IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30870

STATE OF SOUTH DAKOTA,
Appellee,

vs.

SCOTT ANDERSON,
Appellant.

Appeal from the Circuit Court
Fourth Judicial Circuit
Lawrence County, South Dakota

THE HONORABLE MICHELLE COMER

APPELLANT'S BRIEF

Notice of Appeal Filed: October 10, 2024

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PRELIMINARY STATEMENT

Throughout Appellant's Brief, the State of South Dakota is referred to as the "State." Appellant, Scott Anderson, is referred to as "Anderson." The settled record is denoted "SR," followed by the appropriate pagination.

JURISDICTIONAL STATEMENT

Anderson appeals to the South Dakota Supreme Court under SDCL 23A-32-2 and SDCL 15-26A-3(2) from the whole of the final Order Suspending Imposition of Sentence, entered September 21, 2024. Anderson timely filed his Notice of Appeal pursuant to SDCL 15-26A-6 on October 10, 2024. SR 894.

STATEMENT OF THE ISSUES

I. THE CIRCUIT COURT VIOLATED ANDERSON'S RIGHT TO A FAIR TRIAL.

The circuit court erred when it excluded Anderson's experts and denied Anderson's request for a *Daubert* hearing.

Kreps v. Dependable Sanitation, 2022 WL 4094124 (D.S.D. 2022)

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

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

SDCL 19-19-702

SDCL 34-20B-15

SDCL 34-20B-16

STATEMENT OF THE CASE AND FACTS[1]

Introduction

The circuit court in this matter was burdened with confronting a surprising and difficult issue. The question at hand is of state-wide importance because it involves the scientific reliability of the South Dakota Public Health Laboratory ("State Health Lab")—an unaccredited[2] laboratory that has been scrutinized by the United States District Court for the District of South Dakota due to its lack of adequate written quality control protocols, lack of verifiable error rate, and its large standard deviation of +/- 20%. *See Kreps v. Dependable Sanitation*, 2022 WL 4094124 (D.S.D. 2022) at *5. Not only does the State Health Lab bless an alarmingly high standard deviation in its testing for methamphetamine; by its own admission, it also does not test for the difference between illegal d-isomer methamphetamine and its counterpart, l-isomer methamphetamine, which is found in certain over-the-counter inhalers.

As it relates to this issue, the circuit court violated Anderson's right to a fair trial by limiting his ability to challenge the methamphetamine tests in two prejudicial ways: (i) by denying to entertain an evidentiary hearing on Anderson's *Daubert* motion regarding the laboratory's credentials and testing reliability; and (ii) by excluding both of Anderson's expert witnesses on this issue as either as untimely or unqualified. Anderson

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[1] Due to the intertwined nature of the facts and procedural history in this case, the Statement of the Facts and Statement of the Case have been combined.

[2] In December 2023, after the events of this case, the laboratory secured an accreditation. SR 851. The record is not clear regarding which accreditation it secured; however, the accreditation occurred after Anderson's samples were tested. When representatives of the State Health Lab were asked about their new accreditation, they testified that "basic accreditation" was "a lot of extra paperwork for us." SR 846.

asks this Court reverse and remand this matter to the circuit court with instructions for it to: (i) hold an *Daubert* evidentiary hearing on the reliability of the methamphetamine testing; and (ii) order a new trial in which the error of excluding defense expert witnesses is corrected if the test results withstand *Daubert*.

Background

The genesis of this case is a May 18, 2023 traffic stop. On that day, Officer Hunter Bradley ("Officer Bradley") and Officer Saul Torres ("Officer Torres") were patrolling East Colorado Boulevard in Spearfish, South Dakota. At that time, Officer Torres was training and had not yet been through the police academy. SR 729. For that reason, Officer Bradley was his field training officer that evening. SR 704.

While patrolling, they observed a running vehicle sitting stationary in a storage unit parking lot. SR 704: 2–4; 707:4–11. Officer Bradley and Officer Torres entered private property, approached the vehicle, and found Anderson sleeping in the driver's seat with the brake light engaged. SR 707: 19–24. Officer Torres began a DUI investigation. Officer Bradley is certified as a drug recognition expert; Officer Torres has no specialized training in drug recognition and limited experience as a law enforcement officer. SR 745–46.

Officer Torres began a DUI investigation that included a number of field sobriety tests. SR 714–719. Throughout the tests, he concluded that Anderson's pupils were dilated but equal size, that he did not have any resting nystagmus or sustained nystagmus at maximum deviation, and that he did not lack smooth pursuit in either eye. SR 736: 11–25; 737: 1–6. However, Anderson struggled with several of the physical tasks during the tests and was eventually placed under arrest. SR 714–719.

During a subsequent search of Anderson and his vehicle, Officer Bradley and Officer Torres did not find any controlled substances or drug paraphernalia. SR 720: 25; 721: 1–9, 14–15; 738: 14–25, 739:1. Anderson was transported to the Spearfish Police Department where he consented to a urine analysis as well as a blood test. SR 733: 5–11. Although the field test is not in the record, officers testified that it produced a presumptive positive result for tetrahydrocannabinol, methamphetamine, and amphetamine. SR 720: 1–5. Officer Torres testified that he marked and sealed the urine and blood samples, which were placed in the Spearfish Police Department's prepackaged containers. SR 733: 9–13. The samples were then dropped in the Spearfish U.S. Post Office's secured mailing receptacle and were sent, by certified mail, to the South Dakota State Health Lab, located in Pierre, for confirmation testing. SR 733: 14–19; 778: 11–10–13. Days later and without refrigeration, the samples arrived at the State Health Lab on either May 22, 2023 or May 23, 2023. SR 778: 9–10. An initial screen of the samples was conducted by an individual, possibly named Benjamin, who was not a witness at the trial. SR 763: 1–5.

On June 6, 2023, forensic chemist Irene Aplan of the State Health Lab engaged in an amine analysis—i.e., a methamphetamine analysis—of Anderson's urine sample using gas chromatography mass spectrometry ("GCMS"). SR 765–55, 769. Then, on June 7, 2023, Forensic Chemist Aplan analyzed Anderson's urine sample for THC, using GCMS quadrupole. SR 767: 25; 768: 1–3, 769. At trial, Forensic Chemist Aplan initially testified that she had no information as to the climate control of Anderson's specimens as they were transported from the Spearfish Post Office to the custody of the State Health Lab in Pierre. SR 778: 21–24. Later, however, she testified that the State Health Lab

does not "immediately require" samples to be refrigerated, despite contemporaneously acknowledging that failing to do so within 24 hours can create inaccuracies. SR 782: 23–25; 783: 1–3; 8–11; 783: 4–7. JT: 785: 11–18.

In addition to the lack of climate control safeguards during shipment, Forensic Chemist Aplan agreed that her paperwork indicated that the seal initials on Anderson's urine sample were not legible, SR 779: 4–16, and agreed that the specimen did not include a seal date. SR 780: 13–14. Similarly, Forensic Chemist Aplan testified that the urine toxicology worksheet had no seal date on it at all. SR 780:7–12. On top of all this, Forensic Chemist Aplan then testified that the State Health Lab does not chemically differentiate between illegal d-isomer methamphetamine and its counterpart, l-isomer methamphetamine, which is found in certain over-the-counter inhalers. SR 784: 15–20; 787: 11–25; 788: 1–9; 789: 5–14. She testified that the State Health Lab has not tested for l-methamphetamine doses on any of their machines. SR 791: 15–22. As to Anderson, Forensic Chemist Aplan specifically testified that she would not know a urine sample contained l-methamphetamine. SR 792: 14–16 (Q: "So you wouldn't know because you don't test it?" A: "I would not know if the sample contained l-methamphetamine."). These comments are important to the underlying admissibility of the laboratory's tests under *Daubert*, given the State Health Lab's lack of adequate written quality control protocols.

Forensic chemist Jeremy Kroon of the State Health Lab was responsible for analyzing Anderson's blood sample. To test it, he used GCMS, producing a result of 12

nanograms per milliliter of THC carboxy,[3] 21 nanograms per milliliter of amphetamine, and 70 nanograms per milliliter of methamphetamine in Anderson's blood. SR 798: 8–14; 801: 25; 802: 1–4. Like Forensic Chemist Aplan, he agreed that not refrigerating samples can affect the results of the analysis but later stated that doing so was "just a recommendation." SR 807: 10–15; 810: 1–4. Like Forensic Chemist Aplan, he confirmed that the State Health Lab does not test for the two different isomers of methamphetamine. SR 808: 1–4 (Q: "And we have already heard testimony today, but you would tell the jury that [GCMS] does not differentiate between dextro and levomethamphetamine, correct?" A: "The way we run the test, it does not."). Once again, these admissions raise serious concerns about whether the State Health Lab runs its tests outside reliable and accepted scientific practices, which could render them inadmissible under *Daubert*.

Pre-trial, Anderson made several motions related to the handling of expert witnesses. With regard to discovery requests, as it relates to the issues on appeal, Anderson filed a motion for specific discovery requesting discovery related to, among other things, the State Health Lab's quality control data. SR 172 (Motion for Specific Discovery Re: State Health Lab).[4] The State eventually provided discovery related to the

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[3] Forensic Chemist Kroon testified that the carboxy indicated that Anderson was not under the influence. SR 813.

[4] The State resisted designating the chemists as experts. This may have been an attempt to avoid the applicability of *Daubert* to the tests following the *Kreps v. Dependable Sanitation* decision. 2022 WL 4094124 (D.S.D. 2022) at *5. At the hearing, the State represented that "At this point, I don't envision any per se experts. We have officers that were involved and the chemist who did the urinalysis drug testing, blood testing. I know some have reported those chemists and doctors as expert witnesses. My view would be that they are fact witnesses and would not necessarily notice them up as experts." SR 491.

laboratory. *See* fn. 5 (attaching citations to all expert related material). In a further effort to test expert credentials/reliability, Anderson requested a *Daubert* hearing for the circuit court to assess the reliability of the State Health Lab's testing. SR 181. The circuit court denied the *Daubert* motion without analyzing or referencing any of Anderson's serious concerns about the laboratory, including the substantial standard deviation, the lack of adequate written quality control protocols, and the failure to track false negatives and positives.[5] SR 543-47. *See Kreps v. Dependable Sanitation*, 2022 WL 4094124 (D.S.D. 2022) (questioning the admissibility of the laboratory's testing on these grounds).

The Friday before trial, Waeckerle Law, Prof. LLC noticed its appearance. That same day, Anderson received his expert report from Chemtox Consulting expert Sarah Urfer regarding the reliability of the State Health Lab testing. SR 313. Urfer was approached as a defense rebuttal expert in anticipation for the State's position that the State Health Lab's methamphetamine testing was scientifically reliable. Her expert report drew a number of conclusions regarding the test results. SR 313–16. These

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[5] In its written objection, the State argued that *Daubert* only related to scientific testimony and not necessarily all expert testimony. SR 151. At the hearing, the State appeared to alter this argument and agree that *Daubert* applies to all expert testimony. SR 504–05.

The documents in the record related to the State Health Lab do not explain in a comprehensible way how it processed Anderson's samples or arrived at its conclusions in the reports. The following is a comprehensive list of the record documents related to the scientific process/testing: SR 203 (American College of Pathology "original evaluation"); SR 321–23, 770 (Forensic Scientist Aplan's CV); SR 324 (lab report for UA); SR 325–27, 802 (Forensic Scientist Kroon's CV); SR 328–29, 813 (lab report for blood analysis); SR 319–20, 749, 756 (paperwork for packaging samples); SR 320, 751 (toxicology submission form); SR 472 (physical exhibit list marking blood tubes).

included:

- "Methamphetamine is a mirror molecule. *l*-methamphetamine is the active ingredient in several over-the-counter decongestants, such as Vicks Inhaler, which contains 50 mg of *l*-methamphetamine." *Id.*
- That "[w]hen methamphetamine is used as a prescription medication, the expected blood concentration is between 20-50 ng/mL blood with the highest useful therapeutic level being 200 ng/mL." *Id.*
    - Anderson's was 70ng/mL. SR 798.

Urfer also concluded that "it [was her] professional opinion that the testing from the South Dakota Department of Health are deficient to a degree that compromise the validity and reliability of the results provided." She based this opinion on the following:

- "Standard laboratory practice in the scientific community is to accept results as scientifically valid that fall within two standard deviations of the mean variation." *Id.*[6]
    - As noted previously, the State Health Lab's standard deviation is +/- 20%.
- As to the rate of error, Urfer stated, she was "not able to assess what the measure of uncertainty [was] at the state laboratory for any of the testing performed on th[e] sample, nor the data from which the 20% figure cited by

[6] Anderson's pharmaceutical expert, Pharmacist Silva, was prohibited from testifying to the standard deviation. SR 879. However, during an offer of proof, she similarly stated that approximately 5% is generally scientifically acceptable. SR 904.

the court would have been derived if no records of false positives or false negatives were recorded." *Id.*

Within an hour of receiving it, Anderson emailed the report to the State and the circuit court. SR 311. At a bench conference immediately before trial, the circuit court excluded the expert's opinion in its entirety as untimely. SR 604 (Court: "There's been no expert because the Court is not going to allow the expert of the late disclosed.").[7] However, the circuit court permitted the State Health Lab chemists to testify at length to the reliability of their testing even though those individuals did not provide Anderson with formal expert reports/disclosures outside of the chemists curriculum vitae and some general discovery that appeared to be related to the lab as a whole. *See* fn. 5 (articulating all record evidence related to experts). This occurred after Anderson repeatedly requested an opportunity to question these witnesses pre-trial to gain any understanding of the expert opinions, the documents they provided, and the alleged reliability of the tests.[8]

Throughout the trial, Anderson implored the circuit court to allow him to address the two isomers of methamphetamine as the central component of his defense. As noted previously, d-isomer methamphetamine is the illegal form of methamphetamine, whereas

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[7] After jury selection, the circuit court made another comment about the fact that it had "not ruled on" whether it would allow "any expert witness to testify." SR 692. It said this in the context of Anderson's second expert witness, Pharmacist Silva, on the grounds that it had not yet determined whether Pharmacist Silva's testimony regarding cold medicine was relevant. The circuit court never gave Anderson permission to call his Chematox Consulting expert witness following its pre-trial exclusion. SR 604.

[8] The only documents that Anderson received in the nature of expert reports were the CVs of certain chemists and unsigned chemical test results with no underlying opinion or expert designation. This may be because the State took the position that even the chemists were not experts. SR 489.

l-isomer methamphetamine is an ingredient in common over-the-counter products. SR 789–90. The circuit court initially prohibited Anderson from mentioning the different isomers of methamphetamine at all. SR 604. However, it did allow Anderson to comment that there was a difference between methamphetamine and cold medicine. SR 607. In the middle of the trial, however, the State opened the door to discussions of the different isomers during the testimony of Forensic Chemist Aplan, and Anderson was able to cross examine subsequent witnesses about the existence of l-isomer methamphetamine. SR 787–88.

In an effort to overcome the prejudice of the circuit court's handling of the experts up to this point, Anderson called two witnesses: (i) Stacy Ellwanger; and (ii) Pharmacist Silva. Stacy Ellwanger serves as the Deputy Director of Environmental Health Forensic Chemistry of the State Health Lab. Valerie Silva is a pharmacist familiar with the difference isomers in methamphetamine and the ingredients in certain over-the-counter mediation. During her examination, Deputy Director Ellwanger agreed that the lab was not accredited until December 2023—months after Anderson's samples were tested. SR 834. She also admitted that the laboratory has a margin of error rate of +/- 20%. SR 840 (Q: "You still have a margin of error plus or minus 20%?" A: "Plus or minus 20%. Now it is called uncertainty of measurement to make it clear for people to understand."). When Anderson attempted to ask Deputy Director Ellwanger if she would be surprised to learn that reputable labs require standard deviation to be much lower than 20%, the circuit court sustained an objection for assuming facts not in evidence. SR 842.

After Deputy Director Ellwanger testified, Pharmacist Silva testified regarding the differences between l- and d- isomer methamphetamine. More specifically, she

explained that "a lot of generic companies have come up with a stick inhaler with the [l]-methamphetamine in it." SR 871. She also testified that over-the-counter medication with l-methamphetamine as an ingredient is known to cause false positive results in methamphetamine testing and that users would not get the same intoxicating response for l-methamphetamine as they would from d-methamphetamine. SR 871–72; SR 874. When it came time to testify regarding the 20% standard deviation, however, the circuit court restricted Pharmacist Silva's ability to testify on the grounds that she did not have the expertise to offer an opinion on error rates of methamphetamine toxicology testing. SR 903. Thus, by this point in the trial, the circuit court had excluded both of Anderson's experts on the reliability of the testing results (Pharmacist Silva and Urfer with Chemtox Consulting). During an offer of proof, Pharmacist Silva stated as follows:

Q: You have a degree that requires an understanding of statistics?

A: Yes. We use a lot of numbers, yes.

Q: And you have, in your profession, certain reliability protocols or standard deviations to test the reliability of science?

A: So pharmacy started with compounding and so, though I don't compound anymore, back in the day when we did compound, we had to compound within 3%.

* * * *

Q: And with your experience in the field, being a pharmacist for 30 plus years, is it your understanding that the math deviates per industry? In other words, would a standard deviation test [sic] be identical in pharmacy as to maybe forensic testing?

A: I would sure hope so.

Q: And if I told you that the State Health Lab has a standard deviation of plus or minus 20%, what would be your reaction to that?

A: I think that's horrific.

SR 904–05.

Following Pharmacist Silva's testimony, the jury deliberated. In Instruction 18, it was specifically instructed that to be guilty of the only felony count—unauthorized ingestion of a controlled drug or substance—the jury had to conclude that Anderson had ingested methamphetamine as an element of the crime. SR 350. The jury ultimately returned a guilty verdict. As to the Indictment, it found Anderson guilty of unauthorized ingestion of a controlled substance, a class five felony. As to the Information, it found Anderson guilty of driving or physical control of a motor vehicle while under the influence (Count I) and ingesting a substance except alcoholic beverages for the purposes of being intoxicated (Count II), both of which are class one misdemeanors. This appeal follows.

ANALYSIS

I. THE CIRCUIT COURT VIOLATED ANDERSON'S RIGHT TO A FAIR TRIAL.

This Court has consistently held that "every accused, innocent or guilty, is entitled to a fair trial." *State v. Pellegrino*, 1998 S.D. 39, ¶ 25, 577 N.W.2d 590, 600. "[D]ue process is in essence the right of a fair opportunity to defend against the accusations." *State v. Packed*, 2007 S.D. 75, ¶ 23, 736 N.W.2d 851, 859. This means that "[a]n accused must be 'afforded a meaningful opportunity to present a complete defense.'" *Id.* at 860. Although evidentiary rulings are generally reviewed under the abuse of discretion

standard, "[a]n alleged violation of a defendant's constitutional right to due process is reviewed de novo." *State v. King*, 2014 S.D. 19, ¶ 4, 845 N.W.2d 908, 910.

A. THE CIRCUIT COURT ERRED WHEN IT EXCLUDED ANDERSON'S EXPERTS.

The circuit court's exclusion of testimony from Anderson's experts—Urfer of Chematox Consulting and Pharmacist Silva—regarding the reliability of the State Health Lab's methamphetamine testing violated his right to a fair trial. Beginning with Urfer, as noted previously, the circuit court excluded her expert opinion because it was disclosed the Friday before trial. SR 311. It is true that Urfer's report was disclosed that Friday, which was late in the litigation process; however, it was gathered in anticipation of rebutting the State's position that the laboratory was reliable. Rebuttal experts are not typically subject to disclosure rules; however, Anderson nevertheless provided the report to the circuit court and the State via email to facilitate fair and balanced litigation. SR 311–17 (Affidavit of Walno); *Schrader v. Tjarks*, 522 N.W.2d 205, 209 (S.D. 1994) ("Neither statute or rules, nor South Dakota precedent requires disclosure of rebuttal witnesses.")

The circuit court nevertheless excluded Urfer's opinion in its entirety. The decision to allow the State to put its chemists on the stand, thereby bolstering the apparent reliability of the laboratory, while simultaneously silencing Anderson's experts on the same subjects was a significant error. Specifically, the State was allowed to call witness after witness related to the results of the methamphetamine tests. This process started with Forensic Chemist Aplan, who testified that GCMS is accepted in the scientific community and that other labs use it. SR 758 (beginning of testimony); SR

768. She also explained that machines are tested weekly and on the day of testing and that she generally verifies that the retention times are "good." SR 768–69, 774. She further assured the jury that the sample never left the State Health Laboratory other than to bring it to trial. SR 775.

The State then proceeded to Forensic Chemist Kroon, who testified to the initial screening process and the purpose of the screening. SR 792 (beginning of testimony); SR 796–97. He also agreed that GCMS is widely used and that the laboratory runs samples to ensure the instruments are running properly. SR 797. Along those same lines, he testified that the equipment was running properly when Anderson's sample was tested. SR 800. Finally, Forensic Chemist Kroon opined on an unidentified study he had read that analyzed the l-isomer methamphetamine issue, and that of the fifteen participants, two had l-methamphetamine in their blood but, according to Forensic Chemist Kroon, those samples would have been below the State Health Lab's reporting limit. SR 812. All of these witnesses testified in a manner that made the State Health Lab's methamphetamine testing appear to be credible and scientifically reliable with no ability for Anderson to respond with a similarly situated individual to attack the State Health Lab's reliability. For that reason, error is comfortably established.

Moving to prejudice, given the nature of Urfer's opinion, her testimony was critically important to Anderson's defense. Had she been allowed to testify, she would have opined that methamphetamine testing from the State Health Lab was "deficient to a degree that comprises the validity and reliability of the results provided." SR 316. This opinion tracks Judge Duffy's dicta in *Kreps v. Dependable Sanitation,* in which she posed the question whether the State Health Lab's tests could survive a *Daubert*

challenge giving their testing practices. 2022 WL 4094124 (D.S.D. 2022) at *5 ("A 20-percent margin of error is considerable and if there is no tracking of false results, there is no verifiable rate of error, a significant factor in deciding whether to admit expert testimony.")[9] Left without a scientist to explain the gravity of the deviation and other deficiencies, it is unsurprising that the jury convicted Anderson.

Turning next to Pharmacist Silva, the circuit court initially reserved ruling regarding whether she would be allowed to testify at all on relevancy grounds. However, the circuit court eventually allowed Pharmacist Silva to testify to the difference between d- and l-isomer methamphetamine because the State's witnesses opened the door to that discussion during their examination. SR 787–88 (opening door); SR 872–73 (as to difference). When it came time to address the significant +/- 20% standard deviation, however, the circuit court excluded Silva's testimony on the grounds that her pharmaceutical background was insufficient to render an opinion on standard deviation in toxicology. SR 879, 901–905. This led to an offer of proof in which she described the State Health Lab's general deviation as "horrific." SR 904–05.

With both Urfer of Chematox Consulting and Pharmacist Silva disqualified, the defense was unable to respond and explain the concerning aspects of the State Health Lab's testing protocols—aspects that, in at least one court's opinion, merited an inquiry. *See Kreps*, 2022 WL 4094124 at *5. The reliability of the test results was a vitally important component of Anderson's defense. Its significance was apparent throughout

[9] The *Kreps* case resolved before the District Court was asked to rule on the ultimate admissibility of the State Health Lab testing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594, 113 S .Ct. 2786, 125 L.Ed.2d 469 (1993).

the entire defense presentation, from voir dire to closing. Given the circuit court's rulings, Anderson never got to truly fulfill his promise to the jury, made in voir dire, regarding the 20% standard deviation by presenting expert witness testimony to discuss why a standard deviation of 20% was so problematic.[10] The issue was magnified when the State guided its witness to suggest that Anderson should have re-tested the blood when he had no burden of proof and no way to alert the jury that his toxicology expert had been excluded. SR 848; SR 374. And although Anderson was able to comment on the standard deviation and other deficiencies during closing, nothing—and certainly not non-evidentiary comments from counsel during closing—could be as powerful as the State's experts that were anointed by the circuit court as qualified. SR 374 (arguments not evidence instruction). Thus, he was "effectively deprived of a fundamental constitutional right to a fair opportunity to present a defense." *Packed*, 2007 S.D. 75, ¶ 27, 736 N.W.2d at 860.

In an effort to overcome this, it is believed that the State will make two arguments. First, it will likely argue that any prejudice to Anderson is harmless given that he was allowed to cross examine the chemists and question Deputy Director Ellwanger on the standard deviation, the fundamental difference between d- and l- isomer methamphetamine, and lack of adequate written control protocols. SR 840; SR 839 (d and l); SR 839–40 (no adequate written quality program). It is true that the chemists and Deputy Director Ellwanger admitted to some concerning issues with the State Health

[10] SR 643 (Voir dire, Q: "This is a question for those but particularly those who still want to be skydiving. If I told you there was a 20% chance of the parachute not deploying, who here is still going? . . . One in five chance of death, you are, like, let's rock.").

Lab. These included the +/- 20% standard deviation, the lack of adequate written quality control manuals/protocols, and the State Health Lab's decision not to test for the difference between d and l isomer methamphetamine. *Id.* However, cross examination does not cure the defect. As Anderson noted pre-trial, the very presence of expert witnesses—i.e., the chemists—is highly problematic because "a jury of laypeople is going to trust the science even if it is unreliable science." SR 598; *see also Daubert*, 509 U.S. at 595 (same). Thus, Anderson should have been permitted a fair opportunity to present his own expert rather than being limited to commenting/questioning the State's witnesses on these issues.

The second argument that Anderson anticipates will be made is that the error was harmless because the statute listing Schedule II drugs does not differentiate between the different isomers of methamphetamine. SDCL 34-20B-16 (criminalizing methamphetamine, "including [its] salts, *isomers*, and salts of isomers." (emphasis added). Given the language in SDCL 34-20B-16, it is believed that the State will argue, as it did during the trial, that *any* form of methamphetamine is illegal regardless of whether it is an active ingredient in common over-the-counter cold medicine. This argument is easily set aside given SDCL 34-20B-15, which describes the criteria for inclusion in Schedule II. That statute states that a Schedule II substance shall have:

> (1) A high potential for abuse,
> (2) Currently accepted medical use in the United States, or currently accepted medical use with severe restrictions, and
> (3) Abuse which may lead to severe psychic or physical dependence.

SDCL 34-20B-15 (emphasis added). Because the statute links the criteria with "and," all three subsections are required to qualify as Schedule II. *State v. Buffalo Chip*, 2020 S.D.

63, ¶ 48, 951 N.W.2d 387, 401 (Kern, J. concurring specially) ("Typically the use of the word 'and' links a conjunctive list, which communicates that all the elements listed in the connected clauses are required."). Anderson raised SDCL 34-20B-15 to the circuit court on a few different occasions, first pretrial and again during settlement of the jury instructions. SR 605 (Anderson's pre-trial argument); SR 911–913 (settlement of jury instructions). Anderson also proposed a jury instruction on it, which was denied. SR 378.

L-isomer methamphetamine is not a Schedule II drug because it only satisfies the second of the three required criteria. Beginning with subsection (1), an over-the-counter nasal spray does not have a high potential for abuse because l-methamphetamine has minimal central nervous system activity, which is why it is not a controlled substance. SR. 313–16; SR 871–72. Similarly, subsection (3) is not met because there is no evidence to suggest that nasal spray may "lead to severe psychic or physical dependence." SR 871–72 (testimony of Pharmacist Silva explaining why the receptors in the central nervous system do not attach). Thus, the only factor that is met is subsection (2), that l-methamphetamine is currently accepted for medical use in the United States as it is the only ingredient in medicated vapo inhaler. SR 869–73. Reading SDCL 34-20B-15 and SDCL 34-20B-16 together makes it clear that the Legislature did not intend to include l-methamphetamine as a Schedule II drug.[11] This is logical; it would be peculiar

[11] As noted previously, the circuit court denied Anderson's jury instruction requesting that SDCL 34-20B-15 be included to define Schedule II despite the circuit court's intention to instruct the jury that methamphetamine is a Schedule II drug. The circuit court also declined every other jury instruction that Anderson requested, including an instruction on the difference between d- and l- isomer methamphetamine. SR 378–80.

to conclude that possessing or ingesting over the counter nasal medication is the equivalent of a Class 5 felony in South Dakota. Indeed, such a conclusion would criminally implicate drug stores across the state. SR 872 (testifying that these medications are commonly sold in drug stores). For this reason, any argument from the State that l-methamphetamine is criminalized by SDCL 34-20B-16 is unpersuasive.

In conclusion, Anderson had a right to call his expert witnesses to refute the State Health Lab chemists' testimony that their laboratory results were reliable. Because of the severe impact these rulings had on Anderson's right to present a complete defense, and restricted his ability to "respond to the prosecution's case against [him]," it was reversible error to exclude both experts' testimony. *See Packed*, 2007 S.D. 75, ¶ 27, 736 N.W.2d 851, 860 (holding that "[t]hose denied the ability to respond to the prosecution's case against them are effectively deprived of a fundamental constitutional right to a fair opportunity to present a defense."). If the testing survives a *Daubert* hearing and is admitted at a subsequent trial, Anderson requests that this Court reverse the circuit court's exclusion of his experts.

B. THE CIRCUIT COURT ALSO ERRED BY DENYING ANDERSON'S REQUEST FOR A *DAUBERT* HEARING.

Taking matters one step backward, the circuit court also erred by denying Anderson a pre-trial *Daubert* evidentiary hearing. Especially given the situation, Anderson was justified in his request that the State defend the reliability of State Health Lab's tests at a pretrial evidentiary hearing before the State was permitted to present the tests as reliable in front of a jury.

This Court adopted the *Daubert* standard in *State v. Hofer*, 512 N.W.2d 482, 484

(S.D. 1994). Less than a decade later, it also adopted *Daubert's* successor case, *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147 (1999), in *State v. Gurthie*, 2001 S.D. 61, ¶ 34, 627 N.W.2d 401, 415–16. These decisions provide that circuit courts have a gatekeeping responsibility to ensure the reliability of scientific, technical, or other specialized knowledge before a party is allowed to offer those opinions into evidence under SDCL 19-19-702 (Rule 702).

SDCL 19-19-702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) The testimony is based on sufficient facts or data;
> (c) The testimony is the product of reliable principles and methods; and
> (d) The expert has reliably applied the principles and methods to the facts of the case.

It is well established that "[u]nder *Daubert,* the proponent offering expert testimony must show that the expert's theory or method qualifies as scientific, technical, or specialized knowledge under [SDCL 19-19-702] (Rule 702)." *State v. Guthrie*, 2001 S.D. 61, ¶ 34, 627 N.W.2d 401, 415–16 (emphasis added). "This burden is met by establishing that there has been adequate empirical proof of the validity of the theory or method." *Id.* In order to make this determination, the circuit court can consider the following factors:

> (1) whether the method is testable or falsifiable;
> (2) whether the method was subjected to peer review;
> (3) the known or potential error rate;
> (4) whether standards exist to control procedures for the method;
> (5) whether the method is generally accepted;
> (6) the relationship of the technique to methods that have been established

as reliable;
(7) the qualifications of the expert; and
(8) the non-judicial uses to which the method has been put.

Gurthrie, 2001 S.D. 61, ¶ 35, 627 N.W.2d at 416.

In this situation, the circuit court denied the *Daubert* motion without having the State call any witnesses or consider any testimony or evidence related to the *Gurthrie* factors aside from the forensic chemists CVs. SR 544 (beginning of oral *Daubert* findings); *see* fn. 5 (citing CVs).[12] Additionally, except for conclusory findings on methodology and scientific theories/methods, the circuit court did not enter any findings or analyze whether the testing could rest on a "reliable foundation" with such a significant standard deviation, without adequate written quality control policies, and without tracking false negatives/positives to verify the error rate. *Tosh v. Schwab*, 2007 S.D. 132, ¶ 18, 743 N.W.2d 422, 428; *Kreps*, 2022 WL 4094124 at *5. Instead, one of the main reasons that the circuit court denied the challenge without requiring the State to defend its testing was "that the defense at this point has not presented anything to show that it was not reliable." SR 545. The other focus of the circuit court seemed to be the assumption that if the chemists themselves were reliable, then the methods of the tests they were analyzing must also be. SR 544.

However, this burden is not Anderson's to bear. In tandem with an argument from the State, the circuit court erroneously concluded that Anderson was required to make a prima facie showing that the science was unreliable. *Cf. State v. Moeller [Moeller II]*, 2000 S.D. 122, ¶ 84, 616 N.W.2d 424, 448. The circuit court's and the

[12] The circuit court did not issue written findings of fact or conclusions of law on the issue. The State proposed a set that were not signed. SR 284 (proposed findings).

State's belief that Anderson carried this burden was based on a single line in the *Moeller II* opinion, in which this Court restated the holdings of *Lanni v. State of New Jersey,* 177 F.R.D. 295, 303 (D.N.J. 1998) and *United States v. Quinn*, 18 F.3d 1461, 1465 (9th Cir. 1994). More specifically, in *Moeller II*, this Court commented that in *Lanni*, "[r]elying on the Ninth Circuit's decision in *Quinn,* the U.S. District Court for the District of New Jersey recently held that 'the opponent of the proposed expert testimony must demonstrate a prima facie case of unreliability before an evidentiary hearing is required.'" *Moeller II*, 2000 S.D. 122, ¶ 84, 616 N.W.2d at 448. However, the holding was neither formally adopted nor mentioned further in *Moeller II.*

Anderson is unable to locate any further case law in South Dakota that suggests that the challenger in a *Daubert* setting has an initial burden to prove unreliability. In fact, this Court's subsequent cases repeatedly hold that the proponent of challenged science has the obligation to defend its experts. *Guthrie*, 2001 S.D. 61, ¶ 34, 627 N.W.2d 401, 416–17 (proponent must show qualification); *Burley*, 2007 S.D. 82, ¶ 13, 737 N.W.2d at 402 (same); *Tosh*, 2007 S.D. 132, ¶ 18, 743 N.W.2d at 428 (same); *State v. Lemler*, 2009 S.D. 86, ¶ 23, 774 N.W.2d 272, 280 (same); *State v. Kvasnicka*, 2013 S.D. 25, 829 N.W.2d 123 (same); *State v. Huber*, 2010 S.D. 63, ¶ 19, 789 N.W.2d 283, 289 (same); *News America Marketing v. Schoon*, 2022 S.D. 79, ¶ 36, 984 N.W.2d 127, 138 (same). Thus, it was improper for the circuit court to shift the State's burden onto the defense over Anderson's objection.

Even if Anderson did have a burden, however, he met it when he informed the circuit court of the State Health Lab's alarming scientific practices. SR 535–39. For instance, Anderson called to the circuit court's attention the significant deficiencies

regarding the laboratory's testing—including: (i) the +/- 20% standard deviation; (ii) the lack of adequate written quality control protocols; and (iii) the failure to track false positives or negatives. SR 535–38; *Kreps*, 2022 WL 4094124 at *5. Given that the State was the party desiring the admission of the expert testimony, before it was permitted to rely on the State Health Lab's tests, the State was required to "establish[] that there ha[d] been adequate empirical proof of the validity of the theory or method." *Guthrie,* 2001 S.D. 61, 627 N.W.2d at 415–16. Following such an attempted showing, the circuit court was required to measure the evidence for reliability.

This Court has given circuit courts a helpful tool when engaging in this analysis in the form of the *Guthrie* factors. *Id.* The circuit court did not meaningfully engage in this analysis. Instead, it made a few conclusive comments on methodology and observed that the chemists involved, particularly Forensic Chemist Kroon, frequently testifies regarding State Health Lab test results. SR 545; *Burley*, 2007 S.D. 82, ¶ 17, 737 N.W.2d 397, 404 ("Mere experience as a practiced litigation witness is a poor touchstone for measuring genuine expert qualifications.") It did not analyze many of the *Guthrie* factors; for instance, it did not consider "the known or potential error rate," "whether standards exist to control the procedures," "the relationship of the technique to methods that have been established as reliable," "whether the method was subjected to peer review," and "whether the method [was] testable or falsifiable." *Guthrie*, 2001 S.D. 61, ¶ 35, 627 N.W.2d at 416. It also did not comment on Anderson's concerns about the standard deviation, the lack of adequate written quality control protocols, and the fact that false positives/negatives are not documented. SR 542–47.

As the court in *Kreps* noted, some factors when assessing scientific reliability are

significant. One such factor is the known rate of error. 2022 WL 4094124 at *5. With regard to the State Health Lab, the *Kreps* court made the following observation:

> In this regard, the court notes that the state lab does not test to distinguish between "L" or "D" methamphetamine. In addition, according to the email sent to defendants' counsel, the state lab has no written quality control procedures. The state lab does not keep track of (or does not report on) false positives and false negatives. And the state lab states that there is a 20 percent +/- margin of error in their drug testing.
>
> There is some question whether the state lab blood test results will be admissible at trial in this matter under Rule 702. A 20-percent margin of error is considerable and if there is no tracking of false results, there is no verifiable rate of error, a significant factor in deciding whether to admit expert testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (stating that in considering whether to admit expert testimony, "the court ordinarily should consider the known or potential rate of error").

Id. (emphasis added) (cleaned up and internal citations omitted). Given this situation, it was an error for the circuit court, in its role as gatekeeper, to allow the State to proceed forward with questionable science without evaluating these deficiencies and approving them under the *Daubert* standard. There is also certainly prejudice in failing to do so. If unreliable science is submitted to a jury of laypeople, they will be inclined to believe it. This was the very observation that the *Daubert* decision made, explaining that: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert*, 509 U.S. at 595.

In response, the State will likely advance two positions. First, it will likely argue that a *Daubert* evidentiary hearing is not necessarily required and that the circuit court is generally allowed to "choos[e] the best manner in which to determine whether scientific

evidence will assist the jury." *Moeller II*, 2000 S.D. 122, ¶ 84, 616 N.W.2d at 448. This is generally true. However, the circuit court chose not to meaningfully assess the scientific evidence at all at any point. Additionally, unlike in *Moeller II*, which involved soil science, here, the scientific method involves complicated matters related to statistics and chemistry. And while a standard deviation of +/- 20% may be significant enough to concern those with even a basic background in statistics, the chemistry behind the testing and how it applies related to false positives and negatives is complex enough to make a *Daubert* hearing advisable on the issue. *See Kreps*, 2022 WL 4094124 at *5. Additionally, if the circuit court was not inclined to hold a full-scale evidentiary hearing pre-trial, it should have required the State to establish foundation for the reliability of the experts the day of trial before allowing them to testify before the jury. SR 595–98.

Second, the State may argue that the significant defects in the test go to the weight of the evidence, not its admissibility. *Moeller II*, 2000 S.D. 122, ¶ 95, 616 N.W.2d at 450. This is also generally true. However, if the unreliability of science always went to weight and not admissibility, there would be no need for *Daubert* screening. It is unquestionable that there are situations where science is so unreliable that it is not admissible. In fact, *Guthrie* itself is such an example. 2001 S.D. 61, ¶ 42, 627 N.W.2d 401, 419 (holding that portions of Dr. Berman's expert opinion did not satisfy *Daubert* and *Kumho*). Other courts have found that a 20% standard deviation is scientifically unreliable. *People v. Trombetta*, 173 Cal.App.3d 1093, 1103 (Cal App. 1985) (noting an expert's opinion that "the indium tube device had a scientifically unacceptable 20 percent margin of error" and ultimately declining to allow re-testing due to the uncertainty that it would "yield useful results."); *Evans v. State*, 558 S.E.2d 51, 56 (Ga. App. 2001)

(excluding the Widmark formula on the basis that it had a 20 percent margin of error).

Moving to the importance of peer review, this process "conditions publication on a bona fide process" of review by other scientists and experts in the field. *Daubert*, 43 F.3d 1311, 1318 (9th Cir. 1995). As the United States Supreme Court noted in another branch of *Daubert*, "scrutiny of the scientific community is a component of 'good science.'" 509 U.S. at 593. This is in part because peer review "increases the likelihood that substantive flaws in methodology will be detected." *Id.* Interestingly, when questioned about the laboratories peer review, Forensic Chemist Kroon testified that other chemists within the same laboratory, and sometimes the Deputy Director, review the chemists' work for "quality control." SR 806. This does not fall into the definition of peer review. Instead, by definition, peer review requires some level of "its own independence," for instance, "anonymously reviewing a given experimenter's methods, data, and conclusions on paper." *United States v. Gissantaner*, 990 F.3d 457, 465 (6th Cir. 2021) (emphasis added). As for the College of American Pathologists' "original evaluation" of the State Health Lab, which the State has advanced to establish credentials, those documents specifically state that "[t]he College of American Pathologists recommends that the result of this interlaboratory comparison not be used as a sole criterion for judging the sole performance of any individual clinical laboratory." SR 203.

With regard to false positives/negatives, countless courts have been highly skeptical of tests that do not track this data and therefore cannot provide information regarding their rate of error. *Roane v. Greenwich Swim Comm.*, 330 F. Supp. 2d 306, 309, 319 (S.D.N.Y. 2004) (excluding mechanical engineer, in part because witness failed

to provide rate of error); *Nook v. Long Island R.R.*, 190 F. Supp. 2d 639, 641–42 (S.D.N.Y. 2002) (excluding industrial hygienist's opinion in part because witness was unable to provide a known rate of error); *Soldo v. Sandoz Pharmaceuticals Corp.*, 244 F. Supp. 2d 434, 568 (W.D. Pa. 2003) (excluding plaintiffs' expert witnesses in part because court, and court-appointed expert witnesses, were unable to determine error rate); *Phillips v. Raymond Corp.*, 364 F. Supp. 2d 730, 732–33, 740-41 (N.D. Ill. 2005) (excluding biomechanics expert witness who had not reliably tested his claims in a way to produce an accurate rate of error); *Benkwith v. Matrixx Initiatives, Inc.*, 467 F. Supp. 2d 1316, 1326, 1330, 1332 (M.D. Ala. 2006) (granting defendant's motion to exclude testimony of an expert in the field of epidemiology regarding Zicam nasal spray's causing plaintiff's anosmia, because the opinions had not been tested and a rate of error could not be provided).

There is ample prejudice here. The circuit court allowed the State to introduce the State Health Lab reports through its chemists without a proper and thorough *Daubert* screening. Because this error was significant enough to invade large portions of the trial, Anderson asks that this Court reverse and remand this matter to the circuit court with instructions to hold a full *Daubert* evidentiary hearing. If the tests are deemed sufficient under *Daubert*, Anderson requests that a new trial in this matter be ordered with balanced expert testimony.

CONCLUSION

Based upon the foregoing, Anderson respectfully requests that this Court reverse and remand this matter.

REQUEST FOR ORAL ARGUMENT

Anderson, by and through his counsel, respectfully requests the opportunity to present oral argument before this Court.

Dated this 17th day of January, 2025.

Respectfully submitted,

Attorneys for Appellant Scott Anderson

WAECKERLE LAW, PROF. LLC

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that Appellant Brief complies with the type volume limitation provided for in SDCL 15-26A-66. The Appellant Brief was prepared using Times New Roman typeface in 12-point font and contains 7,800 words. I relied on the word count of our word processing system used to prepare Appellant Br*ief* and the original and all copies are in compliance with this rule.

WAECKERLE LAW, PROF. LLC

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2025, I filed the foregoing *Appellant Brief* relative to the above-entitled matter via Odyssey File and Serve, and that such system effected service of the same on the following individuals:

Brenda Harvey
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/s/ Sara B. Waeckerle
Sara B. Waeckerle

APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	CRI 23-534
	)	**ORDER SUSPENDING**
VS.	)	
	)	**IMPOSITION OF SENTENCE**
SCOTT E. ANDERSON Defendant.	)	

An Indictment was filed in this Court on the 21st day of June, 2023 charging the Defendant with the crime of Count I: Unauthorized Ingestion Of A Controlled Drug Or Substance (SDCL 22-42-5.1 and 34-20B) and an Information was filed on the 22nd day of May, 2023 charging the Defendant with Count I: Driving While Under The Influence (SDCL 32-23-1(2)) Or In The Alternative Count IA: Driving Or Physical Control Of A Motor Vehicle While Under The Influence (SDCL 32-23-1(5), Count II: Ingesting Substance, Except Alcoholic Beverages, For The Purpose Of Becoming Intoxicated (SDCL 22-42-15).

The Defendant was arraigned on said Indictment and Information and received a copy thereof on the 24th day of August, 2023. The Defendant, Defendant's attorney, Matt Kinney and Brenda K. Harvey as prosecuting attorney appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the Defendant, including but not limited to the right against self-incrimination, the right on confrontation, and the right to a jury trial. After being advised of the above matters, the Defendant then entered a plea of not guilty to the charges in the Indictment. The Defendant requested a Jury Trial on the charges contained in the Indictment and Information.

A Jury Trial was commenced on the 22nd and 23rd days of July, 2024 in Deadwood, South Dakota on the charges contained in the Indictment and Information. On the 23rd day of July, 2023 the Jury returned a verdict of guilty to the charges of Count I: Unauthorized Ingestion Of A Controlled Drug Or Substance (SDCL 22-42-5.1 and 34-

20B) as charged in the Indictment and Count IA: Driving Or Physical Control Of A Motor Vehicle While Under The Influence (SDCL 32-23-1(5) and Count II: Ingesting Substance, Except Alcoholic Beverages, For The Purpose Of Becoming Intoxicated (SDCL 22-42-15) as charged in the Information.

It is therefore the Judgment of this Court that the Defendant is guilty of Count I: Unauthorized Ingestion Of A Controlled Drug Or Substance (SDCL 22-42-5.1 and 34-20B), Count IA: Driving Or Physical Control Of A Motor Vehicle While Under The Influence (SDCL 32-23-1(5), Count II: Ingesting Substance, Except Alcoholic Beverages, For The Purpose Of Becoming Intoxicated (SDCL 22-42-15) as charged in the Information.

On the 19th day of September, 2024, the Court being satisfied that the ends of justice and the best interest of the public as well as the Defendant will be served thereby and the Court receiving a plea of guilty to a crime that is not punishable by life imprisonment and the Defendant never before having been convicted of a crime which would constitute a felony in this State, this Court exercises is judicial clemency under SDCL 23A-27-13 and 23A-27-12.2 and with the consent of the Defendant

IT IS HEREBY ORDERED that the imposition of sentence is suspended pursuant to SDCL 23A-17-13 and 23A-27-12.2 and the Defendant is placed on supervised probation for a period of two (2) years upon the following terms and conditions:

UNAUTHORIZED INGESTION OF A CONTROLLED DRUG OR SUBSTANCE

(1) Defendant shall be placed under the supervision of the Chief Court Service Officer of this Judicial Circuit, or his representative thereof, for a period of two (2) year(s).

(2) Defendant shall obey all of the conditions placed upon him by the Court Service Officer (said conditions to be attached and incorporated by reference with this Order and to be signed by the Defendant).

(3) Defendant shall violate no laws during the term of his probation.

(4) Defendant shall pay a fine in the amount of $200.00 and court costs in the amount of $116.50.

(5) Defendant shall serve 10 days in the Lawrence County Jail to be completed by January 1, 2025.

(6) Defendant shall submit to a warrantless search and seizure of his blood, breathe or urine, person, vehicle, possessions, electronics or residence at the request of any law enforcement officer or his Court Service Officer.

(7) Defendant shall not possess nor consume any mind-altering substances, including alcoholic beverages, THC, or THC Based products, while on probation.

(8) Defendant shall not enter or remain in any establishment where the primary source of income comes from the sale of alcoholic beverages or from gaming except for employment purposes if approved by his probation office.

(9) Defendant shall maintain full time employment or schooling or a combination thereof.

(10) That the Defendant pay to the Lawrence County Clerk of Courts (for reimbursement to the South Dakota Drug Control Fund, in c/o Division Of Criminal Investigation, E. Highway 34, Pierre, SD 57501) for the costs of urinalysis and/or testing of the marijuana or controlled substances in this case in the amount of $190.00 + $70.00 + 40.00.

(11) You shall complete all treatment recommendations, which may include the following: Cognitive Behavioral Intervention For Substance Abuse (CBISA), Moral Recognition Therapy (MRT), mental health counseling and/or aftercare services. You shall sign a release of information with the treatment provider to allow communication between CSO and treatment provider; and

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence County for blood testing fees in the amount of $60.00, expert witness fees in the amount of $800.00, prosecution costs in the amount of $72.50.

DRIVING WHILE UNDER THE INFLUENCE

IT IS HEREBY ORDERED that the Defendant shall pay a fine in the amount of $100.00 and costs of $96.50 + $50.00 DWI Surcharge and shall serve seven (7) days in the Lawrence County Jail to be completed by January 1, 2025 to run concurrent with the Unauthorized Ingestion Of A Controlled Drug Or Substance.

INGESTING

IT IS HEREBY ORDERED that the Defendant shall pay a fine in the amount of $100.00 and costs in the amount of $96.50 and serve seven (7) days in jail to be completed by January 1, 2025 to run concurrent with his Unauthorized Ingestion Of A Controlled Drug Or Substance and DWI jail sentence.

IT IS FURTHER ORDERED that any bond posted herein be exonerated.

IT IS FURTHER ORDERED that the Court expressly reserve control and jurisdiction over the Defendant for the period of sentence imposed and that this Court may revoke the suspension at any time and reinstate the sentence without diminishment or credit for any of the time that the Defendant was on probation.

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

9/21/2024 4:27:18 AM

BY THE COURT:

Michelle Comer

Hon. Michelle Comer
Circuit Court Judge

DATE OF OFFENSE: MAY 18, 2023

Attest: CAROL LATUSECK, CLERK
Mullaney, Tiffany
...../Deputy

NOTICE OF APPEAL

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

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

STATE OF SOUTH DAKOTA, Plaintiff, v. **SCOTT ANDERSON,** Defendant.	**40CRI23-534** **VERDICT**

We the jury, duly impaneled in the above-entitled action find the Defendant, Scott Anderson:

As to the offenses charged in the INDICTMENT (circle the one that applies):

1. COUNT I: Unauthorized ingestion of a controlled Substance.

NOT GUILTY GUILTY

As to the offenses charged in the INFORMATION (circle all that apply):

1. COUNT I: Driving while under the influence.

NOT GUILTY GUILTY

Or, in the alternative

1. COUNT IA: Driving or physical control of a motor vehicle while under the influence.

NOT GUILTY GUILTY

DEFENDANT'S EXHIBIT B

2. COUNT II: Ingesting substance, except alcoholic beverages, for the purpose of becoming intoxicated.

NOT GUILTY GUILTY

Signed and dated this 23rd day of July 2024.

Foreperson of the Jury

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

STATE OF SOUTH DAKOTA, Plaintiff, v. **SCOTT ANDERSON,** Defendant.	40CRI23-000534 **AFFIDAVIT OF RYAN WESLEY WALNO**

STATE OF SOUTH DAKOTA)
)
COUNTY OF LAWRENCE)

Ryan Wesley Walno, being first duly sworn upon his oath, deposes and states as follows:

1. I am the attorney of record for the Defendant, Scott Anderson, in the above-captioned matter.
2. On May 9, 2024, I sent Chematox Consulting documents to analyze the testing results produced by the South Dakota State Health Laboratory in the above-referenced matter.
3. On Friday, July 19, 2024 at 2:54 PM, I received the results of the analysis from Chematox Consulting, signed by Chief Forensic Toxicologist Sarah Urfer. I received this report less than one business day prior to trial.
4. Within hours of receipt, I provided the results of the testing to the Court

and opposing counsel for consideration.

5. The first day of the jury trial was Monday, July 22, 2024.

6. I make this Affidavit to include, as part of the record, Chematox Consulting's analysis of the litigation kit they received from Mr. Anderson's case.

Dated this 23rd SW day of July, 2024.

Ryan W. Walno

Ryan Wesley Walno
Attorney for Mr. Anderson
121 West Hudson St.
Spearfish, SD 57783
Tel: (605) 642-2147

Subscribed and swore to before me this 23rd day of July, 2024.

Notary Public, South Dakota

(SEAL) SARA WAECKERLE NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

My Commission Expires: 09/22/2026

ChemaTox CONSULTING

PO Box 20590
Boulder, CO 80308
(303) 440-4500 • Fax (303) 440-0668
www.chematox.com

19 July 2024

Ryan Walno
Kinney Law

Re: Scott Anderson, Review No. CR-5146

Dear Mr. Walno,

I am an expert in Forensic Toxicology and the Chief Forensic Toxicologist for ChemaTox Consulting in Boulder, Colorado. I am a board-certified Diplomate of The American Board of Forensic Toxicology (D-ABFT-FT). I have been qualified over 550 times as an expert in forensic toxicology in Colorado courts. I am qualified to testify and give opinions on the effects of drugs on the human body. I specialize in impairment relating to the ability to operate a motor vehicle. I stay up to date on current scientific literature and am a member of the following organizations: the American Academy of Forensic Sciences, the Society of Forensic Toxicologists, The International Association of Forensic Toxicologists, and the National Safety Council (Alcohol, Drugs and Impairment Division).

I have reviewed the following documents related to this case that have been provided by counsel: Spearfish Police Department report for case CR202301961, litigation packet for sample number 23FA02361 from the South Dakota Department of Health, and Kreps v. Dependable Sanitation, WestLaw Citation, 2022WL4094124 Order to Permit Destructive Testing. As I understand them, the relevant facts of this case concerning toxicology, are as follows:

On 18 May 2023 at approximately 0304 hours, officers observed a vehicle parked in front of a storage unit with the engine running. Officers approached the vehicle and contacted the driver of the vhicle, later identified as **Scott Anderson; officers observed that Mr. Anderson was unconscious in the driver's side of the vehicle with his** foot on the break. Upon waking, Mr. Anderson took his foot off the break and the car began to roll forward and **he only stopped the vehicle and placed it in park upon the officer's shouting commands at him to do so.** Mr. Anderson had to be commanded repeatedly to exit the vehicle, as he would stop to try and collect random objects from the center console. Mr. Anderson was commanded to exit the vehicle, and officers observed he exhibited bloodshot eyes with dilated pupils, bruxism, dry mouth, rapid and frequent speech, and fidgeting and frequent **body movement while also appearing to be "on the nod." Mr. Anderson** stated he had a defibrillator and took an unspecified blood pressure medication. Upon exiting the vehicle, Mr. Anderson could not answer whether or not he had weapons on him and attempted to turn out his pockets despite being directed to keep his hands visible. A subsequent pat down revealed a pocket knife on his person and a handgun in the car.

Mr. Anderson consented to participate in Standardized Field Sobriety Testing (SFST). During SFST, Mr. Anderson exhibited 0 clues on HGN, 5 clues on WAT, and 2 clues on OLS.

During Modified Romberg, Mr. Anderson put his head down after fifty seconds but did not say stop or state how many seconds he believed had elapsed; when asked, he confirmed he was ending the test. Eyelid tremors and both front-to-back and side-to-side swaying was observed.

Officers Bradley and Torres determined that Mr. Anderson was unable to complete SFST as a sober person would and placed him under arrest. Mr. Anderson consented to submit to chemical testing.

A urine sample was collected from Mr. Anderson at approximately <HHMM> hours on <DATE>. The sample was tested by the South Dakota Department of Health. The sample was screened via gas chromatography-mass spectrometry (GC/MS) for amphetamines, THC metabolites, cocaine, opiates, methadone, MDMA, and oxycodone. The result of the amphetamines and cannabinoids screens were positive. The remaining screens were none detected.

A blood sample was collected from Mr. Anderson at approximately <HHMM> hours on <DATE>. The sample was tested by the South Dakota Department of Health. The sample was tested for ethyl alcohol content via automated headspace gas chromatography with flame ionization detection (GCFID). The result was none detected. The sample was screened via enzyme-linked immunosorbent assay (ELISA) for barbiturates, benzodiazepines, cannabinoids, carisoprodol, cocaine metabolite, fentanyl, sympathomimetic amines (methamphetamine, amphetamine, MDMA, & MDA), opiates, oxycodone, tramadol, and zolpidem. The result of the sympathomimetic amines and cannabinoids screen were positive. The remaining screens were none detected.

The sample was additionally tested via gas chromatography-mass spectrometry (GC/MS) in order to confirm which drugs were present. THC and THC-OH were confirmed none detected. THC-COOH, amphetamine, and methamphetamine were confirmed positive and quantitated in the sample at the following levels: THC-COOH: 12 ng/mL blood, amphetamine 21 ng/mL blood, and methamphetamine 70n ng/mL blood.

Δ9-Tetrahydrocannabinol (THC) is the psychoactive component of marijuana that is primarily responsible for its euphoric and impairing effects. Once ingested THC is first metabolized into 11-Hydroxy-THC (THC-OH), then further metabolizes into 11-nor-9-Carboxy-THC (THC-COOH). THC-OH is an active metabolite with equipotent psychoactivity to THC. THC-COOH is an inactive metabolite of THC and does not contribute to the euphoric effects of marijuana (Desrosiers et al., 2014).

Methamphetamine is a central nervous system (CNS) stimulant. Methamphetamine is metabolized to amphetamine, which is an active metabolite (Basalt, 2014). The concentration of methamphetamine in blood peaks approximately 2-4 hours after oral ingestion and a few minutes after smoking or injecting. The effects of methamphetamine typically last 4-8 hours; residual effects may endure for 12 hours or longer, depending on the size of the dose. When methamphetamine is used as a prescription medication, the expected blood concentration is between 20-50 ng/mL blood with the highest useful therapeutic level being 200 ng/mL blood (Winek, 2001). When used recreationally, the concentration of methamphetamine is generally between 10-2500 ng/mL blood with an average in apprehended drivers of 600 ng/mL blood (Logan, 1996). Depending on which phase, early or late, the user is in at the time of the incident, the individual could experience a range of effects. If the user is in the Early Phase, effects may include the following: euphoria, rapid speech, hallucinations, insomnia, poor impulse control, and twitching. If the user is in the Late Phase, effects may be more consistent with the following: agitation, paranoia, violence, aggression, delusions, drug craving, poor coordination, and fatigue (Logan, 2002). The effects of methamphetamine on driving behavior during multiple phases of use, including withdrawal phases, can include diminished divided attention, lane travel, erratic driving, accidents, irrational and violent behavior, general distraction, and impairment of general driving performance (Bosanquet et al., 2012; Gustavesen, Mørland, and Bramness, 2006).

A chiral molecule (also known as a "mirror molecule") is a molecule that, when rotated to create a mirrored version, has a different effect than the original version of the molecule due to how they interact with the body. **The different rotations are often referred to as "left hand" and "right hand" molecules; like a right hand will not** fit into a left hand glove, left-hand molecules interact differently in the body than right-hand molecules. Thalidomide is a very well known example of a mirror molecule and the difference between the two versions of the molecule can have drastically different results. The two rotations, or hands, of the molecule are generally differentiated by the letters L (left hand molecule) and D (right hand molecule).

Methamphetamine is a mirror molecule. *l*-methamphetamine is the active ingredient in several of over-the-counter decongestants, such as Vicks Inhaler, which contains 50 mg of *l*-methamphetamine (Logan, 2002).

The therapeutic range of *l*-methamphetamine is the same as *d*-methamphetamine (Winek, 2001). At levels above the therapeutic range, *l*-methamphetamine can have similar effects as *d*-methamphetamine (Basalt, 2014). *l*-methamphetamine is a weaker central nervous system stimulant, and abuse of this isomer is less common than *d*-methamphetamine. "Given the current availability of illicit d-methamphetamine and cocaine, the practice of inhaler abuse is now uncommon" (Logan, 2002).

It is my professional opinion that, in general, I would expect a combination of methamphetamine and amphetamine to cause impairment proportional to the concentration in the blood, especially when supported by toxicology results, witness observations, and/or additional information on the case. However, there are several issues involved in the testing by the South Dakota Department of Health that give me concerns with regard to the validity and reliability of the results.

A litigation packet is information provided from the laboratory that allows an independent toxicologist to determine if all testing followed standard protocols and is reliable, accurate, and precise. It generally includes the original request for testing, all reports issued in a case, all chain of custody documentation, certification information for the laboratory performing the test, CVs of individuals involved in the testing and certification, calibration and control information, and the standard operating procedures for the testing performed. In addition, it provides all information regarding written communication stored with the sample records between the laboratory performing the test and other interested parties regarding the sample or samples tested. These documents allow for a toxicologist to review all of the data and procedures and form an independent conclusion as to the validity of the result based upon the testing performed, collection protocols, and quality control. A litigation packet is a standard document that is provided by a laboratory. Litigation packets are standard work products for any professional and accredited laboratory which perform testing that is to be used for evidentiary purposes. Any and all competent laboratories should be able to produce the documentation included in a standard litigation packet. Any laboratory unable to produce those documents has results that cannot be considered of any evidentiary value.

While the litigation packet from South Dakota Department of Health that I have reviewed included the majority of documents listed above, it is concerning that the standard operating procedures (SOP) for the testing performed was not provided. In the 2022 decision in Kreps v Dependable Sanitation (WestLaw Citation, 2022WL4094124), the court found that **"the state lab has no written quality control procedures."** Without providing the SOP for the lab in this case, I am unable to determine if there have been changes in the laboratory since the 2022 decision or if there is still no quality control policies and procedures in place at the laboratory. SOPs contain the documents necessary to determine what, if any, quality analytics and control procedures are in place and typically consists of the written policies and procedures for a laboratory to monitor, assess and correct any problems identified in the laboratory systems. An SOP provides routine steps to be taken for the identification of problems, implementation of corrective action, monitoring for the desired outcome, and how all actions taken are to be documented.

A common part of the quality analysis and control procedures is the documentation of false positives and false negatives within a given set of tests. **The court found that South Dakota Department of Health "does not keep track of (or does not report on) false positives and false negatives," and has** a twenty (20) percent "margin of error" in their drug testing. **Measurement uncertainty ("margin of error" in layman's terms) is an inevitable** element resulting from variability of each component of a procedure, be it a laboratory testing method or a calculation. Standard laboratory practice in the scientific community is to accept results as scientifically valid that fall within two standard deviations of the mean variation. There are other standards for accuracy which depend on the purpose of the observation, and the differences which are significant. For example, the Colorado Department of Public Health allows a variation of +/- 10% in calibrating chemical testing equipment for blood alcohol. Other scientific measurements require much greater accuracy and precision. Given that the uncertainty **measures for the tests were not reported on the results for Mr. Anderson's sample and that SOP** documents relating to quality assurance and control (if they exist) have not been provided, I am not able to assess what the measure of uncertainty is at the state laboratory for any of the testing performed on this sample, nor the data from which

the 20% figure cited by the court would have been derived if no records of false positives or false negatives were recorded.

In the same decision on Kreps v. Dependable Sanitation, the court found that "the state lab does not test to distinguish between the "L" or "D" methamphetamine." This is extremely concerning due to the substantial difference between *l*-methamphetamine, which is an ingredient in many common over-the-counter medications such as Sudafed, and *d*-methamphetamine, which is the impairing illegal substance. While large doses of *l*-methamphetamine can have effects similar to *d*-methamphetamine, Mr. Anderson's results were within the therapeutic range for *l*-methamphetamine. Without testing to determine which molecule of methamphetamine was detected, *d*-methamphetamine or *l*-methamphetamine, it is not possible to determine whether the methamphetamine detected was responsible for the behaviors observed by Mr. Anderson during his encounter with law enforcement.

The Daubert standard of admissibility was developed from several Supreme Court cases related to the admissibility of scientific evidence. According to this standard, "the court looks to see whether the technique can and has been tested, whether the theory or technique has been subjected to peer review and publication, the scientific technique's known or potential rate of error, and whether the technique has been generally accepted" Shreck, 222 P.3d at 77 citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The results from the testing performed on Mr. Anderson's case do not differentiate between two variations of a mirror molecule (methamphetamine) and the litigation packet is deficient to a degree that does not allow for objective review of the potential rate of error in the testing provided. Therefore, it is my professional opinion that the testing from the South Dakota Department of Health are deficient to a degree that compromises the validity and reliability of the results provided.

My professional opinions are based on current scientific research generally accepted in the forensic toxicology community, on my training and experience, and on the information provided to me regarding this case. Should additional information be presented, I reserved the right to modify my opinions.

Sincerely,

Sarah Urfer, M.S., D-ABFT-FT
Chief Forensic Toxicologist

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Instruction No. 15

The elements of the offense of unauthorized ingestion of a controlled drug or substance, namely, methamphetamine, as charged in the indictment, of which the State must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The Defendant knowingly ingested a controlled drug or substance or had a controlled drug or substance in an altered state in his body, namely: methamphetamine.
2. The drug or substance was not obtained directly pursuant to a valid prescription or order from a practitioner, while acting in the course of his or her professional practice.
3. The controlled substance was listed on Schedule I or II.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30870

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

SCOTT E. ANDERSON,

Defendant and Appellant.

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

THE HONORABLE Michelle K. Comer
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed October 10, 2024

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30870

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

SCOTT E. ANDERSON,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as "State." Defendant/Appellant, Scott E. Anderson is referred to as "Anderson." The settled record in the underlying case is denoted as "SR," followed by the e-record pagination. The Jury Trial transcripts are cited as "JT." The exhibits are cited as "EX" followed by the exhibit number. Anderson's brief is cited as "AB" followed by the page number.

JURISDICTIONAL STATEMENT

On September 21, 2024, the Honorable Michelle K. Comer, Circuit Court Judge, Fourth Judicial Circuit, entered an Order Suspending Imposition of Sentence in *State of South Dakota v. Scott E. Anderson*, Lawrence County Criminal File Number 23-534. SR 432-35. Anderson filed his Notice of Appeal on October 10, 2024. SR 444. This Court has jurisdiction under SDCL 23A-32-2. *See State v. Brassfield*, 2000 S.D.

110, ¶ 8, 615 N.W.2d 628, 631 (Stating, "order suspending the imposition of sentence should be considered a final and appealable order under SDCL 23A–32–2").

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT FOUND A DAUBERT HEARING UNNECESSARY REGARDING THE CHEMISTS FROM THE STATE HEALTH LAB?

The circuit court found it was not necessary to hold a *Daubert* hearing regarding the chemists' testimony because their background and education satisfied the requirements for expert witnesses. And because their methods have been recognized in courts statewide.

II

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT DID NOT ALLOW TESTIMONY FROM ANDERSON'S WITNESSES?

The circuit court did not allow Sarah Ufer to testify due to her late disclosure. It also did not allow Valerie Silva, a pharmacist, to testify regarding the Lab procedures.

State v. Casady, 597 N.W.2d 801 (Iowa 1999)

State v. Pretty Weasel, 2023 S.D. 41, 994 N.W.2d 435

SDCL 23A-13-15

SDCL 23A-45-13

STATEMENT OF THE CASE

The State charged Anderson with the following:

- Count 1: Driving Under the Influence, a Class 1 misdemeanor, contrary to SDCL 32-23-1(2); or in the alternative
- Count 1A: Driving Under the Influence, a Class 1 misdemeanor, contrary to SDCL 32-23-1(5);
- Count 2: Ingestion, a Class 1 misdemeanor, contrary to SDCL 22-42-15.

SR 8. The Lawrence County grand jury also indicted Anderson on one count of Ingestion of a Controlled Substance, a Class 5 felony, contrary to SDCL 22-45-5.1 and Ch. 34-20B. SR 10.

Anderson filed three motions to suppress: a motion to suppress the stop and evidence, a motion to suppress all statements in violation of *Miranda*, and a motion to suppress evidence obtained through an illegal seizure. SR 18-21. Anderson also filed several non-evidentiary motions. SR 28-32. The circuit court entered the findings of fact and conclusions of law, along with an order denying Anderson's three motions to suppress. SR 122-31, 142. Anderson filed a petition for intermediate appeal, [1] which was denied by this Court. SR 179.

Anderson filed a motion for specific discovery regarding the state lab records and a motion for *Daubert* hearing regarding the lab chemists.

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[1] Anderson elected to not raise the issues presented in his petition for intermediate appeal on his direct appeal. *See generally* AB.

SR 172-74, 181-82. The circuit court held a hearing on both motions. At the hearing, Anderson revealed the State had turned over the requested documents related to the lab. SR 532. As for the request for a *Daubert* hearing, Anderson argued a South Dakota District Court has already found the South Dakota Health Lab (Lab) to be deficient in testing for methamphetamine. SR 536.

He also argued that the Lab could not test the difference between two different methamphetamine isomers, dextro-methamphetamine (D-meth) and evo-methamphetamine (L-meth). SR 536-39. Anderson claimed this was important because L-meth can be found in some over the counter medications and therefore the State cannot prove Anderson actually ingested methamphetamine instead of over-the-counter medicine. SR 538-39.

The circuit court found a *Daubert* hearing was not necessary when it came to the Lab chemists, stating that "the trial court is satisfied that the testimony was reasonably based on the expert's education, training, and experience."[2] SR 543-44. The circuit court found that there was "adequate empirical proof of the validity or theory of method[,]" and that both chemists would base their testimony on reliable and scientific bases processes. SR 544-45.

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[2] Anderson did not contest the chemists' education, training, or experience. Instead, he focused on his perceived issues with the Lab procedures.

Both parties made last minute filings: Friday night before trial, Anderson notified the circuit court and the State of Sarah Ufer, a forensic toxicologist, and the morning of trial, the State filed a motion in limine to prohibit Anderson from making any reference to Vicks inhaler (or the generic equivalent) and L-meth. SR 306, 311.

The circuit court addressed both issues before the jury was empaneled. After hearing arguments from the parties, the court determined that despite there being no evidence Anderson was on medication that could have caused a positive test result, he could present evidence that some over-the-counter medication could possibly result in a positive drug test. JT 12-13. It further ruled that Ufer would not be allowed to testify given such late disclosure of an expert witness. JT 14.

Anderson also reraised the issue of the Lab. JT 4-8. He argued the test results from the Lab should be inadmissible as untimely. JT 4. He expressed his concerns for the lack of *Daubert* hearing, claiming the State was trying to use expert witnesses as lay witnesses[3] to avoid having to disclose expert reports. JT 4-5. He then discusses *Kreps* again, in attempt to show the Lab's inefficiencies. JT 4-8. The circuit court found *Kreps* did not support Anderson's position because the court in *Kreps* did not make any actual findings related to the Lab. JT 11. It further found,

[3] The circuit court found the Lab chemists were expert witnesses during a pretrial hearing. SR 547. ("The experts are qualified based upon their knowledge, skill, experience, training, and education.")

Anderson had presented no evidence to support his position of deficiencies at the Lab and even though he could have discovered information to support his position, he made no attempt to acquire that information. JT 11.

After a two-day trial, the jury convicted Anderson on all counts[4]. SR 381-82.

Anderson filed a motion for a new trial. SR 384-86. He argued the State failed to notice its experts to prevent him from challenging the witnesses through a *Daubert* hearing. SR 385. He claims it prohibited him from assessing "the validity of the science at a *Daubert* hearing." SR 385-86. The court denied the motion. SR 388.

At sentencing, the court granted Anderson a suspended imposition of sentence. SR 433. The court placed Anderson on two years of supervised probation for his ingestion of a controlled substance conviction. SR 433. It ordered Anderson to serve seven days in jail for both his driving under the influence conviction and ingestion of marijuana conviction. SR 435. The court ordered all three sentences to run concurrent with each other. SR 435.

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[4] Anderson was charged with two alternative counts of driving under the influence, the jury convicted him on one of the alternative counts. SR 381.

STATEMENT OF THE FACTS

On May 18, 2023, Officers Hunter Bradley and Saul Torres, were on patrol in Spearfish, South Dakota. JT 114. At 3:00 a.m. the officers were driving by R&R Storage and noticed a vehicle in the middle of the storage unit parking lot. JT 117. The vehicle was running, with its lights on, and the brake light engaged. JT 117. Since there has been a history of burglaries in the area, the officers stopped to see what was going on. JT 117.

As Officer Bradley approached the vehicle, he saw Anderson sitting in the driver's seat. JT 117. He appeared to be "passed out[,]" with his foot on the brake and the vehicle in gear. JT 117. The officers knocked on the vehicle window, trying to get Anderson's attention; it took two attempts. JT 140. When Anderson came to, he moved his foot off the brakes and the vehicle started moving forward. JT 119. Officer Bradley opened the passenger door to get Anderson to put the vehicle in park. JT 140.

Anderson told officers he decided to take a "catnap" because he was a little tired and that is why he was parked at the storage unit. JT 141. Law enforcement began to suspect Anderson was under the influence of drugs. JT 141. Officers frisked Anderson and during the frisk he slumped forward, with his whole body going limp. JT 141. This is known as "the nod." JT 141. Anderson's pupils were dilated, his eyes were bloodshot, his speech was slurred, and he had dry mouth. JT 141.

A DUI investigation ensued, and after a series of field sobriety tests, Anderson was eventually arrested for driving under the influence. JT 120-29. After his arrest, Anderson consented to providing both a blood and urine sample. JT 126. Both samples came back positive for methamphetamine: his blood sample showed 70 nanograms per milliliter and his urine showed 23,008 nanograms per milliliter. EX 8, 10.

STANDARD OF REVIEW

The circuit court's "'evidentiary rulings are presumed correct and will not be overturned absent a clear abuse of discretion.'" *State v. Carter*, 2023 S.D. 67, ¶ 24, 1 N.W.3d 674, 685 (quoting *Ronan v. Sanford Health*, 2012 S.D. 6, ¶ 8, 809 N.W.2d 834, 836). "An abuse of discretion is defined as 'fundamental error of judgment, a choice outside the range of permissible choices, a decision, which on full consideration is arbitrary or unreasonable." *State v. Belt*, 2024 S.D. 82, ¶ 20, -- N.W.2d -- (quoting State *v. Krueger*, 2020 S.D. 57, ¶ 29, 950 N.W.2d 664, 672). Not only must a defendant prove the circuit court abused its discretion in admitting evidence, but a defendant must also prove that the ruling resulted in prejudice. *Carter*, 2023 S.D. 67, ¶ 24, 1 N.W.3d at 685 (citing *State v. Loeschke*, 2022 S.D. 56, ¶ 46, 980 N.W.2d 266, 280). A circuit court's ruling is not prejudicial unless "'in all probability [the error] produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it.'" *State v. Hankins*, 2022 S.D.

67, ¶ 21, 982 N.W.2d 21, 30 (quoting *State v. Reeves*, 2021 S.D. 64, ¶ 11, 967 N.W.2d 144, 147).

ARGUMENTS

I

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND A DAUBERT HEARING UNNECESSARY REGARDING THE CHEMISTS FROM THE STATE HEALTH LAB.

SDCL 19-19-702 lays out the parameters for expert witnesses. It requires that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) The testimony is based on sufficient facts or data;
> (c) The testimony is the product of reliable principles and methods; and
> (d) The expert has reliably applied the principles and methods to the facts of the case.

SDCL 19-19-702. This Court has "adopted the *Daubert* test... To be used in determining whether expert testimony is admissible." *State v. Yuel*, 2013 S.D. 84, ¶ 7, 840 N.W.2d 680, 683 (citing *State v. Hofer*, 512 N.W.2d 482, 484 (S.D. 1994). The *Daubert* standard requires the circuit court to ensure that an expert's testimony both "'rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.'" *Yuel*, 2013

S.D. 84, ¶ 7, 840 N.W.2d at 683 (quoting *State v. Loftus*, 1997 S.D. 131, ¶ 21, 573 N.W.2d 167, 173).

The party offering the expert testimony "must show that the expert's theory or method qualifies as scientific, technical, or specialized knowledge under [SDCL 19-19-702]." *State v. Guthrie*, 2001 S.D. 61, ¶ 34, 627 N.W.2d 401, 416. The circuit court must "ensure an expert's testimony 'rests on a reliable foundation.'" *State v. Huber*, 2010 S.D. 63, ¶ 19, 789 N.W.2d 283, 289 (quoting *Hofer*, 512 N.W.2d at 484). It is the court's job to act as the gatekeeper in screening such evidence. *State v. Lemler*, 1009 S.D. 86, ¶ 23, 774 N.W.2d 272, 280 (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997)). As such, it is up to the circuit court to determine the "preliminary questions concerning the qualifications of a person to be a witness[.]" *State v. Moeller*, 2000 S.D. 122, ¶ 82, 616 N.W.2d 424, 447 (citing SDCL 19-19-104[5]). In doing so, the circuit courts are given "great latitude in determining whether expert testimony meets the reliably requisites of Rule 702." *United States v. Aungie*, 4 F.4th 638, 645 (8th Cir. 2021) (quoting *In re Wholesale Grocery Prods. Antitrust Litig.*, 946 F.3d 995, 1000 (8th Cir. 2019)).

But the circuit courts are not required to conduct a *Daubert* hearing for every expert witness. *United States v. Johnson*, 860 F.3d

[5] The original text cited SDCL 19-9-7. But the statutes were transferred in 2016 to 19-19-104. SL 2016, ch. 239 (Supreme Court Rule 15-20), eff. Jan. 1, 2016.

1133, 1139 (8th Cir. 2017). If the court is satisfied that the expert's testimony is "'reasonably based on the expert's education, training, and experience, the court does not abuse its discretion by admitting the testimony without a preliminary hearing.'" *Johnson*, 860 F.3d at 1139 (citing *United States v. Kenyon*, 481 F.3d 1054, 1061 (8th Cir. 2007)).

The circuit court is very familiar with the work of the Lab. It recognized the Chemist Kroon had "testified as an expert before this very court." SR 545. And while unfamiliar with Chemist Aplan, it noted that both chemists have testified as experts throughout the State. SR 545. It also recognized their education and background, along with the procedures used in the Lab, noting that the methods used have been recognized statewide for the very issue present in Anderson's case. SR 546.

Anderson does not refute Chemists Kroon and Aplan's education and experience but criticizes the Lab's operating procedures and protocols. *See* AB. But he does not provide any actual evidence of the Lab's alleged deficiencies and instead relies heavily on an Order on Motion to Permit Destructive Testing issued in *Kreps*. *See AB*. But his interpretation of *Kreps* is distorted and is not proof the Lab is deficient.

Kreps is a lawsuit surrounding a car accident. *Kreps v. Dependable Sanitation, Inc.*, 2022 WL 4094124, at *1 (D.S.D. Sept. 7, 2022). Blood samples were taken from both drivers and sent to the Lab. One of the driver's blood sample tested positive for methamphetamine,

amphetamine, and carboxy THC. *Id.* Two defendants motioned the district court to allow for destructive testing of the blood samples to be performed at a different lab. *Id.* To support their positions, the defendants asserted the Lab does not conduct tests to differentiate between D-meth and L-meth. *Id.* at *2. They also argued according to an email exchange with the Lab, the Lab "does not have data or a report indicating rates of false negatives or false positives and that the lab maintains no written quality control programs and procedures." *Id.* The email also stated there was a plus or minus twenty percent margin of error with any drug testing performed. *Id.*

Nowhere in its Order did the district court make actual findings of issues with the procedures of the Lab. While the district court recognized that the Lab does not test separately for L-meth and D-meth, the court then said:

> In addition, *according to the email* sent to defendants' counsel, the state lab has no written quality control procedures. The lab does not keep track of (or does not report on) false positives and false negatives. And the state lab states that there is a twenty percent +/- margin of error in their drug testing.

Id. at *5. (emphasis added). But these are not findings made by the court, but merely repeating what was presented to the court via an email from the Lab. And while the court did note some concerns it had with the information in the email, it explicitly stated, "This court offers up no

predictions as to whether the state lab results will be admissible at trial." *Id.* at *6. Anderson grossly misrepresents what the district court's order.

The purpose of a *Daubert* hearing is not to prove the expert witness's opinion is correct. *State v. Lemler*, 2009 S.D. 86, ¶ 34, 774 N.W.2d 272, 284–85. "[A]ll that must be shown is that expert's testimony rests upon good grounds, based on what is known. Any other deficiencies in an expert's opinion or qualifications can be tested through the adversary process at trial." *Id.* (cleaned up). And Anderson had the opportunity to flesh out his concerns with the Lab's procedures and protocols at trial.

In his brief, Anderson raises three issues with the Lab that he feels would disqualify the Lab chemists from testifying: (1) the Lab's margin of error is +/- twenty percent standard deviation, (2) the Lab lacks written procedures on quality control, and (3) the Lab fails to track false positive/negative results. Because these three issues were dispelled by the Lab chemists and deputy director's testimony at trial, Anderson cannot show how he was prejudiced by the lack of a *Daubert* hearing.

1. The Lab's margin of error.

Anderson is outraged by the Lab's twenty percent margin of error. He purports other courts have found a standard deviation of twenty percent to be unacceptable. AB 26-27. But Deputy Director Stacy Ellwanger, with the Lab, put the Lab's margin of error into proper context at trial. She explained that the Lab's +/- twenty percent standard

deviation does not mean that twenty percent of the lab results are false. JT 250. It merely means that amount of a certain substance in an induvial sample is +/- twenty percent of that number. *Id.* For instance, Anderson's blood sample was positive for seventy nanograms per milliliter of methamphetamine. EX 10. So with the Lab's +/- twenty percent standard deviation, his range of methamphetamine in his system is 56-84 nanograms per milliliter. The margin of error does not mean that there is a twenty percent chance that there is not methamphetamine in Anderson's system. JT 250. In fact, Deputy Director Ellwanger explained that the Lab now refers to the deviation as "uncertainty of measurement" to help alleviate confusion. *Id.*

Whether Anderson had 56 nanograms or 84 nanograms of methamphetamine in his system does not matter. South Dakota statutes do not distinguish different levels. *See* SDCL 22-42-5.1.

2. Lab's quality control written procedures.

Anderson also gripes about the lack of written quality control procedures. AB 24. But such allegation is baseless. In fact, both chemist Kroon and Deputy Director Ellwanger testified to the contrary. Chemist Kroon testified that he was involved in creating and making the standard procedures used in the Lab and clarified the Lab has *written* standards. JT 216. (emphasis added). Deputy Director Ellwanger's testimony supported Chemist Kroon's testimony. She stated the Lab has written standard operating procedures (SOP), which includes quality

control procedures. JT 249. She elaborated that there are "a lot of quality assurance things that may be in the SOP" that the Lab follows. *Id.*

Chemist Kroon explained how they test the machines frequently to make sure they are in proper working order. There is an automated tuning process that ensures the equipment is properly functioning. JT 209. And while a chemist is running a sample, there is a quality control sample with no compounds in the sample. JT 209. Further, for every ten samples that are ran, a control sample, with a known substance and quantity, is ran to ensure the results are accurate. JT 209-10.

3. The Lab's tracking of false positive/negative results.

Anderson also takes issue with the Lab not keeping track of false positive or negative results. AB 22. But Deputy Director Ellwanger dispelled any misconceptions about false positives and negatives. She testified that the Lab does conformation testing, and therefore there are no false positives or negatives. She further explained that labs that do conformation testing do not track false positives and negatives. JT 248.

As Chemist Kroon explained, an initial screen is performed on the sample. JT 207. If the sample does not indicate there is anything in it, the testing is done. JT 207. However, if the initial screen shows there are substances in the sample, further conformation testing is performed. JT 207.

The Lab uses chromatography and mass spectrometry (GC-MS) [6] to identify the specific compounds in the sample, as well as the quantity. JT 207-08.

Anderson grossly misrepresents what the Order in *Kreps* stands for. Further, testimony from the Lab chemists at trial dispels any insufficiency allegations cast by Anderson. Which is why the circuit court did not abuse its discretion when it found the chemists to be experts without a *Daubert* hearing.

II

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY NOT ALLOWING TESTIMONY FROM ANDERSON'S WITNESSES.

Anderson argues the circuit court erred when it excluded testimony from his experts regarding the Lab's alleged inefficiencies. AB 14. Anderson wished to elicit testimony from Sarah Ufer, a forensic toxicologist, and Valerie Silva, a pharmacist. Anderson argues that the court's decision prohibited him from presenting a meaningful defense.

A. The circuit court did not err when it excluded Ufer's testimony regarding the Lab's alleged inefficiencies.

Any time during the proceedings it is brought to the attention of the circuit court that a party has not complied with a discovery provision, the court may take just action under the circumstances, which includes

[6] GC-MS is widely accepted in the scientific community and is considered one of the best, if not best option for testing for drugs in a blood sample. JT 208.

prohibiting such evidence from being introduced at trial. SDCL 23A-13-15. While it is true, South Dakota does not have a statute or rule that specifically requires the disclosure of rebuttal witnesses, it does not mean that the circuit court cannot impose its own rules for each case. *Schrader v. Tjarks*, 522 N.W.2d 205, 209 (S.D. 1994). In fact, SDCL 23A-45-13 provides that "if no procedure is specifically prescribed by statute or rule, a court *may* proceed in any lawful manner not inconsistent with this title or with any other applicable statute." (emphasis added).

The circuit court instructed both parties to submit their witness and exhibit lists one week before trial. SR 571. Anderson's witness list included two witnesses: Silva and Deputy Director Ellwanger. SR 294. This list was filed on July 15th. Then four days later, on July 19th, Anderson notified the State and the circuit court of a report received by Urfer earlier that day. SR 311. The morning of trial, the circuit court stated it was "not going to allow the expert of the late disclosure." JT 14.

The circuit court's ruling was appropriate given Anderson did not disclose Ufer as a witness by the prescribed deadline. Anderson knew Ufer could be a potential witness as he was in communication with her two months before trial. SR 311. He certainly could have included Ufer on his witness list but chose not to. This Court previously found a circuit court abused its discretion by allowing an unnoticed State expert to testify at trial. *See State v. Pretty Weasel*, 2023 S.D. 41, ¶ 38-39, 994 N.W.2d 435, 443.

The circuit court did not prohibit Ufer's testimony as means to prevent Anderson from presenting a defense. In fact, during a pre-trial hearing, the circuit court welcomed Anderson to bring in his own expert witness to combat any errors the Lab may have committed. SR 543. It is Anderson's own lack of disclosure that prevented Ufer's testimony from being admissible. Because the circuit court did not allow the late disclosure witness to testify, it did not abuse its discretion.

Even if this Court finds an abuse of discretion, Anderson was not prejudiced by the lack of Ufer's testimony. Anderson insists that precluding Ufer's testimony prohibited him from preventing a defense. That is simply false, he was able to present a defense. In fact, one of his witnesses was the Lab's deputy director. He was able to ask Deputy Director Ellwanger his concerns with the operating procedures and what is generally accepted practice in forensic labs.

Further, Ufer's report calls into question her admissibility, even if she was properly noticed. Her report states she reviewed the law enforcement reports, the Lab's litigation packet for the case, and the *Kreps* order. SR 313. It appears, Ufer relies on the *Krebs* order in making factual determinations regarding the Lab's procedures. Again, the order in *Kreps* did not make any findings on the validity of the Lab or its procedures. Therefore, any reliance on that order is misguided. *See Kreps*, 2022 WL 4094124 (D.S.D. Sept. 7, 2022). In addition, Ufer's information on Vick's VapoInhaler is outdated and inaccurate. She

claims that the inhaler contains fifty milligrams of L-meth, but Vick's stopped using L-meth in their nasal inhalers in 2016. JT 282. And not only were Ufer's concerns with the Lab addressed by the State's witnesses but also Anderson's witness, Deputy Director Ellwanger.

B. The circuit court did not err when it excluded Silva's testimony regarding the Lab's alleged inefficiencies.

The circuit court allowed Silva to testify at trial regarding the differences in L-meth and D-meth. JT 281-86. She was also allowed to testify about how some over the counter medication may contain L-meth. *Id.* But the court would not allow for Silva to answer questions about the Lab's twenty percent margin of error. JT 310, 313. If the court had allowed such testimony, it would have been a blatant abuse of discretion. Silva is a pharmacist, not a forensic chemist. While her education included science courses such as chemistry, it does not make her qualified to testify on such a matter. For an expert to testify on a topic, they must have "scientific, technical, or other specialized knowledge" on the topic. SDCL 19-19-702. There was nothing in the record that Silva was a forensic chemist or knew the protocols of the Lab.

C. Anderson had the opportunity to present his defense.

Anderson maintains that by not allowing his witnesses to testify to the Lab's perceived inadequacies, he was deprived his right to present a defense. AB 13-19. Anderson admitted his defense was the State could not prove he ingested methamphetamine or if it was a false positive due

to nasal inhaler usage. JT 18-19. Despite there being zero evidence Anderson was on medication that could cause a positive methamphetamine result, the circuit court still allowed him to present such evidence to the jury. Silva testified that there are medications sold over the counter that can cause a person to have a positive test result. JT 281-86. There was testimony of the differences between L-meth and D-meth. JT 281-86. And how the Lab does not test for the difference. JT 194.

And while Anderson was allowed to illicit such testimony, it does not change that fact that South Dakota statutes do not distinguish between the two isomers. In fact, SDCL 34-20B-16(6) specially states: "*Any* of the following substances, including their salts, *isomers*, and salts of isomers, is included in Schedule II ... methamphetamine." (emphasis added). The statute includes all isomers of methamphetamine, so there is no need for the Lab to distinguish between the two levels when conducting its testing. And Chemist Kroon testified that it was highly unlikely a person would test positive for mere use of a nasal inhaler because it would fall below levels the Lab tests for. JT 219.

Anderson argues that the L-meth does not meet the requirements of SDCL 34-20B-15, and therefore, L-meth cannot be considered a controlled substance. AB 17-18. But this rational is flawed. SDCL 34-20B-15 sets the criteria for what can be included on the Scheduled II controlled substance list. This is what the legislature must look at when

considering what drug or substance should or should not be on that list. The list of Scheduled II controlled substances is found in the next statute. SDCL 34-20B-16. This is the list of drugs or substances the legislature has deemed to meet the criteria set forth in the pervious statute. So if it is included in SDCL 34-20B-16, the Legislature must have found it was in compliance with SDCL 34-20B-15. Further, if the Legislature found that L-meth did not meet the requirements of SDCL 34-20B-15, statute would have reflected as such and excluded L-meth.

South Dakota is not alone in prohibiting all forms of methamphetamine. Iowa found that both L-meth and D-meth are forms of methamphetamine, and the Iowa statutes[7] does not distinguish between the two forms. *State v. Casady*, 597 N.W.2d 801, 808 (Iowa 1999). Federal courts have also routinely held that the law does not distinguish between L-meth and D-meth. *See United States v. Roark*, 924 F.2d 1426 (8th Cir.1991) (stating that methamphetamine is properly classified as a Schedule II controlled substance), *United States v. Youngblood*, 949 F.2d 1065, 1066–67 (10th Cir. 1991) (finding that methamphetamine and its *isomers* are considered Scheduled II controlled substance.), *United States v. Pickrel*, 767 F. Supp. 1048, 1050 (D. Or. 1990), *aff'd*, 967 F.2d 595 (9th Cir. 1992) (stating that

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[7] Iowa code (in 1999 and currently) is like South Dakota's current controlled substance statutes. It reads in part: "methamphetamine, its salts, isomers, or salts of isomers." IA Code Ann. § 124.401(a)(1)(d), https://www.legis.iowa.gov/DOCS/IACODE/1999/124/401.html (last visited February 12, 2025).

methamphetamine is a Schedule II controlled substance). Simply put, regardless of the approval for over-the-counter medication to contain L-meth, it "neither expressly nor impliedly limited the ability ... to classify methamphetamine as a controlled substance." *Pickrel*, 767 F. Supp. at 1050.

Further, Anderson seems to focus on what he considers a negligible amount of methamphetamine in his blood. *See* AB. Not only is it illegal for a person to ingest methamphetamine, no matter the quantity, he is completely ignoring the astronomical levels of methamphetamine in his urine. Chemist Kroon explained how the blood sample was a more accurate reflection of the active methamphetamine in a person's system, while the urine sample represented what a person has consumed over the last few days. JT 213-14. It is hard to believe that even if Anderson was using a nasal inhaler that contained a small amount of L-meth (50 nanograms per milliliter) would result in such a high amount of methamphetamine found in his urine (23,008 nanograms per milliliter). EX 8, 10. Which at trial, Chemist Kroon discussed how, given the Lab's baseline reporting levels, it is highly unlikely that the use of a nasal inhaler would have created a positive screen for methamphetamine. JT 219.

And Anderson completely ignores officers testified to signs of his impairment. He was asleep in his car, with his foot on the brake, and the vehicle in gear. JT 141. He nodded off while talking to the officers

and showed several signs of impairment including dilated pupils, bloodshot eyes, slurred speech, and dry mouth. JT 141.

The circuit court did not abuse its discretion by prohibiting Ufer's testimony. Not only did Anderson disclose her after the court-imposed deadline for witness lists, but her report was based on outdated and misleading information. Further, Silva's testimony about her perspective of how the Lab operates was outside her scope as a pharmacist. Therefore, the court properly excluded such testimony.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 5,036 words.

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

Dated this 26th day of February 2025.

/s/ Erin E. Handke
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 26, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Scott E. Anderson* was served via Odyssey File & Serve upon Sara B. Waeckerle at sara@sbwlawoffice.com, Lora A. Waeckerle, at lora@wlawsd.com, and Ryan W. Walno at ryan@kinney-law.com.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30870

STATE OF SOUTH DAKOTA,
Appellee,

vs.

SCOTT ANDERSON,
Appellant.

Appeal from the Circuit Court
Fourth Judicial Circuit
Lawrence County, South Dakota

THE HONORABLE MICHELLE COMER

APPELLANT'S REPLY BRIEF

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I. THE CIRCUIT COURT VIOLATED ANDERSON'S RIGHT TO PRESENT A DEFENSE AND RIGHT TO A FAIR TRIAL.

A. No standard of review—no matter how deferential—can cure a constitutional violation.

Throughout its brief, the State classifies the standard of review as a straight-forward abuse of discretion analysis related to the evidentiary rulings. *See* Appellee Brief at 9–17. In doing so, there are no references to Anderson's right to a fair trial and only a few passing comments regarding his right to meaningfully present a complete defense. *See* Appellee Brief at 18, 19.

It is true that as a general matter, this Court reviews evidentiary decisions and *Daubert* decisions under the abuse of discretion review. It is also true, however, that while deferential, this standard cannot override a constitutional violation. *Cf. State v. Guzman*, 2022 S.D. 70, ¶ 27. This is because, as this Court has explained, no court has the discretion to violate the law. *Id.*

As applied here, "an accused must be afforded a meaningful opportunity to present a complete defense. When a defendant's theory is supported by the law and . . . has some foundation in evidence, however tenuous, the defendant has a right to present

[1] Anderson appreciates that sometimes statements are made in the heat of advocacy that are inadvertently overstated. However, Anderson must address some comments made. Regarding *Kreps v. Dependable Sanitation*, the State asserts twice that Anderson "grossly misrepresents" the holding. *Appellee Brief* at 13, 16. This is not accurate. Anderson acknowledged that the *Kreps* matter settled before the district court determined admissibility of the laboratories testing. Appellant Brief at 15. *Id.*, n.8 ("The *Kreps* case resolved before the District Court was asked to rule on the ultimate admissibility of the State Health Lab testing under *Daubert v. Merrell Dow*.").

it." *State v. Birdshead*, 2015 S.D. 77, ¶ 27. More broadly, it is equally well established that a criminal defendant has a fundamental right to a fair trial. *See, e.g., Dowling v. United States*, 493 U.S. 342 (1990). Therefore, this Court must review the circuit court's evidentiary and scheduling rulings in the context of the underlying constitutional ramifications that they had—*i.e.*, their impact on Anderson's constitutional rights. *Id.*

When engaging in this analysis, this Court should remain grounded to the established principle that it is disfavored to limit criminal defense witnesses. *Cf. Guzman*, 2022 S.D. 70, ¶ 27 (collecting cases and holding exclusion was harmless error). Such limitation is an extreme remedy, especially while allowing the State full license to present its case to the jury. Rulings should be evaluated carefully—especially when, as here, the excluded witness is a defense expert witness that was approached to rebut the State's potential position that the State Health Lab's methamphetamine testing was cutting edge. *Birdshead*, 2015 S.D. 77, ¶ 27; SR:799. When viewing the overarching facts of this case in light of expert exclusion, it is incredibly important to remember that Anderson was not in possession of methamphetamine when he was arrested; therefore, aside from the observations of law enforcement,[2] the only evidence the State has that Anderson was under the influence of methamphetamine specifically is the laboratory results themselves. Evidence of the type of drug that Anderson had allegedly consumed is a critical piece of the State's allegation that he ingested a Schedule II drug, thus establishing the felony conviction. Given the importance of the evidence

[2] Law enforcement did not engage in drug recognition testing. SR:722. Anderson is a 70 year old man of slight build. SR:723. Officers opined that Anderson was under the influence of methamphetamine; however, the State's evidence regarding the substance turns largely on the test results themselves. SR:27.

that was excluded, this matter is not a straightforward abuse of discretion analysis.

B. Exclusion of Anderson's expert witnesses violated his constitutional rights.

The circuit court excluded Forensic Toxicologist Sarah Urfer's testimony entirely, limited Pharmacist Silva's testimony, and declined to entertain a *Daubert* analysis of the State's expert witnesses. This violated Anderson's fair trial rights and obliterated his ability to present a complete defense. *State v. Packed*, 2007 S.D. 75, ¶ 23 ("[D]ue process is in essence the right of a fair opportunity to defend against the accusations.").

i. Anderson attempted to acquire information regarding the laboratory's testing practices to establish deficiencies.

One notable criticism lodged against Anderson is the allegation that he "presented no evidence to support his position of deficiencies at the lab and even though he could have discovered information to support his position, he made no attempt to acquire that information." *Appellee Brief* at 6. This is not accurate. In fact, Anderson made at least three unsuccessful attempts to raise these concerns, beginning months before the trial of this matter.

First, almost five months before trial (on March 8, 2024), Anderson requested that the State produce an analysis of the testing results. SR:172 (requesting analysis). Anderson never received any formal expert report tying the tests performed by the State Health Lab to an expert opinion as to the results. At different times during the case, the parties discussed the chemists' status as experts. During these discussions, the State's position shifted back and forth regarding whether the witnesses were experts or lay witnesses. For instance, at a February 8, 2024 motions hearing, the State represented that "at this point, I don't envision any per se experts. We have officers that were involved

and the chemists that did the urinalysis drug testing, blood testing. I know some have reported those chemists and doctors expert witnesses. My view would be that they are fact witnesses and would not necessarily notice them up as experts."[3] SR:491. Later, at the May 20, 2024 *Daubert* hearing, the State shifted course and asked that the circuit court qualify its chemists as experts without: (i) formal reports; (ii) description of opinions/testimony to be offered; or (iii) any testimony establishing reliability of the tests in response to Anderson's challenge. The failure to provide Anderson the report/reports, or even a description of the proposed testimony analyzing/evaluating the testing results, was contrary to the State's obligation to provide its expert opinions to Anderson in advance of the trial. *State v. Blem*, 2000 S.D. 69, ¶ 40 (distinguished on other grounds, *Miller v. Young*, 2018 S.D. 33) ("Once an expert opinion is known to the State and the State determines that it will solicit that opinion in court, it must disclose the opinion to the defense regardless of the number of days or hours before the witness is scheduled to testify.")[4]

The second effort Anderson made came in the form of the *Daubert* challenge itself. When Anderson did not receive any reports/designated expert opinions pre-trial, he attempted to utilize the *Daubert* process to discover the proposed opinions. In doing

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[3] Anderson agrees that the State was not required to designate the laboratory chemists themselves as experts if it did not desire to. Instead, it could have retained another, third party expert to analyze testing results.

[4] *Blem* is distinguishable in the sense that in that case, the defendant had "no prior notice in any form, oral or written, that [the expert] would testify as an expert on blood splatter analysis." *Id.* ¶ 35. Here, Anderson knew that the State intended to call the chemists to the stand. However, like in *Blem*, "a report did not exist." *Id.* ¶ 39. In *Blem*, the Court ruled that "[o]nce an expert opinion is known to the State and the State determines that it will solicit that opinion in court, it must disclose the opinion. . . ." *Id.* ¶ 40.

so, he requested the State bring its chemists for examination on the scientific process implemented by the State Health Lab. The parties initially intended to have a *Daubert* hearing on expert issues, and Anderson filed a notice of hearing on April 12, 2024 (for a hearing set on May 20, 2024). SR:181-83 (notice of hearing). On May 6, 2024, the State served its subpoenas in preparation for the hearing. SR:184 (Subpoena of Kroon); SR:186 (Subpoena of Aplan). Then, on May 17, 2024 (the Friday before the Monday, May 20, 2024 hearing), the State shifted course and filed an objection. SR:187–209 (objection). At the same time, the State called off its experts, and no chemists appeared at the Monday hearing. Therefore, no testimony was taken to assess the reliability of the laboratory's practices. SR:530 (beginning of May 20, 2024 hearing transcript). The circuit court ultimately denied the *Daubert* motion at the hearing without any testimony to substantiate the results or any effort on behalf of the State to establish its burden of proof. SR:542–47 (court's holding); *State v. Lemler*, 2009 S.D. 86, ¶ 23 (burden on proponent of expert). As discussed more thoroughly below, although the tests themselves were briefly discussed at the hearing, the focus was the chemists' experience as testifying experts. *Burley v. Kytec Innovative Sports Equipment, Inc.*, 2007 S.D. 82, ¶ 17 ("Mere experience as a practiced litigation witness is a poor touchstone for measuring genuine expert qualifications.")

Finally, third, immediately before trial, in one last attempt to address the issue, Anderson challenged the absence of any written report opining as to the results of the State Health Lab's tests. As a remedy, Anderson requested that the results be excluded. SR:594 (Defendant: "It is, in my opinion, unacceptable for the State to mask its expert witness testimony in lay witnesses as a way to keep expert reports from the defense until

the day of trial, and for that reason alone, [Anderson] would submit that the tests need to be excluded.")[5] At that time, although the circuit court had qualified the chemists under *Daubert*, the qualification itself did not alleviate the State from disclosing its case-in-chief experts to Anderson following his repeated request and in accordance with *Blem*, 2000 S.D. 69, ¶ 40. SR:571 (ordering witness disclosure by date). The circuit court did not disqualify the State's witnesses as untimely disclosed despite them never providing opinions; instead, it disqualified Anderson's expert as untimely.

With (i) the State circumventing the request for expert reports, (ii) the Court denying the *Daubert* motion without testimony or review of the reports; and (iii) the lack of general availability of depositions in criminal procedures, Anderson only had one remaining option: a cold cross examination of the chemists to elicit their opinions on the tests in front of the jury. This task was especially problematic because Anderson's rebuttal toxicologist on the topic had been excluded prior to jury selection.

Anderson's opportunity for a cold cross examination did not allow him to evaluate or test the State's application of the science pre-trial (or even receive pre-trial reports/statements of the ultimate opinions/ conclusions).6 Keeping Anderson in the dark regarding the scientific opinions of the State's experts until testimony at trial and excluding his expert on the same subject were the defects that violated his constitutional rights.

Specifically with regard to the exclusion of Anderson's expert, the exclusion of

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[5] Comparatively, when Anderson attempted to designate Ufer, he provided a full report. SR:311–27 (Ufer report).

[6] Anderson has the right to silence, which protects his decision not to re-test the samples.

Urfer is reminiscent of *State v. Guzman*—but it is even more significant. Experts are often cloaked in credibility more than lay witnesses. This elevates not only the prejudice but also the constitutional ramifications of the exclusion. In an attempt to cure this, the State's brief focuses on its own experts' testimony and highlights how trustworthy and reliable they viewed their scientific process to be. *Appellee Brief* at 16, n.6. However, it is largely inconsequential how persuasive the State thought its own expert witnesses were at the trial. Anderson has no doubt that the jury found Forensic Chemist Kroon's and Forensic Chemist Aplan's testimony credible and persuasive indeed given that Anderson was unable to call an expert to respond.

ii. Excluding Anderson's expert as untimely was improper.

Under SDCL 23A-24-2(4), the Legislature has instructed that following the defense case-in-chief, "[t]he parties may then, respectively, offer rebutting evidence only, unless the court, for good reason, in furtherance of justice or to correct an evident oversight, permits them to offer evidence upon their original case[.]" The State does not challenge Anderson's right to rebuttal witnesses separate from the State's election to call (or not call) those witnesses. SDCL 15-26A-60(6); *Veith v. O'Brien*, 2007 S.D. 88, ¶ 50, (holding issue waived on appeal "for failure to cite authority."). Instead, the State simply acknowledges that there is no statute or rule that specifically requires disclosure of rebuttal witnesses.[7] *See* Appellee Brief at 17; *Cf. Schrader v. Tjarks*, 522 N.W.2d 205, 209 (S.D. 1994) (civil medical malpractice action) ("Neither statute or rules, nor South

[7] SDCL 23A-13-16 is textually different from Federal Rule of Criminal Procedure Rule 16, which is more involved and requires heightened disclosure. In 2022, two sections of the federal rules were amended—Rule 16(a)(1)(G) and Rule 16(b)(1)(C). *See* Fed. R. Crim. Pro. 16(b)(1)(C); Rule 16(a)(1)(G).

Dakota precedent requires disclosure of rebuttal witnesses.")

Although perhaps unconventional, Anderson interprets SDCL 23A-24-2(4) to mean that both parties have a respective right to offer rebuttal evidence following the close of the cases in chief. *Id. But see State v. Mitchell*, 491 N.W.2d 438 (S.D. 1992) (no abuse of discretion in denying the defendant the right to take the stand for the first time during surrebuttal; stating surrebuttal is only permitted regarding the topics raised in the State's rebuttal presentation). A rebuttal witness is generally understood to mean "[a] witness who contradicts or attempts to contradict evidence previously presented." Black's Law Dictionary, *Witness*, (12th Ed. 2024). In the strictest sense, it is true that many if not all defense witnesses are offered to "contradict[] or attempt to contradict evidence previously presented." *Id.* As it relates to this situation, the right for a criminal defendant to present a rebuttal-type/potentially untimely disclosed witness—such as Urfer—is particularly appropriate when the State has not disclosed the opinions of its experts and these opinions are learned on the courtroom floor. Urfer's testimony was sought because Anderson suspected that the State would make sweeping statements regarding the credibility of its laboratory through its chemists; this suspicion became a reality at the trial. SR:799 (Kroon testifies the testing method is "[v]ery widely used."). Urfer did not undertake a separate analysis of the samples; her only role was to opine regarding the credibility of the laboratory's protocols once the chemists testified that their scientific methods were reliable beyond a reasonable doubt. SR:311. Especially in this situation, when the State did not disclose its expert opinions, it would be difficult to attempt to rebut the position before it was asserted at trial

Regardless of Urfer's ultimate classification (i.e., rebuttal or a case-in-chief

expert), the State does not focus on the general structure of a criminal case in its response. Instead, the State relies on SDCL 23A-13-15, and *State v. Pretty Weasel* for the proposition that the circuit court did not err by excluding Anderson's expert witness due to its general authority to order deadlines/disclosure of witnesses. Beginning with the statute, SDCL 23A-13-15 states that the circuit court "*may* proceed in any *lawful manner* not inconsistent with this title or with any other applicable statute." In *Pretty Weasel*, this Court held that the circuit court abused its discretion by allowing an unnoticed expert for the State to testify. 2023 S.D. 41, ¶¶ 38–39.

Anderson agrees that, generally speaking, a circuit court has discretion to manage its courtroom and calendar. *Tosh v. Schwab*, 2007 S.D. 132. This includes entering and enforcing scheduling orders. *Id.* Anderson also agrees that the circuit court ordered the parties to disclose witness and exhibit lists by July 15, 2024. SR:571. At the July 11, 2024 hearing, Anderson specifically stated that there were witnesses that would rebut the evidence/testimony that Anderson speculated the State would elicit. In anticipation of this issue, Anderson specifically raised the handling of this type of evidence. SR:565 (Defendant: "But ultimately, this witness is rebutting the idea that just because the state lab says it is methamphetamine, that it is methamphetamine. That is a core defense.") The State requested identification of the witnesses, but did not object to the general comment that Anderson did not have to disclose the opinions of his experts. SR:567 (State: "We would amend to ask for identification of the witness that he states is going to testify. I mean, I still don't even have the list."). *See Rush v. U.S. Bancorp Equip. Finance, Inc.*, 2007 S.D. 119, ¶ 8 n.1 ("The failure to assert an argument below waives it on appeal."). The State may have made this concession because at no time did it ever file

a motion requesting Anderson's exhibit and witness lists. *Compare* SR:28 (Anderson's December 22, 2023 request that the State provide information, made over seven months in advance). In response, the circuit court acknowledged, "[t]he court will reserve its ruling. I like to – because of the fact that it is going to be a rebuttal witness, I like to clear up these issues prior to trial so we don't have any surprises, usually. However, the court does have to hear the facts…as they come in to determine whether this rebuttal testimony should be admissible."

In the end, the State did not provide a final witness list at any time despite Anderson's request for one months prior; instead, the only document that Anderson received was a "list of potential witnesses" from February 2024. SR:570–71. *State v. Sahlie*, 245 N.W.2d 476, 479 (S.D. 1981) ("It is axiomatic to a fair trial that the state obey the court's orders concerning the conduct of the trial."). Ultimately, Anderson received his toxicologist report the Friday before the Monday trial and elected to proceed in favor of transparency by providing the report to the Court and the State within hours of receiving it. SR:311.[8]

As a second basis that the exclusion was lawful, the State relies on *Pretty Weasel*, 2023 S.D. 41, ¶¶ 38–39. In *Pretty Weasel*, the circuit court allowed an expert of the State, though untimely designated, when the State first attempted to offer the testimony during trial. *Id.* ¶ 37. This Court held that admitting the late disclosed expert was improper. *Id.* In this matter, however, the State does not offer any analysis on how the

[8] Importantly, the circuit court did not exclude Urfer because she was not qualified to testify; it did so on untimeliness. The State's criticism for substantive reasons are not at issue.

prosecution's failure to appropriately designate an expert in *Pretty Weasel* differs from Anderson's fundamental right to present a complete defense. After all, it is Anderson, and not the State, who is afforded constitutional protections. *People v. Melendez*, 80 P.3d 883 (Colo. App. 2003) ("Thus, it implicates the fundamental right of criminal defendants to call witnesses on their own behalf."); *see also Washington v. Texas*, 388 U.S. 14 (1967) (for the proposition that criminal defendants have a fundamental constitutional right to call their own witnesses.)

Even if Anderson's expert disclosure was considered untimely, however, this Court has historically followed the approach of allowing testimony, even from order-violating witnesses. *Taylor v. Illinois*, 484 U.S. 400, 401 (1988) ("The Compulsory Process Clause of the Sixth Amendment may, in an appropriate case, be violated by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness."). It was reversible error for the circuit court to wipe out Anderson's only expert witness in the field of toxicology based on a perceived or actual procedural defect with Anderson's disclosure. *See, e.g., Mitchell*, 491 N.W.2d at 448 (Henderson, J. concurring specially) (discussing the potential concern with procedural rules "vault[ing] over a constitutional right.").

C. The State's authority regarding the distinction between d-isomer and l-isomer methamphetamine supports Anderson's position.

To limit or demonstrate the absence of prejudice, the State argues that there is no legal difference between the isomers of methamphetamine. Therefore, Anderson has not been deprived of any constitutional right despite the fact that he was not permitted to provide expert testimony or learn of the State's proposed expert testimony before trial. In

support of this position, the State relies on SDCL 34-20B-16, stating that methamphetamine—including its salts, isomers, and salts of isomers—is listed in Schedule II. However, this disregards the definition of Schedule II in SDCL 34-20B-15 and takes for granted that these items can be purchased at Walgreens. Because of the availability of these products over-the-counter without felony prosecution, it follows that an exception was made for over-the-counter medications that contain l-isomer methamphetamine.

To overcome the absurdity that l-methamphetamine is a Schedule II controlled substance despite it being the sole active ingredient in certain over-the-counter inhalers, the State cites to four cases. *Appellee Brief* at 21–22. First, it turns to *United States v. Roark*, 924 F.2d 1426, 1428. In *Roark*, the United States Court of Appeals for the Eighth Circuit reviewed 21 USC 811(g)(1), which requires the exclusion of any substance from the schedules of controlled substances if it can be lawfully sold over the counter without a prescription. 924 F.2d at 1426, 1428. The Court explained that "[t]he FDA has not approved methamphetamine for sale over-the-counter, but rather has approved a combination of ingredients found in inhalers containing a diluted isomer of methamphetamine." *Id.* Importantly, in lockstep with the definition of Schedule II substances in SDCL 34-20B-15, it held that "such a combination of ingredients does not create the potential for abuse and harm that the controlled forms of methamphetamine present." *Id. See also* SDCL 34-20B-15 (listing potential for abuse as factor for inclusion in Schedule II). It is notable that, respectfully, the *Roark* analysis may be somewhat misguided given that there are over-the-counter inhalers that list l-methamphetamine as their only active ingredient (see below). However, the court's

observation that over-the-counter cold medication does not create the potential for abuse in the same manner as controlled forms of methamphetamine is well taken.

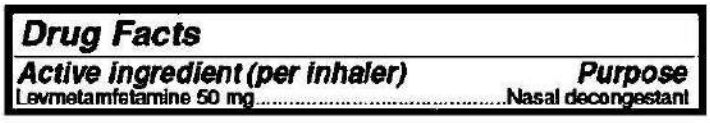
Next, the State turns to *United States v. Pickrel*, 767 F.Supp. 1048 (D. Oregon 1990). In *Pickrel*, the United States District Court for the District of Oregon also turned to 21 U.S.C. 811(g)(1). In its analysis, the Court discussed 21 CFR 1308.12(d), in which "the FDA's approval of Vicks Inhalers (and other such sprays) includes a description of the potency of the ingredients. Any alterations of the form of the substance (e.g., changing its ingredients or increasing the potency) removes the product from the list of approved over-the-counter medications." *Id.* at 1048. The Court ultimately held that "methamphetamine, its salts, isomers, and salts of its isomers is different and distinct from Vicks Inhalers and other approved nose sprays." *Id.* at 1049-50.

The State also relies on *United States v. Youngblood*, 949 F.2d 1065 (10th Cir. 1991). The court in *Youngblood* also cites to 21 USC 811(g)(1) and 21 CFR 1308.12(d) in concluding that "[t]he flaw in Youngblood's contention is that the FDA did not approve methamphetamine for over-the-counter sale. Instead the FDA approved the Rynal and Vicks inhalers, which contain a combination of ingredients, including a diluted isomer of methamphetamine." Like *Roark*, it is noteworthy that the *Youngblood* analysis focuses on the added ingredients diluting the methamphetamine; this is misguided because l-methamphetamine is independently non-intoxicating as it does not trigger the receptor in the brain that causes stimulation of the central nervous system. SR:873 (discussing receptors in the brain and their reaction to the various molecules).

Finally, the State cites to a line in *State v. Casady*, 597 N.W.2d 801 (Iowa 1999) that stated "both forms are methamphetamine and the Iowa statutes makes no distinction

between the d and l forms." *Id.* at 808. Importantly, however, the court goes on to observe that "d-methamphetamine was the substance identified here, and it is this form which has the active physiological effects characteristic of methamphetamine." *Id.* The *Casady* statement regarding the active physiological effects of d-methamphetamine is exactly accurate—it is those effects that make it controlled substance under Schedule II (compared to the non-psychoactive mirror molecule, l-methamphetamine).

In conclusion, it would be sensational indeed if the South Dakota Legislature had intended to criminalize cold medication within Schedule II. Here, this Court should read SDCL 34-20B-15 and SDCL 34-20B-16 together to conclude that the Legislature did not criminalize this type of medication. If an ambiguity is determined and this Court employs its tools of statutory construction, this Court has long held that statutory interpretation should endeavor to avoid an absurd result. *Dep't of Social Services ex rel. Wright v. Byer,* 2004 SD 41, ¶ 17. This is the perfect case to embrace that canon of construction. *See* Defendant Exhibit A (Walmart Brand Inhaler with a single active ingredient, as represented herein).


Drug Facts

Active ingredient (per inhaler)	Purpose
Levmetamfetamine 50 mg	Nasal decongestant

II. THE CIRCUIT COURT ERRED WHEN IT DID NOT DETERMINE THE ADMISSIBILITY OF THE EXPERT WITNESSES.

A. Meaningfully assessing the scientific reliability of the tests was required.

It is true that the circuit court has discretion to determine whether an expert is qualified to testify on a certain topic. *State v. Guthrie,* 2001 S.D. 61. It is also generally true that the circuit court has discretion to determine the best manner to determine

credentials (i.e., at a separate hearing, immediately prior to trial, outside the presence of the jury, etc.). *Goebel v. Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000). However, the circuit court does not have discretion to determine the reliability of the State Health Lab's testing practices without a meaningful review of the actual testing. One foundational United States Supreme Court decision on this topic—*Kumho Tire Co., Ltd v. Carmichael*—clarified this when it explained that discretion does not permit courts to forego the gatekeeping function. 526 U.S. 137, 158-59 (1999) (Scalia, J., concurring) (the majority opinion "makes clear that the discretion it endorses—trial-court discretion in choosing the manner of testing expert reliability—is not discretion to abandon the gatekeeping function"). Building from that concept, this Court recently explained that "[w]hen a trial court misapplies a rule of evidence, as opposed to merely allowing or refusing questionable evidence, it abuses its discretion." *State v. Hernandez*, 2023 S.D. 17, ¶ 24; *see also Goebel,* 215 F.3d at 1087 ("While the district court has discretion in the *manner* in which it conducts its *Daubert* analysis, there is no discretion regarding the actual *performance* of the gatekeeper function."); *BNSF Railway Co. v. Box Creek Mineral Limited Partnership*, 2018 WY 67, ¶ 24 (same).

Beyond the resumes provided by the chemists themselves, there was no evidence in the record for the circuit court to assess as it related to the reliability of the testing procedures that occurred with regard to Anderson's samples. Despite having issued subpoenas to compel the chemists' attendance, the State made no effort to defend its experts by producing or calling them at the May 20, 2023 motions hearing. Nor did it present the circuit court with the "litigation packet" regarding Anderson's blood or urine to show regularity in the testing protocols. Instead, it simply objected to the *Daubert*

hearing and called off the witnesses it had subpoenaed.

With no evidence regarding the tests before it and therefore no evidentiary basis, the circuit court nevertheless entered the following findings[9]:

- "The court believes that the experts methods are properly taken for granted as they have been established as experts state wide and in the circuit for the very testimony they are asked to present in this case." SR:214.

- "Moreover, the challenged evidence does not present a new scientific theory and methodologies are usual and customary." SR:215.

- "An allegation of failure to properly apply a scientific principle should provide basis for exclusion of an expert opinion only if a reliable methodology was so altered as to skew the methodology itself. In this case, no such evidence has been alleged. Here the court finds that no hearing is necessary." *Id.*

- "And the court finds that it is reliable, this methodology, their opinion from the foundations of science rather than any subjective beliefs. These are tried and true methods and there's nothing presented that, in this case, there were any abnormalities." *Id.*

One of the most concerning aspects of the above findings is the burden shifting that occurred. In finding the experts credible, the circuit court specifically relied upon the lack of an evidentiary basis for skewed methodology. SR:215. Then it shifted the burden onto Anderson to demonstrate that the testing was deficient within the State Health Lab. SR:546 ("In this case, aside from Mr. Walno stating a – citing a finding in a court, I'm not even sure of the facts of that case. Nothing has been presented in this case that shows

[9] Additionally, in its findings, the circuit court intermingled the admissibility of the chemists' credentials as individuals, and the admissibility of the results from the lab as a whole. The scientists can be credible; but their testimony is only as admissible as the tests they analyze. SDCL 19-19-702.

that the tests were unreliable. There was no retesting as indicated and Mr. Walno, on behalf of Mr. Anderson is free to call his own expert."). In doing so, the court impermissibly required Anderson to explain why the testing practices were inadmissible rather than requiring the State to defend its experts. *Guthrie*, 2001 S.D. 61, ¶ 34 (burden on proponent).

As previously noted: (i) a wholesale acceptance (or rejection) of an expert, without first assessing specific procedures and methodologies; and (ii) improperly shifting the burden was an improper application of the law that graduated the issue from a generic abuse of discretion standard of review to one with constitutional implications. *Hernandez*, 2023 S.D. 17, ¶ 24, (misapplying rule of law is an abuse of discretion). The circuit court's decision not to assess the reliability of the challenged testing at any point constituted reversible error as an abuse of discretion.

CONCLUSION

Based upon the foregoing, Anderson respectfully requests that this Court reverse and remand this matter.

Dated this 8th day of April, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that Appellant Brief complies with the type volume limitation provided for in SDCL 15-26A-66. The Appellant Brief was prepared using Times New Roman typeface in 12-point font and contains 4981words. I relied on the word count of our word processing system used to prepare *Appellant Reply Brief* and the original and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2025, I filed the foregoing *Appellant Reply Brief* relative to the above-entitled matter via Odyssey File and Serve, and that such system effected service of the same on the following individuals:

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