

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30927

STATE OF SOUTH DAKOTA
Appellee,

v.

JOSEPH PETER BENDEL,
Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD CIRCUIT
GRANT COUNTY, SOUTH DAKOTA

HONORABLE DAWN ELSHERE
Presiding Judge

APPELLANT'S BRIEF

BROOKLYN M. MAILEY
REBECCA MORLOCK REEVES
Attorneys at Law
25 First Avenue Southwest
Watertown, SD 57201
Attorneys for Appellant

SARAH L. THORNE
Deputy Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501
Attorney for Appellee

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Plaintiff and Appellee,

v.

JOSEPH PETER BENDEL,

Defendant and Appellant.

PRELIMINARY STATEMENT

Any references in this brief will be consistent with the page numbers set forth in the settled record, indicated by "SR" followed by the appropriate page number.

References to the Appendix to this brief are designated as "Appx." Counsel will specify any other documents referred to in the record by name in order to provide clarity to the court. Appellant Joseph Peter Bendel will be referred to as "Bendel." Douglas Lindberg Jr. will be referred to as "Doug."

JURISDICTIONAL STATEMENT

On August 25, 2023, Joseph Peter Bendel was charged by Indictment with Murder in the Second Degree (SDCL § 22-16-7), Manslaughter in the First Degree (SDCL § 22-16-15(1)), Manslaughter in the First Degree (SDCL § 22-16-15(2)), Aggravated Assault (SDCL § 22-18-1.1(1), and Aggravated Assault (SDCL § 22-18-1.1(4)) occurring on or about the 20th day of August, 2023. SR 25-26. Both Aggravated Assault counts (SDCL § 22-18-1.1(1) and SDCL § 22-18-1.1(4)) were dismissed on November 19, 2024. SR 469.

The State dismissed “[c]ounts 2 and 4 and 5 of the indictment” on October 22, 2024. SR 559 at 25, 560 at 1.

A jury trial was held on October 22, 23, 24, and 25, 2024, before the Honorable Dawn Elshere. SR 481. On October 25, 2024, the jury acquitted Bendel of Murder in the Second Degree; but found Bendel guilty of Manslaughter in the First Degree (SDCL § 22-16-15(2)). SR 394. On November 19, 2024, the Trial Court sentenced Bendel to sixty (60) years in the South Dakota State Penitentiary, with twenty (20) years suspended upon certain terms and conditions to be established by the Department of Corrections. SR 470-471.

This is an appeal from the Amended Judgment of Conviction entered on November 25, 2024. SR 472-473, Appx. 5. This Amended Judgment of Conviction was entered by the court after the entry and filing of two previous Judgments of Conviction. SR 466, 467, 470, and 471, Appx. 5. This appeal is taken as a matter of right pursuant to SDCL § 15-26A-3. The Notice of Appeal was timely filed with the Grant County Clerk of Courts on December 16, 2024. SR 552, 553.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE TRIAL COURT ERRED BY DENYING BENDEL’S MOTION TO DISMISS.

The Trial Court denied Bendel’s Motion to Dismiss pursuant to SDCL § 22-18-4.8. The Trial Court held that the State refuted Bendel’s claim of self- defense by clear and convincing evidence. The Trial Court initially rejected Bendel’s affidavit and based its finding on the testimony of Tim alone, whom the court deemed credible. The court concluded Bendel’s actions were not objectively reasonable given the circumstances.

The Trial Court erred by denying Bendel's Motion to Dismiss and failing to grant him self-defense immunity pursuant to SDCL 22-18-4.8.

The most relevant cases related to this issue are as follows:

- a. *In re Adoption of Z.N.F.*, 2013 SD 97;
- b. *State v. Bruder*, 2004 SD 12;
- c. *State v. Smith*, 2023 SD 32; and
- d. *State v. Tuopeh*, 2025 SD 16.

The most relevant statutes related to this issue are as follows:

- a. SDCL § 15-6-43;
- b. SDCL § 22-5-9 (repealed);
- c. SDCL § 22-16-34 (repealed);
- d. SDCL § 22-16-35 (repealed);
- e. SDCL § 22-18-1.1;
- f. SDCL § 22-18-3.1;
- g. SDCL § 22-18-4;
- h. SDCL § 22-18-4.1;
- i. SDCL § 22-18-4.7; and,
- j. SDCL § 22-18-4.8.

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING TESTIMONY CONCERNING THE DECEDANT'S PRIOR BAD ACTS.

The Trial Court excluded evidence of the alleged victim's prior bad acts and criminal convictions. In particular, Bendel was prohibited from introducing evidence that Doug was violent and Bendel knew it. Bendel's state of mind is an element to Manslaughter in the First Degree and self-defense. The prohibited evidence was more probative than prejudicial. Denial of this evidence was an abuse of discretion, which stripped Bendel of his right to defend himself.

The most relevant cases related to this issue are as follows:

- a. *State v. Otobhiale*, 2022 SD 35;

- b. *State v. Red Star*, 2001 SD 54;
- c. *State v. Stanley*, 2017SD 32; and,
- d. *Supreme Pork, Inc. v. Master Blaster, Inc.* 2009 SD 20.

The most relevant statutes related to this issue are as follows:

- a. SDCL §19-19-401;
- b. SDCL §19-19-403;
- c. SDCL §19-19-404; and
- d. SDCL §19-19-405.

III. WHETHER THE TRIAL COURT ERRED WHEN IT DENIED BENDEL'S MOTION FOR JUDGMENT OF ACQUITTAL.

Bendel moved for a Judgment of Acquittal, which was denied by the Trial Court.

SR 1103 at 13-22, Appx. 3. There was insufficient evidence presented to the jury to sustain a guilty verdict. The Trial Court prohibited evidence establishing requisite elements of the crime, and the killing was justifiable. The jury found Bendel guilty of Manslaughter in the First Degree (SDCL § 22-16-15(2)). SR 394.

The most relevant cases related to this issue are as follows:

- a. *State v. Carter*, 2009 SD 65;
- b. *State v. Foote Sr.*, 2019 SD 32;
- c. *State v. Stumes*, 90 SD 382; and,
- d. *State v. Swan*, 925 N.W.2d 476.

The most relevant statutes related to this issue are as follows:

- a. SDCL §19-19-804;
- b. SDCL §22-16-15; and,
- c. SDCL § 22-18-4.

IV. WHETHER BENDEL WAS DEPRIVED OF A FAIR TRIAL BASED ON THE ERRORS OF THE TRIAL COURT.

Bendel has been prejudiced by the cumulative effect of the errors that occurred while the Trial Court presided over this matter. Specifically, the Trial Court infringed on

Bendel's Fifth Amendment right, misinterpreted statutory law when sentencing Bendel, and denied testimony at sentencing. The cumulative effect of these errors deprived Bendel of a fair trial.

The most relevant cases related to this issue are as follows:

- a. *Jenner v. Leaply*, 521 N.W.2d 422, 432 (SD 1994);
- b. *State v. Davi*, 504 N.W.2d 844, 857 (SD 1993);
- c. *State v. Delehoy*, 2019 S.D. 30; and
- d. *State v. Fraizer*, 2001 SD 10;

The most relevant statutes related to this issue are as follows:

- a. SDCL §23A-27-48;
- b. SDCL §24-15-4.1;
- c. SDCL §24-15A-32; and,
- d. U.S. Const. Amend. V.

STATEMENT OF THE CASE

Joseph Peter Bendel was convicted of First Degree Manslaughter for the death of his friend, Douglas Lindberg Jr. "Doug." A Complaint was filed August 22, 2023, with a subsequent Indictment filed August 25, 2023. SR 16-18, 25-26. Bendel pled not guilty. SR 509 at 7-8, 20-22. On December 21, 2003, Bendel filed a Motion to Dismiss, based upon self-defense immunity pursuant to SDCL § 22-18-4.8. SR 55-56. A hearing was held on Bendel's Motion to Dismiss on February 1, 2024. SR 98. On February 22, 2024, the court denied Bendel's Motion to Dismiss. SR 271. On March 20, 2024, Bendel filed an intermediate appeal related to the Trial Court's decision. Appx 1. On

April 17, 2024, the Supreme Court issued an Order Denying Petition for Allowance of Appeal from Intermediate Order. Appx. 2.

Bendel's case was tried to a jury on October 22-25, 2024. SR 336-394. Bendel was acquitted of Murder in the Second Degree, but he was found guilty of Manslaughter in the First Degree. SR 394. Bendel was sentenced on November 19, 2024 to sixty (60) years in the South Dakota State Penitentiary, with twenty (20) years of imprisonment suspended upon terms and conditions established by the Department of Corrections. SR 477-478. Bendel appealed his conviction. SR 485.

The sentencing judge did not consider the application of SDCL § 22-18-4.8. Denial of Bendel's Motion to Dismiss, the sentence levied, and denial of Bendel's Motion for Judgment of Acquittal were an abuse of discretion. Appx. 3. The sentence levied was outside the range of permissible sentences for which a reasonable sentencing court could have ordered in light of SDCL § 22-18-4.8, its application to this case, and the mitigating factors.

STATEMENT OF THE FACTS

Bendel was convicted of Manslaughter in the First Degree for the death of Doug. SR 405. Bendel and Doug were friends. SR 63. During the summer of 2023, Bendel had not been spending time with Doug, because Doug was getting into a lot of trouble. SR 57. Bendel knew Doug had been in fights at Farley Fest. *Id.* He was also aware

Doug was in an altercation with law enforcement. *Id.* Bendel knew Doug had gotten into trouble for breaking into houses and stealing. *Id.*

On August 19, 2023, Bendel decided to drop in at Doug's house to say hello and ask if he could charge his phone. *Id.* Doug shared with Bendel that he was in the process of being evicted and asked if he would help clean his house; Bendel agreed. SR 77.

On August 20, 2023, Bendel went to Doug's home. The two started cleaning, but quickly determined that they were missing two things, beer and music. SR 77. Neither Doug nor Bendel had a vehicle. *Id.* They called Tim Loehrer ("Tim") to see if he would give them a ride to pick up Bendel's speakers and some beer. SR 1029 at 9-22.

Bendel did not know Tim well, but Doug did. Tim had been in a relationship with Doug's late grandmother, Margaret, for over 30 years. SR 241. After Margaret's death, Doug's family allowed Tim to continue living in Margaret's home. SR 64.

Tim picked up Doug and Bendel and drove them to get beer and speakers. SR 77. While unloading Tim's car, Bendel noticed an alternator in the back. *Id.* Bendel attended tech school and was mechanically inclined. SR 1017. Thus, he offered to help Tim replace the alternator. SR 77.

Instead of heading to Doug's to clean, they went to Tim's house to work on the car and drink. SR 77. While Bendel was working on the alternator, Doug was drinking and horsing around. SR 77-78. Doug jumped on a four-wheeler and was driving erratically, tearing around, and at one point, almost hitting the car Bendel was working on. SR 324 at 12-18. They drank a 12-pack of beer. SR 131 at 4-5.

While Bendel worked, Tim left the house to assist a family member. SR 78. Then, Doug called Bendel into the house and poured them both shots of vodka. *Id.*

When Tim returned, Bendel wanted to look something up on the internet for the repair. *Id.* Bendel's phone did not have data or reception; so, Bendel asked Tim to connect to a hot-spot or internet, but Tim did not have either. SR 78. Without connecting to internet, Bendel's phone was useless. *Id.*

While Bendel continued working on the car, Tim mentioned he forgot to get gas and could not mow his lawn. *Id.* Bendel offered Tim some of the gas from the can he had filled earlier. *Id.* Bendel put a little gas in Tim's lawnmower. *Id.* Then, Doug asked Bendel to put some gas on the firepit so he could start a fire. *Id.*

As Bendel walked toward the firepit with the gas can, Doug unexpectedly attacked Bendel from behind, putting him in a tight chokehold, and pulling him straight backwards. SR 78. Bendel's airway was restricted, and despite efforts to get Doug to stop or release, Doug would not. *Id.* Doug did not stop until Bendel completely lost consciousness and was on the ground. *Id.*

When Bendel came to, he struggled to get up, was disoriented, and scared. *Id.* As his eyes finally adjusted, he saw Doug standing near him. *Id.* Bendel hurried to his feet and yelled at Doug, "What the fuck are you doing? Stop it!" SR 78. Bendel turned his back to Doug to reach for the gas can. *Id.* As he did, Doug darted at Bendel from behind and tried to choke him a second time. *Id.* This time, Bendel quickly turned and yelled, "Dude, what the fuck? Stop it! What is wrong with you." *Id.*

Bendel, again, turned to try to walk away from Doug and get the gas can, but Doug came at Bendel a third time from behind and tried to choke him. SR 79. Bendel spun around quick, and Doug could not get his arm around his neck. *Id.* It became clear

to Bendel that Doug was not going to stop and Bendel was scared. SR 59. Bendel knew he needed to protect himself. *Id.*

Bendel looked around and spotted a 2x4 lying on the ground. *Id.* He grabbed it hoping to fend Doug off. *Id.* When Doug saw Bendel grab the 2x4, Doug turned and ran away. *Id.* Bendel followed Doug, hoping to get him to run as far away as possible so that Bendel could flee to safety. *Id.*

Bendel was panicked and did not know what else to do. SR 79. Tim was not helping Bendel. *Id.* Bendel had no working phone to call for help. *Id.* From past experience, Bendel knew Doug was relentless, unpredictable, and violent when he was drunk. *Id.*

Once Doug retreated, Bendel stopped following him and tried to leave. *Id.* But as soon as Bendel turned his back to Doug, Doug charged out of the weeds and attacked Bendel from behind a fourth time. SR 85. Fearing for his life and still holding the 2x4, Bendel turned and swung the 2x4, hitting Doug with a couple blows to the front of the head. *Id.* Doug stumbled and fell to the ground. *Id.* Bendel hit him in the torso and body area several more times so that he could safely escape Doug's attacks. *Id.*

Then, Bendel dropped the 2x4 and ran away. *Id.* He was in shock. *Id.* Things moved fast. From the first time Doug choked Bendel to the time Bendel hit Doug with the 2x4 was only a couple of minutes. SR 799 at 4-14.

He looked for Tim but saw his car leaving the driveway, almost to the road. SR 85. Unbeknownst to Bendel, Tim called 9-1-1 as he was leaving. SR 79. Bendel had no vehicle and no cell service. *Id.* Bendel started walking down the driveway. *Id.* By the time Bendel got to the end of the driveway, Tim returned and Bendel asked him for a

ride to Big Stone City. *Id.* Tim said he wanted to lock up the house first so that Doug could not get inside because he was acting crazy. SR 79.

As Tim went into the house, Bendel decided to check on Doug, without getting too close. *Id.* Bendel thought Doug was okay because, from a distance, he could see that he was breathing, and he did not see blood. SR 80. Tim dropped Bendel off in Big Stone City. *Id.*

A Grant County Sheriff's Deputy was dispatched to Tim's residence, but he did not arrive until 17 minutes after the 9-1-1 call from Tim. SR 66. Both Tim and Bendel had left. *Id.* After a brief search, Doug was located, an ambulance was called and arrived minutes later. *Id.*

Doug was taken to the hospital. *Id.* He passed away the next day. SR 13. The autopsy report stated that Doug's cause of death was traumatic brain injury. SR 87. The pathology report and testimony of Dr. Snell indicated that the area of impact on Doug's head was the right front and left side. SR 115 at 12-14. Dr. Snell testified that if you are struck in the front, your injury is going to be in the front. SR 114-115. Dr. Snell testified that there was no injury to the back of Doug's head. SR 774.

Tim was interviewed by law enforcement on three separate occasions. SR 151-155. Each time, he lied. *Id.* When Tim was questioned on August 20, 2023, he denied knowing where Bendel was located or giving him a ride. SR 608-610. When law enforcement talked to Bendel on August 21, 2023, he confirmed Tim gave him a ride home. Tim again denied giving Bendel a ride. SR 843 at 21-23. Law enforcement talked to Tim for a third time. SR 909. They told Tim about their conversation with Bendel and finally, after an hour of interrogation, Tim changed his story and admitted that

he drove Bendel to Big Stone City. SR 943 at 19-21. Tim also lied to the judge and jury regarding what happened on August 20, 2023. When he called 9-1-1, he said, “two people are beating the hell out of one another.” SR 592 at 15-17. But at trial, Bendel’s self-defense immunity hearing, he said, “one of them is beating the hell out of the other one.” SR 145 at 3-5. Tim testified Bendel hit Doug in the back. SR 141 at 16-17.

**I. WHETHER THE TRIAL COURT ERRED BY DENYING
BENDEL’S MOTION TO DISMISS.**

A. Standard of Review

“[This Court] will apply de novo review to the application of this legal standard to the facts before the circuit court.” *State v. Tuopeh*, 2025 S.D. 16 at ¶ 49.

B. Law

In 2021, the South Dakota legislature adopted SDCL § 22-18-4.8 granting immunity from prosecution to individuals reasonably believing force is necessary to defend themselves. SDCL 22-18-4.8 replaced a prior version of the “stand your ground” law. Most of the case law is based on the old law. This prior law was different in language and scope.

The prior analysis of self-defense has a foundation in common law. These statutes, now repealed, required qualification of imminent danger, of great personal injury, and allowed sufficient resistance to prevent an offense against a person. *See* SDCL § 22-16-34 (repealed); SDCL § 22-16-35 (repealed); and SDCL § 22-5-9 (repealed). All three repealed statutes limited when and how much force could be used as self-defense. Case analysis previously focused on whether force used was reasonable in scope. *See State v. Pellegrino*, 1998 S.D. 39; *State v. Bruder*, 2004 S.D. 12; *Conaty v.*

Solem, 422 N.W.2d 102 (S.D. 1988); and *State v. Strozier*, 2013 S.D. 53. The various court decisions analyzing language of the prior statutory provision limited when and how much force was objectively reasonable.

The new immunity statutes provide, in part, “[a] person who uses or threatens to use force, as permitted in SDCL § 22-18-4 to SDCL§ 22-18-4.7, inclusive, is justified in such conduct and is immune from criminal prosecution.” SDCL § 22-18-4.8. Accordingly, “[a] person is justified in using or threatening to use deadly force, if the person reasonably believes” it “is necessary to prevent imminent death or great bodily harm” or “to prevent the imminent commission of a forcible felony.” SDCL § 22-18-4.1. Further, a person “does not have a duty to retreat and has the right to stand his or her ground” if the person is “[n]ot engaged in a criminal activity” and “[i]n a place where the person has a right to be.” SDCL§ 22-18-4.1.

Unlike the prior self-defense provisions, the new statutes do not limit the amount of force used or require force be used only when necessary to stop danger. If the specific person has a reasonable belief that force is necessary, the person is not obligated to split hair on how much force is too much. This court stated,

SDCL § 22-18-4.8 is more than just an affirmative defense to a crime; the immunity afforded by the statute is a legislative determination that justifiable homicide is not a crime subject to prosecution. The 2022 amendment further reflects the legislative intent to create a substantive right to be free from criminal culpability, including arresting, detaining in custody, and charging or prosecuting the defendant when a homicide is justifiable.

State v. Smith, 2023 S.D. 32 at ¶ 30 (internal citations omitted).

After a prima facie case of self-defense is raised, the State must refute the claim by clear and convincing evidence. SDCL § 22-18-4.8. It is insufficient to raise a ‘fact question’ to defeat the claim. The burden shifting and heightened standards demonstrate the strong legislative intent of granting immunity for acts of self-defense. *Id.*

This court reviewed the statutory application of self-defense immunity in *State v. Tuopeh*, 2025 S.D. 16. In *Tuopeh*, the defendant claimed self-defense immunity after an individual was beaten to death during an altercation. *Id.* at ¶ 1. Although the victim was the initial aggressor, the court found the State carried the burden of rebutting the claim of self-defense. *Id.* at ¶ 7. In *Tuopeh*, the victim performed a “tactical retreat” by running away. *Id.* at ¶ 51. Further, this court recognized that, even if the defendant acted in self-defense, use of deadly force was not justified because the victim did not engage in a forcible felony pursuant to SDCL § 22-18-4.1. *Id.*

C. Procedural History Regarding Immunity Motion

Bendel asserted self-defense immunity by filing a Motion to Dismiss supported by his affidavit. SR 55. The State objected to admission of Bendel’s affidavit claiming it was insufficient and insisted Bendel had to testify to raise the claim of immunity. SR 240. The Trial Court originally determined that Bendel’s affidavit should not be considered. *Id.* Still, the Trial Court held the motion alone was sufficient to make a prima facie claim. Thus, the burden to prove that self-

defense did not apply, by clear and convincing evidence, shifted to the State.

SR 246.

At the evidentiary hearing, the State called Tim, DCI agents, and the pathologist. SR 246. Bendel was the only other eyewitness. Bendel tendered his affidavit to set forth facts of the incident a second time. *Id.* The Trial Court, again, refused to receive the affidavit. *Id.*

After the hearing, the Trial Court issued a Memorandum Decision denying immunity and entered Findings of Fact and Conclusions of Law. SR 246. Within this decision, the Trial Court said it would give Bendel's affidavit limited consideration and "proper weight considering it has not been subjected to cross examination." SR 243.

D. Argument

1. Bendel's Affidavit

The Trial Court erred in not considering Bendel's affidavit. Although the Trial Court said it considered the affidavit, a reading of the Trial Court's Memorandum Decision reflects that it did not. SR 240-245.

The question at the immunity hearing was not whether another reasonable, or more reasonable, interpretation of the events could be constructed. *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 535 (1991). Rather, whether Bendel's actions were in self-defense from his view of the facts and circumstances at the time. The current self-defense statute states "if *the person* reasonably believes" force is necessary inputting a subjective standard. SDCL § 22-18-4 (emphasis added). Thus, the court

is required to make a finding of the individual's reasonable belief, not just a conclusion of what is "objectively reasonable given the circumstances." The Trial Court only applied the objective standard. SR 243.

When a motion is based on facts not appearing in record, the court may hear the matter on affidavits presented by the respective parties. SDCL § 15-6-43(e) (in part). Clear and convincing evidence may require more than affidavit testimony. However, the burden shifted to the State to prove Bendel was not acting in self-defense, by clear and convincing evidence.

With self-defense immunity, a defendant must be allowed to present his case without waiving his right to be free from self-incrimination. The State is not entitled to cross-examine a defendant. However, to present a claim of immunity, a defendant must be able to set forth the facts upon which claim is made. While the court may consider the manner of proof (i.e., oral testimony v. affidavit), the Trial Court erred by disregarding Bendel's affidavit or not giving it the weight it deserved. In weighing the evidence, particularly when the other evidence is extremely contradictory, the affidavit can and must be considered for the facts sworn to by Bendel. The Trial Court's failure to properly consider this evidence is a clear error.

2. Tim is not Credible

The Trial Court erred by finding Tim credible and relying on Tim's testimony to establish, by clear and convincing evidence, that Bendel did not act in self-defense. SR 243. With only two eyewitnesses; Bendel and Tim, not just one should be allowed to set forth the facts. SR 241.

The facts provide a tale of multiple events told by the same witness; Tim tells a different factual story with each iteration. SR 13, 65, 132, 135, 151. Tim admits he lied to DCI about key facts at the outset of the case and later changed his version of facts. SR 151. Tim had reason to lie as noted by the Trial Court; he is wholly dependent on Doug's family. SR 164. Dependency creates a strong presumption that Tim's view of the facts is colored by his bias.

Tim's testimony was insufficient to meet the standard of clear and convincing evidence. Statutory law is clear that the State must overcome a claim of self-defense with clear and convincing evidence. SDCL § 22-18-4.8.

To conclude that evidence is clear and convincing, the witnesses must be found to be credible, . . . the facts to which they have testified must be distinctly remembered and the details thereof narrated exactly and in due order, and . . . their testimony must be so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

In re Adoption of Z.N.F., 2013 S.D. 97 (internal citations omitted).

Tim's testimony cannot be clear and convincing because he is inconsistent, lacks credibility, and his statements are not supported by the physical evidence when looking at the record as a whole.

Tim, the State's only eyewitness, was interviewed twice by DCI, once by Bendel's investigator, and testified at the Motion to Dismiss hearing. Each of these narratives vary in several material ways. At the motion hearing, Tim testified for the first time, he was sitting on the lawnmower when Doug initially choked Bendel to the ground. SR 132 at 8. Previously, Tim told DCI officers, he went into the house,

and when he came back out, Doug had Bendel in a headlock. SR 13. The State's brief in opposition to the Motion to Dismiss states the same. SR 65. Yet, on cross-examination Tim denied telling DCI that, stating he went in the house earlier. SR 151 at 25. Conveniently, Tim's new location is ideal for testifying about the altercation. Despite allegedly being mere feet from the incident, Tim was wrong about obvious details, such as not being able to accurately identify the alleged murder weapon. SR 13. However, at the Motion to Dismiss hearing, Tim was now sure it was a 2x4 painted white. SR 135.

Another discrepancy in Tim's testimony, the description of the incident where Doug fell, is perhaps the clearest. Tim could not have seen the incident from where he consistently said he was standing. Tim consistently stated he walked to the end of the sidewalk, where he observed everything before getting in his car and driving away. SR 142 at 17-19. In both his interview with DCI and his testimony at the motion hearing, he was again certain he moved to the end of the sidewalk. SR 142 at 19. This is what Tim stated during his interview with Bendel's investigator as well. SR 95. However, from the end of the sidewalk, it is impossible to see where Doug was on the ground. *Id.* From the end of the sidewalk, there was an RV and truck which prevented line of sight of the location of Doug's body. *Id.* This discrepancy demonstrates Tim is testifying from more than his own knowledge.

Tim lied to DCI. SR 243. This fact is undisputed. Tim told DCI in his first interview he did not know where Bendel went or how he got away from the scene. *Id.* In Tim's second interview (after Bendel's arrest and DCI learned the truth), Tim continued to lie for almost an hour, until he was forced to admit his dishonesty. SR 153. At the

motion's hearing, Tim justified lying, saying he did not want Doug's father to find out the truth. SR 164 at 24. Tim was scared to tell the truth because Doug's family owned Tim's home, vehicle, and provided him with means to survive. *Id.* He did not lie because he was afraid of charges but was afraid of what Doug's family would do if he said anything that did not make them happy. *Id.*

The most damning discrepancy is that the forensic evidence does not align with Tim's testimony that Doug was running away from Bendel when struck in the head. Dr. Snell testified the importance of observing different planes of injuries "is if you were to be struck in the front, your injury's going to be in the front." SR 114 at 25. Doug's head was impacted in two different areas "the right front and then the left side." SR 115 at 13. Doug had no injuries to the back of his head. SR 774. The physical evidence backs Bendel's affidavit.

Tim testified that after Bendel first struck Doug "they continued to run a distance farther." SR 140 at 23-24. Then Bendel hit Doug "on the side of the head a couple times." SR 141 at 11. The Trial Court's finding of fact similarly state Bendel "struck [Doug] in the back of the head" then Doug "fell to the ground." SR 248. Tim's testimony depicts Bendel chasing after Doug and striking him in the head a couple times from behind before falling to the ground. This testimony and finding of fact are directly contradictory to the forensic evidence.

Bendel's affidavit precisely explains the events which are consistent with the forensic evidence. Bendel described "hitting Doug a couple of blows to the head" after Doug charged out of the weeds and attacked a fourth time. SR 79. This

describes Doug coming toward and facing Bendel when he swung and hit him in the head. This explanation aligns with the forensic evidence.

Tim was determined by the Trial Court to be 'credible', however, the heightened standard requires "the witnesses must be found to be credible ... and ... that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct and weighty." *In re Adoption of Z.N.F.*, 2013 S.D. 97 (internal citations omitted). Tim's testimony is inconsistent and filled with discrepancies. Tim's testimony was not clear, direct or weighty. Perhaps standing alone such testimony might preponderate a version of the facts, however, when considered with Bendel's affidavit, it does not meet the heightened standard required by the statute.

3. Bendel's Use of Force was Reasonable

The Trial Court erred in ruling Bendel's use of force was unreasonable. After a sudden and unprovoked attack from behind, and being choked to unconsciousness on the ground, Bendel reasonably felt threatened. SR 59. Bendel was in a location and environment that prevented any other means of protecting himself or extracting himself to a safe location. Bendel picked up the only implement available, a 2x4 to attempt to dissuade his assailant from further attacks. *Id.* Despite possession of the 2x4 and following his attacker for some distance, Doug would not stop. Bendel was attacked when he turned his back to his assailant and was left with no choice but to resist the attack with force. *Id.*

The Trial Court erred when it applied the objectively reasonable standard instead of the subjective standard now required by the self-defense immunity statute. SR 245. Also, the Trial Court relied significantly on the size difference between Bendel and Doug, with Bendel being significantly larger. SR 243. South Dakota law does not require Doug to be smaller than Bendel to lawfully use force to prevent harm. *State v. Bruder*, 2004 S.D. 12 at ¶ 12. Finally, the Trial Court focuses on the number of strikes, asserting that ten was too many to be defensive, but physical evidence supports less than two blows were delivered to the head, as Doug faced Bendel. SR 114. Other blows to Doug's body did not cause his death according to Dr. Snell. SR 117. Statute does not limit when and how much force can be used. SDCL § 22-18-4.8. When starting with the presumption of immunity, coupled with the clear reasonable belief that force was necessary, the State's equivocal evidence is deficient.

4. Bendel is Different than *Tuopeh*

This case is different from *State v. Tuopeh*, for several important reasons: 1) Doug did not retreat but kept attacking each time Bendel turned his back; 2) *Tuopeh* was in public and had help, while Bendel was isolated and had no car or working phone; 3) Bendel was attacked by deadly force, *Tuopeh* was not. *State v. Tuopeh*, 2025 S.D. 16.

The Trial Court erred in concluding Bendel was no longer under any threat by Doug. Doug persisted with attempts to choke Bendel and continued to present a threat to Bendel. Bendel had a right to defend himself from the repeated attacks.

Unlike *Tuopeh*, Bendel was in an isolated environment, without a vehicle or working phone. SR 79. After being choked unconscious, Bendel was not safe from Doug's deadly attacks. Doug did not retreat. He was still on the premises and kept attacking each time Bendel turned away. "[a] person who has been attacked and who is exercising the right of lawful self-defense is not required to retreat and may not only defend against the attack but also may pursue the assailant until secure from danger if that course appears to the defendant[.]" *State v. Bruder*, 2004 S.D. 12 at ¶ 6 fn.2. "[A]nd this is the defendant's right, even if safety may have been more easily gained by withdrawing from the scene." *Id.*

The Trial Court found Bendel, by picking up a 2x4, converted from victim to assailant. SR 245. "Where an assault is made with only hands and fists but with force and in a manner likely to produce great bodily injury, the person attacked may lawfully resist the attack with whatever force is reasonably and apparently necessary." *State v. Bogenreif*, 465 N.W.2d at 781. Where "the individual situation required an immediate response . . . to prevent unlawful force from being inflicted upon [defendant] or another," the claim of self-defense is available under SDCL 22-18-4. *Id.* Bendel attempted to thwart Doug's attacks by grabbing the 2x4, however this was unsuccessful. Left with no other options, Bendel reasonably believed the use of force was justified.

Tuopeh was not a victim of deadly force, Bendel was. Bendel's use of deadly force is justifiable based on Doug's felonious actions. SDCL § 22-18-4.1. Unlike *Tuopeh*, Bendel had a reasonable belief that the force exerted was necessary to prevent

the commission of a forcible felony. Doug choked Bendel to unconsciousness leaving Bendel to be scared about what Doug would do next. Thus, Bendel grabbed the 2x4. SDCL § 22-18-4.1 authorizes the threat or use of deadly force to "prevent the imminent commission of a forcible felony." SDCL § 22-18-4.1. A "forcible felony" is defined as "arson, *assault*, burglary, kidnapping, manslaughter, murder, rape, and robbery, and any other felony that involves the use of or the threat of physical force or violence against a person." SDCL § 22-18-3.1(3) (emphasis added). Doug's actions constituted aggravated assault under SDCL §22-18-1.1(8). As a result, Bendel was justified and use of deadly force to "prevent the imminent commission of a forcible felony-aggravated assault." SDCL § 22-18-4.1.

The Trial Court erred by failure to grant Bendel self-defense immunity.

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING TESTIMONY CONCERNING THE DECEDANT'S PRIOR BAD ACTS.

A. Standard of Review

"This court reviews a decision to admit or deny evidence under the abuse of discretion standard." *State v. Stanley*, 2017 SD 32 at ¶ 21 quoting *Donat v. Johnson*, 2015 SD 16 at ¶ 24; and *Ferebee v. Hobart*, 2009 SD 102 at ¶ 12. An abuse of discretion "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *State v. Delehoy*, 2019 SD 30 at ¶ 22 (internal citations omitted). This occurs when "no judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached the same conclusion." *State v. Red Star*, 2001 SD 54 at ¶10. Evidentiary rulings

made by a circuit court are presumed correct. Thus, Bendel “must not only prove that the Trial Court abused its discretion,” but that there was also a prejudice as a result of the error. *Id.*

B. Procedural History

On July 10, 2024, the State filed its Motion for Disclosure of Rule 404(b) Information. SR 326. This motion compelled Bendel to produce evidence defined by Rule 404(b) that he intended to introduce involving Doug at trial. *Id.* The court addressed this motion at the status hearing on October 8, 2024. SR 532. Bendel’s counsel argued that self-defense testimony should be allowed, and the jury should understand why it was necessary. SR 537 at 12-18. The court reserved ruling on the issue until Bendel determined if he would testify. SR 539 at 5-8.

This issue was addressed on the first day of Bendel’s jury trial. SR 558 at 6-7. There were multiple instances of 404(b) evidence Bendel attempted to introduce.¹ Trial counsel provided argument that the actions of Doug that Bendel witnessed established his fear and the reasonableness of his actions. SR 555 at 19-22. Bendel requested permission to use 404(b) evidence in opening statements. SR 556 at 22-25, 556 at 1-2. The State objected, based on lack of police records to support the events, claiming testimony would be insufficient evidence. SR 556 at 4-16. Bendel argued, less than 30 days before the incident, Doug engaged in a multitude of illegal behaviors (SR 557 at 6-17), which are the same behaviors that caused Bendel to distance himself from Doug.

¹ The Court specifically said, “I think we need to address the issue of the 404(a) evidence that Mr. Ellyson indicated via email on Monday of the incidences that they are asking the Court to allow come into evidence.” However, the evidence at hand would actually be characterized as 404(b) as indicated by prior motions and subsequent argument.

SR 77. The illegal behaviors of Doug include breaking into a home and stealing groceries and beer. SR 557 at 9-10. Doug also broke into a garage to steal a motorcycle but was chased out by the homeowner. SR 557 at 11-12. Doug got into a fight, came back to his residence where Bendel was, looked for his knife, and claimed he intended to kill the men he had fought with. SR 577 at 12-14. Doug then left his residence and came back in the evening injured, beaten up, and again threatening those he fought with. SR 577 at 15-17. Bendel argued these were not rumors but events Bendel experienced. SR 577 at 19-21. The court denied the motion to include evidence stating that the "offer of proof in the court's opinion is insufficient regarding the testimony." SR 558 at 2-3. The court continued it did "a weighing of the evidence whether or not that's more prejudicial than probative," and found the events, "not probative in this matter." SR 558 at 4-6.

The court stated these are "incidences where obviously the victim's not here and all that is hearsay," and found "it's too prejudicial to be allowed." SR 558 at 23-25 and 559 at 1-2. Bendel was not permitted to explain to the jury why he had been avoiding Doug and why he was afraid during the incident. The jury did not hear Doug had broken into homes, stolen things, been in multiple fights, and threatened to kill others.

C. Law

SDCL § 19-19-404(b) states in pertinent part:

(b) Other crimes, wrongs, or acts.

- (1) Prohibited uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) Permitted uses. This evidence may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

SDCL § 19-19-404(b).

The fundamental evidentiary requirement outlined in SDCL § 19-19-401, dictates that evidence is admissible if it tends to affect a fact's probability and said fact is of consequence to the action at hand. SDCL § 19-19-401. Evidentiary relevance is based on whether "(a) [i]t has a tendency to make a fact more or less probable than it would be without the evidence; and (b) [t]he fact is of consequence in determining the action." *Id.* The court in this matter stated that the testimony lacked relevance. SR 558 at 4-6.

SDCL § 19-19-403 requires the court to perform a balancing test in weighing relevant evidence's probative value against "unfair prejudice, confusing the issues, misleading jury . . ." SDCL § 19-19-403. This statute is exclusionary in that it authorizes courts to perform a discretionary balancing test in which they are called to weigh relevant evidence's probative value against social factors likely to tempt a jury to decide different than what the law demands. SDCL § 19-19-403.

SDCL § 19-19-404 excludes evidence used to prove propensity whereby the statute prohibits use of character evidence to show a person acted consistently with their character on occasion. SDCL § 19-19-404(a). This statute further contains a non-exhaustive list of permitted evidential uses that must be both relevant to the case and avoid a propensity inference for admission. SDCL § 19-19-404(b).

SDCL § 19-19-405 defines methods for proving character when a "trait is an essential element of a charge, claim, or defense, the character trait may also be proved by relevant specific instances of the person's conduct." SDCL § 19-19-405(b). This statute allows the presentation of evidence under specific circumstances related to character conduct.

D. Argument

In this matter, Bendel's testimony was barred by the Trial Court because the court ruled it was not probative. SR 558 at 4-6. The threshold for relevance is low because evidence is scrutinized by SDCL § 19-19-403. It is clear that Bendel's knowledge of Doug's tendencies to engage in illegal and violent behavior made it more probable that the force used by Bendel was reasonable and necessary to protect himself in accordance with SDCL § 19-19-401(a). Bendel, using reasonable and necessary force to protect himself, is important in deciding that he acted in self-defense. The court, however, ruled that this testimony was "too prejudicial." SR 559 at 1-2.

SDCL § 19-19-405 was created with the intent of being an exception for testimony. Bendel's mental state is an essential element of Manslaughter in the First Degree. As an essential element of the charge and claim of self-defense, Bendel's testimony may be used to "prove by relevant specific instances," Bendel used reasonable and necessary force. SDCL § 19-19-405. This Court has cautioned that it is important to remember that "virtually all relevant evidence presented at trial is harmful to the other party" but "this is not what is meant by unfair prejudice." *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 SD 20 at ¶ 30. This court clarified the cause of unfair prejudice is evidence that persuades "the jury in an *unfair and illegitimate way*." *Id.*

This is supported by statute and precedent. "Any proffered item that would appear to alter the probabilities of a consequential fact is relevant." *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 SD 20 at ¶ 46 (internal citations omitted). To be relevant, evidence "need not conclusively prove the ultimate fact in issue but only have a tendency," to make any fact more probable than without the evidence. *Id.* (emphasis

omitted). This case affirmed evidence admission for purposes other than proving character, such as knowledge, because the evidence's purpose was beyond showing propensity. *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 SD 20. The testimony requested to be presented here was intended to help the jury understand Bendel's actions, not to prove propensity.

Supreme Pork, Inc. likewise performed a balancing test where it is stated "[e]vidence is not prejudicial because its legitimate probative force damages," the other side's case. *Id.* at ¶ 30 (internal citations omitted). "Once the evidence is found relevant, however, the balance tips emphatically in favor of admission unless the dangers set out in Rule 403 'substantially' outweigh probative value." *Id.* at ¶55. Thus, a "party *objecting* to the admission of evidence *has the burden* of establishing that the trial concerns in Rule 403 substantially outweigh probative value." *Id.* at ¶57. In the case at hand, the State provided no substantive objection to the inclusion of the alleged 404(b) evidence. SR 537 at 5-6. The State never explained what prejudice they would be prescribed nor how it substantially outweighed the probative value of Bendel's testimony. SR 558-559.

Bendel's testimony concerning the prior bad actions of Doug should have been admitted based on *res gestae*. In the absence of the testimony, Bendel was unable to explain to the jury why he acted in the manner that he did. This court has upheld the admission of evidence under *res gestae* when necessary to complete the story. *State v. Otobhiale*, 2022 S.D. 35. When evidence is so connected with the charged offense that it explains circumstances or proves elements of a crime, it should be admitted. *Id.* The case at hand is so blended with the actions of Doug that it is impossible for the jury to understand why Bendel acted in the way he did absent testimony of Doug's prior

behavior. Bendel's testimony is incidental to the facts and the explanation of the same. *State v. Good Plume*, 2011 SD 27. By barring the introduction of Bendel's testimony concerning Doug's prior bad acts, the court abused its discretion.

III. WHETHER THE CIRCUIT COURT ERRED WHEN IT DENIED BENDEL'S MOTION FOR JUDGMENT OF ACQUITTAL.

A. Standard of Review

"[W]hether the circuit court erred when it denied a judgment of acquittal and whether sufficient evidence exist to support a verdict implicate the same standard of review." *State v. Foote, Sr.*, 2019 SD 32 at ¶ 7. Both of these questions require this court to examine "whether there is evidence in the record which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt." *Id* quoting *State v. Carter*, 2009 SD 65 at ¶ 44. This court's standard of review to evaluate the sufficiency of evidence to sustain convictions is de novo. *Id* quoting *State v. Jucht*, 2012 SD 6 at ¶ 18.

B. Law

The present case does not contain evidence sufficient to sustain a finding of guilt beyond a reasonable doubt for Manslaughter in the First Degree (SDCL § 22-16-15(2)). SR 394. SDCL § 22-16-15(2), in relevant part, states, "[h]omicide is manslaughter in the first degree if perpetrated...(2) [w]ithout any design to effect death...and in a heat of passion, but in a cruel and unusual manner." SDCL § 22-16-15(2). The elements of the crime of Manslaughter in the First Degree, which must be proven beyond a reasonable doubt are:

1. Bendel effected the death of Doug;
2. The killing was done in a cruel and unusual manner;

3. The killing was done while Bendel was in a heat of passion; and
4. The killing was not excusable or justifiable.

The term, "heat of passion", is clarified by case law to mean a "suddenly formed passion caused by reasonable and adequate provocation," which temporarily obscures reason and renders the individual incapable of forming a premeditated design to kill. *State v. Swan*, 925 N.W.2d 476. This is "such a mental disturbance or condition as would so overcome and dominate or suspend the exercise of the judgment of the defendant as to render his mind for the time being deaf to the voice of reason." *Id.* The term, "cruel and unusual manner," has been clarified by precedent. The term "as used in our law defining manslaughter in the first degree means that the commission of the homicide must be done with some excess of cruelty or refinement or unusual cruelty under the circumstances sufficiently marked to approach barbarity." *State v. Stumes*, 90 SD 382.

C. Argument

There was insufficient evidence presented to the jury to sustain a guilty verdict for the following reasons: (1) there was no physical evidence identifying the murder weapon that connected Bendel to Doug's death²; (2) the court denied the presentation of evidence that determined Bendel's mental condition; and, (3) the killing was excusable or justifiable.

The State alleges a heinous crime, in which Bendel struck Doug (SR 563 at 9), "from behind on the back," (SR 568 at 3-4) and did so "over and over and over again." SR 568 at 8. However, there was no physical evidence presented that proved the State's

² Even with Bendel's testimony, there was no physical evidence that identified the murder weapon.

allegation. SR 849 at 25, 850 at 1-2. Dr. Snell testified there was no injury to the back of the head. SR 774 at 14-16. Dr. Snell further testified the only injuries occurred to the front of the head. Due to the lack of physical evidence, a conviction of this crime cannot be supported.

The Trial Court denied Bendel's presentation of evidence showing Bendel's mental condition. A statutory requirement for Manslaughter in the First degree is that it be done in the "heat of passion." SDCL § 22-16-15(2). Heat of passion has been defined as a mental disturbance or condition. *State v. Swan*, 925 N.W.2d 476. Bendel was unable to explain to the jury what his mental state or condition was because the court limited his testimony. SR 1027 at 3-14. Bendel attempted to introduce testimony about why a great deal of force was necessary to prevent death or harm, but the request was denied by the court. *Id.* Initially, the evidence was barred because the court found it was, "not probative in this matter." SR 558 5-6. The court later said the evidence was "more prejudicial than probative." SR 558 22-23. After receiving argument from counsel, the court ruled that "[w]eighing the prejudicial effect of hearsay in this matter," the court was "going to deny the request." SR 624 at 11-13.

Bendel's testimony regarding the events would not be hearsay. SDCL § 19-19-804 states a declarant is unavailable if they cannot be present at trial because of death. SDCL § 19-19-804. Inclusion of Bendel's testimony was necessary to establish Bendel's mental state during the incident. Absent Bendel's testimony, the heat of passion element went unaddressed at trial. There is insufficient evidence to support a conviction for Manslaughter in the First Degree.

Contrary to the State's argument, Dr. Snell specifically testified there was no injury to the back of Doug's head. SR 774 at 14-16. Testimony at trial established Doug had been struck multiple times in the head and other areas of his body. SR 115 at 12-25. Bendel's statements about utilizing a 2x4 to fend off attempted assaults acknowledge that he struck Doug in an attempt to thwart his attacks, not evidence that Bendel struck him with blows that were unjustifiable. The Court barred the presentation of heat of passion evidence needed to support a conviction of Manslaughter in the First Degree.

The Trial Court should have granted Bendel's Motion for Judgment of Acquittal because the crime was statutorily justified. SDCL § 22-18-4 states "[a] person is justified in using or threatening to use force, other than deadly force, against another if the person reasonably believes that using or threatening to use force is necessary to defend against the other's imminent use of unlawful force." SDCL § 22-18-4. Bendel used force in response to being the victim of multiple unprovoked attacks by Doug. SR 1040 at 5-11, SR 1042 at 4-12, and SR 1042 at 18-21.

It is undisputed that Doug choked Bendel to the point of unconsciousness during the initial unprovoked attacks. SR 1040 at 18, 1041 at 1-2. After multiple attacks, Doug darted at Bendel, but this time Bendel grabbed a 2x4 from the ground and swung at Doug as he approached. SR 1042 at 23-25, 1043 at 1. After Bendel swung, Doug continued to attack Bendel. SR 1043 at 11. These unprovoked attacks affected Bendel such that he testified "I was terrified. I felt like I was in shock. Like, I don't know, I [had] seen Doug do some erratic, really strange erratic behavior and I could see that that erratic behavior was being thrown on to me so I was just like, I was scared." SR 1043 17-20. Bendel

used the force he reasonably believed was necessary to defend himself, which is permitted pursuant to SDCL §22-18-4.

For the reasons set out herein, the Trial Court erred when it denied Bendel's Motion for a Judgment of Acquittal, as there was insufficient physical evidence to determine Bendel killed Doug, the events took place in the heat of passion, or the killing was unjustifiable.

IV. WHETHER BENDEL WAS DEPRIVED OF A FAIR TRIAL BASED ON THE ERRORS OF THE TRIAL COURT.

A. Standard of Review

To determine whether a defendant was denied the constitutional right to a fair trial based on the cumulative effect of trial errors, this Court reviews the entire record to determine if a fair trial was held. *State v. Delehoy*, 2019 S.D. 30 at ¶ 20.

B. Law

The Trial Court's errors and resulting prejudice affected the fairness of Bendel's trial. This court held "the cumulative effect of errors by the Trial Court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial." *State v. Davi*, 504 N.W.2d 844, 857 (SD 1993) quoting *McDowell v. Solem*, 447 N.W.2d 646 (S.D. 1990). See also *State v. Dokken*, 385 N.W.2d 493 (S.D. 1986); and *State v. Bennis*, 457 N.W.2d 843 (S.D. 1990). "The question we must decide is whether, on a review of the entire record, was [the Defendant] provided a fair trial." *Id.* "As we have said numerous times, the defendant is not entitled to a perfect trial but rather a fair one." *Id.* quoting *State v. Smith*, 477 N.W.2d 27, 35 (S.D. 1991). This Court also recognizes that,

"a 'snowball effect', of the errors at trial may deprive a defendant of a fair trial." *Jenner v. Leapley*, 521 N.W.2d 422, 432 (S.D. 1994).

Bendel was denied a fair trial by the cumulative effect of the Circuit Court's errors. As Justice Sabers stated in his dissent in *State v. Frazier*, "[v]iewing the errors at *Frazier's* trial in isolation may lead some to conclude that they were not sufficiently prejudicial, yet that is not the consideration." *State v. Frazier*, 2001 SD 10 at ¶ 65. "Our system of criminal justice is founded on the twin cornerstones of fairness and proof beyond a reasonable doubt." *Id.*

The errors that occurred at trial deprived Bendel of a fair trial. The court infringed on Bendel's Fifth Amendment rights and misinterpreted statutory law when sentencing Bendel.

Bendel has the right to avoid self-incrimination. U.S. Const. Amend. V. On October 22, 2024, the court stated that if Bendel "all of a sudden decide[d] not to testify, then I think we've got issues." SR 559 at 16-18. Bendel's constitutional right to avoid self-incrimination was limited by the Trial Court on the first day of trial contrary to the Fifth Amendment, Bendel was forced by the Trial Court to testify to assert his defense.

At the time of sentencing, Bendel sought to admit testimony from his sister, Tonya Diggins. SR 646 at 24-25. Tonya was going to provide testimony about the type of person Bendel is and the family support system he has. SR 647 at 6-8. The Trial Court denied the testimony stating "I have reviewed her statement . . . So, I'm going to deny the request for additional testimony." *Id.* at 10-13.

The Trial Court sentenced Bendel to sixty (60) years in the South Dakota State Penitentiary and suspended twenty (20) of those years on terms and conditions. SR 659

at 10-14. The court stated Bendel "will be parole eligible pursuant to SDCL 24-15A-32." SR 659 at 17-18. Based on this statute, Bendel would have been eligible for parole after serving 20 years of his sentence. SR 659 at 16-18. However, Bendel is not eligible for parole. Effective July 1, 2023 "[a]n inmate convicted and sentenced for an offense specified in this section... is not eligible for parole by the Board of Pardons and Paroles." SDCL § 24-15-4.1. Manslaughter in the First Degree is the first offense enumerated in SDCL § 24-15-4.1. *Id.*

The Trial Court mistakenly incorporated parole eligibility into Bendel's sentence when Bendel is statutorily ineligible. This court has held that parole eligibility estimates should not be considered in sentencing because the power to parole is an executive act, not a judicial one. *State v. Springer*, 2014 S.D. 80 at ¶ 17. This pertains to the statutory requirement of SDCL 23A-27-48 for judges to give parole eligibility advisements or estimated minimum periods a Defendant must serve before being parole eligible. *State v. Semrad*, 2011 S.D. 7 at ¶ 7. In this matter, the court was incorrect in its belief that Bendel would be eligible for parole.

CONCLUSION

Bendel asks this court to remand this matter back to the Trial Court for a Judgment of Acquittal or, in the alternate, a new trial. The Trial Court erred by denying Bendel's Motion to Dismiss because the State failed to prove, by clear and convincing evidence, Bendel did not engage in self-defense. The Trial Court erred by sentencing Bendel to sixty (60) years in the South Dakota State Penitentiary with twenty (20) years suspended because Bendel had statutory immunity. The sentence was outside the scope of what would be levied and was cruel and unusual punishment. The Trial Court abused

its discretion by denying testimony concerning a requisite component of the charges. The Trial Court erred by denying Bendel's Motion for Judgement of Acquittal because there was insufficient evidence for a reasonable jury to convict Bendel. The cumulative effect of Trial Court errors deprived Bendel of a fair trial. Bendel thus asks for a finding and order for remand to the Trial Court for acquittal or a new trial.

Respectfully submitted this 28th day of May, 2025.

AUSTIN, STRAIT, BENSON,
THOLE & KOEHN, LLP

BY: 
Brooklyn M. Mailey
Attorneys for Appellant
25 1st Avenue Southwest
Watertown, SD 57201
Telephone: (605) 886-5823
State Bar #5648

AUSTIN, STRAIT, BENSON,
THOLE & KOEHN, LLP

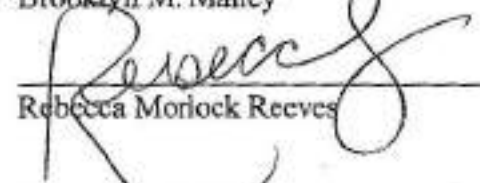
BY: 
Rebecca Morlock Reeves
Attorneys for Appellant
25 1st Avenue Southwest
Watertown, SD 57201
Telephone: (605) 886-5823
State Bar #2706

CERTIFICATE OF COMPLIANCE

We, Brooklyn M. Mailey and Rebecca Morlock Reeves, attorneys for the Appellant, hereby certify that the Appellant's Brief complies with the type volume limitation as provided in SDCL 15-26A-66 and that the Appellant's Brief contains 8,661 words and is set in Times New Roman, size 12.

Dated this 28th day of May, 2025.



Brooklyn M. Mailey


Rebecca Morlock Reeves

REQUEST FOR ORAL ARGUMENT

The Appellant respectfully requests oral argument.

CERTIFICATE OF SERVICE

We, Brooklyn M. Mailey and Rebecca Morlock Reeves, hereby certify that on the 28th day of May, 2025, we mailed the original Appellant's Brief and Appendix to the Supreme Court at the address below and emailed a Word version of the Appellant's Brief, along with a PDF version of the Appendix to the following address:

Supreme Court Clerk's Office
500 East Capital Avenue
Pierre, SD 57201-5070
SCClerkBriefs@njs.state.sd.us

We further certify that we mailed two copies of the Appellant's Brief and Appendix via First Class United States Mail and an electronic copy via Electronic Mail to the following parties:

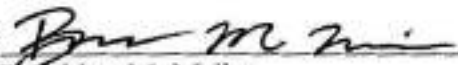
Sarah L. Thorne
Deputy Attorney General
1302 E Hwy 14, Suite 1
Pierre, South Dakota, 57501
ateservice@state.sd.us

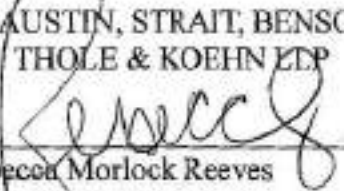
Mark A. Reedstrom
Attorney at Law
210 East 5th Avenue
Milbank, SD 57252
mark@reedstromlaw.com

Jackson Schwandt
Attorney at Law
PO Box 66
Milbank, SD 57252
jackson.schwandt@outlook.com

this 28th day of May, 2025.

AUSTIN, STRAIT, BENSON,
THOLE & KOEHN LLP

BY: 
Brooklyn M. Mailey
Attorneys at Law
25 1st Avenue Southwest
Watertown, SD 57201
Telephone: (605) 886-5823

AUSTIN, STRAIT, BENSON,
THOLE & KOEHN LLP
BY: 
Rebecca Morlock Reeves
Attorneys at Law
25 1st Avenue Southwest
Watertown, SD 57201
Telephone: (605) 886-5823

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SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

NO.

MAR 20 2024

IN THE SUPREME COURT

Shif A. Johnson
Clerk

OF

SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
APPELLEE

VS.

JOESPH PETER BENDEL,
APPELLANT

Appeal from the Circuit Court of the
Third Judicial Circuit, Grant County
The Honorable Dawn Elshere, Presiding

PETITION FOR PERMISSION TO APPEAL

GREGORY P. GRAJCZYK
GRAJCZYK LAW OFFICE
224 E. 4th Avenue
P.O. BOX 68
MILBANK, SD 57252-0068
(605)432-6868
ATTORNEY FOR APPELLANT

JACKSON SCHWANDT
GRANT COUNTY STATES ATTORNEY
210 East Fifth Avenue
MILBANK, SD 57252

MARTY JACKLEY
SD ATTORNEY GENERAL
500 EAST CAPITOL AVENUE
PIERRE, SD 57501
ATTORNEYS FOR APPELLEE

TO THE HONORABLE SUPREME COURT OF SOUTH DAKOTA:

JOSEPH PETER BENDEL, APPELLANT, Defendant below, pursuant to SDCL 15-26A-13, within ten days of Notice of Entry of the Order of the Circuit Court, and pursuant to SDCL 15-26A-3(2)(4) within thirty days of Notice of Entry of Order¹ of the Circuit Court, files this Petition for Permission to Appeal from the Order Denying his Motion to Dismiss pursuant to SDCL22-18-4, presiding, and would show the Court as follows:

I. STATEMENT OF FACTS²

Joe Bendel³ offered to do a favor for Tim, the live-in boyfriend of decedent's deceased grandmother. Joe was helping replace an alternator in a vehicle for Tim. While working on the car he offered Tim gas for Tim's lawnmower. As an invited guest, while putting gas in the lawn mower Doug Lindberg Jr. asked Joe to bring some gas over to help start a fire in the nearby fire pit. As Joe approached the fire pit with the gas can Doug, in a sudden, unexpected and unprovoked attack grabbed Joe from behind and choked him into unconsciousness.⁴

¹ While Appellant believes there is an appeal of right on the issues raised herein, so as not to prejudice review of this matter, it is being initially filed as a Petition for Permission to Appeal. A Notice of Appeal will be timely filed.

² The facts recited are taken from Joe Bendel's affidavit (Appendix 3) unless specified otherwise. The record reference are to T for hearing transcript and I for DCI Interview and then Page/line.

³ Appellant, Defendant below Joseph Bendel will be referred to as Joe or Bendel; decedent Douglas Lindberg Jr. will be referred to as Doug or decedent; Tim Loehrer will be referred to as Tim.

⁴ While what happened next or before is disputed, this fact is relatively undisputed by all parties and witnesses.

Leading up to this event, Joe had not been spending a lot of time with Doug because Doug had gotten into several fights around Farley fest. (T79/5). Doug got into an altercation with law enforcement, broke into people's houses and stole things and was somewhat out of control. The day before the incident Joe went to the house Doug was living in to charge his cell phone and see how Doug was doing. He learned that Doug was being kicked out of the house and asked Joe to help clean the house. Joe agreed and stayed that night in the house. The next day they began the work to clean up the house. They decided to grab some speakers so they could listen to music and get something to drink. Doug called Tim Locher to ask him for a ride to get these things as neither Doug nor Joe had a vehicle they could use. Tim picked them up and drove them to Beren's Grocery store where they picked up the beer. They then made a stop at Joe's house to pick up the speakers so they could play music while they worked on cleaning up Doug's house. When unloading the speakers Joe noticed an alternator in the back of the car. Joe told Tim if he needed a hand installing it that Joe did not have a whole lot going on and would be willing to help you. Joe went into Doug's house to hook up the speakers. As he finished Doug came inside and asked if Joe would go help Tim with the alternator. Joe agreed so the three of them got back into the car and headed back out of town when Joe asked Tim to stop once again at Beren's as Joe needed to get some fuel for his lawn mower. Tim indicated this was actually a third stop because he forgot to pick up water, his purpose for coming to town. Joe grabbed a gas can and they stopped to get a few gallons of fuel. The three men then proceeded out to Tim's house.

When they arrived the car that needed the alternator wasn't there, but rather was at a house down the road. Tim thought they could try to jump it and just cruise it over to Tim's, but determined they couldn't do that because the battery that he brought along to use didn't have the right posts so the cables wouldn't reach. Tim then went back to Tim's house to get tow ropes and Tim's truck to tow the car. However, Tim couldn't get the pickup started. Tim returned to get Doug and Joe to help jump the pickup. Tim and Joe went back up the road to pull the car back to Tim's place. Joe rode in the car and Tim pulled it. At this time Doug had remained at Tim's place and was on a four-wheeler. Doug was horsing around on it as Tim and Joe were pulling the car back. At one time almost running into the towed vehicle. When arriving at Tim's place Joe began working on installing the alternator.

Joe got the tire off and got the bolts loose on the alternator. At this time Tim left briefly to take water somewhere. While gone Doug called for Joe to come into the house, grabbed a bottle of Vodka and poured them both a shot. Joe returned to his task. Tim returned while Joe was doing this work. Joe asked Tim if he had a hot spot on his phone as Joe wanted to look something up on the internet about the repair. They tried to get the hot spot to work as Joe did not have cell phone access and needed wifi to do anything. Joe was not able to get his phone to work on Tim's hot spot so he used Tim's phone to check on the repair question. When Joe went back to the repair Tim was sitting in a lawn chair and said he forgot to get gas so he could mow the lawn. The riding lawn mower was near the car being worked on. Joe offered to give him some gas from the can he'd filled up on the way out. Tim said that would be great so he could get the lawn mowed. Joe went to Tim's car parked near the car being worked on and retrieved his gas can. Joe

went to the lawn mower and put in a gallon of gas, and then Tim got on the mower. At this time Doug hollered to Joe to bring the gas can over to the fire pit as he was trying to start a fire and having difficulties.

Joe headed over toward the fire pit, walking with the gas can when suddenly and unexpectedly Doug comes around from behind Joe and grabs him in a choke hold.⁵ Doug pulled Joe straight back, grabbed him really tight. The gas can in Joe's had got tossed in the air and Joe started tapping Doug to let go, but Doug did not stop until Joe was on the ground having momentarily lost consciousness. (Tim testified he wasn't sure Joe lost consciousness, but confirmed the unprovoked attack). (T58/5)

Despite efforts to get Doug to stop or release him Doug did not stop until Joe was on unconscious and on the ground.⁶ Joe had difficulty getting up, disoriented and scared. Shaking and struggling to stand on his own he notices Doug was a short distance away where he had retreated. As Joe got to his feet he yells at Doug 'what the fuck are you doing? Stop it!'. Now worried what to do Joe turns his back to go retrieve the gas can when Doug again runs up behind Joe and tries to choke him. Joe now aware of the attacks turns to face Doug yelling 'dude what the fuck, stop it! What is wrong with you'. But according to Tim, Doug was pretty tuned up. (I8/21). Doug had a tendency when

⁵ The testimony is undisputed that this attack occurred. Tim, the surrogate grandfather of decedent, downplayed the event and at the hearing and denied there were other attacks. In his interview with DCI his description was different, including an ongoing 'horseplay' that he demanded stop. Since Tim's testimony on the events has changed or evolved, the facts described are from Joe's consistent description of events.

⁶ Tim was nonspecific on the degree of the assault but confirmed that Joe was 'taken to the ground' by the choke hold. (I9/33).

drinking once he started aggression he would not stop. (T89/4, 89/20). When Joe turns to face him Doug retreats, but when Joe turns back to his work Doug comes at him again.

As Doug attempts to attack him the third time Joe picks up a 2X4 that is lying on the ground by the fire pit and turns to face Doug swinging. As Doug retreats again, Joe pursues him approximately 50 yards around a camper towards a garage or barn. At this time Joe is in shock and does not know what to do. There is no cell phone coverage at the farm site, he has no vehicle to get away, and Tim is not helping to stop the attacks, other than to yell at Doug to 'knock it off!'. From past experience Joe knew Doug was unpredictable when he drinks and would not listen. Joe believed the only way to stop the attacks was to incapacitate Doug.

As they approach the building Doug a few steps ahead ran into the tall grass/weeds beside the building. At that point Joe stops. Not sure what to do Joe again turns back towards the fire pit when after only a step or two Doug charges out of the weeds and attacks a fourth time. Joe, left with no other choice but to defend himself swung the 2X4, hitting Doug a couple of blows to the head. After Doug stumbles and falls Joe hits him in the torso/body area several more times until he was sure Doug would not get back up.⁷

Joe was in shock thinking 'Oh my God, what is going on?' Joe turns around to look for Tim and sees his car already down the driveway to the road. Joe proceeded that way trying to figure out what to do. Tossing the 2X4 back on the ground, Joe was trying to figure out how to get back to town.

⁷ The State claims it's pathologist estimate as many as ten blow, including the initial two to the side of the head. Tim claims thirty. While there is no way to accurately determine, the estimate of ten is likely at the high end of the estimate.

Without phone reception, a vehicle or anyone who could help him he walked up the driveway where he stood for a minute or so until he sees Tim coming to the yard and pull back into the driveway. Joe walks over to the car and asks Tim for a ride back to town. Tim agreed to do so, but wanted to shut some things off in the house so Doug wouldn't get in. As Tim went into the house Joe walked back towards where Doug was laying. He could see that Doug was breathing and did not see any blood so believed he would be alright. Joe and Tim got into Tim's car and drove back to Big Stone City where Tim dropped Joe off.⁸

II. STATEMENT OF QUESTIONS PRESENTED

Issue 1: Right to Appeal.

Does SDCL 22-18-4 granting immunity from prosecution of necessity grant a right of appeal prior to trial on the charges?

If an interlocutory appeal is not allowed defendant has no appellate avenue to review issues as an acquittal would not be appealed by Defendant and a conviction would prevent review of the issues. While discretionary appeal is available, it is not an adequate substitute for the right to appeal.

Issue 2: Hobson's Choice

Did the trial court err in failing to properly consider Defendant's Affidavit, putting Defendant to the Hobson's choice of surrendering his rights under the Fifth Amendment or surrendering his right to statutory immunity.

Issue 3: The Legislature has spoken.

Did the trial court err in finding that the new stand your ground statute did not change the law of self-defense?

⁸ While the State adopts one version of the 'relative's' fluid description of event, for the purpose of this Motion, such discrepancy is not significant as there is no dispute that Douglas Lindberg in an unprovoked attack grabbed Joe Bendel from behind in a choke hold, taking Joe to the ground. All of the events that followed, in defense of his life, are statutorily entitled to immunity from prosecution.

The legislature changed the law. The circuit court simply applied prior law.

Issue 3: Immunity.

Did the trial court err in denying immunity based on self-defense?

Issue 4: Clear and Convincing must have a floor.

Did the trial court err in finding that the testimony of a witness who was inconsistent and admittedly false in some respects support a clear and convincing standard?

Clear and convincing cannot rest on false and inconsistent testimony no matter how convincingly it is presented.

The Circuit Court clearly erred in finding Tim credible under the clear and convincing standard

III. RELIEF SOUGHT

This is a case of first impression. The South Dakota legislature, granting immunity from prosecution in self-defense matters, afforded Defendant a right not to stand trial. Having been attacked, and defending himself, the legislative policy demands reversal.

Since the statute provides not only immunity from liability, but from prosecution, the right to have this issue resolved prior to having to face the challenge of a criminal prosecution mandates resolution both at the Circuit Court level and on appeal prior to a trial on criminal charges. Whether as a matter of right or judicial discretion is unclear, but the clear intent is a pre-trial resolution, much like §1983 appeals is required.

The Circuit Court, relying on a witness who gave admittedly false testimony, from a witness that was changing facts each time he described events, determined the witness was credible and as such that clear and convincing evidence existed to deny Defendant's right to immunity. Such ruling fails to apply the proper standard in reviewing the Motion.

The State, arguing that the legislative adoption of SDCL 22-18-4 made no change in the law of self-defense,⁹ fails to recognize the strong presumption of immunity in pursuing charges against Defendant. The self-defense statute modified the reasonableness question. The statute specifies the proper question is did the person asserting self-defense reasonably believe force was necessary. This language clearly altered the analysis from was the force used reasonable to was the need for force as perceived by the defendant reasonably perceived.

IV. STATEMENT OF LAW

In 2021 the South Dakota legislature, addressing the violence spreading around the nation, and the perceived difficulty in protecting oneself or others and the unfettered prosecutorial discretion on what acts to charge and what not to charge, adopted SDCL 22-18-4.8 granting immunity from prosecution those individuals reasonably believing they needed to use force to defend themselves. This statutory plan reversed the previous hurdles individuals accused of using force had to leap in the defense of themselves or others.

The prior statutory provisions on self-defense and stand your ground have now been repealed. SDCL 22-5-9; 22-16-34; 22-16-35. So too presumably must the language of the jury charge reflected in 2-9-1 incorporating the repealed language be superseded.¹⁰

⁹ This is ironic since the State has already taken the position before this Court that the state made a substantive change, which the Court confirmed. *State v. Smith*, 2023 S.D. 32, 29902 -a- SRJ (S.D. July 12, 2023).

¹⁰ The jury instruction also is drafted with the view that self-defense was an affirmative defense. A view that has now been modified by statute.

Unlike the former defense of SDCL 22-5-9 (repealed) which only allowed 'sufficient' resistance, or SDCL 22-16-34 (repealed) and SDCL 22-16-35 (repealed) which required 'great personal injury, and imminent danger of such design being accomplished', the current statutory provisions SDCL 22-11-4¹¹ contain no such limitations.

The stand your ground immunity statute provides:

22-18-4.8. Immunity-Burden of Proof.

A person who uses or threatens to use force, as permitted in SDCL 22-18-4 to SDCL 22-18-4.7, inclusive, is justified in such conduct and is immune from criminal prosecution and from civil liability for the use or threatened use of such force brought by the person against whom force was used or threatened, or by any personal representative or heir of the person against whom force was used or threatened, unless:

(1) a. The person against whom force was used or threatened is a law enforcement officer, who was acting in the performance of official duties; and

b. The officer identified himself or herself; or

(2) The person using or threatening to use force knew or reasonably should have known that the person was a law enforcement officer who was acting in the performance of official duties.

The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by a defendant in the defense of any civil action brought by a plaintiff, if the court finds that the defendant is immune from prosecution in accordance with this section.

In a criminal prosecution, once a prima facie claim of self-defense immunity has been raised by the defendant, the burden of proof, by clear and convincing evidence, is on the party seeking to overcome the immunity from criminal prosecution provided for in this section.

As used in this section, the term, criminal prosecution, includes arresting, detaining in custody, and charging or prosecuting the defendant.

SDCL 22-18-4.8 (*Emphasis added.*)

¹¹ The current self-defense and stand your ground laws could reasonably be viewed as a legislative rejection of the reasoning in *State v. Pellegrino*, 1998 SD 39, 577 NW2d 590 (S.D. 1998) which addressed limitations on using force in defense of self or dwelling.

As this Court has explained, “SDCL 22-18-4.8 is more than just an affirmative defense to a crime; the immunity afforded by the statute is a legislative determination that justifiable homicide is not a crime subject to prosecution. The 2022 amendment further reflects the legislative intent to create a substantive right to be free from criminal culpability, including “arresting, detaining in custody, and charging or prosecuting the defendant[]” when a homicide is justifiable.” *State v. Smith*, 993 N.W. 2d 576, 2023 S.D. 32 (S.D. July 12, 2023).

While the statute is clear on the purpose, the procedure to be applied has presented the bench and bar challenges. At the outset, what is sufficient to raise a prima facie claim of self-defense immunity? Defendant attempted to meet this obligation by presenting a Motion asserting the immunity, supported by his affidavit. The State objected to the affidavit as insufficient and insisted the Defendant had to testify to raise the claim of immunity. The Circuit Court found that the State was correct that the affidavit should not be considered, but determined that under the terms of the statute the Motion was sufficient to make a prima facie claim and the burden was on the State to prove the absence of self-defense.¹²

At the evidentiary hearing the State provided one eyewitness, the DCI agent that investigated the case and pathology.¹³ Defendant, as the only other eyewitness, again

¹² Once the issue is raised, how is the issue to be determined? Is a Motion hearing the proper avenue, or is defendant entitled to a jury to decide the fact intensive circumstances supporting the claim of self-defense. No easy question, as the right to trial by jury, Constitutionally guaranteed, the right should extend to this statutory right of immunity?

¹³ The State also offered three other brief witnesses to offer context to events.

tendered his affidavit to set forth facts of the incident. The Circuit Court again refused to receive the affidavit,¹⁴ (T120/20).

The Circuit Court gave significance to the fact that Bendel was larger in size than Lindberg ("First, we note that our law does not require one to be smaller than an attacker to lawfully use force to prevent an attack. *State v. Bruder*, 2004 SD 12, 676 N.W.2d 112 (S.D. 2004)); that Bendel, after being attacked gave pursuit to his attacker, and that having been attacked, (South Dakota Pattern Jury Instruction 2-9-2: A person who has been attacked and who is exercising the right of lawful self-defense is not required to retreat, and may not only defend against the attack but also may pursue the assailant until secure from danger if that course appears to the defendant, and would appear to a reasonable person in the same situation, to be reasonably and apparently necessary; and this is the defendant's right even if safety may have been more easily gained by withdrawing from the scene. *State v. Bruder*, 2004 SD 12, 676 N.W.2d 112 (S.D. 2004)); by picking up a 2x4 on the ground he was converted from victim to assailant (South Dakota Pattern Jury Instruction 2-9-5: Where an assault is made with only the hands and fists but with such force and in such manner as is likely to produce great bodily injury, the person attacked may lawfully resist the attack with whatever force is reasonably and apparently necessary); (Where "the individual situation required an immediate response ... to prevent unlawful force from being inflicted upon [defendant] or another," the claim of self-defense

¹⁴ After twice refusing to even consider Bendel's affidavit, the Circuit Court 'reconsidered' in the memorandum decision but gave it 'proper weight considering it has not been subjected to cross examination'. However, a reading of the Circuit Court's memorandum decision reflects no consideration of the testimony in the affidavit.

is available under SDCL 22-18-4. *Bogenreif*, 465 N.W.2d at 781). Each conclusion is contrary to law.

Based on this background the following issues arise:

APPEAL AS A MATTER OF RIGHT OR DISCRETION

Immunity is not just from liability, but from having to stand trial. SDCL 22-18-4.8 is more than just an affirmative defense to a crime; the immunity afforded by the statute is a legislative determination that justifiable homicide is not a crime subject to prosecution. The 2022 amendment further reflects the legislative intent to create a substantive right to be free from criminal culpability, including "arresting, detaining in custody, and charging or prosecuting the defendant[]" when a homicide is justifiable. *State v. Smith*, 993 N.W.2d 576 (S.D. 2023).

SDCL 15-26A-3(2) provides that judgments and orders of circuit courts from which appeal may be taken from include an order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken; 15-26A-3(5) an order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership, or deposit in court; 15-26A-3(6) any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding.

The right to immunity is a substantial right. The Circuit Court has entered an order denying that right to defendant. This order, affecting Bendel's substantial right, in effect determines the action and prevents a judgment from which an appeal might be taken. While SDCL 23A-32-12 provides a defendant in a criminal case can appeal 'any intermediate order made before trial, as to which an appeal is not allowed as a matter of right', which is a matter of sound judicial discretion, the rules of appellate procedure likewise apply unless otherwise appearing.

A right to immunity is uniquely a civil/criminal hybrid, regardless of whether it arises out of a criminal charge. The right of immunity prevents the charge. An Order rejecting the right to immunity finally determines that distinct issues. The statutory right is wholly ineffective if an appeal of right is not permitted when the right is rejected. The self-defense immunity statute creates a presumptive right of immunity that precludes the State from arresting or commencing a criminal prosecution against a person who claims immunity. The statute does not merely "regulate the steps" of prosecution. Rather, it presumptively forecloses criminal culpability. *State v. Smith*, 993 N.W.2d 576 (S.D. 2023).

Much like qualified immunity under 42 USC §1983 because immunity is "an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis deleted). Accordingly, the US Supreme Court has repeatedly stressed the importance of resolving immunity questions at the earliest possible stage. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)(*per*

curiam). *Pearson v. Callahan*, 129 S. Ct. 808, 172 L. Ed. 2d 565, 77 U.S.L.W. 4068, 555 U.S. 223 (2009).

SDCL 15-26A3(2) intermediate appeal is the only method to preserve the statutory immunity provided in SDCL 22-18-4.8. The Circuit Court having rejected self-defense immunity, a substantial right, and entering an Order to that effect, this distinct issue is final.¹⁵ The nature of the right, and the ruling forecloses the ability of a defendant to obtain appellate review. Therefore an appeal of right exists. SDCL 15-26A-3(2).

It is axiomatic that if a defendant is denied dismissal on immunity grounds, and stands trial, he is denied the opportunity to have the immunity issue reviewed. However, the harm has already occurred as he has wrongfully had to stand trial. If he is acquitted at trial he had no right or reason to appeal.

In addition, an appeal of right pursuant to SDCL 15-26A-3(5) would apply. The denial of immunity by pretrial motion to dismiss would constitute an Order which 'refuses any of the remedies of arrest' as the right not to be charged, held or tried has clearly been refused by the Order of the Circuit Court.

Alternatively, 15-26A-3(6) strongly compels a discretionary intermediate appeal. The self-defense immunity statute provides immunity from criminal prosecution, not merely immunity from criminal and civil liability. For that reason, adjudication of

¹⁵ "Orders are distinguishable from judgments. A judgment is a 'final determination of the rights of the parties in an action or proceeding.' SDCL 15-6-54(a). An order is '[e]very direction of a court or judge, made or entered in writing and not included in a judgment[.]' *Id.*" *Dollar Loan Ctr. of S.D., LLC v. State*, 920 N.W.2d 321 (S.D. 2018)

immunity is essential, and must occur prior to a trial. Much like qualified immunity of officers under §1983 this is an immunity not only from liability, but from suit. If appellate review is rejected whether of right or by discretion, defendant is deprived of a significant statutory right.

"Immunity is a legal question to be decided by the court and is particularly amenable to summary judgment. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 536, 116 L.Ed.2d 589, 595 (1991); *Hart v. Miller*, 2000 SD 53 at 13, 609 N.W.2d 138, 143; *Horne v. Crozier*, 1997 SD 65 at 6, 565 N.W.2d 50, 52. Qualified immunity is not just a defense to liability but an entitlement not to stand trial or face the burdens of litigation. Therefore, immunity questions should be resolved as early as possible. *Horne*, 1997 SD 65 at 6, 565 N.W.2d at 52, citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411, 425 (1985). Otherwise, the protection of qualified immunity is effectively lost if there must be a trial to establish that no trial is necessary. *Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272, 281 (2001). *Swedlund v. Foster*, 2003 S.D. 8, 657 N.W.2d 39 (S.D. 2003). If an appeal of right does not arise from the ruling, the circumstances arising under SDCL 22-18-4.8 in this case compel discretionary review.

AFFIDAVIT IS EVIDENCE:

If Defendant has a right to present the claim, is he to be muzzled or put to the Hobson's choice of remaining silent or surrendering his rights under the Fifth Amendment to remain silent? The immunity right has little meaning if a person is unable to present his case. The ability to respect both is easily accomplished by use of the affidavit.

However, if he presents facts by affidavit is it adequate to reject the affidavit as the Circuit Court did twice in this case, or treat the affidavit as ineffective to present facts as the Circuit Court ultimately did in this case? The manner the affidavit was treated by the Circuit Court was the same as if rejected out of hand.

The question of immunity from prosecution is similar to the immunity from suit expressed in 42 U.S.C. § 1983 which procedures are usually resolved by affidavit to raise or assert the issue of qualified immunity. In such context the Court considers that 'immunity is a legal question amenable to summary judgment. *Swedlund v. Foster*, 2003 S.D.8, 657 N.W.2d 39 (S.D.2003). Even a good faith mistake does not void the right to immunity. *Id.*

In the summary judgment context, affidavits are routinely used to support motion. Immunity is a legal question to be decided by the court and is particularly amenable to summary judgment. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 536, 116 L.Ed.2d 589, 595 (1991); *Hart v. Miller*, 2000 SD 53 at 13, 609 N.W.2d 138, 143; *Horne v. Crozier*, 1997 SD 65 at 6, 565 N.W.2d 50, 52. 16

Further, the issue is not whether another reasonable, or more reasonable, interpretation of the events can be constructed, *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), but rather whether Defendant's actions were in self-defense from his view of the facts and circumstances at the time.

¹⁶ After the issues is raised the stand your ground immunity statute mandates that the State must refute the claim of self-defense by clear and convincing evidence. It is not sufficient to simply raise a 'fact question' to defeat the claim. This burden shifting and heightened standard demonstrates the strong legislative intent in granting immunity for such acts.

SDCL 15-6-43(e) provides when a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard *wholly or partly* on oral testimony or depositions. (*Emphasis added*).¹⁷

In a case such as this with only two eyewitnesses, the defendant and the decedent's surrogate grandfather, should only one side be allowed to set forth the facts? It would border on the ridiculous to conclude that grandpa is not interested in the outcome. Such a conclusion is even more bizarre when grandpa admits he lied to DCI about key facts at the outset, and then modifies his version of the facts on subsequent telling's. Grandpa eventually admitted to DCI that he was wholly dependent on decedent's family for his shelter, car, and very livelihood. (T118/21).

It also cannot be a surprise that this was an emotional experience for the man. However, emotion does not equate to accuracy or observation. Dependency, the root of his fear, creates a strong presumption that his view of the facts is at the very least colored by this bias. On the other hand Bendel's affidavit, consistent in all respects with the physical evidence and the uncontested nature of the unprovoked sudden attack by Lindberg, strongly supports the presumptive right to immunity.

In the immunity from prosecution situation, with the State already having expressed the intent to prosecution, barring a confirmation of self-defense immunity, the matrix for a decision has to give proper consideration of the constitutional implications.

¹⁷ While clear and convincing evidence requires more than affidavit testimony, refuting the existence of clear and convincing evidence could be done by affidavit, much like raising a fact questions. This is even more appropriate when coming up against significant

The State is not entitled to cross-examine a Defendant. Yet to present a claim of immunity a defendant must have the ability to set forth the facts upon which such claim is made. While the Court can consider the manner of proof (ie: oral testimony vs. affidavit), the Court is not free to disregard the affidavit or treat it as insufficient to prove a fact. In weighing the testimony and evidence, particularly when the other evidence is not strong, or extremely contradictory, the affidavit can and must be considered for the facts sworn to by the defendant. The Circuit Court's failure to properly consider this evidence is a clear abuse of discretion.

THE LEGISLATURE CHANGED THE LAW

Issues of statutory interpretation are questions of law. Review of interpretation and application is de novo. "In conducting statutory interpretation, the Court give 'words their plain meaning and effect, and read statutes as a whole.' " *State v. Bowers* , 2018 S.D. 50, ¶ 16, 915 N.W.2d 161, 166 (internal citations and quotation marks omitted) (quoting *Expungement of Oliver* , 2012 S.D. 9, ¶¶ 5–6, 810 N.W.2d 350, 351–52) *State v. Smith*, 993 N.W.2d 576 (S.D. 2023).

The statutory provision does not provide that reasonable force be used, but rather the person 'reasonably believes that using deadly force is necessary to prevent imminent death or great bodily harm...' SDCL 22-18-4.1.

The Legislature clearly intended a change from prior versions of self-defense:

Prior to the legislative adoption of the stand your ground immunity provisions South Dakota law had a version of stand your ground and the cases interpreting the

statutory and constitutional protections afforded an accused. The burden of proof is on the

provision form the basis of the current pattern jury charge 2-9-1. However, this prior law was different in language and scope.¹⁸

Prior to the adoption of SDCL 22-18-4 to 22-18-4.8 the analysis of self defense had its foundation in the common law. The statutes, now repealed, focused on a limited ability to defend and were reviewed on the reasonableness of the action. See SDCL 22-16-34 (repealed in 2021 by House Bill 1212); SDCL 22-16-35 (same); 2021 S.D. Sess. Laws ch. 93, § 15. The pattern jury charge and case analysis focused on the question of whether the force used was reasonable in scope. See *State v. Pellegrino*, 1998 SD 39, 577 NW2d 590 (SD 1998); *State v. Bruder*, 2004 SD 12, 676 NW2d 112 (SD 2004); *Conaty v. Solem*, 422 NW2d 102 (SD 1988). *State v. Strozler*, 2013 S.D. 53, 834 N.W.2d 857 (S.D. 2013). Upon these decisions interpreting the limitations and availability of self-defense under prior statutes the SD Pattern Jury Instructions were formed.

SDCL 22-16-34 (repealed) and SDCL 22-16-35 (repealed) required a foundation qualification of 'imminent danger of great personal injury'. SDCL 22-5-9 (repealed) provided that allowed 'sufficient resistance' to prevent an offense against a person. All three repealed provisions limited when and how much force could be brought to bear as self-defense. The various court decisions analyzing the language of the prior statutory provision is not surprisingly rooted in the limitations expressed in prior language.

State. Refuting the State's evidence does not require the same level of proof.

¹⁸ As crimes of violence seem to be on the rise, and people are finding it necessary to defend themselves, legislatures from around the country have been expanding the protections for those who find the need to do so. This need seems compelled as the patchwork of unfettered prosecutorial discretion has shown that the decision of who to charge and who not to charge in a given case has left a sour taste in the mouths of the public and many state legislatures.

With the adoption of stand your ground immunity, the statute redirects the analysis on the issue of whether the person asserting the stand your ground defense had a reasonable belief that the use of force was necessary. 22-18-4.3. Unlike the prior self defense provisions the statute does not limit the force used or require the force used be only what is necessary to stop the danger.¹⁹ Rather, if a person has a reasonable belief that force is needed, the person is not obligated to split hairs on how much force is too much.

In this case Joe's belief that force or threat of force was reasonable is presumptively correct has to form the starting point of any analysis. Having been attacked, by his testimony repeatedly,²⁰ while in a location and environment that prevented any other means of protecting himself or extracting himself to a safe location made the reasonable belief necessary. After a sudden and unprovoked attack from behind, choked to unconsciousness, and subsequent repeated attacks, Joe felt threatened, he picked up the only implement available a 2x4 on the ground and tried to dissuade his assailant from further attacks. Despite the fact that he was in possession of the 2x4 and had pursued his attacker for some distance, he was again attacked as soon as he turned his back to his assailant and was left with no choice but to resist the attack with force. This testimony is compelling despite the testimony of Tim that it did not occur. 21

¹⁹ Bendel does not mean to imply that the modified self-defense statute is a hunting license. Far from it. however, the statute redirects the analysis to the viewpoint of the person asserting self-defense, rather than the objective review of 20/20 hindsight.

²⁰ Even his initial interview with DCI made clear he relayed multiple attacks had occurred.

²¹ It was impossible for Tim to see what occurred based on his own admission that he was standing at the end of the sidewalk. State's Exhibit 14 clearly shows that from that

The State focuses on the number of strikes, asserting that ten was too many to be defensive. However, having made the decision to pull the trigger²², he is left with not knowing how angry his assailant will be if he is able to get back up. A choice the statute does not require of him.²³ When starting with the presumption of immunity, coupled with the clear subjective belief that force was necessary, the State's equivocal evidence is deficient.

CLEAR AND CONVINCING APPLIED:

The application of facts to a legal standard presents a mixed question of fact and law requiring us to apply a de novo standard. *State v. DeLaRosa*, 2003 SD 18, ¶ 5, 657 N.W.2d 683, 685; *State v. Bruder*, 2004 SD 12, 676 N.W.2d 112 (S.D. 2004)

It was the best of times, it was the worst of times... much like Dickens's *A Tale of Two Cities* this case provides a tale of two events. The ironic part is that both versions are told by the same witness. But rather than the Dickens's classic this case resembles more 'like sands through an hourglass' as the State's witness, much like shifting sand, tells a different factual story with each iteration.

The statute is crystal clear that the burden of proof is on the State to refute self-defense, and the burden of proof is by a clear and convincing evidence standard. The clear and convincing evidence standard is well established and applied as:

location he would be unable to see anything that occurred due to the obstruction of his view by an RV.

²² Perhaps it is interesting that officers are 'taught' that if the decision to pull the trigger is made, they should continue to do so they empty the clip. Why should the analysis be different because of the weapon that was used?

²³ After the first two strikes to the side of the head, when decedent fell to the ground, it is likely the remaining blows are irrelevant. The State's pathologist testified that the blows to the head were the fatal blows.

[i]ts technical meaning has been expressed as "the witnesses must be found to be credible, that the facts to which they have testified are *distinctly remembered* and the details thereof *narrated exactly and in due order*, and that their testimony is *so clear, direct and weighty* and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."

People in Interest of L.A., 224 N.W.2d 262 (S.D. 1983), citing *Cromwell v. Hosbrook*, 81 S.D. 324, 329, 134 N.W.2d 777, 780 (1965) (citations omitted)(*Emphasis added*)

To meet this heightened standard of proof, the evidence must have certain attributes that were wholly absent in this case.

The witness must be credible, and...

Distinctly remembers:

Narrated exactly

In due order:

Clear, direct and weighty:

The State cannot come close to this standard unless you choose to ignore all but one of Tim's accounts of the incident. Looking at the record as a whole, the State's facts are drowned by the shifting versions of each iteration of the eyewitness account. Tim Loerher, the State's only eyewitness was interviewed twice by DCI, once by Defendant's investigator and testified at the hearing.²⁴ Each of these descriptions vary in several material ways.²⁵

For example:

²⁴ Tim was also interviewed by Deputy Bjordahl, but that interview was not recorded so we have no record of the conversation.

²⁵ While the Circuit Court found Tim to be 'credible' and the State will likely argue that this determination resolves the discrepancies. However, if the witness tells more than one version of the facts, it is not a question of how credible he appears, but the question is how

The location of the eyewitness:

At the motion hearing Tim testified when questioned by the State that he was sitting in a lawn chair by the car being repaired (T35/8) and on cross-examination testified he was sitting on the fender of the lawnmower. (T55/5). When questioned by DCI the day after the incident he claimed he was inside the house and when he came outside the two men were already fighting. (17/13, 9/3, 9/11). However, when cross-examined at the motion hearing about his statement he denied ever saying that. (T54/25). At the first questioning of DCI he also stated he was inside when the incident started.

What the 'eyewitness saw:

While Tim has consistently confirmed that Defendant was in an unprovoked and sudden manner attacked from behind and choke. His description of this has varied. He testified that he was choked to the ground where he laid for a second or two (T36/2). However when DCI 'classified it as horseplaying, he agreed that at first he thought they were doing horseback riding. (150/26). However, at the hearing he testified the attack occurred spontaneously, (T35/20) yet still confirmed the State's leading question of horseplay. (T37/6).

What happened after the attack has also varied:

One version has the two men running to the location where decedent fell in a single event. (19/29) Another has the two men running with multiple locations of the event. (T36/12). In this version Tim claims Joe hit him a couple times in the head but claims Doug ran an additional 30 yards before falling. (T36/12). (of course this version has evolved when it became clear he had physical limitations on what he claimed to have seen). One version has the incident in one location, (Exhibit A indicating the fall is at the top of the circle drive) but different than where the physical evidence establishes the decedent fell.

reliable is any of the multiple versions of his story. In addition, the resolution of discrepancies between witnesses is the not same as discrepancies of the same witness.

In one version Tim claimed Defendant turned on him and advanced with the pipe so he ran to his car to get away. (I11/8). At the hearing he testified he yelled at Defendant to stop and Defendant did not so he got in his car to call 911.

When Tim returned to the yard, after finally admitting he actually gave Joe a ride back to town after adamantly lying about this, he told DCI that he saw Joe standing behind the black car (I44/32), (the car being repaired) when he pulled up. (I59/13). Initially he told DCI that this Joe dude was just standing there (I42/34), but can't really say where. (I43/2). However at the motion hearing he testified he did not see Defendant until later, coming across the yard north of the house, a different location. (T49/8). While on cross-examination he testified he did not see him until later but that he was by the driveway close to the road, right where he had just driven. (T64/19). At motion hearing Tim testified that he went to check on Doug (T49/1) testified at length on how Doug looked and his condition. (T49/4). Yet when he was interviewed by DCI he said 'to be honest with you , I didn't hardly look at him (I45/34).

When interviewed by DCI he was 100% sure the weapon was a PVC pipe that he had laying on the ground. (I8/16, 10/25, 26/20). However at the hearing he was now sure it was a 2X4 painted white. (T38/18).

The admitted lie:

There is no question Tim lied to DCI directly. He told them in his first interview that he did not know where Defendant went or how he got away from the scene. (I13/22). He continued to deny knowing where Joe was, despite having transported him to town. (I43/2). In the second interview, despite DCI knowing for sure that Tim had transported Defendant back to town, (I18/20) he continued to lie about this fact until backed into a corner and DCI made clear that he was 'aiding' the crime before admitting he lied. (I42/21). At the hearing he justified the lie by acknowledging that he felt he had to for the decedent's family controlled his home, vehicle, income and means to survive. (T118/21).

Tim explained to DCI he didn't lie because he was afraid of charges or being caught in a falsehood, but being deathly afraid of Doug's family. (I41/l 1).

Nonsensical version:

Tim testified that when decedent needed some gas to start the fire Defendant offered gas and went to the car to retrieve the gas can and took it to the firepit where the attack occurred. However on cross-examination he admitted that gas was first put into the lawnmower. (T57/11). However, rather than remember that the conversation of gas started when he mentioned he forgot to get gas for the lawnmower, he claims that Joe just decided on his own to put gas in the lawnmower, and suggested he 'put the rest of the gas' in the lawnmower first. (T57/15). He testified that he did not ask for gas in the lawn mower, but then said he might have but he doesn't think so. (T57/13).

The gas questioning has also further demonstrated a confused narrative. Tim came to town to get water. Yet testified that he forgot the water on the first trip to the store adamant that he did not take Joe on this trip. Then he went to get water on the second trip while going to Joe's to get speakers. Any at the hearing testified that they took a third trip to the store so Joe could get gas before proceeding directly to Tim's house. 31/5, 31/23, 32/12. This confused narrative occurs when Tim states facts that are not accurate, and then to make the actual facts fit his narrative he has to add things. Since he was adamant that Joe did not go to the store the first trip, and since Joe clearly went on two trips, he had to add a third trip. This despite the fact that during his initial interview it was clear there were only two trips to the store, a preliminary trip and then one stop on the way out of town.

Perhaps the most accurate testimony from Tim was his admission that he 'can't remember too good and that he is not too positive. (T48/10). While this testimony was only on the content of the 911 call, it clearly appears to more accurately reflect the bulk of his testimony.

The reliability of Tim's testimony is demonstrated by the fact that despite 'thinking about it for three days' prior to the hearing and being prepped by the State, (T66/10) he

could not recall the time he talked to Doug until reminded by the state, (Testified he called around 4PM (T29/17) but when reminded by State of time stamp at the store he changes to 3:30 ish (T31/6).²⁶ Tim could not recall around what time he called 911 until reminded by the State. (T48/10). Even the 'horseplay' theory was by leading questions from the State. (T37/6).

The most damning testimony, the description of the incident where decedent fell, is perhaps also the clearest discrepancy. Quite simply Tim could not have seen the incident from where he has consistently said he was standing! Ironically, in the shifting narrative Tim has consistently stated that he came to the end of the sidewalk where he observed everything before getting in his car and driving away. In both his interview with DCI and his testimony at the motion hearing he was again 100% sure he move to the end of the sidewalk. (T45/19, 63/14). In fact this is what he stated in his interview with Defendant's investigator as well. (Exhibit A). However, from the end of the sidewalk you simply cannot see where the decedent was on the ground. (Exhibit 14). From the end of the sidewalk, there is an RV and truck that prevents line of sight to the location of the decedent's body where, at least in some versions, the final altercation took place. This physical discrepancy more than anything else demonstrates that Tim is testifying from other than his own knowledge.

Without even considering Bendel's affidavit the testimony is inconsistent and filled with discrepancies. When considering the changing tapestry that is the testimony of Tim Loehrer, it is difficult to find the testimony distinctly remembered, narrated exactly and in due order and beyond difficult to see it as clear, direct and weighty. Perhaps standing along such testimony might preponderate a version of the facts. However, when standing against the testimony of the Defendant, albeit by affidavit, it does not reach the heightened standard required by the statute.

²⁶ While not a material issue itself, Tim even gave different answers when asked how long he had lived in the Lindberg family's house. Testifying that he had lived there 33 years, but when interviewed said it was 35 years. When cross-examined on this he admitted he could really remember but could figure it out. (T66/17).

While the witness was determined by the Circuit Court to be 'credible', the heightened standard required "the witnesses must be found to be credible... and ... that the facts to which they have testified are *distinctly* remembered and the details thereof *narrated exactly* and *in due order*, and that their testimony is so *clear, direct and weighty* and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." Here, the facts are not really remembered, and with each different narration become less ordered. As such they cannot be clear, direct and weighty.

VI. DOCUMENTS AND EXHIBITS

Documents and exhibits are attached in the appendix hereto and include:

1. Findings of Fact and Conclusions of Law and Order.
2. Notice of Entry of Order.
3. Transcript of Motion Hearing.
4. Transcript of DCI Interview. Defendant's Exhibit B. Defendant has included a transcript of the taped DCI interview Defendant's Exhibit B to allow for record reference to the portions of the interview that are relevant to the issues discussed.
5. State Exhibit 14.
6. Defendant's Exhibit A.
7. Memorandum Decision.
8. Order Appointing Attorney.

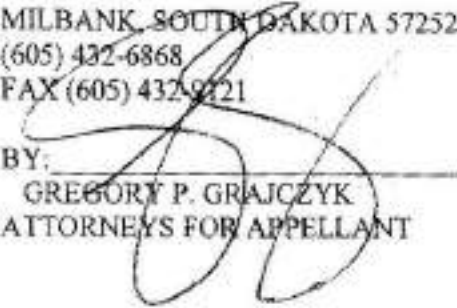
VII. CONCLUSION AND PRAYER

Based on the record, Defendant is immune from prosecution. The Order of the

Circuit Court should be vacated and the matter remanded for dismissal of the charges pending in this matter.

Respectfully submitted,

GREGORY P. GRAJCZYK
ATTORNEY AT LAW
224 E. 4th Avenue
P.O. BOX 68
MILBANK, SOUTH DAKOTA 57252
(605) 432-6868
FAX (605) 432-9721

BY: 
GREGORY P. GRAJCZYK
ATTORNEYS FOR APPELLANT

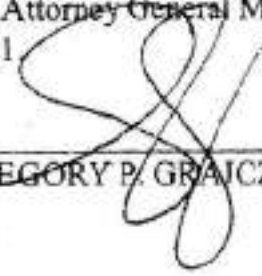
CERTIFICATE OF COMPLIANCE

The undersigned attorney, Gregory P. Grajczyk, Attorney for the Appellants, hereby certifies pursuant to SDCL 15-26A-14 that the Appellants' Petition for Permission to Appeal herein complies with the type volume limitation set forth in such statute.


GREGORY P. GRAJCZYK

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing Appellants' Petition for Permission to Appeal together with the Appendix has been forwarded to all interested parties on this the 19th day of March, 2024, including two copies to Jackson Schwandt, States Attorney for Appellee, at 210 East 5th Ave, Milbank, SD 57252 and Attorney General Marty Jackley at 500 East Capitol Avenue, Pierre, SD 57501



GREGORY P. GRAICZYK

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APR 17 2024

Shirley A. Jensen
Clerk

* * * *

STATE OF SOUTH DAKOTA,
Plaintiff and Respondent,

vs.

JOSEPH PETER BENDEL,
Defendant and Petitioner.

) ORDER DENYING PETITION FOR
) ALLOWANCE OF APPEAL FROM
) INTERMEDIATE ORDER

#30655

Petitioner served and filed a petition for permission to appeal from an intermediate order of the Circuit Court of the Third Judicial Circuit within and for the County of Grant, South Dakota, filed March 20, 2024. Respondent served and filed a response. The Court considered the petition and response and determined that Petitioner does not have a right to appeal from the circuit court's order, it is, further

ORDERED that the petition for permission to appeal from the intermediate order is denied; the Court expresses no opinion as to the merits of the appeal.

DATED at Pierre, South Dakota this 17th day of April, 2024.

BY THE COURT:

ATTEST:

[Signature]
Clerk of the Supreme Court
(SEAL)

[Signature]
Steven R. Jensen, Chief Justice

PARTICIPATING: Chief Justice Steven R. Jensen and Justices Janine M. Kern,
Mark E. Salter, Patricia J. DeVaney and Scott P. Myren.

STATE OF SOUTH DAKOTA)

CIRCUIT COURT

COUNTY OF GRANT)

THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

File No.: 25CRI23-000123

VS.

JUDGMENT OF ACQUITTAL

JOSEPH PETERSON

Appx 1-2 are in
3-4?
Appx need to
be marked in
Brief?

1. The prosecuting Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled not guilty to the aforementioned charge and requested a jury trial. On the 1st day of May, 2024, Roger Ellyson filed a Notice of Substitution for Counsel in place of Greg Grajczyk, on behalf of the defendant, and Mr. Ellyson represented the defendant throughout the remainder of these proceedings.

A Jury Trial commenced the week of October 22-25, 2024, in the City of Milbank, County of Grant, State of South Dakota on the charge. The defendant, defendant's attorney, Roger Ellyson, and Mark A. Reedstrom, appeared at the defendant's trial. On the 25th day of October, 2024, the jurors returned a verdict of Not Guilty.

It is therefore,

ORDERED, that a Judgment of Acquittal is entered.

11/19/2024 3:42:15 PM

BY THE COURT:

Attest:
Mielitz, Brooke
Clerk/Deputy



Deena Ellyson
Judge of Circuit Court

Appx. 32

STATE OF SOUTH DAKOTA)
SS

IN CIRCUIT COURT

COUNTY OF GRANT)

THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA.

Plaintiff.

File No.: 25CRI23-000123

VS.

JUDGMENT OF CONVICTION

JOSEPH PETER BENDEL

Defendant.

AN INDICTMENT was filed with the Honorable Dawn Elshere on the 25th day of August, 2023, charging the defendant with the crime of COUNT 3 – MANSLAUGHTER IN THE FIRST DEGREE, SDCL 22-16-15(2), which offense was committed on or about the 20th day of August, 2023. The defendant was arraigned on the Indictment on the 29th day of August, 2023. The defendant, defendant's attorney, Greg Grajczyk, and Mark A. Reedstrom, Prosecuting Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled not guilty to the aforementioned charge and requested a jury trial. On the 1st day of May, 2024, Roger Ellyson filed a Notice of Substitution for Counsel in place of Greg Grajczyk, on behalf of the defendant, and Mr. Ellyson represented the defendant throughout the remainder of these proceedings.

A jury trial commenced on October 22, 23, 24 and 25, 2024, in Milbank, South Dakota, on the charge. On the 25th day of October, 2024, the jury returned a verdict of guilty.

IT IS THEREFORE, the judgment of this Court that the defendant is guilty of the offense of COUNT 3 - MANSLAUGHTER IN THE FIRST DEGREE, SDCL 22-16-15(2).

SENTENCE

On the 19th day of November, 2024, after the Court and counsel reviewed a presentence report, the Court asked the defendant whether any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court pronounced the following sentence:

IT IS HEREBY ORDERED that the defendant be imprisoned in the South Dakota State Penitentiary situated in the City of Sioux Falls, State of South Dakota, at hard labor for a term of sixty (60) years, there to be kept, fed and clothed according to the rules and discipline governing the institution; and that the defendant shall be given credit for three

hundred ninety-five (395) days for pretrial detention in this matter; and that the defendant forthwith pays court costs in the sum of One Hundred Sixteen Dollars and Fifty Cents (\$116.50).

IT IS FURTHER ORDERED that the execution of twenty (20) years of imprisonment are hereby suspended upon the following conditions:

1. That the defendant reimburses Grant County for the cost of court-appointed attorney on a schedule established by the Board of Pardons and Paroles; and
2. That the defendant obeys all rules and regulations set by the Board of Pardons and Paroles.

IT IS FURTHER ORDERED that the Court reserves the right to amend any and all of the terms of this Order at any time.

11/20/2024 8:57:35 AM

Attest:
Schuelke, Cathy
Clerk/Deputy



BY THE COURT:

A handwritten signature in dark ink, appearing to read "Deena E. Sher", is written over a horizontal line. Below the line, the text "Judge of Circuit Court" is printed.

Appx. 34

STATE OF SOUTH DAKOTA))SS COUNTY OF GRANT) ***** STATE OF SOUTH DAKOTA, Plaintiff, VS. JOSEPH PETER BENDEL, Defendant. *****	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT ***** File No.: 25CR123-000123 AMENDED JUDGMENT OF CONVICTION *****
--	---

AN INDICTMENT was filed with the Honorable Dawn Elshere on the 25th day of August, 2023, charging the defendant with the crime of COUNT 3 – MANSLAUGHTER IN THE FIRST DEGREE, SDCL 22-16-15(2), which offense was committed on or about the 20th day of August, 2023. The defendant was arraigned on the Indictment on the 29th day of August, 2023. The defendant, defendant's attorney, Greg Grajczyk, and Mark A. Reedstrom, Prosecuting Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled not guilty to the aforementioned charge and requested a jury trial. On the 1st day of May, 2024, Roger Ellyson filed a Notice of Substitution for Counsel in place of Greg Grajczyk, on behalf of the defendant, and Mr. Ellyson represented the defendant throughout the remainder of these proceedings.

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SENTENCE

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IT IS HEREBY ORDERED that the defendant be imprisoned in the South Dakota State Penitentiary situated in the City of Sioux Falls, State of South Dakota, at hard labor for a term of sixty (60) years, there to be kept, fed and clothed according to the rules and discipline governing the institution; and that the defendant shall be given credit for four

hundred fifty-six (456) days for pretrial detention in this matter; and that the defendant forthwith pays court costs in the sum of One Hundred Sixteen Dollars and Fifty Cents (\$116.50).

IT IS FURTHER ORDERED that the execution of twenty (20) years of imprisonment are hereby suspended upon the following conditions:

1. That the defendant reimburses Grant County for the cost of court-appointed attorney on a schedule established by the Board of Pardons and Paroles; and
2. That the defendant obeys all rules and regulations set by the Board of Pardons and Paroles.

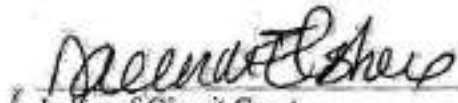
IT IS FURTHER ORDERED that the Court reserves the right to amend any and all of the terms of this Order at any time.

11/25/2024 9:09:43 AM

BY THE COURT:

Attest:
Schuelke, Cathy
Clerk/Deputy




Judge of Circuit Court

Appx. 36

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30927

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSEPH PETER BENDEL,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
GRANT COUNTY, SOUTH DAKOTA

THE HONORABLE DAWN M. ELSHERE
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

Brooklyn M. Mailey
Rebecca Morlock Reeves
25 First Avenue Southwest
Watertown, SD 57201
Telephone: (605) 886-5823
E-mail: Brooklyn@austinlawsd.com
E-mail: Rebecca@austinlawsd.com

ATTORNEYS FOR DEFENDANT
AND APPELLANT

MARTY J. JACKLEY
ATTORNEY GENERAL

Erin E. Handke
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@statc.sd.us

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Notice of Appeal filed December 12, 2024

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30927

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSEPH PETER BENDEL,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Appellant, Joseph Peter Bendel, is referred to as “Bendel.” Appellee, the State of South Dakota, is referred to as “State.”

References to documents are designated as follows:

Settled Record (Grant County Criminal File No. 23-123) .. SR
Immunity Hearing Transcript (February 1, 2024).....IT
Jury Trial Transcript (October 22-25, 2024)JT
Sentencing Hearing Transcript (November 19, 2024).....ST
Bendel’s Appellant Brief AB
Jury Trial Exhibits EX

All document designations are followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On November 19, 2024, the Honorable Dawn M. Elshere, Circuit Court Judge, Third Judicial Circuit, filed an Amended Judgment of Conviction in *State of South Dakota v. Joseph Peter Bendel*, Grant County Criminal File Number 23-123. SR 472-73. Bendel filed his Notice of Appeal on December 12, 2024. SR 552. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE CIRCUIT COURT PROPERLY DENIED
BENDEL'S MOTION TO DISMISS BASED ON IMMUNITY?

Bendel filed a motion to dismiss claiming he had immunity because he was acting in self-defense. After an evidentiary hearing, the circuit court denied the motion.

State v. Smith, 2023 S.D. 32, 993 N.W.2d 576

State v. Tuopeh, 2025 S.D. 16, 19 N.W.3d 37, *reh'g denied* (Apr. 29, 2025)

SDCL 22-18-4.8

II.

WHETHER THE CIRCUIT COURT PROPERLY LIMITED
BENDEL'S PRESENTATION OF 404(B) EVIDENCE?

Bendel sought to introduce evidence of Doug Lindberg Jr.'s prior bad acts to show his state of mind at the time of the attack. The circuit court limited the evidence, allowing testimony only on some prior bad acts.

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

State v. Phillips, 2018 S.D. 2, 906 N.W.2d 411

State v. Rouse, 2025 S.D. 29, —N.W.3d—

SDCL 19-19-404(b)

III.

WHETHER THE CIRCUIT COURT PROPERLY DENIED BENDEL'S MOTION FOR JUDGMENT OF ACQUITTAL?

At the close of the State's case, Bendel moved for a judgment of acquittal. The circuit court denied the motion finding that if believed by the jury, the State presented sufficient evidence to support a conviction. After Bendel rested his case, he renewed the motion, which the circuit court also denied.

State v. Ahmed, 2022 S.D. 20, 973 N.W.2d 217

State v. Bolden, 2024 S.D. 22, 6 N.W.3d 238

State v. Swan, 2019 S.D. 14, 925 N.W.2d 476

IV.

WHETHER BENDEL WAS DEPRIVED OF A FAIR TRIAL?

The circuit court did not rule on this issue.

Madetzke v. Dooley, 2018 S.D. 38, 912 N.W.2d 350

State v. Delehoy, 2019 S.D. 30, 929 N.W.2d 103

SDCL 24-15-4.1

STATEMENT OF THE CASE

On August 25, 2023, the Grant County grand jury indicted Bendel on the following:

- Count 1: Murder in the Second Degree, a Class B felony, contrary to SDCL 22-16-7;
- Count 2: Manslaughter in the First Degree, a Class C felony, contrary to SDCL 22-16-15(1); or in the alternative;

- Count 3: Manslaughter in the First Degree, a Class C felony, contrary to SDCL 22-16-15(2);
- Count 4: Aggravated Assault, a Class 3 felony, contrary to SDCL 22-18-1.1(2); or in the alternative; and
- Count 5: Aggravated Assault, a Class 3 felony, contrary to SDCL 22-18-1.1(4).

SR 14-15.

Bendel moved to dismiss the indictment pursuant to SDCL 23A-8-2(3), (5), or (6), arguing he acted in self-defense, and was therefore immune to prosecution. SR 44-45. He attached an affidavit he signed detailing his version of events. SR 46-49. The State opposed the motion to dismiss and opposed the circuit court considering Bendel's affidavit. SR 40-43, 50-59. The circuit court found Bendel made a prima facie claim of self-defense. SR 60. The circuit court then shifted the burden to the State to prove by clear and convincing evidence that Bendel did not act in self-defense when he killed Doug Lindberg Jr. SR 60. The court set the matter for an evidentiary hearing. SR 60.

At the immunity hearing, the State presented several witnesses and exhibits. *See* IT. The circuit court stated it would not consider Bendel's affidavit because he was not subject to cross-examination.¹ SR 60; IT 120.

A few weeks later, the circuit court issued its memorandum decision. SR 229-34. The court reconsidered its position on Bendel's

¹ The circuit court also recognized that it would be improper to force Bendel to waive his Fifth Amendment right by making him testify. SR 60.

affidavit and considered it but gave it the weight it deemed appropriate because Bendel was not subject to cross-examination. The circuit court found Tim Loehrer to be a credible eyewitness. SR 238. And ultimately determined the State met its burden, showing that Bendel did not act in self-defense.

The State filed a motion requesting Bendel provide any potential 404(b)-other acts evidence before trial. SR 315. At a motion hearing, Bendel disclosed two prior instances he wanted to present at trial. SR 602. The circuit court ordered Bendel to provide the information to the State in writing and delayed any further ruling until trial. SR 602. The circuit court addressed the issue of 404(b) evidence at trial. JT 72. Bendel wanted to present evidence about a fight that happened on June 21, 2023, and events that occurred at Farley Fest in 2023.² JT 72-75. The court allowed admission of evidence about the June 21st fight but excluded the evidence of the Farley Fest incident. JT 75-76.

The court found evidence from Farley Fest not only hearsay but also more prejudicial than probative. JT 75.

After a four-day trial, the jury found Bendel guilty of Manslaughter in the First Degree.³ SR 394. The circuit court sentenced Bendel to sixty years in prison, with twenty years suspended. SR 472-73.

² Bendel alleged that Doug Jr. told him he broke into people's homes, and stole things, and got into a fight during Farley Fest. JT 72-75.

³ Prior to trial, the State informed the circuit court it was dismissing Counts 2, 4, and 5 of the indictment. JT 76.

STATEMENT OF FACTS

On August 20, 2023, Doug Lindberg Jr. was hanging out with Bendel. JT 408. The two had been friends since they were kids. JT 405. Doug Jr. called his grandmother's⁴ boyfriend, Tim Loehrer, and asked for a ride to the grocery store. JT 178. Tim agreed; Doug Jr. came out of the grocery store with just a twelve pack of Steel Reserve.⁵ JT 181. Tim took Doug Jr. back to his house. JT 181. Tim visited with Doug Jr. and Bendel for a bit, and then Doug Jr. asked Tim if he would take them to the gas station so Bendel could get some gas. JT 181. Tim obliged. JT 182.

After getting a couple of gallons of gas, Doug Jr. asked if Tim would mind swinging them by Bendel's house to get Bendel's speakers. JT 181-82. After picking up the speakers, Tim went back to Doug Jr.'s to drop off Bendel and Doug Jr. JT 182-83. When Bendel was getting his speakers out of Tim's car, he noticed Tim had an alternator in the back of his car and asked Tim about it. JT 183. The alternator was for Tim's mother's vehicle, and Bendel offered to help Tim replace it. JT 183.

The three men then drove to Tim's brother's house⁶ and brought his mother's car to the farmstead.⁷ IT 32; JT 183. Bendel worked on

⁴ Doug Jr.'s grandmother passed away the year before. JT 177.

⁵ Steel Reserve is a malt liquor. JT 182.

⁶ Tim's brother lived three-quarters of a mile from the farmstead. IT 32. The farmstead originally belonged to Doug Jr.'s grandmother. JT 176.

⁷ Tim lived there with her while she was alive. After she passed away, her family allowed Tim to continue to live there. JT 176-77.

the car, trying to get the old alternator off, while Doug Jr. messed around. JT 185-86. Both Bendel and Doug Jr. drank the Steel Reserve⁸ Doug Jr. bought earlier that day. JT 185.

Doug Jr. decided he wanted to start a fire in the firepit. JT 186. After struggling to get a fire going, Doug Jr. asked Tim if he had any gas to help ignite the fire. JT 186. Bendel offered the gas he purchased earlier. JT 186. Tim cautioned Bendel that he better pour the gas because Doug Jr. would use it all. JT 187.

As Bendel walked towards the firepit with the gas, Doug Jr. came from behind him and put him in a headlock. JT 187. Doug Jr. pulled Bendel down to the ground; Bendel was on the ground for a couple of seconds then got back up. JT 187-88. Bendel shouted at Doug Jr., "I can't believe you tried to choke me." JT 187. Doug Jr. denied the allegation. JT 187. Bendel dropped the gas can and picked up a nearby 2x4.⁹ JT 188. At the same time, Doug Jr. took off running; Bendel chased him with the 2x4. JT 188.

After running twenty-five to thirty feet, Bendel swung the board at Doug Jr. but missed. JT 189. Bendel chased Doug Jr. another forty feet, before swinging the board at him again. JT 190. This time Bendel hit Doug Jr. and he went down to the ground, but was able to get back

⁸ Tim drank one of the Steel Reserves; Bendel and Doug Jr. drank the other eleven. JT 185. Tim suspected that Bendel and Doug Jr. had consumed alcohol before he picked them up. JT 185.

⁹ It was originally believed Bendel used a white PVC pipe to attack Doug Jr. But Bendel later told his attorney it was a white 2x4. JT 249.

up. JT 190. Doug Jr. continued to run and Bendel chased after him. JT 190. Bendel then struck Doug Jr. a second time, knocking him clear down to the ground; Doug Jr. could not get back up. JT 191. Bendel continued to bludgeon Doug Jr. with the 2x4, hitting him ten to fifteen times. JT 191.

Tim hollered at Bendel to “knock it the blank off.” JT 192. Bendel stopped the attack for a moment and then continued beating Doug Jr. with the board. JT 192. Doug Jr. laid there and didn’t move. JT 192.

Tim, seeing the entire thing unfold before his eyes, feared Bendel. JT 192. He got into his car and called 911. JT 192. He told the dispatcher he was with two men who were “beating the hell out of each other.” EX 1. He clarified that “one kid beat the hell out of the other one. He’s laying [sic] there in pretty bad shape.” EX 1. When dispatch asked if they should send an ambulance, Tim said, “yep, somebody better get here.” EX 1.

While on the phone with dispatch, Tim drove a mile and a half down the road. JT 192. His phone died, and he decided he should go back to the farmstead to check on Doug Jr. JT 193. As he approached Doug Jr., Tim couldn’t tell if Doug Jr. was breathing, but knew he was in rough shape. JT 193. As he was heading back to his car, Bendel approached Tim and asked for a ride. JT 193. Afraid Bendel “would go bananas if [he] didn’t”, Tim agreed. JT 194.

When law enforcement responded to the farmstead, they found Doug Jr. unresponsive, beaten, and bloodied. EX 2 (body camera video). EMS rushed Doug Jr. to the hospital, while performing CPR on him. JT 127. He was in severe condition and showed several signs of blunt force trauma. JT 127-30. He suffered from popped lungs, air in his chest cavity, a fractured clavicle, a fractured shoulder blade, fractured ribs, and a subarachnoid hemorrhage. JT 130-33. He went into cardiopulmonary arrest three times and was resuscitated each time. JT 133. The decision was made to transfer Doug Jr. to a hospital in Sioux Falls for more advanced care. JT 136. Unfortunately, Doug Jr. did not survive Bendel's attack. JT 154.

An autopsy revealed Doug Jr. had a traumatic brain injury and pulmonary contusions. IT 16. The cause of death was due to an assault. IT 20. His manner of death was homicide. IT 20.

Tim drove Bendel from the farmstead to Big Stone City, SD and dropped him off near the lake. JT 194. From there, Bendel made his way to Presley Boogaard's house. JT 308. She didn't want Bendel around her children, so she asked him to leave. JT 313, 429. Bendel left and went to John Schablin's home. JT 308. John told him they were eating supper, and he would have to come back another time. JT 429. Bendel then went to Mac Daddy's¹⁰ where he stayed for a couple of hours, drinking, gambling, and harassing patrons. JT 309-10.

¹⁰ Mac Daddy's is a gas station, convenience store, and casino. JT 309.

He eventually made his way to a bridge near the river, where he was apprehended by law enforcement. JT 430. While being interviewed, Bendel told law enforcement his memory was fuzzy. JT 298. He said that Doug Jr. choked him and the two started “scrapping and rolling around,” JT 298. He claimed they were “roughhousing.” JT 299. Bendel admitted to being irritated that day. JT 301. He never mentioned to law enforcement that he hit Doug Jr. with a 2x4. JT 302. At the end of his interview, law enforcement arrested Bendel for the death of Doug Jr. JT 454.

ARGUMENTS

I.

THE CIRCUIT COURT PROPERLY DENIED BENDEL’S MOTION TO DISMISS BASED ON IMMUNITY.

A. Standard of review.

This Court reviews the circuit court’s findings of fact under the clearly erroneous standard. *State v. Tuopeh*, 2025 S.D. 16, ¶ 49, 19 N.W.3d 37, 55 (quoting *State v. Heney*, 2013 S.D. 77, ¶ 8, 839 N.W.2d 558, 561-62). But “the application of a legal standard to those facts is a question of law reviewed de novo.” *Id.*

B. The circuit court properly denied Bendel's motion to dismiss based on immunity.

Recently, the South Dakota Legislature enacted a statute that provides immunity from criminal prosecution¹¹ for people who use justifiable force. SDCL 22-18-4.8. Once a defendant makes a prima facie claim of self-defense, the burden shifts to the State to prove by clear and convincing evidence that he was not acting in self-defense. SDCL 22-18-4.8.

The circuit court found Bendel made a prima facie showing for immunity when he filed his motion to dismiss. SR 229. The court held a hearing on the matter. *See IT*. The State presented seven witnesses, including law enforcement officers, Dr. Kenneth Snell (the medical examiner), Tim, and Presley Boogaard. There were also several exhibits including autopsy photographs, images of the farmstead, and law enforcement body camera video. *See IT*. Bendel submitted an affidavit and asked the court to consider it. *IT* 120. The circuit court originally stated it was not going to consider the affidavit because Bendel was not subject to cross-examination. *IT* 120; SR 229-30. But after revisiting the issue, the circuit court considered the affidavit and weighed it with the understanding it was an affidavit and Bendel was not subject to cross-examination. SR 230.

¹¹ This statute also grants immunity from civil liability as well. SDCL 22-18-4.8.

The circuit court found Tim to be a credible eyewitness. SR 232. It stated “Bendel’s version of the facts is limited based upon his inability to be cross examined or for the [c]ourt to judge his credibility.” SR 232. The circuit court found that “Both Tim and [Bendel] described Doug Jr.’s actions as rough housing when Doug Jr. put Bendel in a chokehold. Bendel’s actions after being put in a chokehold are not objectively reasonable for a self-defense claim.” SR 232-33. It further elaborated and said that “Bendel was no longer under any threat by Doug Jr. when he began to strike him several times in the back and the head with the 2x4.” SR 234.

The circuit court’s determination of the facts was not clearly erroneous. It reviewed all the evidence and weighed it how it saw fit. Just because the circuit court did not believe Bendel’s version of the events does not mean that it was wrong in its factual determination.

Additionally, the circuit court instructed the jury on Bendel’s self-defense claim. SR 375-77. The State met its burden of proving Bendel’s guilt beyond a reasonable doubt, meaning the jury rejected his self-defense argument. Because the burden of proving a case beyond a reasonable doubt is a higher burden to meet than the clear and convincing standard in an immunity hearing, there is no harm in the circuit court finding Bendel was not immune from prosecution. *State v. Smith*, 2023 S.D. 32, ¶ 36, 993 N.W.2d 576, 588.

Bendel criticizes the court's findings, arguing the court erred in four ways: 1. the court didn't properly consider Bendel's affidavit, 2. the court found Tim to be a credible witness, 3. Bendel's use of force was necessary, and 4. Bendel's case is distinguishable from *State v. Tuopeh*. AB 14-21.

1. The circuit court gave Bendel's affidavit the weight it thought it deserved.

Bendel claims the circuit court did not properly weigh his affidavit when determining whether he was immune from prosecution. AB 14. But "[i]t is well-established 'that the credibility of witnesses and weight of evidence is for the trial court and that a reviewing court accepts that version of the evidence, including the inferences that can be fairly drawn therefrom, which is favorable to the trial court's determination.'" *Long v. State*, 2017 S.D. 79, ¶ 29, 904 N.W.2d 502, 513 (quoting *In re Estate of Dokken*, 2000 S.D. 9, ¶ 25, 604 N.W.2d 487, 494). This is because the circuit court is in the position to "observe the witnesses and the evidence first hand." *Geraets v. Halter*, 1999 S.D. 11, ¶ 18, 588 N.W.2d 231, 234. The court is free to believe or disbelieve a witness, just as a jury is at trial. *State v. Bausch*, 2017 S.D. 1, ¶ 34, 889 N.W.2d 404, 414.

The court stated that it considered Bendel's affidavit, but was limited in its ability to determine the credibility of the statements as Bendel was not subject to cross-examination. SR 229-30. Bendel has not argued that the court's statements were clearly erroneous. Just

because the court did not rule in his favor, does not mean the court didn't properly weigh the affidavit. Therefore, Bendel has not shown how the circuit court was clearly erroneous in its findings of fact.

2. Tim was a credible witness.

Bendel argued that Tim was not a credible witness. AB 15-19. He claims Tim's testimony was not supported by physical evidence and that he consistently gave varying versions the events. AB 16-19. He also claims Tim is biased because he lived on the farmstead owned by Doug Jr.'s family.

In its findings, the circuit court acknowledged that Tim was not truthful with law enforcement at first, about whether he gave Bendel a ride to Big Stone City. SR 232. But the court found Tim to be "remorseful, emotional and understanding [sic] scared to death of Bendel." SR 232. Tim knew Doug Jr.'s family for years, relied on them, and would not be able to survive without them. SR 232. The court also found that "after listening to [Tim] and observing him on the witness stand it is clear to the [circuit court] that his account of what happened on that day was extremely credible despite the lie[] he told law enforcement." SR 232.

The court heard Tim's interviews with law enforcement and his testimony at the hearing. As earlier stated, it is for the circuit court to determine credibility of the witnesses. It is common in court proceedings for the finder of fact to be presented with two versions of events and

determine who is telling the truth. And here, the court found Tim to be truthful.

Further, Tim's testimony was corroborated by Dr. Snell. Dr. Snell said that Doug Jr. suffered injuries to his back, consistent with blunt force trauma. IT 18. Tim said that Doug Jr. was running away when Bendel hit him on the back twice, before he fell to the ground. IT 44. Doug Jr. was hit at least ten times by a blunt object. IT 19. Tim said Bendel hit Doug Jr. ten to fifteen times, with at least ten blows happening after Doug Jr. was on the ground. IT 45.

The circuit court did not clearly err by finding Tim was a credible witness. It observed his testimony firsthand and saw the remorse he had for not being truthful with law enforcement at the beginning of the investigation. Just because the circuit court did not believe Bendel's version of events, does not mean it erred.

3. Bendel's force was unnecessary.

Bendel claims he reasonably felt threatened, so his use of force was reasonable. AB 19. He claims he "was left with no choice but to resist the attack with force." AB 19. But evidence at the hearing suggests otherwise. Tim said that after Doug Jr. put Bendel in a headlock, Bendel immediately started chasing Doug Jr. with a 2x4. IT 35-36. He said Bendel hit Doug Jr. twice before he fell to the ground and never got back up. IT 36. And then Bendel proceeded to hit Doug Jr. at least ten more times. IT 36, 45. The fatal blow was to Doug Jr.'s

head. IT 20. But Bendel only hit Doug Jr. on the front of the head. So, the fatal blow was not the first blow.

Bendel also argues the circuit court “relied significantly” on the size difference between Bendel and Doug Jr. AB 20. Bendel is correct, the circuit court did make a finding that Bendel was “of larger stature”, measuring six feet and three inches tall. SR 232. It also made a finding that Doug Jr. was five feet and nine inches tall, weighing 172 pounds. SR 232. But that was just one of the many factors the court looked at when it determined Bendel was not acting in self-defense. SR 239-40. And while an individual is not precluded from asserting self-defense if they are larger than the other person, it does not mean size cannot be a factor in the determination. *State v. Bruder*, 2004 S.D. 12, ¶ 12, 676 N.W.2d 112, 116. It is for the fact finder to determine what is a reasonable response, which is what the circuit court did. *Id.* It found that:

The [S]tate met its burden by clear and convincing evidence that the Defendant was not acting in self-defense. The Defendant's actions after being put in a chokehold are not objectively reasonable given the circumstances. Both Tim and Defendant described Doug Jr. 's actions as “rough housing” when Doug Jr. put Bendel in the chokehold. Bendel and Doug Jr. were friends. Defendant was staying at Doug Jr. 's home at the time. They spent time together. Both parties were intoxicated at the time. Defendant is a man of larger stature being 6 foot 3 inches tall. Doug Jr. is a small man 5 feet 7 [sic] inches tall and weighing 172 pounds at the time of his death. It is counterintuitive that a reasonably objective person would find it objectively necessary to use lethal force against a smaller unarmed presumable friend.

SR 239-40. The size discrepancy was just one of many things the circuit court considered.

Finally, Bendel claims that it shouldn't matter how many times he hit Doug Jr. because only two blows were to his head. AB 20. He argues the statute does not limit the number of times you can hit a person. AB 20. But the number of times Bendel hit Doug Jr. goes directly to reasonableness.

Once Doug Jr. was on the ground, after the second blow to the back, it was not reasonable for Bendel to continue to strike Doug Jr. eight to thirteen more times. *See Tuopeh*, 2025 S.D. 16, ¶ 53, 19 N.W.3d at 56 (“Once the [victim] fell to the ground it was not reasonable for Tuopeh and Pour to treat him as an ongoing threat.”).

Likewise, it was not reasonable for Bendel to chase Doug Jr. and beat him with a 2x4 simply because Doug Jr. put Bendel in a headlock. Even by his own statements, after Doug Jr. put him in a headlock, they were “scrapping and rolling around.” JT 298. It isn't reasonable to brutally attack and kill a person for horsing around.

4. This case is similar to *Sate v. Tuopeh*, where this Court rejected an immunity claim.

In *State v. Tuopeh*, Tuopeh was with a few people, including Pour, outside of Red Sea Pub. *Tuopeh*, 2025 S.D. 16, ¶ 2, 19 N.W.3d at 42. Mousseaux showed up, and Tuopeh and Pour stopped him before he reached the pub's entrance. *Id.* “Mousseaux, who appeared intoxicated,

started vigorously pulling up his pants, stepped forward, and then suddenly swung at Tuopeh and Pour with his right fist. Mousseaux, while still facing Tuopeh and Pour, started skipping and hopping backwards down the street, away from the pub.” *Id.*

Tuopeh and Pour ran after Mousseaux. *Id.* ¶ 2, 19 N.W.3d at 42. Mousseaux tripped and fell to the ground. *Id.* Tuopeh and Pour started kicking and punching Mousseaux as soon as he fell. *Id.* The men beat Mousseaux to death. *Id.* ¶ 3-5, 19 N.W.3d at 42-43. Tuopeh, charged with three counts of homicide, claimed he was immune from prosecution because he was acting in self-defense. *Id.* ¶ 7, 19 N.W.3d at 43. After an immunity hearing, the circuit court denied his claim, finding that Mousseaux was retreating and not a threat to Tuopeh when he ran after him. *Id.*

At trial, the jury convicted Tuopeh of second-degree murder and first-degree manslaughter. *Id.* ¶ 11, 19 N.W.3d at 44. On appeal, this Court affirmed his conviction, concluding the circuit court did not err when it found Tuopeh was not acting in self-defense. *Id.* ¶ 53, 19 N.W.3d at 56.

Bendel’s case is similar to *Tuopeh*. In both cases, the victim was retreating from the defendant. Thus, the threat no longer existed when the victim was brutally beaten to death.

Bendel claims the cases are dissimilar because Doug Jr. kept coming at him. AB 20. But that is Bendel’s version of events. Tim said

that Doug Jr. only put Bendel in a headlock once, Bendel got upset, picked up the 2x4 and chased after Doug Jr. IT 35-36. The circuit court stated it believed Tim's version of events. SR 232.

Bendel claims he was left with no other option to protect himself from Doug Jr.'s deadly attacks. AB 21. But that is not what he told his friend, Boogaard. He told her that he was "pissed off" that Doug Jr. put him in a chokehold and he "just seen [sic] red." IT 87. Tim thought they were fooling around at first and likened it to "horseplay." JT 187. The evidence does not support Bendel's accusation that the headlock was aggravated assault or an attempt to kill him. AB 20-22. And even if what Bendel said was true, that Doug Jr. repeatedly came at him, the threat dissipated once Doug Jr. was on the ground, not able to get up.

Further, it is reinforced that the circuit court did not err, by the fact that the jury found Bendel guilty beyond a reasonable doubt of first-degree manslaughter. *See Smith*, 2023 S.D. 32, ¶ 36, 993 N.W.2d at 588 (concluding that the circuit court did not err in denying Smith's immunity motion because he was convicted at trial, which requires a higher burden of proof.). Thus, it cannot be argued that the circuit court erred in finding, by clear and convincing evidence, that Bendel was not entitled to immunity, when the jury used a higher standard to convict him.

Bendel's argument features his version of events and ignores Tim's version of events. The circuit court, as fact finder, was tasked with

weighing the credibility of witnesses and determining what happened. Bendel has not shown how the circuit court was clearly erroneous in its findings.

II.

THE CIRCUIT COURT PROPERLY LIMITED BENDEL'S PRESENTATION OF 404(B) EVIDENCE.

A. *Standard of review.*

Admission of other acts evidence is reviewed under the abuse of discretion standard. *State v. Phillips*, 2018 S.D. 2, ¶ 13, 906 N.W.2d 411, 415 (citing *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 16, 835 N.W.2d 886, 892). “An abuse of discretion ‘is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.’” *State v. Hernandez*, 2023 S.D. 17, ¶ 24, 989 N.W.2d 525, 533 (quoting *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109). “In order to justify relief on appeal, an evidentiary error ‘must also be shown to be prejudicial.’” *State v. Rouse*, 2025 S.D. 29, ¶ 24, —N.W.3d— (quoting *State v. Belt*, 2024 S.D. 82, ¶ 20, 15 N.W.3d 732, 737). “Error is prejudicial when it ‘in all probability ... produced some effect upon the jury’s verdict and is harmful to the substantial rights of the party assigning it.’” *Smith*, 2023 S.D. 32, ¶ 37, 993 N.W.2d at 589 (quoting *State v. Hankins*, 2022 S.D. 67, ¶ 21, 982 N.W.2d 21, 30).

Circuit courts have a broad discretion in “deciding whether to admit or exclude evidence.” *Hernandez*, 2023 S.D. 17, ¶ 24, 989 N.W.2d at 533 (quoting *State v. Packed*, 2007 S.D. 75, ¶ 24, 736 N.W.2d 851, 859). It is not for this Court to decide whether it would have allowed the evidence. *State v. Birdshead*, 2015 S.D. 77, ¶ 63, 871 N.W.2d 62, 84 (citing *State v. Mattson*, 2005 S.D. 71, ¶ 21, 698 N.W.2d 538, 546). Rather, this Court looks at whether the circuit court misapplied a rule of evidence. *Hernandez*, 2023 S.D. 17, ¶ 24, 989 N.W.2d at 533 (citing *State v. Guthrie*, 2001 S.D. 61, ¶ 30, 627 N.W.2d 401, 415).

A. *The trial court properly limited other acts evidence regarding Doug Jr.*

The admission of other acts evidence is controlled by SDCL 19-19-404(b) (Rule 404(b)):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted with conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b) prohibits “propensity evidence in the form of evidence of character traits or other acts unless the evidence is being used for a non-propensity purpose.” *Hernandez*, 2023 S.D. 17, ¶ 32, 989 N.W.2d at 536. This prohibition includes evidence that supports the notion that a person acted a certain way because of a trait or their history. *Id.*

To determine the admissibility of 404(b) evidence, the circuit court must apply a two-prong analysis. *Phillips*, 2018 S.D. 2, ¶ 14, 906 N.W.2d at 415 (citing *State v. Huber*, 2010 S.D. 63, ¶ 56, 789 N.W.2d

283, 301). This analysis requires the circuit court to determine “(1) whether the intended purpose is relevant to some material issue in the case, and (2) whether the probative value of the evidence is substantially outweighed by its prejudicial effect.” *Id.* Rule 404(b) prohibits the use of other act evidence to “solely prove character.” *Phillips*, 2018 S.D. 2, ¶ 14, 906 N.W.2d at 415 (quoting *State v. Wright*, 1999 S.D. 50, ¶ 17, 593 N.W.2d 792, 800). The proponent has the burden to persuade the circuit court the evidence has a permissible purpose. *State v. Armstrong*, 2010 S.D. 94, ¶ 11, 793 N.W.2d 6, 11 (citing *State v. Lassiter*, 2005 S.D. 8, ¶ 15, 692 N.W.2d 171, 176).

1. Evidence of what happened during Farley Fest was not relevant.

“The determination of whether evidence is relevant ‘is committed to the sound discretion of the trial court, for which this Court will not substitute its own judgment.’” *Birdshead*, 2015 S.D. 77, ¶ 38, 871 N.W.2d at 76 (quoting *State v. Wilcox*, 441 N.W.2d 209, 212 (S.D. 1989)). When considering whether other acts evidence should be admitted, the circuit court must compare the similarities between the other acts and Doug Jr.’s conduct on the day in question. *State v. Chamley*, 1997 S.D. 107, ¶ 12, 568 N.W.2d 607, 612 (citation omitted) (overruled on other grounds by *State v. Boe*, 2014 S.D. 29, 847 N.W.2d 315).

Bendel argues the circuit court erred by not allowing evidence about what happened during Farley Fest. AB 26-28. The purported evidence was that a month before Bendel beat Doug Jr. to death, Bendel

was at Doug Jr.'s house. JT 74. Doug Jr. supposedly told Bendel he had just broke into a house and stole groceries and beer. JT 74. Doug Jr. left and came back, claiming he attempted to steal a motorcycle but was chased away. JT 74. He left again and came back, claiming he had been in a fight. JT 74. Doug Jr. started looking for a knife and said he was "going to kill those guys." JT 74. He left for the fourth time and when he got home was injured. JT 74. He was making threats about "getting these people." JT 74.

The circuit court found Bendel's offer of proof insufficient. JT 75. The circuit court did not address whether the evidence was relevant, it instead jumped right to weighing the probative value against the prejudicial effect, but the evidence of Doug Jr.'s alleged theft (or attempted theft) is not similar to Doug Jr.'s behavior exhibited on August 20th. Bendel claims the evidence helps show his state of mind when he attacked Doug Jr. by showing why he was afraid of Doug Jr. AB 26-27. But there is a vast difference between stealing groceries and physically attacking someone. So, any evidence about the theft (or attempted theft) is not relevant evidence.

The other two incidents at Farley Fest are more similar in nature to the violent behavior Bendel claimed Doug Jr. exhibited on August 20th. However, just because the incidents are similar in nature, does not automatically mean the evidence is admissible at trial; the rules of evidence still apply. The circuit court found that the other acts at Farley

Fest of Doug Jr. getting into an altercation was hearsay. JT 75-76.

Bendel did not witness Doug Jr. get into an altercation at Farley Fest; he only had what Doug Jr. told him. JT 74.

Therefore, not only was the evidence related to anything that happened at Farley Fest irrelevant, it was also hearsay. So the circuit court properly disallowed such evidence to be presented.

2. The probative value substantially outweighed the prejudicial effect.

Even if this Court finds Bendel's 404(b) evidence regarding Farley Fest was relevant, the probative value does not outweigh the prejudicial effect.

Before admitting other acts evidence, the circuit court must also consider whether the probative value substantially outweighs the prejudicial effect. "Prejudice 'refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means.'" *Birdshead*, 2015 S.D. 77, ¶ 63, 871 N.W.2d at 83 (quoting *State v. Moeller*, 1996 S.D. 60, ¶ 38, 548 N.W.2d 465, 478). In this case, the State has the burden of establishing the prejudice of the evidence substantially outweighs the probative value. *Birdshead*, 2015 S.D. 77, ¶ 61, 871 N.W.2d at 82 (citing *Wright*, 1999 S.D. 50, ¶ 16, 593 N.W.2d at 799).

The circuit court stated, "I also do a weighing of the evidence and whether or not that's more prejudicial than probative and I would find that it's not probative in this matter." JT 75. It further reiterated that "I

find that it's more prejudicial than probative. You're talking about incidences where obviously the victim's not here and you're providing all that as hearsay and I'm finding that it's too prejudicial to be allowed.” JT 75.

As Bendel points out in his brief, “unfair prejudice is evidence that persuades ‘the jury in an unfair and illegitimate way.’” AB 26. To allow hearsay evidence in to prove character evidence is an illegitimate way of making one's case. Hearsay is inadmissible evidence. SDCL 19-19-802. And the evidence presented by Bendel in his offer of proof was based entirely off statements Doug Jr. allegedly made to him. JT 74-75.

Bendel argues that the evidence should have been admitted as *res gestae* evidence. AB 27. *Res gestae*, also known as intrinsic evidence, “is a theory of relevance which recognizes that certain evidence is relevant because of its unique relationship to the charged crime” *State v. Otobhiale*, 2022 S.D. 35, ¶ 16, 976 N.W.2d 759, 767 (quoting 29A Am. Jur. 2d Evidence § 858 Westlaw (database updated May 2025)). *Res gestae* is used to provide context and show a complete story. *Otobhiale*, 2022 S.D. 35, ¶ 16, 976 N.W.2d at 767 (additional citation omitted). Rule 404(b) governs extrinsic evidence and therefore intrinsic evidence is not excluded by 404(b). *Id.*

Doug Jr. telling Bendel he got into a fight and made threats is not “so blended or connected with the crime []that it incidentally involves it[.]” *Otobhiale*, 2022 S.D. 35, ¶ 16, 976 N.W.2d at 767 (citation omitted).

The evidence does not paint the picture for the jury as to why Bendel beat Doug Jr. to death while he was running away from him.

Bendel seems to be conflating *res gestae* and 404(b) evidence. He argued to the circuit court it was other acts evidence. He argued in his brief it was other acts evidence. But then also made the argument it was *res gestae*. Regardless which theory the evidence was presented under, the circuit court didn't abuse its discretion in excluding the evidence. Bendel hasn't shown how he was prejudice by the exclusion. He was not precluded from presenting evidence to show his state of mind. In fact, the court ruled that he could talk about how he knew Doug Jr. had a criminal history and how Doug Jr. attacked him a couple of months before the date in question. Therefore, the circuit court did not abuse its discretion when it limited what other acts evidence Bendel could present.

III.

THE CIRCUIT COURT PROPERLY DENIED BENDEL'S MOTION FOR JUDGMENT OF ACQUITTAL.

Bendel argues there was insufficient evidence for the jury to convict him of first-degree manslaughter. AB 29. But he fails to look at the evidence in light most favorable to the State. When doing so, the State presented sufficient evidence to support the conviction.

A. Standard of Review.

This Court reviews the denial of a motion for judgment of acquittal *de novo*. *State v. Bolden*, 2024 S.D. 22, ¶ 39, 6 N.W.3d 238, 246 (citing *State v. Seidel*, 2020 S.D. 73, ¶ 32, 953 N.W.2d 301, 313). “A motion for

a judgment of acquittal attacks the sufficiency of the evidence.” *State v. Peneaux*, 2023 S.D. 15, ¶ 24, 988 N.W.2d 263, 269 (quoting *State v. Timmons*, 2022 S.D. 28, ¶ 14, 974 N.W.2d 881, 887). “When reviewing the sufficiency of the evidence, [this] Court considers ‘whether there is evidence in the record which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt.’” *State v. Ahmed*, 2022 S.D. 20, ¶ 14, 973 N.W.2d 217, 221. (quoting *State v. Wolf*, 2020 S.D. 15, ¶ 13, 941 N.W.2d 216, 220). This Court “accepts the evidence and the most favorable inferences that can be fairly drawn from it that support the verdict.” *Id.* “This Court does not ‘resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence on appeal.’” *Id.* Further, a “conviction may be supported by circumstantial evidence even when all the elements of the crime are established circumstantially.” *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342 (citing *State v. Shaw*, 2005 S.D. 105, ¶ 45, 705 N.W.2d 620, 633).

B. The State presented sufficient evidence to convict Bendel of first-degree manslaughter.

For the jury to convict Bendel of first-degree murder, the State needed to prove: 1. Bendel caused the death of Doug Jr., 2. the killing was done in a cruel and unusual manner, 3. the killing was done while Bendel was in a heat of passion, and 4. the killing was not excusable or justifiable. SDCL 22-16-15; SR 369.

The State's evidence included testimony from several people, including testimony from an eyewitness, a forensic pathologist and coroner, and law enforcement. *See JT*. The testimony painted a picture for the jury of the events of that day that led to Doug Jr.'s death.

Doug Jr. and Bendel had been hanging out at Doug Jr.'s house. Doug Jr. asked Tim for a ride to the grocery store, where he bought a twelve pack of Steel Reserve. *JT* 181. When Tim took Doug Jr. home, Bendel asked Tim to take him to get gas, and swing by his place to get speakers. *JT* 181. They then went back to Doug Jr.'s house. *JT* 183. As Bendel was getting the speakers out of Tim's car, he noticed an alternator and asked Tim about it. *JT* 183. Bendel offered to help Tim put it in his mom's car. *JT* 183.

The three men got the car and brought it to Tim's farmstead. *JT* 183. While at the farmstead, Bendel and Doug Jr. drank eleven of the Steel Reserve beers Doug Jr. bought earlier that day. *JT* 185. Both men were intoxicated. *JT* 186. As Bendel tried replacing the alternator, Doug Jr. tried starting a fire in the fire pit. *JT* 186. Doug Jr. asked Tim if he had anything to light the fire. *JT* 186. Bendel offered some of the gas he just purchased. *JT* 186. Tim suggested Bendel pour the gas, as he was afraid Doug Jr. would use the entire amount. *JT* 187.

As Bendel was walking towards the fire pit, Doug Jr. came up from behind and put his arm around Bendel's neck, like a headlock. *JT* 187. Doug Jr. pulled Bendel down to the ground, onto his knees. *JT* 187.

Bendel got back up after a couple of seconds and said to Doug Jr., "I can't believe you tried to choke me." JT 187. Doug Jr. denied the action. JT 187. Bendel dropped the gas can and chased Doug Jr. with a 2x4 that was laying nearby. JT 188-89. Bendel held the 2x4 in a striking position; he swung at Doug Jr. after running twenty-five to thirty feet. JT 189-90. He missed. JT 189. They ran another forty feet and Bendel swung again. JT 190. This time Bendel made contact, hitting Doug Jr. JT 190. The impact knocked Doug Jr. down, but he got back up and kept running. JT 190. Bendel hit Doug Jr. a second time, knocking him down again. JT 191. While Doug Jr. was on the ground, Bendel hit him at least twelve times. JT 191.

Tim, seeing Bendel beating Doug Jr. with the board, hollered at Bendel to "knock it the blank off." JT 192. Bendel stopped for a second, then continued to beat on Doug Jr. JT 192. Doug Jr. laid on the ground, unable to move, while Bendel hunched over him, continuing to strike blows. JT 192.

Scared, Tim got in his car and drove away. JT 192. He called 911 and told the dispatcher that there were two people with him "beating the hell out of each other." EX 1. When the dispatcher asked follow-up questions, Tim said, "The one kid beat the hell out of the other one... He's lying there in pretty bad shape." EX 1.

Worried about Doug Jr., Tim went back to the farmstead. JT 193. He got out and walked up to Doug Jr. JT 193. Tim couldn't tell if he

was breathing, but knew he was in “rough shape.” JT 193. Bendel approached Tim and asked him for a ride to town. JT 193. Scared Bendel “would go bananas if [he] didn’t,” Tim agreed. JT 194. Tim took Bendel to Big Stone City and dropped him off near the lake. JT 194.

The next day, Bendel was apprehended by law enforcement. JT 262-65. Bendel told law enforcement that Doug Jr. had choked him out, then they started “scrapping and rolling around.” JT 298. He said Doug Jr. was drunk and acting belligerent; he was getting irritated with Doug Jr. JT 300-01. Bendel never told law enforcement he hit Doug Jr., he never said he was afraid of Doug Jr., he never said he was acting in self-defense, and never said he was afraid Doug Jr. was going to hurt or kill him. JT 302-03.

Doug Jr. had several injuries, including popped lungs, a clavicle fracture, a fractured shoulder blade, multiple rib fractures, and contusions on his back, arms, and head. JT 130-32, 156-67. A blow to the left side of Doug Jr.’s head was the dominate blow that caused his death. JT 369. Based on the evidence presented, there was sufficient evidence to convict Bendel of first-degree manslaughter.

Bendel now argues he couldn’t be convicted of first-degree manslaughter because the evidence lacked three things: 1. There was “no physical evidence identifying the murder weapon that connected Bendel to Doug’s death”; 2. The circuit court disallowed evidence that supported

Bendel's mental state; and 3. The "killing was excusable or justifiable." But Bendel's three assertions do not negate the State's evidence.

1. No physical evidence of the murder weapon is required.

The State bears the burden "of proving every element of the crime." *State v. Falkenberg*, 2021 S.D. 59, ¶ 39, 965 N.W.2d 580, 591 (quoting *Shaw*, 2005 S.D. 105, ¶ 45, 705 N.W.2d at 633). The elements may be proved by circumstantial evidence. *Id.* Both direct and circumstantial evidence are weighted the same. *Id.* And sometimes circumstantial evidence can be more reliable than direct evidence. *Id.*

The State must prove that Bendel killed Doug Jr., but what object he used to cause that death is not an element of the crime. Tim witnessed Bendel beating Doug Jr. with a white object he originally believed to be a PVC pipe. JT 199. Bendel, through his attorney, notified the State he instead used a white 2x4. JT 249. The evidence showed Doug Jr. had several injuries caused by a blunt object. JT 158. And his cause of death was a "traumatic brain injury due to an assault." JT 169. So whether Bendel used a PVC pipe or a 2x4, the evidence showed he killed Doug Jr. by hitting him in the head with a blunt object.

Bendel claims the State argued that Bendel struck Doug Jr. "from behind on the back" repeatedly, but that there was no evidence that Doug Jr. was hit on the back of the head. AB 30. Therefore, because there were no injuries to the back of Doug Jr.'s head, this Court cannot

sustain his conviction. AB 30. But that is a misrepresentation of the facts.

Bendel chased Doug Jr. with a 2x4. Bendel himself testified that Doug Jr. ran away from him when he saw the 2x4. JT 448. In fact, Bendel said that Doug Jr. never came at him again because he had the 2x4. JT 447. Tim saw Bendel strike Doug Jr. from behind, twice, before completely falling to the ground, never getting back up. JT 191. Bendel repeatedly struck Doug Jr., at least nine times, while on the ground, according to Bendel. JT 449. Doug Jr. had several injuries to his back, including several broken posterior ribs. JT 159.

Because Doug Jr. was running away from Bendel, the first time Bendel hit Doug Jr. could not have been the fatal blow. The evidence supports the first two blows to Doug Jr. were on his backside, which is exactly what the State argued. When making his argument, Bendel failed to provide the State's argument in full. The State argued in closing:

The defendant struck him a couple more times from behind on the back. Doug Jr. stumbled a little bit, but kept on running south. Eventually the defendant caught up with him, struck him down to the ground, and thereafter, ladies and gentlemen, continued to strike Doug Jr. over and over and over again.

JT 85.

Simply put, the State presented sufficient evidence to show Bendel fatally struck Doug Jr. with a blunt object.

2. The court allowed Bendel to present evidence about his mental state.

Bendel next argued that the State couldn't prove that he acted in a heat of passion because he could not introduce evidence as to his mental state on the day in question. AB 30. This seems to be a condensed version of Argument II, which the State already addressed. *Supra* 19-26. Bendel claims that without this additional testimony "the heat of passion element went unaddressed." AB 30. But that is an incorrect assessment of the evidence.

"Heat of passion" is defined as an "intent formed suddenly, under the influence of some violent emotion, which for the instant overwhelmed the reason of the slayer." *State v. Swan*, 2019 S.D. 14, ¶ 14, 925 N.W.2d 476, 479-80 (quoting *State v. Hart*, 1998 S.D. 93, ¶ 15, 584 N.W.2d 863, 865). It's a:

suddenly formed passion which was caused by reasonable and adequate provocation on the part of the person slain, causing a temporary obscurity of reason rendering a person incapable of forming a premeditated design to kill and which passion continues to exist until the commission of the homicide.

"Heat of passion" is such mental disturbance or condition as would so overcome and dominate or suspend the exercise of the judgment of [a person] as to render [that person's] mind for the time being deaf to the voice of reason, make [him or her] incapable of forming and executing the distinct intent to take human life, and to cause [him or her], uncontrollably, to act from impending force of the disturbing cause rather than from any real wickedness of heart or cruelty or recklessness of disposition.

Swan, 2019 S.D. 14, ¶ 14, 925 N.W.2d at 480 (quoting SDPJ 3-24-26 (1996)).

The evidence at trial supported Bendel acted in the heat of passion when he killed Doug Jr. Doug Jr. had been messing around while Bendel was trying to fix the car. JT 186, 418-19. He came up from behind Bendel and put his arm around his neck. JT 187. Bendel got irritated, picked up a 2x4, and chased Doug Jr. for a total of fifty yards. JT 188-90, 287. He struck Doug Jr. on the back, and once he fell to the ground, Bendel continued to beat him to death. JT 190-92.

The evidence shows Bendel was provoked by Doug Jr. and Bendel acted uncontrollably, brutally beating Doug Jr. to death. Therefore, the evidence supported a finding that Bendel acted in the heat of passion.

3. The State's evidence supports that the killing of Doug Jr. was not excusable or justified.

The evidence showed that Doug Jr. was running away from Bendel when Bendel first struck him in the back with the 2x4. JT 188-90. He had several injuries to his back, along with injuries to his face and head. JT 156-59. Doug Jr. was on the ground, not moving, and Bendel continued to brutally attack him. JT 190-92.

Even if Bendel's version of events was true, that Doug Jr. kept coming at him, once Doug Jr. was on the ground, he was no longer a threat to Bendel. There was no need to continue the attack. While Doug Jr. had several non-lethal injuries, the blow to the head is the one that killed him. JT 369. If the first two strikes to Doug Jr. were to his back that took him down to the ground, then the additional times Bendel hit Doug Jr. with the 2x4, including the blow to the head, were not

necessary as the threat no longer existed. *See Tuopeh*, 2025 S.D. 16, ¶ 54, 19 N.W.3d at 56. Therefore, the State's evidence supported the jury finding Bendel actions were not excusable or justifiable.

The evidence, when viewed in light most favorable to the State, is sufficient to support Bendel's conviction of first-degree manslaughter. Therefore, the circuit court did not err when it denied Bendel's motion for judgment of acquittal.

IV.

BENDEL WAS NOT DEPRIVED OF A FAIR TRIAL.

Bendel argues that cumulative errors at trial deprived him of a fair trial. AB 32. While framed as a cumulative error issue, it does not appear Bendel is making a cumulative error argument regarding the first three issues addressed in this brief. Rather, he puts forth three new issues, two of which occurred at sentencing. He argues 1. the circuit court infringed on his Fifth Amendment right against self-incrimination, 2. the circuit court did not allow character testimony at sentencing, and 3. the circuit court misinterpreted the parole eligibility statute when it imposed its sentence. Regardless, none of these purported issues deprived Bendel of a fair trial.

A. *Standard of review.*

To determine whether a defendant was “denied the constitutional right to a fair trial based on the cumulative effect of trial errors, [this Court] review[s] the entire record to determine if a fair trial was held.”

Delehoy, 2019 S.D. 30, ¶ 20, 929 N.W.2d at 108 (citing *State v. Davi*, 504 N.W.2d 844, 857 (S.D. 1993)).

B. The circuit court did not infringe on Bendel's Fifth Amendment right against self-incrimination.

Bendel argues the circuit court forced him to testify at trial and violated his right against self-incrimination. AB 33. Bendel relies on a statement made by the court when determining which other acts of Doug Jr.'s would be allowed at trial. AB 33. The court cautioned Bendel "if you bring these things up in opening statement, [], and your client all of a sudden decides not to testify, then I think we've got issues." JT 76. This statement was not made to "force" Bendel into testifying. It served as a caution to his attorney to be careful what he says in opening statements.

Opening statements act as a road map, allowing the parties to explain to the jury what evidence they can expect at trial. *State v. Moran*, 2003 S.D. 14, ¶ 48, 657 N.W.2d 319, 330. While opening statements are not evidence, if an attorney claims certain evidence will come in at trial, it can have serious implications when that evidence is not presented. For instance, "[t]he failure to present evidence promised during opening statements can constitute ineffective assistance of counsel in certain circumstances." *Ally v. Young*, 2023 S.D. 65, ¶ 39, 999 N.W.2d 237, 251, *reh'g denied* (Jan. 19, 2024) (citing *Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003)).

The court's statement was not to "force" Bendel to testify, but merely to caution counsel that there could be implications if evidence was discussed during opening statements but not presented to the jury. The circuit court canvased Bendel before trial on his right to not testify at trial. JT 76. It then addressed Bendel again before he testified stating, "Mr. Bendel, at this time I want to advise you again that you do have a Fifth Amendment right not to incriminate yourself." JT 394. Not once did the court tell Bendel he had to testify; he was given a choice. The court therefore did not violate Bendel's Fifth Amendment rights to not incriminate himself.

C. The circuit court did not err by not allowing Bendel's sister to testify at the sentencing hearing.

During the sentencing hearing Bendel asked the circuit court to allow his sister, Tonya Diggins, to provide testimony on Bendel's character and his support system. ST 5. The circuit court denied the request, stating, "I have reviewed her statement and that was all indicated in the statement about the support and all that. So, I am going to deny the request for additional testimony from the individuals who provided statements to the [c]ourt." ST 5.

Before imposing its sentence, the court needs to familiarize itself with the person before it. *State v. Klinetobe*, 2021 S.D. 24, ¶ 29, 958 N.W.2d 734, 741. Because the court already received the same

information in writing, it did not err by not allowing the testimony. The evidence at best would have been cumulative.

D. Parole calculation is not part of the sentence.

Bendel argues the circuit court erred when it said he will be eligible for parole pursuant to SDCL 24-15A-32, because he is not eligible for parole. AB 33-34. But parole calculations are not part of the court's sentence.

SDCL 24-15A-32 sets out the parole eligibility guidelines for the South Dakota Department of Corrections. But in 2023, the South Dakota Legislature enacted a statute that prohibited parole eligibility for people convicted of certain crimes. SDCL 24-15-4.1. Manslaughter is on that list. SDCL 24-15-4.1(1).

Given that statute, Bendel claims the circuit court erroneously told him he would be eligible for parole. AB 33-34. But “[a]s a matter of law, a court’s parole eligibility advisement is not part of the court’s sentence.” *Madetzke v. Dooley*, 2018 S.D. 38, ¶ 13, 912 N.W.2d 350, 355 (quoting *State v. Semrad*, 2011 S.D. 7, ¶ 7, 794 N.W. 2d 760, 763). That is because calculating parole eligibility is not a function of the judicial branch; instead that is a function of the executive branch. *Id.* The court did not base its sentence on Bendel’s possibility of parole. In fact, it stated it based its sentence on the factors required including rehabilitation, his support system, protecting the community, his criminal history, “desire to live a sober life,” the violent nature of the

crime, deterrence, and punishment. ST 15-16. Nowhere in the sentencing hearing did the circuit court say it was relying on Bendel's possibility of parole when it fashioned its sentence. Because it is not part of the court's sentence, it did not deprive Bendel of a fair trial.

Simply put, Bendel was not deprived of a fair trial. The circuit court did not force him to testify. And the other two claims, which were alleged errors at sentencing, did not violate any of Bendel's rights.

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that Bendel's convictions and sentences be affirmed.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

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

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 10,678 words.

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

Dated this 14th day of July 2025.

/s/ Erin E. Handke
Erin E. Handke
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 14, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Joseph Peter Bendel* was served through odyssey file and serve upon Brooklyn M. Mailey at Brooklyn@austinlawsd.com and Rebecca Morlock Reeves at Rebecca@austinlawsd.com.

/s/ Erin E. Handke
Erin E. Handke
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30927

STATE OF SOUTH DAKOTA
Appellee,

v.

JOSEPH PETER BENDEL,
Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD CIRCUIT
GRANT COUNTY, SOUTH DAKOTA

HONORABLE DAWN ELSHERE
Presiding Judge

APPELLANT'S REPLY BRIEF

BROOKLYN M. MAILEY
REBECCA MORLOCK REEVES
Attorneys at Law
25 First Avenue Southwest
Watertown, SD 57201
Attorneys for Appellant

SARAH L. THORNE
Deputy Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501
Attorney for Appellee

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSEPH PETER BENDEL,

Defendant and Appellant.

No. 30927

PRELIMINARY STATEMENT

In this brief, Appellant, Joseph Peter Bendel is referred to as "Bendel." All references in this brief will be consistent with the page numbers set forth in the settled record, indicated by "SR" followed by the appropriate page number. References to the Appendix to this brief are designated as "Appx." References to the Appellee's Brief are designated as "AB" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

The parties agree that this Court has jurisdiction pursuant to SDCL §23A-32-2. This appeal is taken as a matter of right pursuant to SDCL §15-26A-3.

STATEMENT OF THE CASE

Appellant relies on the Statement of the Case in Appellant's Brief.

STATEMENT OF THE FACTS

Appellant clarifies disputed facts but relies on the Statement of Facts in Appellant's Brief.

I. Tim did not witness the entire encounter.

Appellees argue Tim saw the entire encounter unfold. AB 8. This is incorrect. When questioned by DCI the day after the incident, Tim claimed he was inside, and when he came outside, the two men were fighting. SR 210 11-17. The probable cause affidavit of DCI Agent Winters stated, "[Tim] went into the house and when he came back out, he saw Bendel was in a headlock by [Doug]." SR 13. This statement was audio recorded and reflected in DCI reports. Additionally, Tim wrote in his statement, dated August 20, 2023, he "came outside and Joe Bendel and Doug were fighting." Appx. Statement of Tim Lochrer.

At the immunity hearing, Tim testified for the first time he sat on a lawnmower fender witnessing the entire encounter. SR 132 7-9. At this same hearing, during cross-examination, Tim denied stating he was inside. SR 151 21-25. The State's Brief in Opposition stated Tim was inside and when he came outside the men were fighting. SR 65. Finally, at trial, Tim testified he sat on his lawnmower when the encounter began and walked to the end of his sidewalk¹ to see what Bendel and Doug were doing. SR 790 15-17. This contradicted all prior statements indicating he was inside.

Tim's testimony about where he was and what he saw was inconsistent. During

¹ From the end of the sidewalk, it is impossible to see where the decedent was on the ground. See Exhibit 14 of the February 1, 2024 Motions Hearing and Deputy Bjordahl's footage. From the end of the sidewalk, a RV and truck block line of sight to the location where the decedent's body lay in some versions of Tim's testimony.

the immunity hearing, Tim testified Doug yelled at Bendel while they fought. SR 142 7-10. However, Tim instantaneously contradicted himself testifying Doug did not say anything. SR 142 15-17. Tim also testified, while Doug ran away, Bendel hit him "on the side of the head a couple times." SR 140 11. Dr. Snell's pathology report supports two blows to the head: one to the "right frontal skull", not side of the head as Tim testified. SR 88. This is significant because it corroborates Bendel's Affidavit: Doug was not running away when Bendel defended himself. SR 59. These differing recounts are important because Tim's testimony was considered credible and is the basis for denying Bendel immunity.

II. Appellee's brief failed to address Bendel was attacked multiple times.

It is undisputed Doug unexpectedly attacked Bendel from behind, putting him in a tight chokehold, pulling straight backwards where Bendel's airway was restricted. SR 78. Despite efforts to get Doug to release, Doug did not stop until Bendel lost consciousness on the ground. *Id.*

Appellee's brief omits Doug darted at Bendel and tried to choke him a second time. SR 59, 78. When unsuccessful, Doug darted at Bendel from behind yet a third time. SR 59, 79. This time Bendel grabbed a 2x4 from near his feet. *Id.* Doug was undeterred by Bendel's threat of force and continued attempting to attack Bendel. *Id.* When Doug temporarily retreated, Bendel stopped and tried to leave. SR 59, 85. As Bendel turned, Doug charged out of the weeds to attack a fourth time. *Id.* Bendel hit Doug's body several times so he could safely escape Doug's attacks. SR 59, 85. Appellee's brief purposefully omitted Doug's numerous attacks.

ARGUMENT

I. The court erred by denying Bendel's Motion to Dismiss.

Factual findings are reviewed under the clearly erroneous standard; after facts are determined, application of a legal standard is reviewed *de novo*. *State v. Tuopeh*, 2025 SD 16.

a. The court improperly evaluated the weight of Bendel's Affidavit and incorrectly categorized Tim as a credible witness.

Appellees argue "because the court did not rule in [Bendel's] favor, does not mean the court didn't properly weigh the affidavit." AB 14. While this is a correct statement, it is inapplicable. The relevant self-defense statute states "if the person reasonably believes" force is necessary, which imputes a subjective standard. SDCL §22-18-4. The court was required to consider Bendel's subjective perspective, not what was objectively reasonable. *Id.* The court erred basing Finding of Facts and Conclusion of Law on an objective standard instead of Bendel's reasonable belief as statutorily required. SR 243.

The court erred by initially refusing to consider Bendel's Affidavit. SR 240. This Court stated "SDCL §22-18-4.8 is more than just an affirmative defense to a crime" and "further reflects the legislative intent to create a substantive right." *State v. Smith*, 2023 SD 32, ¶ 30. Although the immunity statute does not explicitly authorize use of affidavits, the accused must be able to present facts constituting their reasonable belief. Requiring an accused to testify to assert reasonable belief does not align with the legislature's intent of creating a substantive right.

Nonetheless, denying Bendel's Affidavit removed the baseline for the State to disprove. After a *prima facie* claim, the presumption is a defendant acted in self-defense.

SDCL § 22-18-4.8. At an immunity hearing, it is the State's burden to prove the opposite by clear and convincing evidence. *Id.*

Although the court stated "[a]fter further consideration" it would consider Bendel's Affidavit, this was too late. SR 240. Bendel's Affidavit illustrates discrepancies between Tim's testimony and what occurred on August 20, 2023. It should be noted the court found "the Defendant raised the issue of self-defense by prima facie evidence when" the motion was filed; the only evidence included with the motion was Bendel's Affidavit. SR 55-60, 240. This illustrates the court's confusion regarding application of the immunity statute. Nonetheless, the court refused to consider the affidavit until after the immunity hearing. SR 240. Bendel's Affidavit outlined his belief that deadly force was necessary to protect himself. Because the affidavit was not initially included, the State had nothing to disprove at the hearing. Thus, the State did not carry its burden.

All conflicting evidence was resolved in favor of Tim's testimony and "Bendel's version of the facts is limited based upon his inability to be cross-examined or for the court to judge his credibility." SR 249. The essential element of reasonable belief was discredited based on Bendel's exercise of his Fifth Amendment. U.S. Const. Amend. V. This is contrary to an accused person's silence "does not create any presumption against him." SDCL § 23A-22-6. Yet, the court found "Tim was the only credible witness." SR 249.

The court erred finding Tim credible. SR 249. Appellees argue Tim's credibility and overstate Tim was truthful. AB 14-15. Tim lied to law enforcement, was biased, and could not remember key facts. *Id.*, SR 145 5, 10. The court identified Tim's bias stating "[Tim] was a simple man who lied to the cops so Doug Jr.'s family would not be

disappointed in him.” SR 249. The fact Tim was a simple man and biased proves he lacked credibility, not the inverse. Categorizing Tim as credible blatantly disregards impeaching evidence and produced clearly erroneous findings. Tim’s testimony was insufficient to satisfy the State’s burden of clear and convincing evidence. Clear and convincing requires testimony be “distinctly remembered and the details thereof narrated exactly and in due order, and . . . their testimony must be so clear, direct and weighty and convincing.” *In re Adoption of Z.N.F.*, 2013 SD 97, ¶ 18. Tim stated multiple times he could not remember or was unsure while testifying about key facts. SR 145 5, 10. Tim told conflicting renditions of events that took place. *Supra* 3.

Finding “[u]here was no testimony that Doug continued trying to put Bendel in a chokehold” is clearly erroneous. SR 249. This finding proves the court did not consider Bendel’s Affidavit because Bendel stated “Doug [ran] up behind me trying to choke me again.” SR 59. Bendel additionally stated every time he turned, Doug came at him. *Id.* *Supra* 5. The court’s finding is an incorrect statement of the record. Further, DCI Agent Nathan Winters testified Bendel “described being choked out and then roughhousing and then scraping and then wanting to leave.” SR 207. The court only considered Bendel’s Affidavit in the light most favorable to the State despite the State bearing the burden. The court ignored evidence illustrating Doug continued to pursue Bendel.

The finding of “Tim sat on a lawn mower. . . a few yards away” witnessing all events is clearly erroneous. SR 247. *Supra* 3.

Appellees assert Dr. Snell corroborated Tim’s testimony, but Tim’s testimony does not explain Doug’s injury to the front of the head. *Supra* 3. The front injury is consistent with Bendel’s Affidavit stating Doug was coming at him when struck. SR 59. Tim never

testified Bendel struck the front of Doug's head.

Finding Bendel "struck Doug in the back of the head" is clearly erroneous.

SR 248. Dr. Snell specifically testified Doug had no injuries to the back of his head.

SR 774. No evidence or testimony supports this finding.

b. Bendel's force was subjectively reasonable.

Bendel was choked unconscious. SR 78. After the initial attack, Doug tried to attack Bendel several times: Doug would temporarily retreat but kept attempting to attack Bendel when he turned. SR 59, 78, 79, 85. *Supra* 4. Following Doug's forcible felony, Bendel's choice to resist Doug's attacks with force was reasonable. SR 1043 17-20.

The State's evidence was deficient to prove Bendel's use of force was unreasonable. Appellees consistently argue application of the outdated objective self-defense standard. They endorsed the court's finding where "[i]t is counterintuitive that a reasonably objective person would find it objectively necessary to use lethal force."

AB 16, *citing* SR 239-40. Appellees further argued: it was not objectively reasonable for Bendel to strike Doug more than twice; it was not objectively reasonable for Bendel to chase Doug because he was choked; and, it was not objectively reasonable for Bendel to defend himself with lethal force. AB 17. But the standard changed to subjective in 2021. SDCL §22-18-4. The court and Appellee's analysis ignore statutory and evidentiary support for the contrary.

The self-defense statute imputes a subjective standard. SDCL §22-18-4. Thus, finding what was objectively reasonable is incorrect. SR 250. Application of the wrong standard led to denying Bendel immunity. The court erroneously concluded Bendel's "actions after being put in a chokehold are not objectively reasonable."

SR 250. Again, the court only used Bendel's Affidavit when favorable to the State instead of using it to explain Bendel's subjective beliefs in response to Doug's felonious acts: SR 59. Appellees argue Bendel's version of event's ignore Tim's, but it is unclear which version of Tim's iterations Appellees are referring to (SR 13, 65, 132, 135, 151); nonetheless, Tim consistently acknowledged Doug choked Bendel to the ground. SR 187.

The court erroneously cited repealed law "SDCL 22-5-9 (as amended July 2006)" within its Conclusion of Law. SR 249. The court even emphasized "[t]he force or violence used may never be more than sufficient to prevent such offense." *Id.* SDCL §22-5-9 was repealed in 2021. The court's reliance on repealed law contradicts current statutes. Additionally, statute does not limit when and how much force can be used as self-defense. SDCL §22-18-4.8. The court's Conclusion of Law based on repealed statutes is clearly erroneous.

Appellees contend evidence does not support the headlock was aggravated assault. AB 19. This glosses over the statutory and evidentiary support illustrating Bendel was feloniously assaulted. Statute defines aggravated assault as "attempts to induce fear of death or imminent serious bodily harm by impeding the normal breathing or circulation of another person by applying pressure to the throat or neck." SDCL §22-18-1.1. Dr. Sutton testified being put in a chokehold is "anxiety and panic provoking." SR 982-83. Fear and panic are increased when someone taps out without success. SR 984. When strangled from behind, you would feel no different in terms of concern for your life than having a gunshot or stab wound. SR 991. Further, unprovoked attacks neutralize any size advantage of the victim. SR 985 19-22.

Nonetheless, Doug refused to release, even after Bendel tapped out. SR 78. Doug committed aggravated assault by definition and Bendel's use of force was legal.

Assault is defined as a forcible felony. SDCL §22-18-3.1(3). If a person reasonably believes deadly force is necessary to prevent imminent commission of a forcible felony, lethal force is permissive. SDCL §22-18-4.1. Bendel endured one forcible felony and fended off additional attempts: lethal response was reasonable. Precedent supports these statutes. *State v. Timmons*, 2022 SD 28 (Wrapping an arm around another's neck and impeding breathing where they are frightened and struggling to breathe is aggravated assault). Case law addressed similar law under different circumstances.

Appellees argue Bendel's matter is similar to *Tuopeh* because Doug retreated but this ignores evidence of continued attacks. AB 18. Doug retreated, but they were tactical retreats: Doug pursued Bendel as soon as he turned. SR 59, 78, 79, 85, *Supra* 4. Doug remained a threat unlike Tuopeh. *Tuopeh*, 2025 SD 16. Additionally, Bendel's case was not in public, it was at a secluded farm stead. *Id.* More importantly, Bendel was attacked with deadly force, Tuopeh was not. *Id.* In *Tuopeh*, the Court reasoned, even if the defendants acted in self-defense, deadly force—repeated punches and kicks to the head—were not justified because the victim had not committed a forcible felony. *Id.* ¶ 51. Doug committed a forcible felony. Tim even testifies Bendel was choked to the ground. SR 187.

Appellees argue the court correctly denied Bendel's Motion to Dismiss because a jury convicted Bendel using a higher standard. AB 19. This argument is misplaced because immunity statutes did not apply retroactively, thus *de novo* review was inapplicable. *Smith*, 2023 SD 32. While this Court has not addressed arguments like

Appellees, others have. Other courts rule based solely on evidence presented at pretrial hearings while jury verdicts are based solely on trial evidence. *State v. Cervantes-Pavon*, 426 SC 442, (2019). These courts issue rulings based on the record as it exists at the time of the motion. *Id.* Application limits review to evidence presented at the immunity hearing. Appellee's argument further disregards the State bore the burden of proof. Arguing Bendel was convicted at a higher standard deceptively implies the burden was born by Bendel to prove, by clear and convincing evidence, he acted in self-defense, which is not the standard.

Again, all conflicting evidence was resolved to align with Tim's testimony. Bendel's subjective reasonableness was blatantly disregarded. The State failed to meet its clear and convincing burden. Thus, factual findings contradicting evidence was clearly erroneous. Lastly, the court's inaccurate Conclusions of Law applied outdated law leading to the erroneous denial of Bendel's Motion to Dismiss. This case should never have gone to trial.

II. The court abused its discretion by limiting Bendel's testimony.

Decisions to admit or deny evidence are reviewed under the abuse of discretion standard. *State v. Stanley*, 2017 SD 32, ¶ 21. To justify relief on appeal, an evidentiary error must be prejudicial. *State v. Rouse*, 2025 SD 29, ¶ 24. Evidentiary error is prejudicial when it affects the jury's verdict and harms the defendant's substantial rights. *Smith*, 2023 SD 32, ¶ 37.

a. The evidence excluded was relevant, probative, and for a permissive use.

The court never addressed or disputed relevance of the events that took place

during Farley Fest: Appellee's brief contests relevance. AB 22-24. A 403-balancing test is only preformed if evidence is relevant; the statute itself states a "court may exclude relevant evidence if..." whereby non-relevant evidence is not evaluated. SDCL §19-19-403. The court proceeded directly to a balancing test. Due to application of Rule 403, the court implied the Farley Fest evidence was relevant. *Id.*

The court initially found the evidence was not probative (SR 558 5-6), then it was too prejudicial (SR 559 1-2), and finally it was hearsay (SR 624 11). Appellees never argued this evidence was non-probative, only "the probative value does not outweigh the prejudicial effect." AB 24. This is legally and factually incorrect. The applicable standard calls for unfair prejudice to *substantially* outweigh probative value, not merely outweigh. SDCL §19-19-403. The probative value of the Farley Fest evidence is significant; it illustrates Bendel's actions were subjectively reasonable and presents his mental state. The prejudicial risk is minimal, which is why the State never explained what prejudice would be prescribed. What Doug told Bendel about fights, thefts, break-ins, and threats, that may or may not have happened, is only slightly prejudicial. Doug and the State are minimally affected, if at all, by this evidence. A "party *objecting* to the admission of evidence *has the burden* of establishing that the trial concerns in Rule 403 substantially outweigh probative value." *Supreme Pork Inc. v. Master Blaster, Inc.*, 2009 SD 20, ¶ 57. The State did not meet their burden and provided no substantive objection to inclusion of the evidence. SR 537 5-6. The court erred by excluding important evidence.

Appellees argue Farley Fest behaviors of Doug are dissimilar to his behaviors on August 20, 2023. AB 23. While this may be true, Bendel did not intend to introduce evidence to prove propensity or truth of the statements. The purpose of the evidence was

to demonstrate Bendel's considerations in determining reasonable response. Inclusion of the evidence is further supported by Rule 404.

Statute permits evidence of other wrongs for the purpose of proving knowledge. SDCL §19-19-404(b)(2). Statute permits evidence to establish Bendel was justifiable in his apprehension and reasonableness of defensive measures. *Id.*, *State v. Cottier*, 2008 SD 79, ¶ 33. Precedent supports Doug's "specific acts may be admissible to demonstrate [Bendel's] state of mind" as they were known prior to the offense. *Id.* ¶ 33. Moreover, 405 permits evidence when it "is an essential element of a charge, claim, or defense." SDCL §19-19-405(b). Justification is an essential element of the crime at hand. SDCL §22-16-15, SR 369.

The bottom line is courts have broad discretion in "deciding whether to admit or exclude evidence." *State v. Hernandez*, 2023 SD 17, ¶ 24. When considering 403 evidence, "the party objecting to the admission of evidence has the burden of establishing that the trial concerns expressed in Rule 403 substantially outweigh probative value." *St. John v. Peterson*, 2011 SD 58, ¶ 16. The State did not meet their burden because there was no substantive objection. SR 558-59, *State v. Janklow*, 2005 SD 25, ¶ 38. Exclusion was impermissive and impacted result of trial by unfairly limiting Bendel's right to present a defense.

b. Not hearsay.

The final exclusionary ruling was the evidence is prejudicial as inadmissible hearsay. SR 624 11. Hearsay is statements not made while testifying offered to prove the truth of the matter asserted. SDCL §19-19-801(c). Appellees argue Farley Fest evidence was inadmissible hearsay. This is incorrect because it is not presented to prove the truth

of the matter. AB 24-25. Bendel intended to show knowledge of the statements he believed true, not that Doug committed the Farley Fest acts. *Stanley*, 2017 SD 32 (Statements by defendant to provide context, not used to prove the truth of the matter asserted, are admissible). The statements are not hearsay because they are not being used to prove the truth of the matter asserted.

Even if hearsay, Appellees failed to address application of 804. SDCL §19-19-804. A declarant is unavailable if they cannot be present or testify because of death. SDCL §19-19-804. Doug was unavailable to testify because of death; neither the court nor Appellees acknowledged this exception. The court's exclusion of the evidence was improper.

c. Res gestae.

Appellees argue the Farley Fest information is not connected to the crime at hand. AB 25-26. Heat of passion is an essential element. Thus, what formed Bendel's response is deeply intertwined and important to the jury. The court improperly limited Bendel's testimony about why he felt lethal force was necessary. SR 12-13.

d. Prejudice.

Exclusion of Bendel's Farley Fest testimony was a prejudicial error. Exclusion was not harmless because inclusion would have resulted in a different verdict. Bendel's rights were substantially harmed and resulted in the jury only receiving half Bendel's story. The omitted evidence described Bendel's mens rea, which would have established doubt because Bendel's actions were justified. Exclusion of Bendel's mental state and justification for actions undoubtably encouraged the jury to find Bendel guilty. Exclusion implicates Bendel's right to provide a defense. U.S. Const. Amend. VI. But for exclusion

of the Farley Fest evidence, the jury would have found Bendel not guilty. The court abused its discretion by excluding the Farley Fest evidence, limiting Bendel's testimony, and restraining Bendel's ability to mount a defense. Bendel's justification would have created reasonable doubt for the jury to find him not guilty.

III. The court erred by denying Bendel's Motion for Judgment of Acquittal.

This Court reviews whether there is sufficient evidence in the record to sustain guilt beyond a reasonable doubt *de novo*. *State v. Carter*, 2009 SD 65. Appellees argue Bendel failed to look at the evidence in a light most favorable to the State; this was considered. There is insufficient evidence to support Bendel's conviction.

a. The State provided insufficient evidence to prove heat of passion.

Heat of passion is an essential element of First-Degree Manslaughter; the State presented insufficient evidence that Bendel acted in a heat of passion. Doug attacked Bendel from behind, put him in a chokehold, and pulling straight backwards where his airway was restricted. SR 78. Despite efforts to get Doug to stop, he did not release until Bendel lost consciousness. *Id.* Appellees argues Doug "came up behind Bendel and put his arm around his neck," "Bendel got irritated, picked up a 2x4, and chased Doug for a total of fifty yards," then, "struck Doug Jr. on the back, and once he fell to the ground, Bendel continued to beat him to death." AB 34. This summary is a gross deduction of the events that diminishes undisputed facts and the severity of Doug's felonious acts. Nonetheless, Appellees argue "evidence shows Bendel was provoked and acted uncontrollably" thus "evidence supported a finding that Bendel acted in the heat of passion." AB 34. Neither the record nor evidence indicate Bendel was provoked, acted

uncontrollably, or support finding Bendel acted in a heat of passion which explains Appellees lack of citations supporting this argument.

Prior to Bendel's motion, there is no evidence indicating he was provoked or acted uncontrollably. While Bendel described feeling irritated, that is definitionally mild and insufficient to deduct provocation or acting uncontrollably. SR 919 13-14. In fact, the term provoked was used a single time prior to Bendel's motion to describe Doug's conduct (SR 637, 882, 1100): "then out of nowhere without provocation Doug Junior jumps on Joe's back from behind and puts him in a neck hold." SR 815 22-24. No testimony or evidence indicated Bendel acted uncontrollably. SR 629, 873, 1085 (control), 640, 886, 1107 (uncontrol). There was insufficient evidence presented to support Bendel was provoked, acting out of control, or acted in a heat of passion because there was no evidence presented. Further, the first time the term "heat of passion" was used occurred in the State's objection to Bendel's Motion for Acquittal; while it is not impossible to support an argument without formally using a term, the State did not argue or present evidence supporting heat of passion. SR 973 11.

b. The State provided insufficient evidence to prove the killing was not excusable or justified.

An essential element of Manslaughter in the First Degree, which must be presented sufficiently to survive a judgment of acquittal, is killing was not excusable or justified. SDCL §22-16-15. Thus, the State needed to provide evidence of such; this did not occur. The State did not present evidence Bendel did not act in self-defense. Doug choked Bendel unconscious. SR 1040 18, 1041 1-2. Appellees argue evidence does not support Bendel's response was justified or excusable, but the record does not reinforce

this assertion. AB 34. Specifically, Appellees argue Doug retreated and Bendel's force was unnecessary after Doug was on the ground. *Id.* This is an incorrect interpretation of the events, but most significantly also insufficient to prove evidence was presented to the jury regarding the essential element.

The record reflects the State did not present evidence or testimony of an unjustified or inexcusable killing. The State asked a singular question about justifiable homicide to Dr. Snell, who answered he had no knowledge of legal conclusions. SR 770 1. The sole witness asked a question about self-defense was Agent Winters. For context, Winters interviewed Bendel until Bendel terminated the interview and requested an attorney. The State asked if Bendel indicated he acted out of self-defense, whereby Winters responded "no." SR 922 1-3. No other questions were asked by the State pertaining to justification or self-defense prior to Bendel's motion. The record reflects no evidence supports the killing was inexcusable or unjustified.

Appellees argue "once Doug was on the ground, he was no longer a threat to Bendel." AB 34. This ignores Bendel's subjective view and is unsupported by evidence. Further, statute does not limit how much force can be used in response to a forcible felony. SDCL §22-18-4.8. Pattern jury instruction 2-9-2 reflects Bendel had a right to stand his ground after being attacked. Bendel was not required to retreat, could defend himself, and even pursue his assailant until secure from danger.

Appellees argue if Doug was on the ground, then no threat existed. AB 34-35. This argument is speculative utilizing "if, then" reasoning and unsupported by the record. The court erred denying Bendel's motion because evidence was not presented to support conviction of the offenses charged. Specifically, there was insufficient evidence

supporting killing was in a heat of passion, inexcusable, or unjustifiable.

IV. Cumulative Effects

a. The court's errors and abuse of discretion deprived Bendel of a fair trial.

Appellees indicate it is unclear whether Bendel's cumulative effects arguments incorporate the first three arguments of the Appellant's Brief. AB 35. To clarify, each error is incorporated as a component of cumulative effect.

i. The court's abbreviated consideration of Bendel's Affidavit and mischaracterization of Tim as credible.

The Memorandum Decision issued following Bendel's Motion to Dismiss resolved all evidence to align with Tim's testimony whereby "reconsideration" of Bendel's Affidavit was obsolete. Bendel's subjective reasonableness was disregarded based on silence. Tim's testimony was not distinctly, directly, and clearly remembered in detail or order. *Supra* 5-8.

ii. The court's antiquated self-defense statute application.

An individual's subjective belief is the standard for self-defense. SDCL §22-18-4. Appellee's objective arguments and the court's objective factual findings are outdated. Doug impeded Bendel's normal breathing by applying pressure; Bendel's Affidavit explained his subjective response to this aggravated assault. Bendel did what he believed was necessary to prevent additional attacks. The court applied the incorrect standards and erred denying Bendel's Motion to Dismiss. *Supra* 8-11.

iii. The court's misinterpretation of the rules of evidence.

The court misapplied the South Dakota evidentiary rules 403, 404, 405, 801 and

failed to apply rule 804. SDCL §19-19. The testimony Bendel attempted to introduce was relevant, probative, intended for permissive use, and was not hearsay. *Supra* 11-15.

iv. The court's misguided denial of Bendel's Motion for Judgment of Acquittal.

The court incorrectly denied Bendel's Motion for Judgment of Acquittal. The State failed to present evidence supporting First-Degree Manslaughter because they did not present evidence Bendel acted in a heat of passion or his actions were inexcusable or unjustified. Both of these are essential elements; neither was sufficiently addressed. *Supra* 15-18.

v. The court's prejudicial effect.

Each above analyzed errors or abuses of discretion were prejudicial to Bendel. Individually, each had a disparaging and prejudicial effect on the outcome of Bendel's trial by elongating proceedings against him, restricting his ability to mount a defense, and insufficiently presenting to the jury.

b. The court infringed on Bendel's Fifth Amendment.

Appellees argue Bendel was not forced to testify because he was advised of his Fifth Amendment. AB 36. Bendel was constructively forced to testify. Any reasonable person cautioned by the court that deciding not to testify would create issues would feel forced to testify. On the first day of trial, Bendel faced the decision to testify or have issues with the court. Nobody, during the most impactful and decisive week of their life would feel they had the option to refrain from testifying. Though Bendel was never directed to testify, what option did he have? Bendel was constructively forced to testify.

c. The court erred by not allowing Bendel's sister to testify at sentencing.

Tonya Diggins, Bendel's sister, provided a written statement to the court.

Appellees argue the court did not err "[b]ecause the court already reviewed the same information in writing" and this "evidence at best would have been cumulative." AB 37-38. Though the court was never afforded the opportunity to determine the cumulative nature of Tonya's testimony, what she planned to offer was not included in her previous statement.

d. The court erred by sentencing Bendel with parole consideration.

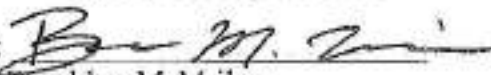
The court was unaware of SDCL §24-15-4.1 at sentencing. Appellees argue eligibility advisement are not part of a court's sentence. AB 38. Appellees incorrectly assume the court did not consider Bendel's parole eligibility. Parole eligibility and parole considerations are two different topics. The record reflects the court intentionally considered Bendel's parole eligibility and deliberately stated Bendel would "be parole eligible pursuant to SDCL 24-15A-32"; SR 659 17-18. The court was prepared with the statute reference; if not considering Bendel's parole eligibility it would not have included this consideration. The court mistakenly incorporated parole eligibility into Bendel's sentence and was unaware of SDCL §24-15-4.1.

CONCLUSION

Bendel asks this Court to reverse denial of his Motion to Dismiss. The State did not carry its burden, and all charges should be dismissed. Alternatively, Bendel requests this matter be remanded for a new immunity hearing or in the alternate trial.

Respectfully submitted this 12th day of August, 2025.

AUSTIN, STRAIT, BENSON,
THOLE & KOEHN, LLP

BY: 

Brooklyn M. Mailey
Attorneys for Appellant
25 1st Avenue Southwest
Watertown, SD 57201
Telephone: (605) 886-5823
State Bar #5648

AUSTIN, STRAIT, BENSON,
THOLE & KOEHN, LLP

BY: 

Rebecca Morlock Reeves
Attorneys for Appellant
25 1st Avenue Southwest
Watertown, SD 57201
Telephone: (605) 886-5823
State Bar #2706

CERTIFICATE OF COMPLIANCE

We, Brooklyn M. Mailey and Rebecca Morlock Reeves, attorneys for the Appellant, hereby certify Appellant's Reply Brief complies with the type and volume limitation as provided in SDCL 15-26A-66 and Appellant's Reply Brief contains 4,997 words and is set in Times New Roman, size 12.

Dated this 12th day of August, 2025.


Brooklyn M. Mailey

Rebecca Morlock Reeves

REQUEST FOR ORAL ARGUMENT

The Appellant respectfully requests oral argument.

CERTIFICATE OF SERVICE

We, Brooklyn M. Mailey and Rebecca Morlock Reeves, hereby certify that on the 12th day of August, 2025, we mailed the original Appellant's Reply Brief and Appendix to the Supreme Court at the address below and emailed a Word version of the Appellant's Reply Brief, along with a PDF version of the Appendix to the following address:

Supreme Court Clerk's Office
500 East Capital Avenue
Pierre, SD 57201-5070
SCClerkBriefs@uds.state.sd.us

We further certify that we mailed two copies of the Appellant's Reply Brief and Appendix via First Class United States Mail and an electronic copy via Electronic Mail to the following parties:

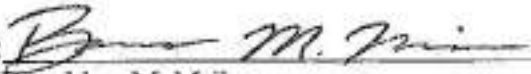
Sarah L. Thorne
Deputy Attorney General
1302 E Hwy 14, Suite 1
Pierre, South Dakota, 57501
atgservice@state.sd.us

Mark A. Reedstrom
Attorney at Law
210 East 5th Avenue
Milbank, SD 57252
mark@reedstromlaw.com

Jackson Schwandt
Attorney at Law
PO Box 66
Milbank, SD 57252
jackson.schwandt@outlook.com

this 12th day of August, 2025.

AUSTIN, STRAIT, BENSON,
THOLE & KOEHN LLP

BY: 
Brooklyn M. Mailey
Attorneys at Law
25 1st Avenue Southwest
Watertown, SD 57201
Telephone: (605) 886-5823

AUSTIN, STRAIT, BENSON,
THOLE & KOEHN LLP

BY: 
Rebecca Morlock Reeves
Attorneys at Law
25 1st Avenue Southwest
Watertown, SD 57201
Telephone: (605) 886-5823

APPENDIX
TABLE OF CONTENTS

<u>No.</u>		<u>Appx. Page</u>
1.	STATEMENT OF TIM LOEHRER	Appx. 1

STATEMENT OF: Tim Loehrer 07/27/1964

I came out side and Joe Bendel and Doug were fighting and Doug had Joe around the neck and then Joe fell on Ground and Then Doug took off running and Joe chased him with a pipe and hit hit several times Then he fell down and Joe hit him maybe 20 times or so Then he came after me so I took off in my Car and called 911 then my phone died so I went to his dad house and told him

Timothy Loehrer