Moeller*, 1996 S.D. 60, ¶92, 547 N.W.2d 465, 486 (*Moeller I*)).

Simply put, because the information in the child death investigation reports was inadmissible at Absolu's trial, those police reports were not "material" under *Brady*. *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991)("We conclude that the videotape was not material for *Brady* purposes because it was inadmissible as evidence."). Then, that means there is no "'reasonable probability' of a different result" had those reports been disclosed to the defense. *Kyles*, 514 U.S. at 434. And that should end this appeal. But even if this Court disagrees with the circuit court's evidentiary rulings, the next sections address why those child death investigation reports were not "material" notwithstanding their inadmissibility.

2. Shamar Bennett's trial testimony mirrored his grand jury testimony.

Absolu argued below, and reiterates now, that his rights were violated by the nondisclosure of the child death investigation reports because Shamar probably tailored his testimony at trial to win favor with the State in the child death case. SR:1286-87, 1548-51; AB:17-23. The

circuit court properly rejected that claim because Shamar's trial testimony tracks his grand jury testimony, given almost two years before the child death investigation. SR:1625. As the following table shows, there was no divergence between Shamar's testimonies on the major points that he provided proof for:

Major Points Testified to by Shamar	**Citation to Grand Jury Transcript**	**Citation to Jury Trial Transcript**
Shamar met Absolu through the drug scene	GJ:58.	JT3:465-66
Shamar met Absolu at Maddie Ziegler's apartment to help him get rid of a rug and chair that had blood on them	GJ:59-60, 62	JT3:467-68
Absolu told Shamar he killed Dakota because he was worried about Dakota witnessing Charles's and Ashley's murders	GJ:60	JT3:481-82, 501-02
Absolu showed Shamar Dakota's body, which was in the trunk of Absolu's blue Chevy Malibu, while at Breeze Stock's apartment	GJ:61	JT3:469-70
Absolu asked Shamar to help him dump Dakota's body	GJ:61	JT3:469
Shamar initially refused to help dump Dakota's body and was upset by being asked, but eventually agreed to help	GJ:61-62	JT3:470-71

Shamar and Absolu took separate cars to Sheridan Lake to dump Dakota's body	GJ:62-63	JT3:471-72
Absolu hit a tree stump with the front of his rental car	GJ:63	JT3:473
Shamar helped Absolu drag the tote into the woods; the tote broke and Dakota's body fell out	GJ:64	JT3:473-74
After Dakota's body fell out of the tote, Absolu started covering it with wood; Shamar went back to his car and waited for Absolu	GJ:64-65	JT3:474-75
Detectives asked Shamar for help finding Dakota's body and he eventually led them to where he and Absolu dumped the body	GJ:65.	JT3:476-78

That Shamar's trial testimony tracked his grand jury testimony is not the only problem for Absolu's prejudice claim. As the Supreme Court mandated, when

> evaluating th[e] question of prejudice, it is necessary to consider *all the relevant evidence that the jury would have had before it* if [the defense] had pursued [a] different path—not just the mitigation evidence [the defense] could have presented, but also the [other] evidence that almost certainly would have come in with it.

Belemontes, 558 U.S. at 20 (emphasis added). Had Absolu tried to use the child death investigation reports to insinuate that Shamar was lying or had a motive to lie so that he could win favor with the prosecution,

that would have opened to door to Shamar's grand jury testimony being admitted as an exhibit to rebut those insinuations. SDCL 19-19-801(d)(1)(B). At that point the jury would have seen the same testimony that doomed Absolu's new trial motion in front of the circuit court. And that mandates a single conclusion: There is no reasonable probability of different verdicts had Absolu been able to use the child death investigation reports to attack Shamar's credibility.

3. *The information in the police reports is not "material" because Shamar Bennett was already impeached by the defense.*

Even without the child death investigation reports, Absolu extensively attacked Shamar's credibility on cross-examination. He got Shamar to admit that he repeatedly lied to detectives during the investigation of the murders. JT3:484-97. Within those lies, Absolu got Shamar to admit he initially said he went to Sheridan Lake with Absolu to bury drugs, not a body. JT3:490-91. Shamar admitted he originally told officers that when he and Absolu were looking in the trunk of Absolu's car, they were looking at bags of drugs, not Dakota's body. JT3:492-93. Absolu also keyed in on Shamar's felony record in front of the jury. JT3:497-98. And he pointed out that, while this case was pending, Shamar had some other felony cases dismissed or informally

resolved, attempting to plant the seed that those results were because of Shamar's cooperation with the prosecution.[10] JT3:498-501, 506-07.

These credibility attacks cut against any materiality claim that Absolu can dream up about the undisclosed police reports. Courts routinely reject materiality claims under *Brady* where the witness's credibility was already attacked on cross-examination. *Evenstad*, 470 F.3d at 784-85; *Moore-El*, 446 F.3d at 901; *Clay v. Bowersox*, 367 F.3d 993, 1000 (8th Cir. 2004); *United States v. Spinelli*, 551 F.3d 159, 165 (2d Cir. 2008); *Hovey v. Ayers*, 458 F.3d 892, 920 (9th Cir. 2006); *Shabazz v. Artuz*, 336 F.3d 154, 166-67 (2d Cir. 2003); *Amiel*, 95 F.3d at 145. Perhaps the *Spinelli* Court said it best: "[I]f the information withheld is merely cumulative of equally impeaching evidence introduced at trial, so that it would not have materially increased the jury's likelihood of discrediting the witness, it is not material." 551 F.3d at 165 (citing *United States v. Avellino*, 136 F.3d 249, 257 (2d Cir. 1998)).

The same can be said about Absolu's case. It is hard to see how one more piece of potentially impeaching information would have changed the outcome. This is especially true considering the "hundreds of admitted lies of Shamar Bennett" that were already presented to the

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[10] Shamar challenged that characterization by asserting that the only benefits he received from his immunity agreement were specifically linked to this case, it had no connection to his other criminal cases. JT3:502-03. He also challenged the insinuation that one of his criminal files was dismissed for his cooperation in Absolu's case, when it was dismissed because he completed the Pennington County criminal diversion program on that file. JT3:503-04.

jury, which Absolu continually harps on in his brief. AB:19, 23. If those lies—about 700 by Absolu's count in his new trial motion (SR:1288)—weren't damning enough for the jury to reject Shamar's testimony, then the child death investigation reports wouldn't have tipped the scales that way either. *See Akrawi*, 572 F.3d at 264 (rejecting *Brady* claim premised on undisclosed mutual understanding of leniency between a witness and the prosecution because "[t]here is no reason to believe that disclosure of the additional impeachment evidence would have so altered the jury's assessment of [the witness's] already suspect credibility as to give rise to a reasonable probability that the outcome of trial would have been different.").

Because the information in the undisclosed police reports would have been cumulative of the other impeaching evidence against Shamar, Absolu cannot prove the materiality of the reports. Thus, his *Brady* claim must fail.

4. *There is overwhelming evidence of Absolu's guilt aside from Shamar Bennett's testimony.*

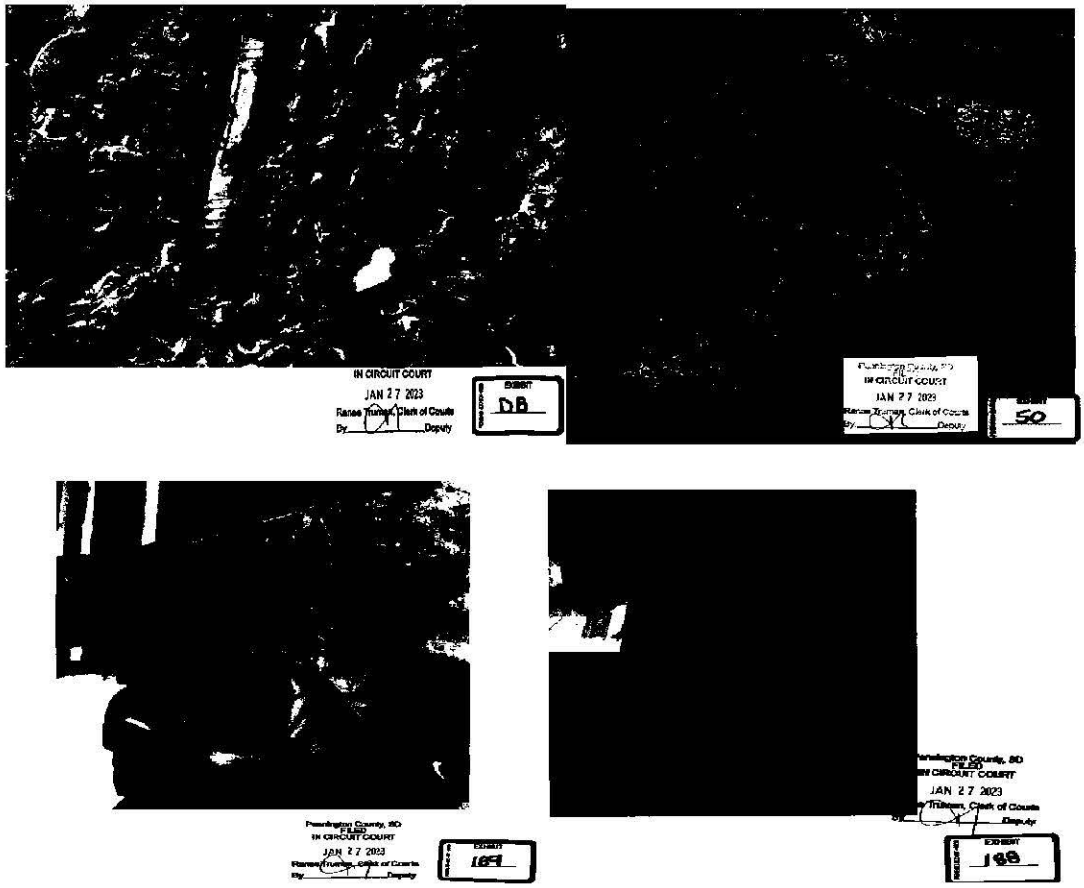
Absolu also claims that the child death investigation reports were material under *Brady* because had he been able to cross-examine Shamar about that topic, and the lack of charges, it "would have been the straw that broke the camel's back[,]" and the jury would have found him not guilty. AB:19. This argument ignores that Shamar's testimony wasn't the only evidence linking Absolu to Charles's, Ashley's, and

Dakota's murders. *Amiel*, 95 F.3d at 145 ("Evidence of impeachment is material if 'the witness whose testimony is attacked supplied *the only evidence linking the defendants to the crime*, or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case.'" (quoting *United States v. Wong*, 78 F.3d 73, 79 (2d Cir. 1996)))(emphasis added). The State presented overwhelming evidence tying Absolu to the murders, even without Shamar's testimony.

When the killer is seen on security video near the park, he has darker skin and is wearing dark clothing and white shoes. Exhibits 8 and 8.1. Absolu, who is African American, was seen wearing dark clothing and white shoes earlier in the day. Exhibits 38 and 184. The security video near the park also shows that Dakota and the killer drove a dark colored sedan, which officers determined was a 2016 to 2018 Chevy Malibu. JT8:1320-21; Exhibits 8 and 9. The car that Absolu rented from Casey's Auto earlier in the day was a 2018 dark blue Chevy Malibu. JT4:576-77; JT8:1320-21; Exhibits 40 and 42.

The police also found evidence on Absolu's phone and in his phone records that tied him to the murders. There was a WhatsApp conversation about a black pistol that he was negotiating to buy, as well as pictures of that gun, on his phone. JT8:1353-54, 1356; Exhibit 188 and 199. Officers believe they seized that exact gun, based on distinctive metal imperfections, when they searched Absolu's Malibu in New York. JT8:1328-29, 1354; Exhibits 11, 50, 188, 189. In that same WhatsApp

conversation, Absolu was also asking about buying a black and silver .40 caliber Smith and Wesson pistol. JT8:1354-61; Exhibits 188, 190, 191, 199. The gun used to murder Charles and Ashley, which was ditched in Rapid Creek, is a black and silver, .40 caliber Smith and Wesson. JT6:1030-31, 1038; JT7:1230-33, 1246-49; Exhibits 169 and 179. Here are the pictures of those guns that the jury saw:



The police also found images on Absolu's cell phone, which were saved to the phone after Dakota's death, about making lye. JT8:1364-65; Exhibit 194. What is a nefarious use for lye? Destroying a body to coverup a murder. *People v. Wilson*, 530 P.3d 323, 330 (Cal. 2023); *Powell v. State*, 2021 WL 5370163, *37 (Tex. App.); Natalie Lynner, *Death*

in a Pandemic: Funeral Practices and Industry Disruption, 70 UCLA L. Rev. 154, 189-90 (2023).

The evidence also shows that Absolu, not Shamar, had the motive to kill all three victims. Charles had stiffed him on some drug money, angering Absolu and causing him to threaten Charles's life. JT2:331-32, 336; JT3:427-29. He had the motive to kill Ashley because he couldn't leave a witness to Charles's murder. JT9:1427. That same motive also drove Dakota's murder because Absolu couldn't leave a witness to Charles's and Ashley's murders. JT9:1430.

The evidence presented also contradicted Absolu's unnoticed third-party perpetrator theory that tried to pin the murders on either Cory Staab or Shamar Bennett. Staab had no car, so he had to bum rides from friends and co-workers. JT7:1289-92, 1294. His cellphone location data showed that he was at a hotel, not Thompson Park, at the time of the murders. JT7:1286-87; JT8:1314-15, 1382; Exhibit D10. And while Charles had burned Staab on $100 worth of cocaine, they were friendly with each other at the Flying J Bar, a couple of hours before the murders. JT7:1137-38, 1284, 1292; Exhibit 184.

As for Shamar, Absolu tried to claim Shamar was the killer at the park because he is over six foot tall, and the security video showed that the killer was taller than Dakota. JT9:1495-96. According to Absolu, he and Dakota are about the same height so he couldn't be the killer. JT9:1469-70. But the evidence doesn't support this claim. Importantly,

the security video from the park is dark, and it blurs movement because it captures only fifteen frames per second. *See* JT5: 760; Exhibits 8 and 8.1. More importantly, security video from Breeze Stock's apartment complex, where Absolu showed Dakota's body to Shamar, shows that Absolu and Shamar are themselves about the same height. JT9:1509; Exhibit 12. Likewise, Shamar's cell tower location data shows that he was in Southeastern Rapid City, not Thompson Park, during the murders of Charles and Ashley. JT6:925-26; Exhibit 57, pg. 23.

On top of all the evidence unconnected to Shamar, the major points of his testimony were corroborated by independent evidence. Cell tower location data backed up his testimony that he and Absolu traveled out to Sheridan Lake to dump Dakota's body. JT3:470-71; JT6:929-31; JT8:1331-35; Exhibit 57, pg. 26-28. Security video from Breeze Stock's apartment corroborated Shamar's testimony that Absolu showed him Dakota's body in the trunk of Absolu's Malibu, and it upset him that Absolu asked for help burying the body. JT2:261; JT8:1333-34; Exhibit 12. Shamar leading officers to Dakota's body also corroborates that that was his and Absolu's actual mission when they went into the woods, and not to bury drugs as Shamar originally told investigators. JT3:476; JT8:1341-43; This evidence also corroborates Shamar's admission that he initially lied to the police but eventually decided to tell the truth. JT3:477. And Shamar's testimony that Absolu smacked a tree stump, damaging his car, when they stopped to dump Dakota's body was

confirmed by the damage seen on Absolu's rented Malibu after his arrest. JT2:254, 271-72; Exhibits 13-19.

Absolu also claims that his prejudice argument becomes apparent because the jury deliberated over a two-day period before returning its guilty verdicts. AB:24. That argument makes no sense. Absolu's trial lasted three weeks, the jury heard testimony from forty-nine witnesses, and it had 233 exhibits to consider. The lengthy deliberation shows at most a jury that took its duty seriously, thoroughly considering the mountain of evidence presented and the jury instructions it was given. Had the jury returned a quick verdict, surely Absolu would then argue that it didn't follow the law because it's not possible to deliberate that quickly given the magnitude, length, and scope of the case.

Finally, to the point that Absolu may claim he was prejudiced by the nondisclosure of the child death investigation reports because the evidence against him is circumstantial, that too must fail. All elements of a crime can be proven by circumstantial evidence because direct and circumstantial evidence have the same weight. *State v. Falkenberg*, 2021 S.D. 59, ¶39, 965 N.W.2d 580, 591. What's more, "in some instances circumstantial evidence may be more reliable than direct evidence.'" *Id.* (quoting *State v. Riley*, 2013 S.D. 95, ¶18, 841 N.W.2d 431, 437). As shown above, this is one of those instances. All the evidence points to one person being responsible for the murders of Ashley Nagy, Charles Red Willow, and Dakota Zaiser: Arnson Absolu.

CONCLUSION

Based on the above argument and authorities, the State respectfully requests that this Court affirm the circuit court's denial of Absolu's motion for a new trial, as well as his convictions and sentences for First-Degree Murder.

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 9,613 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 1st day of November, 2023.

/s/ Matthew W. Templar
Matthew W. Templar
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of November, 2023, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Arnson Absolu* was served via the Odyssey electronic filing system upon Timothy J. Rensch, *tim@renschlaw.com*.

/s/ Matthew W. Templar
Matthew W. Templar
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL #30353

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

ARNSON ABSOLU,
Defendant and Appellant

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT GUSINSKY

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30353

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

ARNSON ABSOLU,
Defendant and Appellant

Appellant reasserts the statement of facts, as well as all legal points, case law, and argument and authorities contained in Appellant's Brief as previously served and tendered.

STATEMENT OF LEGAL ISSUE 1

1. **Whether the circuit court erred when it denied Defendant's Motion for a New Trial, when the key witness for the State was a suspect/person of interest in another murder case and such information was not provided to the defense in violation of the discovery order and *Brady v. Maryland*, as well as Fair Trial and Due Process rights.**

ARGUMENT

1. No violation of third-party perpetrator ruling.

Despite contentions otherwise there was not a violation of the third party perpetrator ruling and order of the court by the defense, and the defense was merely commenting on evidence which came in during the state's case in chief. SR: 339. In fact during the closing when said arguments were made by defense counsel there was no

objection voiced by the prosecution. JT: 1494-1496. As such please disregard contentions and/or arguments that such order was violated somehow by the defense.

2. Discovery order required in pertinent part disclosure of DSS matters as well as "consideration", and was a specific request for said information.

> 17. Any and all consideration or promises of consideration given to or on behalf of each witness or expected or hoped for by the witness. "Consideration" means absolutely anything, whether bargained for or not, which arguably could be of value or use to the witness or to person of concern to the witness, including but not limited to formal or informal, direct or indirect leniency, favorable treatment or recommendation or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, social services matter, civil matter, administrative matter or other dispute involving the State of South Dakota; (emphasis added)
>
> 18. Any other evidence, statements, or materials known to the prosecution, including law enforcement officers or investigators, which is exculpatory in nature or favorable to the Defendant or which may lead to exculpatory material or which aids in the preparation of the defense, including evidence relevant to guilt or innocence of said Defendant not otherwise specifically requested by this motion; (emphasis added)

Order Granting Defendant's First Motion for Discovery. SR: 334.

The Order on Defendant's First Motion for Discovery required the state to supply information about "consideration" which clearly included social services matters and anything a witness could hope for by way of consideration, among other things. SR: 334. Shamar Bennett was in the middle of an infant skull fracture/death investigation involving contact with the police as well as DSS personnel. SR: 1614, Memorandum Opinion and Order Denying Motion for New Trial, 4-6. Shamar Bennett exercised his

right to silence when the police wanted to interview him. *Id.* The state knew about it in November, 2022, when the murder trial started in early January, 2023. *Id.* This was hidden from the defense. Bennett was crossed at trial about his many lies and the benefits he received without the benefit of the infant skull fracture/death investigation, the reports of DSS, the police reports, or the contentions of the authorities he was a suspect. Nor was the defense able to use any of the hidden information to investigate Shamar Bennett and his motivation, bias, interest, or inducement as a result. In fact there are likely many more things in the records which could lead to relevant information based upon the contents of the DSS records alone, which is the reason this Court was asked to review such information which the defense has never seen at page 15 of Appellant's Brief. What if they contain information which allowed impeachment by contradiction as to his drug use, what he had to do to keep his own children, why his significant other lied about his presence, or statements he may have made to DSS or law enforcement about the Absolu case and his cooperation? What about his motivation to please the state, self interest, and benefits expected or received. The circuit court erred in not considering the DSS material as such is embodied in the Order Granting Defendant's First Motion for Discovery, SR: 334, ¶¶17 and 18. Under *State v. Sahlie*, 90 S.D. 682, 245 N.W.2d 476 (1976), the production of that very material should have been expeditiously carried out. As such the information is not irrelevant and should have been reviewed and considered, and it was error not to evaluate it, describe it, or include it in the analysis for a new trial.

3. Cross-examination is to expose what benefits a cooperating witness has received or expects to receive.

The state contends the circuit judge was correct in finding the defense would never be allowed to ask anything about the child death investigation because it was not relevant and/or more prejudicial than probative under 403, not admissible per 404 and/or 609(a), was not impeaching, and therefore not prejudicial. The heart of cross examining a cooperating witness is testing their credibility, questioning motive, interest, bias, and to give the jury reasons to question believability. And the question is not whether one says the same thing before he started hoping for something that he says after. Any impeachment occurs at trial, and only at trial. During the time of the trial in front of the jury is where the impeachment must occur. If it does not, the jury never gets to consider the cross examination on the specific topic in light of the demeanor, manner of testifying, the answers, the look on the face, the sweat, the reaction, the pauses, the quickness, the tone, the emotion—in short the jury does not get to consider if the witness is lying or telling the truth.

Under the circuit court's Instruction No. 47 bias, prejudice, interest, or lack of interest, among other things is fair game and to be considered by the jury.

INSTRUCTION NO. 47

> You are the exclusive judges of all questions of fact and the credibility of the witnesses and the weight that should be given to their testimony.
>
> In judging the credibility of the witnesses and determining the weight to be given their testimony, you may and should consider the opportunity and capacity of the several witnesses for seeing and knowing and remembering the matters about which they have testified; their conduct and demeanor while testifying; their apparent candor, fairness, bias or prejudice, if any appears; their interest or lack of interest in the result of the case; the motive, if any,

> actuating them as witnesses; the reasonableness of their statements; and all the evidence, facts and circumstances shown tending to shed light upon the truth or falsity of the testimony of any witness in the case and the weight to be given the testimony.
>
> If you believe that any witness has knowingly sworn falsely to any material fact in the case, you may reject all of the testimony of the witness.

SR: 916.

The infant skull fracture/death investigation information (and the information gleaned by the police and DSS in the process) is impeaching information in that it goes to bias, interest, and consideration. And even if the extrinsic information cannot come in, the inquiry can be made. If Bennett contends he is getting no consideration, should he not be confronted with what he has received, just like he was confronted at trial with the other favorable treatment he received? And how can this be so prejudicial to the state when by reading its brief, the case was so very strong the State should win this appeal because the evidence of guilt was so overwhelming? The 403 ruling of the court was unreasonable and an abuse of discretion. So was the finding there was no material prejudice.

4. The court ruled that any evidence that Defendant could impeach Shamar Bennett with was critical.

> There cannot be a reasonable dispute that Bennett was a key witness for the State. The Defendant admitted to Bennett that he killed Zaiser and that he did so because he did not believe that Zaiser would stay quiet regarding Red Willow and Nagy. Bennett helped Defendant hide Zaiser's body and disposed of physical evidence. Clearly any evidence that would allow Defendant to impeach Bennett would have been critical.

Memorandum Opinion and Order Denying Motion for New Trial SR: 1614 at 13; Appx. (emphasis added). Bennett's testimony was crucial to the state's case. He testified about confessions and led the state to the body of Dakota Zaiser. Clearly his testimony was the heaviest part of the hammer. Without Bennett's testimony the case would be in pieces. He was the hub which held it all together. And this is why impeachment of him was critical. As the United States Supreme Court notes:

> This Court said: "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th[e] general rule [of *Brady*]. 405 U.S., at 154, 92 S.Ct., at 766 (citations omitted).

U.S. v. Bagley, 473 U.S. 667, 677, 105 S.Ct. 3375, 87 L.Ed.2d 481, 53 U.S.L.W. 5084 (1985) (citing *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). The fact that Bennett was a suspect in a pending killing was fair game. It does not come in for the truth of the matter asserted, and it is not hearsay. *State v. Wills*, 2018 SD 21, ¶12, 908 N.W.2d 757, 762. The important information would have altered the power of his testimony and such brings great question to the verdict and undermines confidence therein.

The withholding of the baby death material impaired the adversarial process:

> We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality, however, for

> under the *Strickland* formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

U.S. v. Bagley, 473 U.S. 667, 677, 105 S.Ct. 3375, 87 L.Ed.2d 481, 53 U.S.L.W. 5084 (1985). The DSS and police information was requested as a matter of law as it was included in the discovery order. And the defense was not able to use any of the information to investigate or prepare for trial, thus impairing unfairly the adversarial process. Impeachment is not just inconsistent statements. It includes evidence of consideration and benefits, and matters required to be produced by order of the court. The circuit court's limitation of the concept of impeachment of like testimony from grand jury to trial does not take into account the information was ordered to be produced and that it goes to credibility, interest, bias, and motivation, and thus is material. Bias is impeachment.

> In addition to the conferring upon a defendant the right to call witnesses on his behalf, South Dakota Constitution Article VI, § 7, also guarantees a defendant the right to impeach the state's key witnesses by showing bias on their part. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Layton*, 337 N.W.2d 809 (S.D.1983); *State v. Volk*, 331 N.W.2d 67 (S.D.1983); *State v. Wounded Head*, 305 N.W.2d 677 (S.D.1981).

State v. Wiegers, 373 N.W.2d 1 (SD 1985). Impeachment includes bias.

> Likewise, the common law rules of evidence, and, we conclude, our court adopted rules of evidence, see, e.g.,

> SDCL 19–12–1; 19–12–2; 19–14–8; 19–14–9; 19–14–10; and 19–14–19, permit a party to impeach a witness by showing his bias. *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); *State v. Volk*, supra; *State v. Wounded Head*, supra; State v. Goff, 79 S.D. 138, 109 N.W.2d 256 (1961); *State v. Kenstler*, 44 S.D. 446, 184 N.W. 259 (1921).

State v. Wiegers, 373 N.W.2d 1 (SD 1985).

From this standpoint the circuit court's sole reliance upon consistency between grand jury and trial testimony as impeachment is error. Impeachment is bias and interest as well. As this court stated:

> In *Davis v. Alaska*, the United States Supreme Court explained: A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, *Evidence* § 940 at 775 (Chadbourn rev.1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. 415 U.S. 308, 316–17, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (citing *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959)). "[D]ue process is in essence the right of a fair opportunity to defend against the accusations. State evidentiary rules may not be applied mechanistically to defeat the ends of justice." *State v. Luna*, 378 N.W.2d 229, 233 (S.D.1985) (citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)); see also *Holmes v. South Carolina*, 547 U.S. 319, 321, 126 S.Ct. 1727, 1731–32, 164 L.Ed.2d 503 (2006).

State v. Packed, 2007 SD 75, 736 N.W.2d 851.

The United States Supreme Court also noted impeachment includes bias, prejudice, and corruption:

> One commentator, recognizing the omission of any express treatment of impeachment for bias, prejudice, or corruption, observes that the Rules "clearly contemplate the use of the above-mentioned grounds of impeachment." E. Cleary, *McCormick on Evidence* § 40, p. 85 (3d ed. 1984). Other commentators, without mentioning the omission, treat bias as a permissible and established basis of impeachment under the Rules. 3 D. Louisell & C. Mueller, *Federal Evidence* § 341, p. 470 (1979); 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 607[03] (1981).

U.S. v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). And bias can come in under the federal rules:

> We think this conclusion is obviously correct. Rule 401 defines as "relevant evidence" evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402 provides that all relevant evidence is admissible, except as otherwise provided by the United States Constitution, by Act of Congress, or by applicable rule. A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.

U.S. v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). Impeachment includes matters affecting the credibility of the witnesses:

> The correctness of the conclusion that the Rules contemplate impeachment by showing of bias is confirmed by the references to bias in the Advisory Committee Notes to Rules 608 and 610, and by the provisions allowing any party to attack credibility in Rule 607, and allowing cross-examination on "matters affecting the credibility of the witness" in Rule 611(b). The Courts of Appeals have upheld use of extrinsic evidence to show bias both before

> and after the adoption of the Federal Rules of Evidence. *See, e.g., United States v. James*, 609 F.2d 36, 46 (CA2 1979), cert. denied, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980); *United States v. Frankenthal*, 582 F.2d 1102, 1106 (CA7 1978); *United States v. Brown*, 547 F.2d 438, 445–446 (CA8), cert. denied *sub nom. Hendrix v. United States*, 430 U.S. 937, 97 S.Ct. 1566, 51 L.Ed.2d 784 (1977); *United States v. Harvey*, 547 F.2d 720, 722 (CA2 1976); *United States v. Robinson*, 174 U.S.App.D.C. 224, 227–228, 530 F.2d 1076, 1079–1080 (1976); *United States v. Blackwood*, 456 F.2d 526, 530 (CA2), cert. denied, 409 U.S. 863, 93 S.Ct. 154, 34 L.Ed.2d 110 (1972).

U.S. v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). And the Court goes on:

> We think the lesson to be drawn from all of this is that it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was permissible to do so before their adoption.

U.S. v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). Thus consistency in testimony is not the hallmark of impeachment.

The defense is entitled to a full and fair opportunity to show why little weight should be given to a witness's testimony.

> "The Sixth Amendment to the United States Constitution provides that a criminal defendant has the right to be 'confronted with the witnesses against him.' " *State v. Carothers* (*Carothers I*), 2005 S.D. 16, ¶ 8, 692 N.W.2d 544, 546 (quoting U.S. Const. amend. VI). "This right is 'generally satisfied when the defense is given a full and fair opportunity to probe and expose [a witness'] infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.' " *State v. Carothers* (*Carothers II*), 2006 S.D. 100, ¶ 16, 724 N.W.2d 610, 617 (quoting *United States v. Owens*, 484 U.S. 554, 558, 108 S. Ct. 838, 841, 98 L. Ed. 2d 951 (1988)).

State v. Dickerson, 2022 SD 23, 973 N.W.2d 249. In the present case Absolu was deprived of that right because the information was not turned over, and the Motion for New Trial was not granted and thus the defense was not given a full and fair opportunity against Bennett in cross examination. This deprivation was material and greatly undermines confidence in the verdict. Had the jury learned what was at stake the result of the trial would have been different, and an entirely different impression of Bennett as a witness and the possible killer herein would have been made. Bennett's motivations would have been presented to this jury – i.e., to stay out of the child skull fracture/death investigation at all cost.

> The United States Supreme Court has long recognized "that 'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Olden v. Kentucky*, 488 U.S. 227, 231, 109 S. Ct. 480, 483, 102 L. Ed. 2d 513 (1988) (quoting *Davis v. Alaska*, 415 U.S. 308, 316–17, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974)).

State v. Dickerson, 2022 SD 23, 973 N.W.2d 249

There is no convincing rebuttal to the height difference shown on the video in Exhibit 8.1. The state sidesteps the fact that Exhibit 8.1 (a portion of Exhibit 8, SR: 2959) displays a significant height difference by contending the figures were shadows and without arguing or evaluating the height difference. A review of the video in channel 7 of Exhibit 8.1 at 10:35:08 to 10:35:20 shows exactly the contention of the defense that the culprit was substantially taller the person in the red shirt, i.e. whomever was with Dakota Zaiser (victim 3) was much taller. Not just the inch or two difference between Absolu and Zaiser. The only other person in the fact pattern who can meet this

description, accounting for the difference, is the state's key witness, Shamar Bennett. Height cannot be distorted unequally. If the state accounts for this through distortion, which was never argued at trial, then the state must explain how the two individuals could be recorded by the same camera, the same lens, the same distance, and the same location in a way which made one, both, or either different than they appear in relation to one another. Thus the theory of the defense that the killer could have been Shamar Bennett and such would explain his knowledge and testimony.

CONCLUSION

In the end the circuit court abused its discretion in denying Defendant's Motion for a New Trial for the reasons stated herein. Appellant respectfully requests that the decision of the circuit court be reversed, the Judgment and sentence be vacated, and this matter be remanded for a new trial.

REQUEST FOR ORAL ARGUMENT

Request is respectfully made for oral argument.

Dated this 16 day of November, 2023.

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