IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellant,

vs. NO: 28800

ROGER JACKSON,
Defendant and Appellee.

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

HONORABLE JANE WIPF PFEIFLE, Circuit Court Judge

APPELLANT'S BRIEF

Alecia E. Fuller
Law Office of the Public Defender
for Pennington County
130 Kansas City Street, Suite 310
Rapid City, South Dakota 57701
Attorney for Appellee

Mr. Jason Ravnsborg
Attorney General
1302 E. Highway 14, Suite 1
Pierre, South Dakota 57501

Mr. Mark A. Vargo
Pennington County State's Attorney
130 Kansas City Street, Suite 300
Rapid City, South Dakota 57701

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PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Roger Jackson, will be referred to as "Jackson." Plaintiff and Appellee, the State of South Dakota, will be referred to as "State." References to documents in the record herein will be designated as "SR" followed by the appropriate page number. References to each Motion Hearing will be designated as "MH" followed by the date of the hearing and the appropriate page number. References to the Jury Trial held June 25, 2018 through June 29, 2019 will be designated as "JT" followed by the appropriate page number. References to the Sentencing Hearing held October 25, 2019 will be designated as "SH" followed by the appropriate page number. Reference to the Appendix will be designated as "Appx" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Roger Jackson appeals from a final judgment of conviction for Third Degree Rape, the judgment was orally pronounced on October 25, 2018, and entered on October 30, 2018 by the Honorable Jane Wipf Pfeifle, Seventh Judicial Circuit Court Judge, Rapid City, Pennington County, South Dakota and filed on October 31, 2018. SR 886, Appx 1. Appeal is by right pursuant to SDCL 23A-32-2. Notice of Appeal was filed on November 14, 2018. SR 889.

STATEMENT OF LEGAL ISSUES

1. Whether the trial court erred when it denied Jackson's Motion to Dismiss re: Due Process

   The trial court denied Jackson's motion to dismiss for a violation of due process.

   United States Constitution, Amendment V and XIV § 1.
   South Dakota Constitution Article VI §§ 2 and 7.

State v. Larson, 2009 S.D. 107, 776 NW2d 254.
United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).
California v. Trombetta, 467 U.S. 479 (1984).

2. Whether the court erred when it held knowledge is not an element of SDCL 22-22-1(3)?

The trial court denied Jackson's Motion for Determination that Knowledge is an Element of SDCL 22-22-1(3).

State v. Jones 2011 S.D. 60, 804 N.W.2d 409.
U. S. v. Bruguier, 735 F.3d 754 (2013).
State v. Stone, 467 N.W.2d 905 (SD 1991).

3. Whether the trail court erred when it restricted the testimony of expert witness Rodney Swenson.

The trial court limited the defense expert witness on the issue of capacity to consent to sex as well as a discussion of records outside a limited time

SDCL 19-15-2.

4. Whether the State committed prosecutorial misconduct and failed to provide Brady material to Jackson?

The trial court did not rule on the issue of prosecutorial misconduct. The court ruled that that the report of Dr. Cherry was not exculpatory and therefore the failure to provide the report was not a violation of Brady.

Brady v. Maryland, 373 U.S. 83 (1963).
State v. Piper, 2006 S.D. 1, 709 N.W.2d 783.
Thompson v. Weber, 2013 S.D. 87, 841 N.W.2d 3.
United States v. Bagley, 473 U.S. 667 (1985).

5. Whether the court erred in denying Jackson's motion to continue?

The court ruled that because the report of Dr. Cherry was not exculpatory and was cumulative, that a motion to continue to secure his presence at trial was denied.

State v. Moeller, 2000 S.D. 122, 616 N.W.2d 424.

STATEMENT OF CASE AND FACTS

This matter was presented to the Pennington County Grand Jury on March 15, 2017, and at the close of the grand jury proceedings, an Indictment was issued charging Jackson with Third Degree Rape (SDCL 22-22-1(3)) alleged to have occurred on or about November 18, 2016. SR 1. On March 27, 2017, Jackson made his initial appearance in Pennington County, South Dakota on the charge of Third Degree Rape, SDCL 22-22-1(3). SR 916.

On April 20, 2017, Jackson was arraigned in front of the Honorable Jane Wipf Pfeifle on the Indictment and Jackson pled not guilty. A jury trial was held. JT 1. The jury found Jackson guilty of Third Degree Rape under SDCL 22-22-1(3). SR 722. On October 25, 2018, the Defendant received a fifteen (15) year penitentiary sentence with the last five (5) years suspended. The Judgment was filed on October 31, 2018. SR 886. Notice of Appeal was filed November 14, 2018. SR 889.

STATEMENT OF FACTS

On November 19, 2016, Rapid City Police officers responded to Bella Vista (Golden Living Nursing Home) following a report of a missing person who was found and may have had unusual vaginal discharge. JT P376. The missing person was Kathleen Sheets, hereinafter referred to as "K.S." K.S. is diagnosed with a form of dementia called Benson's disease. JT P182. At the time of the report, K.S. was not interviewed by law enforcement. JT P389-390. Investigator Mischelle Boal began her investigation on November 21, 2016. JT P616. She did not interview K.S. JT P671.

On November 23, 2016, Investigator Boal interviewed Roger Jackson. JT P621. Jackson denied anything sexual happened, but highlighted the relationship he had with

K.S. JT P626; P651. In February, Investigator Boal interviewed Jackson again following the receipt of the DNA reports from the State Lab. JT P628.

Jackson was Indicted on the sole charge of Third Degree Rape pursuant to SDCL 22-22-1(3).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO DISMISS RE: DUE PROCESS.

STANDARD OF REVIEW

"[A]n alleged violation of a constitutionally protected right is question of law examined de novo." State v. Stanga, 2000 S.D. 129, ¶ 8, 617 N.W.2d 486, 488; *see* also State v. Miller, 2006 S.D. 54, ¶ 11, 717 N.W.2d 614, 618 (cite omitted).

ARGUMENT

Jackson filed a Motion to Dismiss on November 1, 2017, based on the violation of Mr. Jackson's right to due process as set forth in United States Constitution Amendments V and XIV § 1 and South Dakota Constitution Art. VI §§ 2 and 7. SR 129. An evidentiary hearing was set for December 13, 2017, Jackson subpoenaed relevant, necessary witnesses to support his motion. The State filed an Objection to Defendant's Motion to Dismiss on November 14, 2017. SR 132. The State also filed a Motion to Stay Subpoenas on November 16, 2017. SR 140. A hearing was held on the Motion to Stay Subpoenas and Jackson requested an ex parte hearing pursuant to SDCL 23A-14-26. MH12-7-17 P7. The State filed a Second Objection to Defendant's Motion to Dismiss Indictment on December 10, 2017. SR 145. On December 12, 2017, the trial court issued an Order granting the Motion to stay the subpoenas for lay witnesses. SR 155. In its Order, the court also limited Jackson to inquiring of law enforcement witnesses solely on

the issue of claimed bad faith. SR 155. Without being able to proceed on the issue of whether the evidence was exculpatory, Jackson elected to withdraw his Motion to Dismiss to clarify the record. SR 159.

Jackson filed a Motion to Dismiss Re: Due Process on January 19, 2018. SR 160. In his motion, Jackson requested the opportunity to present evidence in support of his motion at a hearing. The State filed an Objection to Defendant's Motion to Dismiss Re: Due Process on February 2, 2018. SR 178. At a hearing on February 15, 2018, the court denied the Motion without an evidentiary hearing and without allowing Jackson to call witnesses. MH2-15-18 P9. On February 21, 2018, the court issued an Order Denying Defendant's Motion to Dismiss Re: Due Process. SR 190. The Order did not provide any authority or reasoning for the denial. By denying the Motion, the court also denied Jackson an opportunity to present evidence in support of his motion, therefore, the court had insufficient evidence to rule on the issue. At the close of the State's case, Jackson renewed the Motion to Dismiss, and without argument or discussion, the court again denied the motion. JT P677.

Jackson's right to due process as set forth in United States Constitution Amendment V and Amendment XIV § 1 and South Dakota Constitution Article VI §§ 2 and 7 were violated when the government failed to investigate. The government's failure resulted in the loss of exculpatory and material evidence. This caused irreversible prejudice and permanent harm to Jackson's opportunity to obtain a fair trial as a result of the misconduct.

The trial court erred when it did not dismiss the case under both the South Dakota Constitution and the United States Constitution.

In State v. Larson, the South Dakota Supreme Court held

> [w]e have potentially exculpatory evidence lost as a result of the delay. What remedy, then, would be available when suppression is not an option? To balance the societal interest in punishing criminal behavior and the defendant's right to due process, we conclude that dismissal would be warranted "in cases of egregious prosecutorial misconduct **or** on a showing of prejudice (or a substantial threat thereof), **or** 'irremediable harm' to the defendant's opportunity to obtain a fair trial. "

2009 S.D. 107, ¶ 16, 776 N.W.2d 254. (quoting Commonwealth v. Viverito, 661 N.E.2d 1304, 1306 (Mass. 1996)) (emphasis added).

In Larson, the defendant was arrested and his appearance before a magistrate was delayed 18 days, as a result, the evidence that supported his claim of self-defense was lost. Larson is not unlike Jackson. The sexual contact in this case is alleged to have occurred on November 18, 2016. SR 1. On November 23, 2016, Jackson was served with temporary protection paperwork, to which he complied fully. SR 160. On March 14, 2017, four months after the alleged events occurred, the State presented the case to a Grand Jury and a warrant was subsequently issued. SR 1. The delay in this case obstructed any possibility that Jackson had of proving his innocence, or even holding the State to its burden of proof through the use of the exculpatory evidence that would have been obtained through an interview of K.S. In both cases, exculpatory evidence existed that was capable of being collected by law enforcement, but was ignored, and as a direct result, exculpatory evidence was permanently lost. Neither patrol officer, Chad Strobel and Daniel Anderson interviewed, nor or even attempted to interview K.S. JT P389-390. Further, Officer Strobel knew the police policy that stated victims shall be interviewed

and believed an investigator would interview K.S. JT P385; SR 160 ¶ 18. These officers even had information about K.S.'s ability to communicate and her memory and a description that she had the mental capacity of a 20-year-old. JT P392-393. Investigator Mischelle Boal, who had all the information Strobel and Anderson had collected, did not interview, or attempt to interview K.S. JT P671. She also had the additional information of specific facts and details relayed by K.S. to other people regarding K.S.'s relationship with Jackson and some information that K.S. had relayed to them about what happened on November 18, 2016. JT P949. Investigator Boal made the decision not to interview K.S. without any personal knowledge about K.S.'s level of functioning. JT P674.

In United States v. Valenzuela-Bernal, the U.S. Supreme Court addressed the rights of the accused to compulsory process and his rights under the Fifth Amendment's due process of law. 458 U.S. 858 (1982). Valenzuela-Bernal was charged with "transportation of an alien illegally in the United States," and specifically with transporting one Romero-Morales. Id. at 860. There were four other individuals in the car and the government deported two of them. Id. at 861. Valenzuela-Bernal moved for a dismissal alleging the deportation had "deprived him of the opportunity to interview the two passengers to determine whether they could aid in his defense." Id. The Supreme Court discussed the importance of the executive branch being able to promptly deport individuals "who are determined by the government to possess no material evidence relevant to a criminal trial." Id. 865. In the present case, the government's only duty was to investigate a potential crime and interview witnesses. It is wholly inconceivable to contend that K.S. could not provide material evidence. All the witnesses in the car with Valenzuela-Bernal were interviewed by the government and deemed to have no material

evidence relevant to the criminal trial. By contrast, law enforcement did not even attempt to interview K.S and, therefore, cannot assert a lack of material evidence. JT P649. Valenzuela-Bernal bore the burden of establishing the deported witnesses were necessary witnesses and failed to meet his burden. Jackson, in his motion and at hearings, clearly articulated why K.S. was necessary. SR 160, MH12-7-17, MH12-8-17, MH12-13-17.

A significant analysis of materiality was included and the Court stated when determining "the presence or absence of the required materiality" the court should consider "the events to which a witness might testify and the relevance of those events to the crime charged." Id. at 871. In applying this standard to the present case, the events to which K.S. would have provided information for are inextricably linked to the charges for which Jackson is now charged. Thus, her statement of what happened is absolutely material.

The Due Process Clause of the Fifth Amendment guarantees that a criminal defendant:

> Be treated with "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

Id. at 872 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)). Jackson submits a due process violation occurred. The lack of interviewing, or even attempting to interview, the only witness to an offense who has a progressive brain disease is tantamount to destroying evidence. The lack of an interview destroyed any possibility of justice for any party to this action. The lack of an interview of K.S. provided no alternative other than to infect the trial because the ultimate issue is whether at the time of the sexual contact, K.S.

could consent, and did. The lack of an interview of K.S. prevented a fair trial and shifted the burden to Jackson to prove his innocence rather than on the State to prove his guilt.

In California v. Trombetta, the U.S. Supreme Court analyzed the application of the Due Process Clause on the State's obligation to "deliver exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." 467 U.S. 479, 485 (1984). While the court found the State did not have a duty to preserve the breath samples, it did so after finding Trombetta could not meet the burden of showing the evidence had "an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. at 489. If the defendant can meet this burden, then the Constitution imposes upon the State the duty to preserve the evidence as it is "expected to play a significant role in the suspect's defense." Id. at 488. For Jackson, it is obvious that any statements by K.S. would be expected to play a significant role in his defense. It was apparent at the time of the investigation that the alleged victim's statements were constitutionally material. Further, it is clear that Jackson had no other way to obtain comparable evidence. This fact is further compounded by the State's delay in charging Jackson.

In Trombetta, the court also considered whether the destruction of the evidence was "in good faith and in accord with their normal practice." Id. at 488 (quoting Killian v. United States, 368 U.S. 231 (1961)). Ultimately, the court found that it was. Id. However, the court did not utilize this information when setting forth the standard of when the Constitution imposes a duty to preserve evidence upon the State. For Jackson,

the failure to interview K.S. and thereby the failure to preserve evidence was contrary to law enforcement's normal practice and therefore was not in good faith. JT P385; 669

In Arizona v. Youngblood, the United States Supreme Court was guided by its prior holdings in Trombetta and Valenzuela-Bernal and found that the unpreserved evidence was only potentially useful. 488 U.S. 51 (1988). The court then went further to determine whether there was bad faith on the part of the government. Id. The court found that when evidence is only potentially exculpatory:

> requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interest of justice most clearly require it, *i. e.* , those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Id. at 58. The court then specifically held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve *potentially* useful evidence does not constitute a denial of due process of law." Id. (emphasis added). In addition, the untested evidence was available to Youngblood's expert, who declined to perform any tests. Id. At no time since the allegations arose in this case, has K.S. been available for Jackson, or his lawyer, to interview. Furthermore, the delay in the Indictment prevented Jackson from obtaining evidence that could have been obtained from K.S. The progressive nature of K.S.'s Benson's disease has now made the possibility of obtaining information from her as to the events of November 18, 2016, virtually impossible. MH6-7-18 P18.

In United States v. Tyerman, the Eighth Circuit Court of Appeals applied the prior cases of Trombetta and Youngblood and clearly set forth the standard of proof for cases based on whether the evidence is exculpatory or whether the evidence is only potentially exculpatory. 701 F.3d 552, 560 (8th Cir. 2012). Specifically, the court found:

> A due process violation arises from destruction of evidence when the evidence "possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. " California v. Trombetta, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). A higher standard of proof applies, however, when the evidence is only potentially useful to the defendant. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Arizona v. Youngblood 488 U.S. 51, 58,109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

Id. The court found that the firearm was only *potentially* useful. Therefore, the court proceeded to the bad faith analysis and determined the government merely mistakenly destroyed the firearm and therefore it was not in bad faith. Id.

The South Dakota Supreme Court appears to have misinterpreted Arizona v. Youngblood, as standing for the proposition that regardless of whether the evidence is exculpatory or merely potentially exculpatory, the defense must show bad faith. See State v. Bousum, 2003 S.D. 58, 663 N.W.2d 257; State v. Bruce, 2011 S.D. 14, 796 N.W.2d 397; State v. Danielson, 2012 S.D. 36, 814 N.W.2d 401. However, the court often applies the standard appropriately. For example in State v. Bousum, the court held that Arizona v. Youngblood stands for the proposition that the defense must show the State acted in bad faith in releasing the [evidence]. 2003 S.D. 58, ¶ 15. Even though the court ignored the word "potentially," it still found Bousum was not prejudiced as the destruction of evidence was remedied by the ability to cross-examine the repair man. Id. The court went further and took "this opportunity to admonish the State for its careless handling of evidence and to remind it of its duty to *zealously* protect evidence in its possession." Id. (cite omitted). It is important to note that the prosecutor did not have information about the repair, so the burden to protect the evidence was placed on law enforcement. In

addition, the repair man was a witness that could be, and was, cross-examined and impeached through other means. For Jackson, K.S., the only witness who can testify as to what purportedly happened on November 18, 2016, cannot be cross-examined.

Arizona v. Youngblood is consistent with California v. Trombetta, United States v. Valenzuela-Bernal, and was accurately applied by United States v. Tyerman. When deciding the issue of whether Jackson's due process rights under the United States Constitution were violated, Trombetta, Valenzuela-Bernal, and Tyerman govern.

The burden was on Jackson to establish the evidence was exculpatory and he requested the opportunity to meet this burden by calling witnesses. If Jackson can only show that the lost evidence was merely *potentially* exculpatory, he has the additional burden of showing that law enforcement acted in bad faith. In order to establish bad faith, it is important to show what law enforcement could have learned if they had only asked the questions of K.S.

With regard to bad faith, Jackson submits that to allow the government to bury its head in the sand as to the actual facts of the case defies justice. Setting a precedent that law enforcement does not have to interview adverse witnesses would allow the systematic destruction of evidence favorable to the defense. The fact that the failure to interview was contrary to the Rules and Procedures of the Sheriff's office is evidence of its bad faith. Further, it is not as if the officers had an inordinate number of witnesses to interview, it was one person and she was known to law enforcement. Good faith destruction or lack of preservation are occurrences where the actions on the part of law enforcement were part of the routine practice. This is not the case for Jackson.

The Court erred when it denied Jackson's Motion to Dismiss re: Due Process. Further, the Court compounded the error by failing to conduct any type of evidentiary hearing which created an incomplete and insufficient record. Jackson requests the conviction be dismissed.

II. THE COURT ERRED WHEN IT HELD KNOWLEDGE IS NOT AN ELEMENT OF SDCL 22-22-1(3)

STANDARD OF REVIEW

"Statutory interpretation is a question of law subject to de novo review." State v. Davis 1999 S.D. 98, ¶ 7, 598 N.W.2d 535, 537 (citing City of Sioux Falls v. Ewoldt, 1997 S.D. 106 ¶ 12, 568 N.W.2d 764, 766).

"Challenges to the constitutionality of a statute are reviewed de novo." State v. Asmussen, 2003 S.D. 102, ¶ 2, 668 N.W.2d 725, 729. A strong presumption exists that statutes are constitutional. Id. However, a criminal statute may be vague and therefore void if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). Therefore, we consider whether the statute affords notice to citizens as to what conduct is prohibited and whether it "'establish[es] minimal guidelines to govern law enforcement'" so as not to allow "'policemen, prosecutors, and juries to pursue their personal predilections.'" Id. at 358, (quoting Smith v. Goguen, 415 U.S. 566, 574–75 (1974)).

ARGUMENT

Jackson Moved for the Determination of Knowledge as an Element. SR 67. The Motion contained a Brief in Support. The State filed a Response to Defendant's Motion

for Determination of Knowledge relying entirely upon the dicta in State v. Jones 2011 S.D. 60, 804 N.W.2d 409. SR 71. The trial court found State v. Schuster, 502 N.W.2d 565 (SD 1993), controlling and issued an Order Denying Defendant's Motion That Knowledge is an Element of SDCL 22-22-1(3). SR 73.

In State v. Schuster, which is contrary to Jackson's position, the Court held the defendant's knowledge of the victim's inability to consent is not an element of rape. 502 N.W.2d 565 (S.D. 1993). The Schuster court focused on an analysis of "inability to consent" and the plain reading of the statute and ignored the presumption of a mens rea. What is striking is the court in Jones could have applied the Schuster analysis to SDCL 22-22-1(4), but it declined to do so. Instead, the Jones court did a more thorough analysis and came to a more accurate decision.

While a knowledge component is not specified in SDCL 22-22-1(3), the South Dakota Supreme Court has held, as to a substantially similar statute, specifically SDCL 22-22-1(4):

> Because mere silence by the Legislature on whether knowledge is a necessary element of an offense will not always negate a knowledge requirement, especially for crimes with potentially severe punishments, we conclude that the Legislature intended that a rape conviction under SDCL 22-22-1(4) requires proof that the defendant knew or reasonably should have known that the victim's intoxicated condition rendered her incapable of consenting.

State v. Jones, 2011 S.D. 60, ¶ 1, 804 N.W.2d 409, 410. SDCL 22-22-1(3) and (4) are both 3rd degree rape and require a showing the victim is incapable of giving consent. Therefore, the analysis should be the same.

SDCL 22-22-1 provides:

Rape is an act of sexual penetration accomplished with any person under any of the following circumstances: . . .

(3) If the victim is incapable, because of physical or mental incapacity, of giving consent to such act; or

(4) If the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis; or

The significantly similar language of the statute does not state intent, knowledge, or recklessness is required, yet the presumption should be knowledge and not strict liability as "offenses that require no mens rea are generally disfavored[.]" Jones at ¶ 10 (cite omitted). SDCL 22-2-1(3) is a crime with a potentially severe punishment of 25 years (the same as SDCL 22-2-1(4)). As the same language is contained in each statute, it should have the same meaning. Therefore, the analysis and findings in Jones with regard to (4) should be the same. In the present case, the court erred when it found the State did not have to show that Jackson knew, or should have reasonably known, that K.S. was unable to give consent because of physical or mental incapacity.

The Jones court stated that if SDCL 22-22-1(4) was read literally, "South Dakota would be the only jurisdiction to hold that even when a man accused of rape convinces a jury that he reasonably and good faith believed he had engaged in consensual adult sex, the jury must disregard his innocent state of mind if the woman he had sex with later establishes that she drank too much to have given her consent." Id. ¶ 13, 804 N.W.2d 409, 413-14. Similarly, if SDCL 22-22-1(3) was read literally, the law of South Dakota would find that even if an accused person were to prove that a sexual relationship was consensual between partners, that person would still be guilty of third degree rape, if the other partner had any form of mental incapacity, regardless of an innocent state of mind.

Both of these statues require that the state prove an inability to give consent. The mere fact that the state has to prove this to a jury should require the knowledge of the

defendant. The application of a strict liability rule for an age of consent is a clear defined line. An inability to consent due to intoxication and/or due to mental incapacity is an undefined and unclear factual finding that the state needs to prove.

"The presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." U. S. v. Bruguier, 735 F.3d 754 at 763 (2013) (quoting U. S. v. X-Citement Video, 513 U.S. 64, at 72 (1994)). To exclude a mens rea component in SDCL 22-22-1(4) could lead to a broad criminalization of otherwise innocent behavior and SDCL 22-22-1(4) "must be read to include a knowledge element." State v. Jones, 2011 S.D. 60, ¶ 15, 804 N.W.2d 409, 414. Jackson is asking the Court to make the same determination.

When the trial court omitted the knowledge element, it allowed the law applied to violate Jackson's substantive due process guarantees. As SDCL 22-22-1(3) without a knowledge element, violates substantive due process guarantees, and it is unconstitutional. In State v. Stone, the court held "legislative acts which are essentially public welfare regulatory measures may omit the knowledge element without violating substantive due process guarantees." 467 N.W.2d 905, 906 (SD 1991) (citing Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960)). The facts of this case and the serious charges levied against Jackson are not public welfare regulatory measures.

In Stone, the court held "despite the absence of the word 'knowingly' in SDCL 22-42-10, knowledge is an essential element of the offense." Id. at 907. The court declined to reach the question of whether it would violate due process if it did not require knowledge because it found it did require knowledge. Id. If this Court finds that

knowledge is not an element, then the Court must do the further analysis to determine if the statute as written and applied violated Jackson's substantive due process guarantees.

Defense acknowledges that in dicta in Jones, the court opined that cases of typical "statutory rape," "nonconsent is conclusively presumed because of age or physical or mental incapacity." Id. at ¶ 14. Such determination was not before the Jones court and, as to mental deficiency; it is contrary to its analysis of requiring knowledge in the inability to consent due to intoxication. Further, with dementia, this conclusive presumption cannot be so readily assessed.

Mental incapacity is not defined in the code, but the court included Instruction 19 to instruct the jury as to the definition of mental incapacity. SR 684. In the case of an allegation of rape based on SDCL 22-22-1(1) and SDCL 22-22-1(5), neither of which have a knowledge element, there need not be a jury instruction to define and clarify the meaning of "age." Mental incapacity is more closely related to intoxication than to the clearly defined and static age. Age is not fluid and changeable as is intoxication level or mental incapacity due to a dementia type disease.

The Jones court further outlined the fact the State relied upon an expert to establish the level of intoxication as contrary to the idea that the incapacity was readily apparent and stated "the very fact that the State needed an expert makes the idea of strict liability for this offense even more problematic." Id. at ¶14. Here the State noticed seven witnesses as experts in this matter. Specifically, Dr. Scott Cherry, Dr. Priscilla Bade, and Stacy Kilber to speak about K.S.'s mental condition. SR 192, 195, 206. The State's Notice with regard to Dr. Bade offered her testimony "regarding her examination and treatment of the victim and her opinion the victim's mental and cognitive ability." SR

195. The State then filed a Response to Defendant's Objection which stated she is an expert and "is a fact witness as to her examination, diagnosis and treatment of K.S. during the sexual assault examination." SR 22. The State later retracted that qualification, as she did not conduct a sexual assault examination. MH6-7-18 P5. The State requested, and was granted the request, that Dr. Bade be "noticed up at least as an expert in geriatrics." JT P247. The State relied upon Dr. Bade as an expert to establish the level of mental incapacity of K.S.

The State's Notice of Intent to Use Expert Testimony of Stacy Kilber "regarding her care and treatment of the victim leading up to and including the time of the alleged offense and the victim's physical, mental and cognitive ability. " SR 206. The State slightly backed off asserting Kilber was an expert at the hearing on June 7, 2018, advising she has "special training and experience. . . she'll testify to her contact with her and what she saw and, you know, her behaviors." MH6-7-18 P12-15. The State asserted Kilber "sees her on a daily basis and she's aware of her cognitive abilities, and she can apply that to her training and experience as to what she observed about her patient." MH9-7-18 P14. Allowing the testimony on this issue goes beyond merely being a fact witness and was in fact, placed on the record as if it were expert testimony.

To interpret SDCL 22-22-1(3) without a knowledge component could have the same consequences the South Dakota Supreme Court foresaw in State v. Jones, the criminalization of a broad range of apparently innocent conduct. Jones, ¶ 12, 804 N.W.2d at 413. SDCL 22-22-1(3) is vague as it does not define what constitutes mental incapacity, nor does it define consent. If this Court were to follow Schuster, an absurd result could occur. Further, the application of the statute would violate Jackson's

substantive due process rights. The Court should start with the presumption that there is mens rea and disfavor any strict liability offense except in specific situations.

Jackson requests this Court find that knowledge *is* an element of SDCL 22-22-1(3) and reverse and remand for a new trial. If this Court finds that knowledge is not an element of SDCL 22-22-1(3), then Jackson submits that the statute violates Jackson's substantive due process rights and should find the statute unconstitutional and remand for further proceedings.

III. THE COURT ERRED IS RESTRICTING THE TESTIMONY OF DR. RODNEY SWENSON

STANDARD OF REVIEW

"A trial court's decision regarding the qualification of experts and the admission of their testimony will only be reversed upon a showing of an abuse of discretion." State v. Well, 2000 S.D. 156, ¶ 11, 620 N.W.2d 192.

ARGUMENT

The admissibility of Expert testimony is controlled by SDCL 19-15-2 which provides:

> If scientific, technical, or other specialized knowledge will *assist the trier of fact to understand the evidence or to determine a fact in issue,* a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data,
>
> (2) The testimony is the product of reliable principles and methods, and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

(emphasis added). Dr. Swenson's testimony would have assisted the trier of fact to understand the evidence or determine a fact in issue, specifically, as to the ability to

consent to sexual activity. Further Dr. Rodney Swenson's testimony satisfies all three of the factors set forth in SDCL 19-15-2.

A lengthy hearing was held on the issue of the admissibility of Dr. Swanson's testimony and opinion. MH6-18-18. Prior to the testimony of Dr. Swanson at the evidentiary hearing the State filed a Motion in Limine re: "Different Types of Capacity." SR 235. The State filed this Motion in response to the Jackson providing information to the court, as requested, regarding the authority explaining different types of capacity. MH6-7-18 P7. The court and the State received a copy of the Assessment of Older Adults with Diminished Capacity – A Handbook for Psychologists which was created by the American Bar Association in conjunction with the American Psychological Association. Dr. Swenson reviewed this handbook when rendering his opinion, but did not exclusively rely upon it; he rather relied upon his years of experience, education, training, and review of the literature. MH6-18-18 P13; P43-44. Dr. Swenson also set forth the three prongs that he utilizes when determining sexual consent, specifically: do they have the knowledge of what sex is, do they have an understanding of what they are doing, and then some type of determination of voluntariness. MH6-18-18 P14. These are the areas that Dr. Swenson testified should have been discussed with K.S. at or near the time of the alleged sexual contact in order to assist with making a determination of capacity to consent to sex. MH6-18-18 P14.

The court limited Dr. Swenson from speaking about capacity to consent to sexual activity. JT P688. Defense was instructed to not use the term capacity to consent to sex in its direct examination of Dr. Swenson. JT P733. However, the capacity to consent to sex is the major issue in the case.

The court also limited his testimony on the issue of what questions he thought would have been relevant to ask to assist him in determining her capacity to consent to sex. MH6-18-18 P108. The court understood Dr. Swenson to say that there were specific questions that would have "informed this entire event." MH6-18-18 P105. Dr. Swenson repeatedly stated there were areas that should have been covered and went on to give examples of questions that could encompass the areas. MH6-18-18 P61. The court also misunderstood Dr. Swenson to say that law enforcement must have been the person to conduct the interview. MH6-18-18 P12. However, Dr. Swenson stated that someone needed to interview her; it could have been law enforcement, a trained professional, or someone else. MH6-18-18 P65.

The court limited his testimony about the difference in capacity to consent to financial matters or drafting a will from the capacity to consent to sex or other intimate decisions. The court ignored his experience testifying as an expert about an individual's capacity to consent to sexual activity. MH6-18-18 P10. The court also focused almost exclusively on the introductory sections of the Handbook and did not address the section dedicated to sexual consent. MH6-18-18 P72. Dr. Swenson responded to the court's question by advising that while there isn't set testing as there is for financial capacity, to determine sexual capacity he stated "[T]his is an area where empirical science is not as straightforward in terms of assessment devices and it really has to go more on clinical interview and observation." MH6-18-18 P74. Further, when Dr. Swenson tried to direct the court to additional and more complete information contained on pages 63-71, specifically dedicated to Sexual Consent Capacity, the court focused the issue of the lack of a clear evaluative criteria to be used in the assessment. MH6-18-18 P75-76. The court

failed to recognize that in the substance of the Handbook on the specific issue of sexual consent that while there is not a generally accepted standard, the legal standards and criteria for sexual consent vary across states, and the most widely accepted criteria included the three prongs as set forth by Dr. Swenson. Specifically, this criteria covers knowledge, understanding, and voluntariness. MH6-18-18 P14.

At the close of the hearing on the admissibility of Dr. Swenson's testimony, the court determined that Dr. Swenson was prohibited from speaking about specific questions that would have informed the event. MH6-18-18 P105.

The State made a motion to limit the testimony regarding the timeframe following the alleged incident. This Motion was granted by the court and directly resulted in the limitation of Dr. Swenson's relevant testimony. The court also limited Dr. Swenson from testifying about records that fell outside the October through November 2016 period. JT P689. The State was able to bring in information about the progression of K.S.'s illness from as far back as 2008. JT P47. However, Jackson was limited to a two-month period which impeded his ability to demonstrate moments of clarity, capacity, lucidity that happened as close as a month after the incident. JT P84. Jackson filed a motion to reconsider the time limitation as set by the Court and the Court denied the Motion. SR 544; JT P162; P237-240. The records and information contained in the medical records show that after the incident, K.S. had relationships with treatment providers, had times of great lucidity, was not as impaired as the family witnesses asserted, that family noted her ability to be embarrassed (awareness) and manipulate (reasoned thinking). JT P89. Those issues would have been addressed through the testimony of Dr. Swenson. The State was allowed to present that this "fast acting" progressive dementing disease began far before

November 18, 2016, and that she would never got better. JT P67. The witnesses of the State would assert lack of memory when the Jackson attempted to address the inconsistency. JT P133. The only way to refute this claim was to utilize all the records received to highlight she had good days and bad days and the days of capacity and understanding occurred for a long time after November 18, 2016. The court, by limiting Jackson, tied his hands and directly impeded his ability to put on a defense. The arbitrary decision to withhold relevant and valuable information from the jury was an abuse of discretion and impeded Jackson's ability to confront and cross examine the State's witnesses.

IV. THE PROSECUTION'S FAILURE TO DISCLOSE THE EXCULPATORY OPINION OF THEIR EXPERT, DR. CHERRY, WAS MISCONDUCT AND VIOLATED DUE PROCESS PURSUANT TO BRADY V. MARYLAND

STANDARD OF REVIEW

The standard of review applicable to prosecutorial misconduct is an abuse of discretion standard. However, the court has reviewed prosecutorial misconduct under a *de novo* standard in cases where the prosecutorial misconducted specifically implicated a defendant's constitutional right. State v. Ball, 2004 S. D. 9 ¶ 16-21, 675 N.W.2d 192, 197-199 (using a *de novo* standard of review in cases where a prosecutor comments on a defendant's Fifth Amendment right to remain silent). The Court addresses alleged constitutional due process violations, like Brady violations, *de novo.* State v. Piper, 2006 S.D. 1 ¶ 18, 709 N.W.2d 783.

FACTS

The State filed a notice of intent to offer expert opinion through Dr. Cherry on April 6, 2018. SR. 192. As part of that notice, the state contended that Dr. Cherry would

testify, for the state, about "…the results of his neuropsychological evaluation of K.S. (DOB 6/23/60) on March 7, 2018, as well as provide his medical opinion as to K.S.'s mental condition on the date of offense." SR. 192 (emphasis added).

Although testing results were provided from the April 6, 2018 neuropsychological evaluation, no report was ever produced with regard to Dr. Cherry's opinion about "K.S.'s mental condition on the date of offense." SR 192. On June 7, 2018, defense counsel advised the court that it had not received a report from Dr. Cherry related to his opinions about K. S. mental condition on the date of offense. MH6-7-18 P18. The State represented that they would get a report and emphatically stated that Dr. Cherry's opinion "…would be that at the day that this happened or the time frame this happened that she--given his review of the medical records and his exam of her to date, that he is of the opinion that she could not consent." MH 6-7-18 P18-19. The State went on to say that defense had been provided a CV and an evaluation of the alleged victim and that "…simply put that that would be his opinion as far as her inability to consent." MH6-7-18 P19.

Later in that hearing the State agreed they could have Dr. Cherry put together a report stating his opinion of K.S.'s inability to consent. The State argued the nature of Dr. Cherry's opinion was apparent because if his opinion was that K. S. could consent, "we wouldn't be here." MH6-7-18 P22.

Despite the State's assertion that the nature of Dr. Cherry's testimony was apparent, the trial court ordered the state produce a report and set a deadline of 5 days. MH6-7-18 P32. The State never produced a report and thereafter on June 14, 2018, the state withdrew their notice to call Dr. Cherry. MH6-14-18 P15. In addressing the

withdrawal of their expert, the state said, "[i]t's the state's understanding from our last hearing that the Court did it not want Dr. Cherry to testify about her present condition, you know, present issues, and so the question for the Daubert was going to be going back in time as far as ability to consent or not to consent. We've decided we won't then broach that subject with him, so we'll withdraw Dr. Cherry." MH6-14-18 P15. The state went on to assert that because they were not calling an expert that the defense expert should also be excluded. MH6-14-18 P15-19.

Four days later, on June 18th, Jackson contacted Dr. Cherry to inquire about his opinion and was informed that he, like defense expert Dr. Swenson, could not opine about K.S.'s capacity on or near the date in question because he did not speak to her at that time. Thereinafter, Dr. Cherry signed an affidavit stating that his opinion "was, and is, that it is impossible to determine capacity from a review of records with-out a face to face interview of Ms. Sheets on or shortly after the date that capacity is to be determined." MH6-22-18 P11. Furthermore, Dr. Cherry, having been released of the States subpoena, was no longer available to testify at the trial. MH6-22-18 P5. Jackson filed a notice of intent to offer expert testimony through Dr. Cherry and a motion to continue on June 22, 2018. SR 439; 448.

A hearing on the motion was held where the State essentially conceded that Dr. Cherry's testimony was not what it had been represented to be. The State argued that it was a mistake and not intentional misinformation. MH6-22-18 P9. The State went on to say that had he understood what Dr. Cherry's testimony would be, "I would not have filed notice. I would have found *another expert or looked for another expert*. I wouldn't have stopped with Dr. Cherry." MH6-22-18 P9.

The trial court conceded that the situation looked "a little odd." MH6-22-18 P13. However, denied the motion finding the information was not exculpatory and was cumulative. MH6-22-18 P13.

ARGUMENT

"Prosecutorial misconduct implies a dishonest act or an attempt to persuade the jury by the use of deception or by reprehensible methods." Piper, 2006 S.D. 1 ¶ 18, 709 N.W.2d 783, 794 (*citing* State v. Lee, 1999 S.D. 81, ¶ 21, 599 N.W.2d 630, 634 (internal cites omitted)). The Court will reverse a conviction when prejudicial error results from the misconduct. Id. Prejudicial error is error which in all probability produced some effect upon the jury's verdict and is harmful to a substantial right of the party assigning it. Id. There is no hard and fast rule to determine when prosecutorial misconduct reaches the level of prejudicial error which demands reversal of the conviction and a new trial; each case must be decided on its own facts. Lee, 1999 S.D. 81 ¶ 21, 599 N.W.2d at 634.

The question for the Court is twofold; did the prosecutor commit misconduct, and did that misconduct effect the jury verdict or harm a substantial right of Jackson. Id. The misconduct begins with the State's misrepresentation of the opinion of its expert, Dr. Cherry. From April 6, 2018 until June 14, 2018, the State affirmatively represented to the court and Jackson that it would present an expert who would testify that K.S. lacked capacity on the date of alleged incident. During this same period, the State repeatedly objected to Jackson's expert Dr. Swenson. SR 213; 228; MH6-7-18 P16; MH6-22-18. A large part of the objection was based on the State's belief that Dr. Swenson's opinion, that it was impossible to know if K. S. had capacity at the time of the incident because no one had asked her about the incident, was not an opinion. MH6-7-18 P25-27, MH6-14-18

P15-19. All the while, unbeknownst to Jackson, the state's expert had a significantly similar opinion. MH6-22-18 P11.

It is unclear when the state became aware of Dr. Cherry's opinion regarding capacity on the date of offense, it is clear that they were aware of Dr. Cherry's true opinion at the time they withdrew their request to call Dr. Cherry as a witness on June 7, 2018. The state had a duty to disclose the exculpatory opinion of their expert and failing to do so was misconduct necessitating a reversal of Jackson's conviction.

Jackson requested notice of expert testimony and discovery related to that notice on May 5, 2017. SR 40. That request was granted by the trial court on May 30, 2017. SR18th 60. The trial court again ordered the State to turn over the opinion of Dr. Cherry on June 7, 2018. MH6-7-18 P35. The State never provided a report related to capacity on the date of the offense. The State failed to disclose this information in violation of its ethical obligations, two court orders, and in violation of Jackson's due process rights pursuant to Brady. *See* South Dakota Rules of Professional Conduct 3. 4; 3. 8; 4. 1; 8. 4(d); SR 60; MH6-7-18 P35.

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. " The prosecution commits a Brady violation when "(1) '[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching;' (2) the 'evidence [has] been suppressed by the State, either willfully or inadvertently;' and (3) 'prejudice [has] ensued.'" Thompson v. Weber, 2013 S.D. 87, ¶ 38, 841 N.W.2d 3, 12

(alterations in original) (quoting Strickler v. Greene, 527 U.S. 263, 281–82 (1999)). The South Dakota Supreme Court has approved of and adopted this standard. *E.g.* Piper, 2006 S.D. 1 ¶ 19, 709 N.W.2d at 795.

a. The evidence in this case was favorable to Jackson.

Evidence, that Dr. Cherry also could not opine about capacity because K.S. was not interviewed at the time of the incident was exculpatory and reinforced the defense position. K.S.'s capacity at the time of the offense was the primary fact at issue throughout the trial. Jackson's theory of defense rested on the fact that no one talked to K.S. about the incident close in time to the event and thus no one could say, one way or the other, whether she had the capacity to consent at the time of the alleged incident nearly two years later.

The court acknowledged differences between Dr. Cherry and Swenson's opinions, despite its ruling that the testimony would be cumulative. MH6-22-18 p.13. As the individual hired by the State to opine on capacity, Dr. Cherry could be viewed as uniquely unbiased by a jury. Additionally, Dr. Cherry had the opportunity to actually meet with K.S. during the pendency of the case. The state attempted to undercut the credibility of Jackson's expert, Dr. Swenson, in a number of ways. Dr. Swenson was questioned about not meeting K.S., not having access to family members, and the fact that he had been paid by Jackson in the case. JT p. 791-798. Had Dr. Cherry testified for Jackson, these lines of questioning would have been moot. By failing to disclose the true nature of Dr. Cherry's opinion, the State deprived Jackson of presenting a witness that was favorable to his theory of defense and was simultaneously immune the State's credibility attacks.

The State even acknowledged that the evidence was favorable to Jackson when it told the court that had they rightly understood what Dr. Cherry's testimony, "I would not have filed notice. I would have found *another expert or looked for another expert*. I wouldn't have stopped with Dr. Cherry. " MH6-22-18 P9. Clearly, the State understood that Dr. Cherry's opinion was contrary to their theory of the case; why else would they suggest hiring or looking for another expert. The evidence suppressed by the State was clearly favorable to Jackson and should have been disclosed.

b. The State did not provide the information to Jackson.

As outlined above, Jackson specifically requested the opinion of any State expert. SR 40. That request was granted by the trial court. SR. 60. The trial court specifically ordered the state to turn over the opinion of Dr. Cherry. MH6-7-18 P35. During the hearing, the State suggested Jackson had been put on notice of Dr. Cherry's opinion based primarily on the fact that the state intended to call him as a witness. MH6-7-18 P18-23; 31. At that time, Dr. Cherry's opinion had been repeatedly misstated by the State when, in fact, Dr. Cherry's opinion "…was, and is, that it is impossible to determine capacity from a review of the records without a face-to-face interview of Ms. Sheets (K.S.) on or shortly after the date that capacity is to be determined." MH6-22-18 P11. This opinion was not learned by Jackson until June 18, 2018, procured through Jackson's own due diligence.

The State made the same argument regarding Jackson's ability to contact Dr. Cherry when Jackson discovered the misrepresentation and sought a continuance. MH6-22-19 P7. At that hearing, the state argued when they withdrew their notice of Dr. Cherry, "anyone can surmise that he is not providing that opinion as far as her mental

condition on November 18th, so it should be no surprise to defense." Id. The state contends that it was Jackson obligation to guess about Dr. Cherry's opinion at the time notice was filed and then surmise, based on the withdrawal of the expert that this opinion had changed. This argument violates the rules of evidence, the two court orders issued by the court and the Court's holdings in Brady and its progeny. SDCL 23A-13-4; SR 60, MH6-7-18 P23; 32.

A prosecutor's obligations under Brady are not met by providing a witness list or by simply withdrawing a witness as an expert. A prosecutor's obligations under Brady are affirmative and require the State to disclose "evidence" favorable to the accused that if suppressed would deprive the defendant of a fair trial. United States v. Bagley, 473 U.S. 667, 675 (1985). The principal object of the Brady rule is fairness and its fundamental purpose is to "ensure that a miscarriage of justice does not occur." Id.

Although not binding on this Court, the District Court of Utah, dealt with a similar issue and held, "when [the state] becomes aware that the opinions of a potential witness tend to negate the guilt of the defendant, fairness requires more from the state than simply placing the witness's name on a witness list without any mention whatsoever of the expert's exculpatory opinions. " State v. Weitzel, 2001 WL 34048225 (UT) (unpublished case from the District Court in Utah). There the court held that the state had not met its Brady obligations by simply providing notice of a witness's name.

c. Jackson was prejudiced by the State's failure to disclose the evidence.

The failure of the State to disclose the exculpatory opinion of Dr. Cherry prevented Jackson from calling Dr. Cherry as a witness in the case against him. Typically, prejudice occurs if the state's failure adversely affects a defendant's

fundamental rights, such as his right to a fair trial. Bagley, 473 U. S. 667, 678 (1985). A defendant's fair trial rights are undermined only where the undisclosed evidence is material, meaning that "there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different." Id. at 682. This does not mean Jackson has to prove he would have been acquitted had the evidence been produced, it simply means that "…the government's evidentiary suppression undermines the confidence in the outcome of the trial." Kyles v. Whitley, 514 U. S. 419, 434, (1995) (*quoting* Bagley, 473 U. S. at 678). Thus, Jackson is entitled to a new trial if the state's failure to disclose the opinion of Dr. Cherry, undermines the confidence in the outcome of the trial.

In this case, Jackson was severely prejudiced and should be granted a new trial. Jackson found out about the evidence that the State failed to disclose, but it was too late as the witness was no longer available for trial. Jackson attempted to cure the prejudice by moving to continue the case and the court denied that request forcing Jackson to trial without the benefit of an expert that was exculpatory and seemingly unbiased. The State's cross-examination of Dr. Swenson gave the jury the impression that he was hired gun, partial to the defense, and limited as to the information he had been given. Dr. Cherry, by contrast, had a similar opinion as Dr. Swenson but had none of the perceived bias and had full access to the state's information as well as access to K.S.'s testimony by Dr. Cherry, would in all likelihood, been viewed favorably by a jury and could have changed the outcome of the trial.

The result of the State's behavior was a denial of a fair trial to Jackson in violation of his right to due process of the law. The Court should for all these reasons reverse Jackson's conviction and grant him a new trial.

V. THE COURT ERRED WHEN IT DENIED JACKSON'S MOTION TO CONTINUE FOLLOWING THE LATE DISCOVERY OF EXCULPATORY EVIDENCE IN THE FORM OF THE CONTRARY OPINION OF THE STATE'S EXPERT

The trial court's denial of a continuance, which would have been the most measured cure for state's aforementioned misconduct, considerably increased the prejudice suffered by Jackson and denied him a fair trial and the right to present a full defense.

STANDARD OF REVIEW

A trial court's decision to grant or deny a continuance is reviewed under an abuse of discretion standard. E.g. State v. Beckley, 2007 S.D. 122, ¶ 20, 742 N.W.2d 841,847 (cite omitted) "An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." State v. Asmussen, 2006 S.D. 37, ¶ 13, 713 N.W.2d 580, 586 (cite omitted). However, in this instance, the trial court's denial of a continuance based on the withholding of exculpatory evidence amounted to a due process violation which is reviewed *de novo.* *See* State v. Piper, 2006 S.D. 1 ¶ 18, 709 N.W.2d 783; State v. Ball, 2004 S.D. 9, ¶ 16-21, 675 N.W.2d 192, 197-199.

ARGUMENT

An accused is entitled, as a matter of right to a reasonable opportunity to secure evidence on his behalf. State v. Moeller, 2000 S.D. 122, ¶ 7, 616 N.W.2d 424, 431. A continuance should be granted if the court determines that "due diligence has failed to

procure it, and where manifest injustice results for the denial of the continuance." Id. (*citing* State v. Dowling, 87 S.D. 532, 534, 211 N.W.2d 572, 573 (1973) (cite omitted)).

Furthermore, "[in] deciding whether to grant a continuance, a trial court must also consider: (1) whether the delay resulting from the continuance will be prejudicial to the opposing party; (2) whether the continuance motion was motivated by procrastination, bad planning, dilatory tactics or bad faith on the part of the moving party or his counsel; (3) the prejudice caused to the moving party by the trial court's refusal to grant the continuance; and, (4) whether there have been any prior continuances or delays." Beckley, 2007 S.D. 122 ¶ 21, 742 N.W.2d at 847 (cite omitted); Moeller, 2000 S.D. 122 ¶ 8, 616 N.W.2d at 431.

The trial court should have granted Jackson's motion to continue the trial, which was filed four days before the trial began. Jackson exercised due diligence in procuring evidence for his defense. But for the State's misinformation about Dr. Cherry's opinion and its failure to provide a report, the defense would have had the information in a timely manner and been able to make the necessary arrangements for Dr. Cherry's appearance at trial. By the time the information became known, Dr. Cherry was no longer available for trial as the State had released him from their subpoena.

The trial court should have granted a continuance in view of the four factors described above. There is nothing in the record to suggest a continuance would have prejudiced the opposing party despite the State's assertion to the contrary.

The continuance was not motivated by "procrastination, bad planning, dilatory tactics, or bad faith." By the time it became clear that Jackson would not be getting a report and the State was no longer calling Dr. Cherry, the trial date was fast approaching.

Dr. Cherry had already been released from the State's subpoena and was unavailable to testify. There was nothing that could have been done by Jackson to prevent the timing of the motion to continue.

Jackson was severely prejudiced by the denial of the motion to continue. Jackson was prevented from calling a witness that would have been enormously useful for the jury's understanding of the facts of the case and corroborated the defense expert opinion regarding the lack of interview with K.S.

At the time of the motion to continue the case had been pending since March 15, 2017. SR. 1. There had been one prior joint motion to continuance the jury trial. SR 127. Other delays can be attributed to legitimate constitutional motions Jackson was entitled to have heard. At no point were there intentional delays or wastes of time. The motion to continue was not based on lack of readiness on the part of the defense but the unavailability of a critical, newly discovered, witness whose position had been incorrectly represented to the court and counsel by the State.

The denial of the motion to continue prevented Jackson from reasonably curing the prejudice suffered due to both the prosecutorial misconduct and the Brady violation. Essentially, the trial court doubled down on the prejudice suffered by Jackson by forcing Jackson to trial and effectively preventing him from calling Dr. Cherry as a witness. For all these reasons, the denial of the motion to continue was not simply a denial of a motion but a due process violation deserving of *de novo* review. At a minimum, the trial court's denial of the motion was an abuse of discretion and substantially prejudiced Mr. Jackson in his trial. The Court should overturn the conviction and remand for a new trial on this basis alone.

CONCLUSION

The individual prejudice from the above issues are each significant and cumulatively prevented Jackson from receiving a fair trial.

Roger Jackson respectfully requests this Court reverse his conviction and remand the case to the trial court for further proceedings consistent with the Supreme Court's rulings.

REQUEST FOR ORAL ARGUMENT

Roger Jackson requests to present oral arguments on these issues.

Dated this 29th day of August 2019.

Respectfully submitted,

/s/ Alecia E. Fuller
Alecia E. Fuller
Law Office of the Public Defender for Pennington County
130 Kansas City St., Ste. 310
Rapid City, South Dakota 57701
(605) 394-2181
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12-point type. Appellant's Brief contains approximately 9,944 words and is 35 pages in length, which is less than the total words permitted by the rule of this Court.

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

/s/ Alecia E. Fuller
Alecia E. Fuller
Attorney for Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of August 2019, a true and correct copy of Appellee's Brief in the matter of State of *South Dakota v. Roger Jackson* was served via electronic mail, at the e-mail listed below, upon these individuals:

Mr. Mark A. Vargo
Pennington County States Attorney
vargo@pennco.org

Mr. Jason Ravnsborg
Attorney General
State of South Dakota
atgservice@state.sd.us

Sarah L. Larson
Assistant Attorney General
State of South Dakota
Sarah. Larson@state.sd.us

/s/ Alecia E. Fuller
Alecia E. Fuller
Attorney for Appellee

APPENDIX

1. Judgment

APPENDIX

1. Judgment

STATE OF SOUTH DAKOTA,	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON.	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	File No. CRI 17-1259
Plaintiff,	)	
vs.	)	**JUDGMENT**
ROGER L. JACKSON, DOB: 2-21-47 CR#: 16-215768	)	
Defendant.	)	

On the 25th day of October, 2018, the Defendant, ROGER L. JACKSON, being present personally and being represented by and through his attorneys, Alecia Fuller and Elizabeth Regalado, Rapid City; the State being represented by State's Attorney, Mark A. Vargo; the Defendant having previously been arraigned on an Indictment alleging the offense of THIRD DEGREE RAPE (CLASS 2 FELONY), committed on or about November 18, 2016, in violation of SDCL 22-22-1(3); the Defendant having entered a plea of not guilty on April 20, 2017, to the Indictment as charged; a trial by jury having been held before this Court on June 25, 2018 through June 30, 2018; the Jury having returned its verdict of Guilty of the offense of THIRD DEGREE RAPE as charged; the Defendant having been fully advised of his rights, and the Court having affixed this day as the date for pronouncing sentence; the Defendant having been asked whether there was any legal cause to show why a judgment should not be pronounced against him in accordance with the law and no cause being shown; it is hereby

ORDERED AND ADJUDGED, and the sentence is that you, ROGER L. JACKSON, upon your conviction for the crime of THIRD DEGREE RAPE (CLASS 2 FELONY), be and you hereby are sentenced to serve Fifteen (15) years in the South Dakota State Penitentiary, Sioux Falls, South Dakota, that the last Five (5) years are herein suspended; and that he/she receive credit

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for time already served in the Pennington County Jail in the amount of Three (3) days plus credit for each day served in the Pennington County Jail while awaiting transport to the South Dakota State Penitentiary; and it is further

ORDERED, that, in accordance with SDCL 23A-40-11 through SDCL 23A-40-13, the determined amount for services and expenses of court-appointed counsel that may be filed as a lien against the property of Defendant by the county or municipality is Fourteen Thousand Two Hundred Seventy Dollars ($14,270); and it is further

ORDERED, That the Defendant pay through the Pennington County Clerk of Courts liquidated court costs pursuant to SDCL 23-3-52 which have been incurred in these proceedings in the amount of Forty Dollars ($40.00); plus the crime victims' compensation surcharge pursuant to SDCL 23A-28B-42 in the amount of Two Dollars and Fifty Cents ($2.50); plus the unified judicial system court automation surcharge pursuant to SDCL 16-2-41 in the amount of Sixty-One Dollars and Fifty Cents ($61.50); and it is further

ORDERED, That the Defendant reimburse Pennington County for the Grand Jury transcript costs in this matter in the amount of Eighty-Six Dollars and Twenty-Five Cents ($86.25) to be paid through the Clerk of Court's Office; and it is further

ORDERED, That the Defendant have no contact with the victim, the victim's family, any minors under sixteen (16) years of age, and no contact with any nursing homes, including assisted living facilities, and in the event that Defendant himself lives in a nursing home or assisted living facility, that he inform the nursing home or assisted living facility of his conviction in this case; and it is further

ORDERED, that the suspended portion of the Defendant's penitentiary sentence is herein suspended on the term and condition that all of the court-ordered financial obligations and restitution ordered herein be paid; and it is further

ORDERED, that any bond which has been posted in this matter be discharged and the bondsman exonerated; and it is further

ORDERED, that the Defendant be remanded to the custody of the Pennington County Sheriff for transportation and delivery to the Warden of the South Dakota State Penitentiary, Sioux Falls, South Dakota.

Dated this 30 day of October, 2018, effective the 25th day of October, 2018.

BY THE COURT:

The Honorable Jane Wipf Pfeifle
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:
Ranae Truman, Clerk of Courts
Camille Bloomy
(Deputy)

UNIFIED JUDICIAL SYSTEM
STATE OF SOUTH DAKOTA

NOTICE OF RIGHT TO APPEAL

You, ROGER L. JACKSON, are hereby notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Pennington County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Judgment is filed with said clerk.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28800

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ROGER L. JACKSON,

Defendant and Appellant.

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

THE HONORABLE JANE WIPF PFEIFLE
Circuit Court Judge

APPELLEE'S BRIEF

JASON R. RAVNSBORG
ATTORNEY GENERAL
Sarah L. Larson
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Alecia E. Fuller
Law Office of the Public Defender for
Pennington County
130 Kansas City Street, Suite 310
Rapid City, South Dakota 57701
Telephone: (605) 394-2181
E-mail: aleciaf@pennco.org

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed November 14, 2018

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No. 28800

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ROGER L. JACKSON,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Appellant, Roger L. Jackson, is known as "Defendant" or "Jackson." Appellee, the State of South Dakota, is known as "State." Trial exhibits are referred to as "Exh." References to documents are as follows:

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JURISDICTIONAL STATEMENT

Jackson appeals from the Judgment issued by the Honorable Jane Wipf Pfeifle on October 31, 2018. SR 886. Jackson filed his Notice of Appeal on November 14, 2018. SR 276. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT PROPERLY DENIED JACKSON'S MOTION TO DISMISS?

The trial court denied the motion.

State v. Blakey, 2001 S.D. 129, 635 N.W.2d 748

State v. Vatne, 2003 S.D. 31, 659 N.W.2d 380

State v. Cameron, 1999 S.D. 70, 596 N.W.2d 49

II

WHETHER THE TRIAL COURT PROPERLY DENIED JACKSON'S MOTION FOR DETERMINATION OF KNOWLEDGE AS AN ELEMENT?

The trial court denied the motion.

State v. Schuster, 502 N.W.2d 565 (S.D. 1993)

State v. Jones, 2011 S.D. 60, 804 N.W.2d 409

State v. Fox, 72 S.D. 119, 31 N.W.2d 451 (1948)

SDCL 22-22-1(3)

III

WHETHER THE TRIAL COURT PROPERLY LIMITED EXPERT TESTIMONY?

The trial court limited some areas of Dr. Swenson's testimony.

State v. Johnson, 2015 S.D. 7, 860 N.W.2d 235

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This issue was not addressed at the trial court level.

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

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WHETHER THE TRIAL COURT PROPERLY DENIED JACKSON'S MOTION TO CONTINUE?

The trial court denied the motion.

State v. Onken, 2008 S.D. 112, 757 N.W.2d 765

State v. Karlen, 1999 S.D. 12, 589 N.W.2d 594

State v. Hagan, 1999 S.D. 119, 600 N.W.2d 561

STATEMENT OF THE CASE

On March 15, 2017, an Indictment was filed charging Jackson with Third Degree Rape, a Class 2 felony, in violation of SDCL 22-22-1(3). SR 1. A warrant of arrest was issued on the same day. Jackson made his initial appearance on March 27, 2017, pleading not-guilty at an arraignment on April 20, 2017.

The Honorable Jane Wipf Pfeifle presided over pre-trial hearings on May 25, 2017; June 29, 2017; September 21, 2017; October 26, 2017; December 7, 2017; December 8, 2017; December 13, 2017; January 11, 2018; February 8, 2018; February 15, 2018; June 7, 2018; June 14, 2018; June 18, 2018; and June 22, 2018. Several of these motions are pertinent to Issues III, IV, and V of Jackson's brief. Relevant summaries are included under each issue.

A six-day jury trial commenced on June 25, 2018. JT1: 1. At the conclusion of trial, a jury returned a verdict of Guilty of the offense of Third-Degree Rape, as charged. SR 886. Jackson was sentenced on October 25, 2018. *Id.* The trial court sentenced Jackson to fifteen years in the South Dakota State Penitentiary, with five years suspended and credit for three days served. SR 886-87. The sentence included an order of no contact with the victim or her family, nor any contact with any nursing homes, including assisted living facilities. *Id.*

A Notice of Appeal was filed on November 14, 2018. SR 889.

STATEMENT OF FACTS

K.S. is the wife of Mark Sheets, an administrator at Douglas Schools in Box Elder. JT2: 36. She is the mother to her daughter, Kaia, who was a Rapid City police officer in 2016. She also has two sons, Justus and Jordan. K.S. graduated from Valparaiso University with a degree in math. JT2: 41. She went on to become a teacher, a school administrator, and a children's minister, as well as assisting women create small businesses in rural areas, among other careers. *Id.*

K.S. was an outgoing, intelligent, and active friend and community member. She was known for her desire to be the best at whatever she did. JT2: 45. She had an exceptional gift of writing, an angelic singing voice, and an orderly home. JT3: 504, 510. She and Mark took their family hiking, biking, camping, canoeing, fishing, and kayaking. JT2: 41. She sent Kaia to ballet class to learn proper posture. JT3: 506. She taught her to sew and made sure she was active in 4-H. *Id.* She invented recipes for her children's special tastes, ensured each child was diligent about their individual chores, planned surprise birthday parties, and encouraged them to be goal-oriented. *Id.* at 507-08. She taught her children a significant amount of responsibility, because she felt that young children need to feel needed. JT2: 42. She was creative and organized and a best friend. JT3: 503-08.

In 2008, K.S.'s orderly and organized behaviors began to change. She could not articulate to her husband what she did at work during the day. JT2: 47. Her annual Christmas letters no longer made sense. JT3: 511. She lost her ability to write and compose written words. *Id.* at 512. She stopped helping with cooking, cleaning, and daily chores. JT2: 49. The entire family was concerned. *Id.*

Within a couple years, K.S. could not operate a television or a remote. JT3: 513. She could not dial a telephone. She could not read a book, follow a recipe, or keep track of time. She would try to go for a walk and would get lost. *Id.* She would think no one had been home in days, when Mark had just left briefly to get some groceries. *Id.*

By, 2012, Mark was helping K.S. get dressed. JT2: 56. She could not understand how to button buttons correctly. *Id.* at 57. She had a hard time brushing her hair. K.S., a math major, could not tell her husband what "8 + 7" added up to. *Id.* at 58. She was leaving the gas burners on. *Id.* at 60. She would push around moveable furniture and tell Mark she had no idea what happened. *Id.* at 63.

Finally, the family was told in the summer of 2012 that K.S. had early-onset Alzheimer's. JT2: 60. Later, the family would receive a more formal diagnosis – Benson's Syndrome – a rare form of degenerative dementia that affected her verbal, visual, and motor skills. SR 572.

With professional advice from Mayo Clinic, the family determined it was dangerous for K.S. to live at home without additional care. JT3: 512; JT2: 65. K.S. liked the rooms at Holiday Hills, an assisted living center in Rapid City. JT3: 514. The family hired outside nurses to care for K.S., who required assistance to shower, eat, and get dressed. JT2: 66. After moving there, K.S.'s symptoms continued to worsen. She lost her ability to control her body, her balance, and to understand her bodily urges. JT3: 515. She could not comprehend how her arms went in the arm holes of her clothing. *Id.* at 516. When looking in a mirror next to Kaia, K.S. could not distinguish which body was hers and which was Kaia. *Id.* at 516. She was never able to help with her grandchildren. *Id.* at 520. She had hallucinations of large mechanical spiders crawling out from the vents; Mark bought her a sparkly wand from Toys-R-Us, which K.S. said helped make the spiders go away. JT2: 92-93.

Finally, in 2016, it became impossible for Holiday Hills to properly care for K.S. Kaia received a phone call early one morning asking her to come to the center. Despite being in diapers, K.S. lost control of her bladder overnight and fecal matter was smeared on the walls, in the carpet, and even in her shoes. JT3: 516. K.S. didn't seem to understand what had happened or why anyone was in her room cleaning. *Id.* at 519. Holiday Hills was not equipped to handle that level of care. JT2: 77. The family was heartbroken. JT3: 521.

So began an exhaustive search for a new home that could properly care for K.S. They needed a locked facility, one that accepted Medicaid and dementia patients and provided 24-hour care. JT3: 522. The family finally decided on Bella Vista, a nursing-home-like facility in Rapid City. *Id.* K.S. moved into Bella Vista in the fall of 2016. At that time, she was only 56 years old. K.S. was described by her caregivers as pleasant, innocent, child-like, and compliant. JT3: 338, 349; JT5: 904.

K.S. often did not recognize her family. *Id.* at 540. She couldn't brush her own teeth, use the bathroom, brush her hair, or tie her shoes without assistance. JT3: 543. She did not understand an instruction to "sit down." She would stare blankly at that request. *Id.*; JT2: 95. However, Bella Vista was able to feed her, change her diaper, and provide her 24-hour care. JT2: 79.

After K.S. moved to Bella Vista, the family began to notice a man named Roger Jackson spending significant time with K.S. Mark was immediately wary of Jackson's intentions with his wife. JT2: 107. Jackson told Mark that music helps Alzheimer's patients, so it could really help K.S. *Id.* Mark explained Benson's Syndrome to Jackson; that it does not affect the brain like Alzheimer's; that he and K.S.'s son is a doctor of genetics, and they were quite abreast of the disease and current research. *Id.* at 108. Jackson seemed to disregard the disease.

Mark told Jackson directly, and told the staff at Bella Vista, that K.S. was to never leave the facility with Jackson. JT2: 111.

When Kaia met Jackson, he said he first "noticed" K.S. when he played music at Holiday Hills. When he saw that K.S. was no longer there, he asked around, discovered she had moved to Bella Vista, and followed her there. JT3: 523. When Kaia brought her children to visit "Grammy," Jackson was there at Bella Vista with K.S. *Id.* Jackson played music for K.S., which she seemed to like. He said they would sing hymns and read the Bible. *Id.* On one visit, Kaia found that Jackson left K.S. a card, a box of chocolates, and clothing. *Id.* at 526. Still, because of their priority that K.S. experience moments of joy, the family decided that Jackson's visits were permittable since she was in a locked facility, so they believed she was safe. JT3: 524-25.

In the several years since K.S. had fallen victim to her disease, Mark and Kaia had never left town at the same time. They ensured someone was always around for K.S. On the weekend of November 18, 2016, however, they decided that for the first time, it would be safe if they both had to leave town at the same time. JT3: 527. When Kaia visited her mother to inform her they were both leaving town for the weekend, Jackson was there. *Id.* Jackson interrupted, "[o]h, don't worry. I'll take care of her." *Id.* at 528. Jackson then asked Kaia if he could take K.S. out of the facility over the weekend. Kaia responded, as

the family and Bella Vista already decided, only family was allowed to take her out. *Id.* at 529.

While Kaia was out of town, she received a phone call from law enforcement telling her that her mother had been located. JT3: 529. Kaia had no idea what was happening. *Id.* Kaia was informed that her mother left Bella Vista with Jackson. The family would later discover that when another Bella Vista resident fell and cut his head, all of the nurses and aides rushed to his aid. JT2: 192. It was then that Jackson took K.S. out of the facility without authorization. JT5: 860. K.S. was abducted for approximately two hours. *Id.*

When K.S. was returned to Bella Vista, the nursing staff did a head-to-toe assessment, and found vaginal discharge in K.S.'s diaper. JT3: 343. A nurse at Bella Vista asked K.S. where she went with Jackson. K.S. responded, "Where we always go. To the school." JT2: 206. When asked if she had any sexual contact, she said, "I don't think I would do that." *Id.*

The family was thrown into a frenzied storm of contact with law enforcement and filing of a police report. Kaia gave consent for her mother to undergo a rape exam at Rapid City Regional Hospital. JT3:535-38. Because Kaia was a Rapid City Police Officer, multiple officers and medical personnel knew the family as well as K.S.'s condition. JT3: 532-35. Two nurses performed a sexual assault interview of a tearful K.S. SR 578. K.S. was unable to answer their

questions. *Id.* In addition to the discharge in her diaper, there was redness on the inner sides of K.S.'s vagina. *Id.*

When interviewed by an investigator, Jackson initially stated he only took K.S. for a drive and no sexual contact occurred. JT4: 625. He provided a DNA sample, which revealed that Jackson could not be excluded as the source of seminal fluid from K.S.'s diaper. Exh. 11. When interviewed a second time, Jackson denied sexual contact again, until he asked how the DNA result turned out. Exh. 15. When informed it was not Mark's seminal fluid, but Jackson's, found in K.S.'s diaper, Jackson confessed to having sex with K.S. *Id.* He said K.S. was "horny" and asked for the sex; that she undressed and re-dressed herself; that she grabbed Jackson's hand and made him touch her; and that the sex was consensual. *Id.* He indicated he would plead guilty to whatever he had done and did not want the family to have to go through court proceedings. *Id.*

In November of 2016, when the rape occurred, Mark and K.S. were one month short of celebrating 35 years of marriage. JT2: 38.

ARGUMENTS

I

THE TRIAL COURT PROPERLY DENIED JACKSON'S MOTION TO DISMISS.

A. Background.

Jackson's preferred theory of defense was that K.S. had the capacity to, and did, consent to sex with Jackson. AB 8-9. Jackson repeatedly claims throughout the record and in his brief that K.S. was never interviewed. AB 5-13. Jackson suggests, "[t]he lack of interviewing, or even attempting to interview . . . is tantamount to destroying evidence. The lack of an interview destroyed any possibility of justice for any party to this action." AB 8.

Yet, the record reveals Jackson's claim that K.S. was never interviewed is inaccurate. Officer Dan Anderson and other law enforcement knew K.S. personally and were aware of her condition. SR 319. Records indicated a Sexual Assault Exam and Interview was reported by Anne Fisher, M.D., on November 19, 2016. SR 320-21. The interview was signed by Heather Pullins and Nicole Weyer, R.N.'s. SR 321, 578. Nurses also questioned K.S. immediately upon her return to the nursing home. JT2: 205. K.S.'s answers were part of the trial record. *Id.*

Jackson filed a Motion to Dismiss on November 1, 2017. SR 129. Jackson withdrew this Motion to Dismiss and filed a second one on January 19, 2018. SR 159-60. Jackson also filed a Motion to Dismiss Re: 23A-8-3(1) and 23A-8-2(3). SR 173. In each motion, Jackson suggested that an alleged failure to interview K.S. violated his constitutional rights of due process under the United States

Constitution and the South Dakota Constitution, and that the Indictment did not conform to SDCL ch. 23A. AB 6. After reviewing filings and hearing and reading evidence as to the same, the trial court denied the motions. SR 186, 190. Jackson continued to assert, through the end of trial, that law enforcement did not interview K.S., a severe dementia patient with limited physical and mental capabilities, and in failing to do so, a "defect in the institution of the prosecution" resulted. SR 174; JT4: 677.

Jackson argues the trial court erred in its denial of the Motions to Dismiss. AB 4-13.

B. Legal Standard.

This Court reviews a trial court's denial of a motion to dismiss for an abuse of discretion.[1] *State v. Kvasnicka*, 2013 S.D. 25, ¶ 17, 829 N.W.2d 123, 127. "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109 (quoting *State v. Lemler*, 2009 S.D. 86, ¶ 40, 774 N.W.2d 272, 286).

A trial court may dismiss an indictment or information in any of nine circumstances. SDCL 23A-8-2. This Court has consistently held that "[t]hese nine grounds for dismissal of an indictment are exclusive."

[1] Jackson's substantive argument that his due process rights were violated is set forth in Issue IV.

State v. Vatne, 2003 S.D. 31, ¶ 14, 659 N.W.2d 380, 384 (holding that the trial court could not dismiss an indictment when Batne argued testimony was hearsay and incompetent); *State v. Springer–Ertl,* 1997 S.D. 128, ¶ 7, 570 N.W.2d 39, 40–41 (holding that the judge could not dismiss an information for lack of probable cause). Indeed, "this Court will not inquire into the 'legality or sufficiency of the evidence upon which an indictment is based.'" *State v. Hoekstra,* 286 N.W.2d 127, 128 (S.D. 1979); *State v. Gardner,* 429 N.W.2d 60, 61 (S.D. 1988).

This Court stated, "dismissal of an indictment for reasons not set forth in SDCL 23A–8–2 would be an error of law and thus by definition, an abuse of discretion." *Vatne*, 2003 S.D. 31, ¶ 14 n.1, 659 N.W.2d at 384 n.1. It is reversible error for a trial court to consider the facts of the case in making a decision to dismiss an indictment. *State v. Blakey*, 2001 S.D. 129, ¶ 6, 635 N.W.2d 748, 750. Summarily, this Court "held that 'neither the Fifth Amendment, nor justice and the concept of a fair trial, required indictments to be open to challenge on the grounds that there was inadequate or incompetent evidence before the grand jury.'" *State v. Kleinsasser*, 436 N.W.2d 279, 281 (S.D. 1989); *Costello v. United States,* 350 U.S. 359, 363, 76 S.Ct. 406, 409, 100 L.Ed. 397 (1956). Accordingly, "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on

the merits. The Fifth Amendment requires nothing more." *Costello,* 350 U.S. at 363, 76 S. Ct. at 409.

C. There Were No Proper Grounds to Dismiss the Indictment.

Jackson failed to cite any statutorily permitted grounds for a trial court's dismissal of an indictment in his November 1, 2017 motion. SR 129. The State summarized this fact in its objection to the motion. SR 134. When Jackson re-filed his Motion to Dismiss on January 19, 2018, he cited much of the same due process authority references in Issue IV of his appellate brief. SR 159. He argued, "[t]he substance of this motion [to dismiss] encompasses the Court's authority to dismiss under both the South Dakota Constitution and the United States Constitution and the burden that is upon Jackson to show in order to have the Court dismiss." SR 163-64 (*see* SR 160-72). However, again, no authority for granting the motion was set forth. As argued at the trial court level, Jackson's motion set forth no legal grounds by which the trial court was empowered to grant it. SR 179. Because the "nine grounds for dismissal of an indictment are exclusive," the trial court did not err in denying the motions. *State v. Cameron*, 1999 S.D. 70, ¶ 10, 596 N.W.2d 49, 52.

In Jackson's third motion to dismiss, titled "Motion to Dismiss Re: 23A-8-3(1) and 23A-8-2(3)," he continues to argue the case be dismissed due to his distaste of law enforcement's investigation of the rape. SR 173. He argued the Indictment, issued by a grand jury and

complete on its face, did not conform to Title 23A "because of the failure to investigate. . ." *Id.* However, the law enforcement investigation made prior to the commencement of the indictment is not governed by Title 23A. SDCL 23A-45-1; 23A-42-4. There are no requirements in Title 23A dictating the method by which law enforcement shall interview a victim of a sex crime.

This Court has reviewed these types of claims before. In *Blakey*, 2001 S.D. 129, 635 N.W.2d 748, the defendant attempted to dismiss the indictment for reasons other than those specified in SDCL 23A-8-2, which this Court held was improper. *Id.* ¶ 6. The defendant then attempted to avoid that ruling by invoking 23A-8-3, otherwise known as Rule 12(b), as Jackson is here. This Court cited multiple Courts of Appeals in ruling, "a Rule 12(b) motion to dismiss is not the proper way to raise a factual defense. [. . .] [A] motion to dismiss amounted to a premature challenge to the sufficiency of the government's evidence tending to prove a material element of the offense." *Id.* ¶ 7 (quoting in part, *United States v. Nukida*, 8 F.3d 665, 669-70 (9th Cir. 1993)). Because Jackson was raising a factual defense challenging the State's ability to prove its case, and not properly stating grounds to dismiss the indictment, the trial court ruled consistently with the law when it denied Jackson's motion. SR 186.

Lastly, while Jackson complains he was prejudiced because the trial court "denied Jackson an opportunity to present evidence in

support of his motion," this Court has held, "[i]t is within the trial court's discretion whether to permit oral testimony on a motion." *State v. Ricketts*, 333 N.W.2d 827, 828 (S.D. 1983); AB 5. Therefore, it was within the trial court's discretion to not grant additional hearings on Jackson's motions, particularly when it already heard and read significant authority from both sides on the matter.

II

THE TRIAL COURT PROPERLY DENIED JACKSON'S MOTION FOR DETERMINATION OF KNOWLEDGE AS AN ELEMENT

A. Background.

Jackson petitioned the trial court to grant his motion entitled "Motion for Determination of Knowledge as an Element." SR 67. Jackson asked the trial court to add "that knowledge is an element of the offense of 3rd degree rape in violation of SDCL 22-22-1(3) and the state had the burden of proof, beyond a reasonable doubt, that the defendant knew, or reasonably should have known, the other person was incapable of giving consent because of physical or mental incapacity." SR 67. In the motion, Jackson concedes, "a knowledge component is not specified in SDCL 22-22-1(3)." *Id.*

However, Jackson urged the circuit court to mimic this Court's authority exercised in *State v. Jones*, 2011 S.D. 60, 804 N.W.2d 409, when a divided Court ruled "that the Legislature intended that a rape conviction under SDCL 22-22-1(4) requires proof that the defendant

knew or reasonably should have known that the victim's intoxication condition rendered her incapable of consenting." *Jones*, 2011 S.D. 60, ¶ 1, 804 N.W.2d at 410. The *Jones* court did so based on a review of prior versions of SDCL 22-22-1(4), which included a knowledge requirement.

Here, the trial court denied the motion in a six-page order. SR 73. Jackson asserts an abuse of discretion by arguing, "[i]n the present case, the court erred when it found the State did not have to show" the knowledge element. AB 15.

B. Legal Standard.

A trial court's refusal to give a jury instruction is reviewed under an abuse of discretion standard. *State v. Martin*, 2004 S.D. 82, ¶ 21, 683 N.W.2d 399, 406. Jury instructions are satisfactory when, considered as a whole, they properly state the applicable law and inform the jury. *Id.* A trial court's denial of a pre-trial motion is also reviewed for an abuse of discretion.

C. The Statutory Language is Clear Regarding a Knowledge Element.

It is a fundamental duty of a trial court to instruct the jury on the law applicable to the case. *State v. Eagle Star*, 1996 S.D. 143, ¶ 15, 558 N.W.2d 70, 73. In doing so, a trial court is "not at liberty to read into the statute provisions which the Legislature did not incorporate, or enlarge the scope of the statute by an unwarranted interpretation of its language." *Jones*, 2011 S.D. 60, ¶ 24, 804 N.W.2d at 416; *Matter of*

Adams, 329 N.W.2d 882, 884 (S.D. 1983). This Court and trial courts give words their plain meaning and read statutes as a whole. *State v. Bowers*, 2018 S.D. 50, ¶ 16, 915 N.W.2d 161, 166. Indeed, "the Court's only function is to declare the meaning of the statute as clearly expressed." *Jones*, 2011 S.D. 60, ¶ 24, 804 N.W.2d at 416; *Martinmaas v. Engelmann,* 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611. A court "will not enlarge a statute beyond its face where the statutory terms are clear." *Allegheny Corp., Inc. v. Richardson, Inc.,* 463 N.W.2d 678, 679 (S.D. 1990).

Jackson was charged with and tried for a violation of SDCL 22-22-1(3). That statute sets forth:

> Rape is an act of sexual penetration accomplished with any person under any of the following circumstances:
> (3) If the victim is incapable, because of physical or mental incapacity, of giving consent to such act[.]

The trial court instructed the jury as to the exact elements of the crime in Jury Instruction No. 18, which stated,

> "The elements of the crime of Third Degree Rape, each of which the State must prove beyond a reasonable doubt, are that at the time and place alleged:
>
> 1. The Defendant accomplished an act of sexual penetration with [K.S.]; and
> 2. [K.S.] was incapable, because of physical or mental incapacity, of giving consent to such act of sexual penetration."

SR 691. In its review of Jackson's motion, the trial court thoroughly analyzed the difference between SDCL 22-22-1(3) and

22-22-1(4) in relation to their statutory construction and their history. SR 73-8. The court correctly concluded, "[i]f knowledge is to become an essential element of the offense, *that is an issue for the legislature, not the courts*." SR 78 (emphasis added). Knowledge had never been an element of past versions of SDCL 22-22-1(3), nor is it a part of the plain meaning and reading of the statute. The trial court correctly denied Jackson's motion on the basis of the statutory language.

D. Case Law Also Supports the Court's Refusal to Require the State Prove Knowledge.

To further justify the trial court's denial of Jackson's motion, this Court has unambiguously addressed the issue of knowledge as an element of SDCL 22-22-1(3). In *State v. Schuster*, 502 N.W.2d 565 (S.D. 1993), this Court held that SDCL 22-22-1(3) does not require proof of the perpetrator's knowledge of the victim's inability to consent. *Schuster*, 502 N.W.2d at 569. This Court specified,

> "The statute is clear on its face. A person is guilty of rape where the actor accomplishes sexual penetration with a person who is physically or mentally incapable of consenting to such act. The section of the rape statute pertaining to persons incapable of consent makes no mention of, and thus does not require, knowledge on the part of the perpetrator. The precedent established by holdings of the court regarding SDCL 22–22–1(2)[2] has made no reference to the knowledge of the perpetrator as an element of crime and has simply required evidence showing the victim incapable of giving consent. *See State v. Willis,* 370 N.W.2d 193 (S.D. 1985); *State v. Fox,* 72 S.D. 119, 31 N.W.2d 451 (1948)."

[2] The original case cites SDCL 22-22-1(2); its modern version is SDCL 22-22-1(3). The language in each version is identical.

Schuster, 502 N.W.2d at 568. The trial court referenced excerpts of these statements of law in its order denying the motion. As the trial court recognized, the legislature could have modified the elements of SDCL 22-22-1(3) each time the statute was revised in 1994, 2000, and 2005. SR 77. Indeed, the "definition of the elements of a criminal offense is entrusted to the legislature, particularly . . . crimes [that] are solely creatures of statute." *Jones,* 2011 S.D. 60, ¶ 36, 804 N.W.2d at 420 (quoting *Staples v. United States,* 511 U.S. 600, 604, 114 S.Ct. 1793, 1796, 128 L.Ed.2d 608 (1994)). "Thus, . . . determining the mental state required for commission of a [statutory] crime requires 'construction of the statute and . . . inference of the intent of [the legislature]." *Id.* (quoting *United States v. Balint,* 258 U.S. 250, 253, 42 S.Ct. 301, 302, 66 L.Ed. 604 (1922)). SDCL 22-22-1(3) and each of its prior versions have never included a knowledge requirement.

The *Schuster* case in 1993 was not the last time this issue was addressed by this Court. As recently as 2011, this Court set forth, "[i]n typical 'statutory rape' cases, nonconsent is conclusively presumed *because of age or physical or mental incapacity*. But in cases of underage youth, unconsciousness, or *mental deficiency*, these conditions are readily apparent or reasonably discoverable, justifying strict liability for those who take advantage of such incapacities." *Jones*, 2011 S.D. 60, ¶ 14, 804 N.W.2d at 414 (emphasis added).

K.S. was diagnosed with early-onset Alzheimer's and Benson's Syndrome several years prior. K.S.'s family explained her condition to Jackson, and Jackson even verbally explained the same to Investigator Boal. Exh. 14. K.S. was unable to eat, walk, sit, or dress herself without assistance. Proof of such conditions meet this Court's guidance under *Schuster*, as those being readily apparent.

Historically, too, this Court has maintained the same view. In *State v. Fox*, 72 S.D. 119, 31 N.W.2d 451 (1948), a mentally incapacitated adult woman was raped by her family's farm hand. This Court held,

> "In this species of rape . . . [n]or will an apparent consent in such a case avail any more than in the case of a child who may actually consent, but who, by law, is conclusively held incapable of legal consent. Whether the woman possessed mental capacity sufficient to give legal consent must, saving in exceptional cases, remain a question of fact for the jury. It need but be said that legal consent presupposes an intelligence capable of understanding the act, its nature, and possible consequences. This degree of intelligence may exist with an impaired and weakened intellect, or it may not."

Fox, 72 S.D. at 124, 31 N.W.2d at 454–55 (1948). *Fox* is still good law.

Jackson asks this Court to consider that a victim's mental and physical incapacities, often the anguishing effects of severe and permanent diseases of the mind and body, are analogous to voluntary intoxication which wanes by the minute. AB 17. In refuting any comparison to statutory rape, Jackson asserts, "[a]ge is not fluid and changeable as is intoxication level or mental incapacity due to dementia type disease." *Id.* This is the opposite of what this Court has explicitly

stated. This Court ruled, "[r]ape of a person incapable of giving consent . . . is analogous to the statutory rape of a person less than sixteen years old. . ." *Schuster*, 502 N.W.2d at 569.

The trial court relied on controlling precedent in denying Jackson's motion. SR 73-8. In doing so, the court properly advised the jury on the law. As the trial court held, adding a knowledge element to SDCL 22-22-1(3) is an act which should be done by the legislature, not the courts. SR 78.

III

THE TRIAL COURT PROPERLY LIMITED THE EXPERT TESTIMONY OF DR. SWENSON.

A. Background .

Jackson hired Dr. Rodney Swenson as an expert witness to testify about Benson's Syndrome and his opinions relating to K.S.'s capacity to consent on November 18, 2016. SR 200. Dr. Swenson's conclusory opinion was that "no information exists regarding [K.S.'s] specific capacity to give consent with respect to this sexual encounter because she was not questioned about what she understood happened in this encounter." SR 231. He signed an affidavit attesting to the same. *Id.*

Because Dr. Swenson admitted he is unable to render an opinion as to K.S.'s capacity on November 18, 2016, the State objected to Dr. Swenson testifying to K.S.'s mental capacity on that date. SR 213. The State argued that any reference thereto would cause unfair

prejudice, mislead the jury, and confuse the issues in violation of SDCL 19-19-403.

At a status hearing on June 7, 2018, Jackson informed the trial court and the State that Dr. Swenson would testify as to different types of capacity and consent. SR 235. The State asked the court to order the defense to refrain from referencing these varying degrees of capacity and consent which have no basis in law, and which would serve to confuse the jury. *Id.* The State also argued that testimony about varying types of consent, which have no basis in the law and are not generally accepted, as well as discussion about specific questions an expert would ask a victim, would invade the province of the jury. SR 257.

The trial court held a *Daubert* hearing on June 18, 2018, to further consider the arguments of both parties regarding Dr. Swenson's testimony. SR 234, 290. Both parties, as well as the court, asked Dr. Swenson about the source of his opinion, which was based partially on a review of a 186-page handbook which was presented to the court. During the inquiry, the trial court referenced a statement which set forth, "[t]here are no universal accepted criteria for capacity consent." SR 364. Dr. Swenson agreed there are no generally accepted approaches or criteria for the assessment of consent to sexual activity. SR 365, 372.

The trial court summarized that the issue before the jury is not about K.S.'s specific consent, but rather, whether she was able to give consent at all. SR 369-70. Therefore, discussion before the jury regarding types of consent would only serve to confuse the jury. SR 370. The trial court ruled that Dr. Swenson should not present testimony as to his personally-developed three-prong test for sexual consent, as it would mislead the jury. SR 397.

The court also ruled that references to medical records be limited to November of 2016, the time of the date of the offense. JT2: 84. The purpose was to avoid confusion for the jury, given the progressive nature of K.S.'s disease. Jackson argues these rulings impeded his ability to put on a defense. AB 23.

B. Legal Standard.

This Court reviews a circuit court's decision to admit or deny an expert's testimony using an abuse of discretion standard. *State v. Johnson*, 2015 S.D. 7, ¶ 30, 860 N.W.2d 235, 247; *Lemler,* 2009 S.D. 86, ¶ 18, 774 N.W.2d at 278. "Under this standard, not only must error be demonstrated, but it must also be shown to be prejudicial." *State v. Stone*, 2019 S.D. 18, ¶ 22, 925 N.W.2d 488, 497.

C. The Trial Court Properly Filtered Prejudicial Testimony.

Circuit courts have broad discretion to determine "the qualification of expert witnesses and the admission of their testimony." *Johnson*, 2015 S.D. 7, ¶ 30, 860 N.W.2d at 247 (quoting *State v.*

Running Bird, 2002 S.D. 86, ¶ 38, 649 N.W.2d 609, 617). The guideline for admitting expert testimony is whether it is "scientific, technical, or other specialized knowledge [which] will assist the trier of fact to understand the evidence or to determine a fact in issue…" SDCL 19-19-702. The testimony must then be based on sufficient facts or data, be the product of reliable principles and methods, and the witness must apply those principles and methods to the facts of the case. *Id.* As this Court set forth in *Johnson*, "perhaps the most important consideration in determining the admissibility of expert testimony is whether the testimony is helpful to the jury in resolving issues of fact." *Johnson*, 2015 S.D. 7, ¶ 33, 860 N.W.2d at 248; *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 591–92, 113 S.Ct. 2786, 2795–96 (1993).

The trial court analyzed the experts in Jackson's case, and their testimony, at length. Numerous motions were reviewed, hearings held, and rulings made on those motions. The trial court found Dr. Swenson was qualified as a witness because of his education, training and experience. SR 396. The court held that Dr. Swenson's testimony would be of assistance to the jury in relation to his expertise on Benson's Syndrome. *Id.*

However, it was within the trial court's discretion to limit Dr.Swenson's testimony with regard to his personal theory of types of capacity, as well as the medical records outside the time frame

established by the court. Dr. Swenson conceded that his three-prong test was not a generally accepted approach for the assessment of consent to sexual activity. SR 365, 372. All parties agreed that it has no basis in the law. Dr. Swenson also conceded that professionals throughout the record were asking K.S. questions, but that "there's nothing in this record that would – that has the type of questions *that I would ask* that would help me determine whether she could give sexual consent." SR 322 (emphasis added). Dr. Swenson thereby refuted his assertion that no questioning was done; he specifically indicated he was simply not satisfied with the questions the other professionals asked. A desire for a better interview is not a formal expert opinion, and therefore, the exclusion of the same has not caused Jackson to show any prejudice.

This case presented an especially difficult challenge for all parties involved. Not only is the victim's disease rare, but it also makes the jury's evaluation of the crime an especially time-sensitive one. The court vigilantly protected the information before the jury in order to ensure their review of the case was as accurate as possible. The court held that discussion of evaluative standards which are not commonly relied upon and are not supported by law would confuse the jury. Similarly, discussion about the victim's medical condition approximately a year and a half after the rape would confuse them as well. The trial court had the duty to ensure that Dr. Swenson's opinion

be presented "only if [its] probative value in helping the jury evaluate [the matter] substantially outweighs [the] prejudicial effect." SDCL 19-19-703. The court properly found that the excluded information would confuse the trier of fact; not assist the trier of fact, as required by the law. Therefore, the court did not err.

IV

THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

A. Background.

On April 6, 2018, the State filed a Notice of Intent to offer the testimony of Dr. Scott Cherry, PhD, "as to his medical training and experience in Neuropsychology and the results of his neuropsychological evaluation of K.S. (DOB 6/23/60) on March 7, 2018, as well as provide his medical opinion as to K.S. mental condition on date of offense." SR 192. On May 29, 2018, Jackson objected to Dr. Cherry's evaluation, alleging that Dr. Cherry's report did not make "any conclusion as to (K.S.'s) mental condition on any date other than March 7, 2018." SR 203. The matter was discussed at a hearing on June 7, 2018, when the trial court instructed the State to inquire as to Dr. Cherry's conclusory opinion. SR 495.

The State contacted Dr. Cherry per the court's instruction. SR 444. Dr. Cherry stated that the date of the offense is too remote in time for him to form a retroactive opinion. *Id.* There was a misunderstanding. *Id.* When initially hired, both the State and Dr.

Cherry agreed Dr. Cherry would opine as to K.S.'s mental condition "as of the date in question." SR 2454. The State assumed it was understood that the "date in question" was the date of the offense, November 18, 2016. *Id.* Dr. Cherry assumed the "date in question" was the date he evaluated K.S. *Id.* This was an unexpected misunderstanding.

The State verbally informed Jackson's counsel at another court proceeding that the State would be withdrawing Dr. Cherry as a witness. SR 2455. At a pretrial conference on Thursday, June 14, 2018, the State formally withdrew Dr. Cherry. SR 256. The State cited the trial court's instruction that the medical evidence before the jury must be limited to the time frame of the offense. *Id.*

On Monday, June 18, 2018, defense counsel contacted Dr. Cherry for the first time. SR 440. Jackson decided he would like to call Dr. Cherry as a witness to establish that Dr. Cherry was originally retained by the State, but that he, similar to Jackson's expert, Dr. Swenson, could not offer an opinion as to K.S.'s capacity in 2016. SR 441. Dr. Cherry informed the defense that he had been released from the State's subpoena, had made other arrangements, and would not be available at the time of trial. *Id.*

On June 22, 2018, Jackson filed his own Notice of Intent to offer the testimony of Dr. Cherry. SR 448. Jackson also filed a Motion for Continuance on the same date, asserting the defense needed to

reschedule the trial due to Dr. Cherry's unavailability. SR 441. The trial court heard arguments, considered submissions by both parties, and denied the motion on grounds that Dr. Cherry's lack of opinion did not constitute exculpatory evidence. SR 2461 469.

Jackson suggests the State willingly withheld evidence. AB 27. Jackson also asserts that Dr. Cherry's conclusion, that he could not opine as to K.S.'s mental condition nearly 18 months prior to the time he consulted with her, was exculpatory. *Id.* Jackson argues that the State had a duty to disclose "the exculpatory opinion" of Dr. Cherry, and "failing to do so was misconduct necessitating reversal of Jackson's conviction." *Id.* Therefore, Jackson argues his fundamental rights to a fair trial were hindered. AB 31.

After several hearings on the matter, the trial court told the defense, "[t]o the extent that you would try and elicit an opinion that some other physician may have carried a similar opinion (that the expert is unable to form an opinion as to K.S.'s mental state in 2016), I find cumulative and irrelevant." JT4: 689. The trial court concluded, "not having an opinion, I find that of no assistance to the jury." *Id.*

B. Legal Standard.

Jackson raises two topics for review under this issue. First, he alleges prosecutorial misconduct. "Prosecutorial misconduct implies a dishonest act or an attempt to persuade the jury by use of deception or by reprehensible methods." *State v. Bariteau*, 2016 S.D. 57, ¶ 23, 884

N.W.2d 169, 177 (quoting *State v. Lee,* 1999 S.D. 81, ¶ 20, 599 N.W.2d 630, 634). This Court will find that prosecutorial misconduct has occurred if (1) there has been misconduct, and (2) the misconduct prejudiced the party as to deny the party a fair trial. *State v. Hayes*, 2014 S.D. 72, ¶¶ 23-24, 855 N.W.2d 668, 675. If both prongs for prosecutorial misconduct are satisfied, this Court will reverse the conviction. *Id.*

This Court reviews a claim of prosecutorial misconduct under an abuse of discretion standard. *Bariteau*, 2016 S.D. 57, ¶ 23, 884 N.W.2d at 177. "Under this standard, 'not only must error be demonstrated, but it must also be shown to be prejudicial error.'" *Hayes*, 2014 S.D. 72, ¶ 22, 855 N.W.2d at 675 (quoting *State v. Perovich,* 2001 S.D. 96, ¶ 11, 632 N.W.2d 12, 15–16).

Secondly, Jackson alleges a *Brady* violation. "A *Brady* violation occurs when (1) the evidence at issue [i]s favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence [has] been suppressed by the State, either willfully or inadvertently; and (3) prejudice [has] ensued." *Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d at 109 (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999)). An abuse of discretion standard is also appropriate when assessing *Brady* violations. *Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d at 109.

C. The Evidence Was Not Exculpatory.

Foremost, it is important to determine whether any evidence was exculpatory, as Jackson alleges. Exculpatory evidence is evidence "favorable where it creates a reasonable doubt that did not otherwise exist," and is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Rodriguez v. Weber*, 2000 S.D. 128, ¶ 19, 617 N.W.2d 132, 140 (quoting *State v. Fowler*, 1996 S.D. 79, ¶ 22, 552 N.W.2d 391, 395). However, "if a defendant knows or should have known of the allegedly exculpatory evidence, it cannot be said that the evidence has been suppressed by the prosecution" in violation of due process. *Rodriguez,* 2000 S.D. 128, ¶ 15, 617 N.W.2d at 139.

In order to show Dr. Cherry's lack of opinion is exculpatory evidence, Jackson must show that the evidence allegedly withheld is favorable to him by creating reasonable doubt that did not otherwise exist. *Id.* ¶ 19, 140. In addition, Jackson must show a reasonable probability that, had the evidence been disclosed, the result would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Fowler*, 1996 S.D. 79, ¶ 22, 552 N.W.2d at 395. Jackson has failed to meet these burdens.

The premise of Jackson's case is based on the State's ability to prove that Jackson did perform an act of sexual penetration with a victim who is incapable, because of physical or mental incapacity, of

giving consent to such act. SDCL 22-22-1(3). Dr. Cherry stated it was impossible for him to determine K.S.'s capacity at the time the rape occurred without having performed his own face-to-face interview with K.S. on, or shortly after, the day of the rape. Jackson suggests that Dr. Cherry's inability to determine K.S.'s backdated capacity creates a reasonable doubt that did not otherwise exist. However, Dr. Cherry's lack of opinion makes no determination as to K.S.'s capability, incapability, consent, non-consent, capacity, nor incapacity. No element of the crime is put into question because an expert has no opinion as to the same.

With regard to a different trial outcome, Jackson suggests that, while Dr. Swenson and Dr. Cherry "had a similar opinion," Dr. Cherry had "none of the perceived bias and had full access to the state's information as well as access to K.S.'s testimony by Dr. Cherry." AB 31. An argument speculating jury bias does not meet the standard of a probability sufficient to undermine the confidence of the outcome. Jackson was provided with the report summarizing Dr. Cherry's examination of K.S. in the spring of 2018. Dr. Cherry held no information, nor any opinion, which would have affected the outcome of his trial.

Indeed, this Court analyzes whether the evidence in question "would have made a markedly stronger case for the defense or a markedly weaker case for the State." *Thompson v. Weber*, 2013 S.D. 87,

¶ 48, 841 N.W.2d 3, 15. It would not have. A duplicate statement that an opinion cannot be formed does not "create a reasonable doubt that did not otherwise exist." The trial court correctly ruled Dr. Cherry's lack of an opinion was "not exculpatory." SR 2461.

D. Prosecutorial Misconduct Did Not Occur.

To prevail on this issue, Jackson must show that (1) there has been prosecutorial misconduct, and (2) the misconduct prejudiced the party as to deny the party a fair trial. *Hayes*, 2014 S.D. 72, ¶¶ 23-24, 855 N.W.2d at 675. Misconduct implies the State acted dishonestly or in an attempt to persuade the jury by deception. *Bariteau*, 2016 S.D. 57, ¶ 23, 884 N.W.2d at 177. Such an act of dishonesty or misconduct did not arise.

The misunderstanding between Dr. Cherry and the State was not only unexpected, but came at a detriment to the State. Had Dr. Cherry opined as the State expected, that K.S. did not have capacity to consent on November 18, 2016, such testimony would have been beneficial to the State's case. Without it, Dr. Cherry's testimony became far less effectual. The State was upfront with defense counsel and the trial court when the miscommunication was discovered. SR 2455, 256. As the trial court stated in its ruling, "once the State was clear that the doctor couldn't offer an opinion about her competence on that day, that they then made that clear." SR 2461.

Notwithstanding the harm to the State, Dr. Cherry's inability to formulate a professional opinion as to the mental capacity of a severe dementia patient approximately eighteen months before he ever met her, was ruled as cumulative by the trial court. SR 2461. Dr. Cherry's inability to opine as to the past status of K.S.'s unique disease mirrored Dr. Swenson's inability to opine as to the same. Jackson has presented no evidence showing that the State performed a dishonest act. There existed no attempt to persuade the jury by the use of deception. The first prong of prosecutorial misconduct is not met.

Because the first prong is not satisfied, this Court need not determine whether any alleged misconduct prejudiced Jackson's right to a fair trial. Indeed, such prejudice did not occur. As this Court found in *Delehoy*, evidence not produced before trial is not prejudicial if that evidence is cumulative. *Delehoy*, 2019 S.D. 30, ¶¶ 25-26, 929 N.W.2d at 109–10. The trial court ruled that it was. SR 2461. Jackson's own assertions of prejudice are entirely speculative. Jackson summarizes that Dr. Cherry's opinion "would *in all likelihood*" and "*could have* changed the outcome of the trial." AB 31 (emphasis added). A hypothetically different outcome does not equate to a reasonable probability of a different outcome. Therefore, Jackson "cannot establish he was prejudiced by the State[.]" *Delehoy*, 2019 S.D. 30, ¶¶ 25-26, 929 N.W.2d at 109–10. As the trial court held, the exclusion of an expert's statement that he cannot form an opinion does not adversely

affect the defendant. SR 2461. Because Jackson has not proven either prong, no prosecutorial misconduct occurred.

E. There Was No Brady Violation.

Lastly, Jackson asserts that the State's actions constituted misconduct violating his due process rights pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). AB 23. Three prongs must be met to satisfy the *Brady* standard. The first prong necessitates that the evidence at issue is either exculpatory or impeaching. *Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d at 109. Dr. Cherry's lack of an expert opinion is not exculpatory for the reasons set forth above. It is not impeaching, because there is no statement in question which affects a witness' credibility.

The second prong requires that the evidence be either willfully or inadvertently suppressed by the State. *Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d at 109. The prosecutor's explanation of the misunderstanding between he and Dr. Cherry is contrary to an unfounded suggestion that the State withheld any information. SR 444. Because there was no conclusory opinion produced by Dr. Cherry, there was no statement in existence which could have been suppressed. Jackson has provided no evidence of any intentional or careless act on the part of the State.

Lastly, "[a] *Brady* violation occurs when [. . .] prejudice [has] ensued." *Delehoy*, 2019 S.D. 30, ¶ 25, 929 N.W.2d at 109. The element

of prejudice was addressed above. Jackson's claims assert a loose speculative probability of a different outcome not substantially supported by the facts. Again, as the trial court held, the exclusion of an expert's statement that he cannot form an opinion does not adversely affect the defendant. SR 2461. For these reasons, the trial court was correct in ruling nothing was suppressed, nothing deprived Jackson of a fair trial, and hence, no misconduct occurred.

V

THE COURT PROPERLY DENIED JACKSON'S MOTION TO CONTINUE.

A. Background.

Jackson's trial was scheduled on February 16, 2018, set to begin on June 25, 2018. SR 189. The State filed a Notice of Intent to offer the expert testimony of Dr. Scott Cherry, PhD, on April 6, 2018. SR 192. Dr. Cherry evaluated K.S. on March 7, 2018, and compiled a report from that evaluation. *Id.* The State noticed Dr. Cherry as a trial witness on May 17, 2018. SR 194.

It was not until May 29, 2018, that Jackson objected to any testimony from Dr. Cherry. SR 203-05. Defense counsel did not reach out to Dr. Cherry for the first time until June 18, 2018. SR 440. On June 22, 2018, the last business day before trial was to begin, Jackson filed his own notice of intent to offer the testimony of Dr. Cherry, as well as a motion for continuance. SR 439, 448.

The basis of Jackson's motion for continuance was the unavailability of Dr. Cherry. SR 441. Jackson suggests he was "severely prejudiced by the denial of the motion to continue" because he was "prevented from calling a witness that would have been enormously useful." AB 34. Jackson wanted to call Dr. Cherry, initially the State's witness, because he would be "seemingly unbiased" to the jury. AB 31.

The trial court addressed the use of Dr. Cherry's testimony on several occasions throughout the record. The trial court held that the exclusion of an expert's statement that he cannot form an opinion does not adversely affect the defendant.

Noting that Dr. Cherry's lack of opinion as to K.S.'s capacity in 2016 did not constitute exculpatory evidence, was cumulative, and was irrelevant, the trial court denied the motion to continue. JT4: 689; SR 2461, 469. The trial court concluded, "[Dr. Cherry] not having an opinion, I find that of no assistance to the jury." *Id.*

B. Legal Standard.

"The granting of a continuance is within the sound discretion of the trial court and its rulings will not be disturbed absent a clear showing of abuse of discretion." *State v. Onken*, 2008 S.D. 112, ¶ 21, 757 N.W.2d 765, 771 (citing *State v. Rosales,* 302 N.W.2d 804 (S.D. 1981)). Indeed, a trial court's decision will not be set aside unless a

manifest injustice results from the denial of the continuance. *State v. Moeller*, 2000 S.D. 122, ¶ 7, 616 N.W.2d 424, 431.

Jackson requested that trial be continued "until such as time as the witnesses necessary to the heart of Jackson's case are available." SR 441. "When a witness is unavailable, three requirements must be met for the defendant to obtain a continuance." *State v. Karlen*, 1999 S.D. 12, ¶ 24, 589 N.W.2d 594, 600. First, the testimony of the absent witness must be material. Second, due diligence must be used to secure the witness' attendance or deposition. And third, it must be "reasonably certain the presence of the witness or his testimony will be procured by the time to which the trial would be postponed." *Id.* (citing *State v. Davies,* 33 S.D. 243, 247–48, 145 N.W. 719, 720 (1914)). However, if the defendant has failed in any of these respects, the court has not abused its discretion in denying the continuance. *Id.*

C. Dr. Cherry's Testimony Was Not Material.

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Birdshead*, 2016 S.D. 87, ¶ 18, 888 N.W.2d 209, 215 (quoting *Strickler*, 527 U.S. at 280, 119 S.Ct. at 1948). The trial court addressed the materiality of Dr. Cherry's conclusory statement on several occasions and ruled that his inability to provide an opinion did not adversely affect Jackson. JT4: 689. The court specifically deemed the same "irrelevant." *Id.* The trial court also

concluded Dr. Cherry's lack of an opinion was not exculpatory evidence. SR 2461, 469. Because Dr. Cherry's opinion was irrelevant, cumulative, and not exculpatory, it was not material.

D. Due Diligence Was Not Used

Jackson was put on formal notice of Dr. Cherry's testimony approximately two and one-half months before trial. SR 192. Dr. Cherry was formally removed as the State's witness ten days before trial. SR 256. Jackson filed his motion for continuance on the last business day before trial was to begin. SR 441. As the State set forth at the trial court level, defense counsel "had ample time to speak with Dr. Cherry about his involvement in the case, but neglected to do so, and he has now requested a continuance on the last business day before trial is to begin." SR 445. Jackson had sufficient time to inquire of Dr. Cherry and his opinion. However, the issue was less about timeliness and more about materiality. Not having shown Dr. Cherry's statement was material, a motion to continue based on an unavailable witness was properly denied.

Similar instances have been affirmed by this Court in the past. In *Onken*, the defendant claimed the State did not provide adequate information regarding one of the State's witnesses. *Onken*, 2008 S.D. 112, ¶ 10, 757 N.W.2d at 768. The trial court instructed the State to give the defense counsel an address for the witness, but stated that any interview of the witness must occur "between now and dawn." *Id.*

Defense counsel failed to contact the witness and was denied a request for a continuance. *Id.* ¶ 11, 768-69. On appeal, Onken argued the court's denial of a continuance was an abuse of discretion because the witness may have affected the outcome of trial. *Id.* ¶ 16, 769–70. This Court held there was no showing that the trial court abused its discretion. *Id.* ¶ 23, 771.

In *State v. Hagan*, 1999 S.D. 119, 600 N.W.2d 561, the State failed to provide the defense with inculpatory statements made by witnesses until five days prior to trial. *Hagan*, 1999 S.D. 119, ¶¶ 17-20, 600 N.W.2d at 566. When defense was notified of the statements, the defendant moved the trial court for a continuance. *Id.* The trial court in *Hagan* found that as soon as the statements were known, the State notified the defense. *Id.* at ¶ 22. The defense did know the name of one of the witnesses almost two months prior to trial. On appeal, this Court held that the denial of a continuance was not an abuse of discretion because defense counsel had advance notice of the witness long before trial and failed to initiate an interview "in the ample time available." *Id.* ¶ 21. "In addition," this Court held, "there [was] no showing of bad faith delay by the prosecutors in the disclosure of the witness's statement." *Id.*

Lastly, in *Karlen*, the defendant claimed a witness was critical to his defense, so he moved for a continuance when that witness became unavailable. *Karlen*, 1999 S.D. 12, ¶ 25, 589 N.W.2d at 600. The trial

court found nothing in the record to support the materiality of the witness' testimony, nor of the witness' knowledge of the offense charged. *Id.* Because Karlen failed to establish the first requirement in the three-prong test, this Court found the trial court did not abuse its discretion in denying the motion. *Id.*

Jackson's trial court found Dr. Cherry's lack of opinion to be cumulative and non-exculpatory. SR 2461. The court also determined that the lack of opinion did not adversely affect Jackson. JT4: 689. Because of these factors, the trial court did not abuse its discretion in denying the motion.

CONCLUSION

Based upon the foregoing arguments and authorities, State respectfully requests that Jackson's conviction and sentence be affirmed.

Respectfully submitted,

JASON R. RAVNSBORG
ATTORNEY GENERAL

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

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 9,588 words.

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

Dated this 30th day of October 2019.

/s/
Sarah L. Larson
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this October 30, 2019, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Roger L. Jackson* was served via electronic mail upon Alecia E. Fuller at aleciaf@pennco.org.

/s/
Sarah L. Larson
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellant,

vs. NO: 28800

ROGER JACKSON,
Defendant and Appellee.

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

HONORABLE JANE WIPF PFEIFLE, Circuit Court Judge

APPELLANT'S REPLY BRIEF

Alecia E. Fuller
Law Office of the Public Defender
for Pennington County
130 Kansas City Street, Suite 310
Rapid City, South Dakota 57701
Attorney for Appellee

Mr. Jason Ravnsborg
Attorney General
1302 E. Highway 14, Suite 1
Pierre, South Dakota 57501

Mr. Mark A. Vargo
Pennington County State's Attorney
130 Kansas City Street, Suite 300
Rapid City, South Dakota 57701

NOTICE OF APPEAL FILED NOVEMBER 18, 2018

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PRELIMINARY STATEMENT

Appellant's Brief in this matter was properly filed with this Court on August 29, 2019. The Appellee's Brief was properly filed with this Court on October 30, 2019. Appellant intends that all arguments, abbreviations, and references contained in its earlier brief be incorporated herein by reference. Any reference to Appellant's Brief will be designated as "AB," followed by the appropriate page number. Any reference to the brief filed by the State will be designated as "SB," followed by the appropriate page number.

REPLY ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO DISMISS RE: DUE PROCESS

The State's Reply to this section primarily addresses only the statutory grounds for dismissing an indictment as set forth in SDCL § 23A-8-2. Jackson's Motion to Dismiss re: Due Process and Appellant's Brief address the constitutional violation of Jackson's due process rights. SR 160. Jackson also filed a Motion to Dismiss re: Statutory grounds. SR 173. The court erred when it denied this Motion, however, Jackson did not address this issue in the Appellant's Brief.

The State asserts Jackson does not "cite any statutorily permitted grounds" for a dismissal of an indictment. SB 15. The authority for Jackson's brief rests upon the Constitutions of both South Dakota and the United States. The State's assertion that no authority exists to support his motion is misplaced. The State has ignored State v. Larson, which clearly held that dismissal for a due process violation is appropriate in cases of "egregious prosecutorial misconduct **or** on a showing of prejudice (or a substantial threat thereof), **or** 'irremediable harm' to the defendant's opportunity to obtain a fair trial."

2009 SD 107, 16, 776 N.W.2d 254 (quoting Commonwealth v. Viverito, 661 N.E.2d 1304, 1306 (Mass. 1996)(emphasis added). Jackson's brief sets forth the misconduct on the part of the State in failing to investigate, the prejudice to Jackson in that in his ability to investigate and confront and cross-examine the only witness to the events is restricted, **and** the significant and irremediable harm to his ability to obtain a fair trial. AB 6-12. Each of the factors the Larson court set forth to determine when a dismissal is appropriate is satisfied, therefore, the court erred when it denied Jackson's Motion to Dismiss re: Due Process. Jackson submits the authority and factual analysis in his original brief to support his claim that the trial court erred by denying Jackson's Motion to Dismiss.

II. THE TRIAL COURT ERRED WHEN IT HELD KNOWLEDGE IS NOT AN ELEMENT OF SDCL 22-22-1(3).

Jackson's argument is two-fold, (1) there is a presumption of a *mens rea* for all serious criminal offenses and one should be included in SDCL 22-22-1(3), and (2) if this offense does not include a *mens rea* then it violates Jackson's substantive due process guarantees.

Jackson requests this Court conduct the same analysis in this case as it did in State v. Jones. 2011 S.D. 60, 804 N.W.2d 409. There is a presumption in favor of a "scienter requirement to each of the elements that criminalize otherwise innocent conduct." U.S. v. Bruguier, 735 F.3 754 at 763 (2013). As applied by the trial court and without the element of knowledge, the statute is vague and violates Jackson's due process rights.

The Jones court found "mere silence by the legislature on whether knowledge is a necessary element of an offense will not always negate a knowledge requirement, especially for crimes with potentially severe punishments." Id. ¶ 1.

The State's brief ignores Jackson's assertion that the statute, without the knowledge element, violates Jackson's substantive due process guarantees and, therefore, concedes the issue.

It its brief, the State cites to the Jones decision, but on three of the citations does not accurately note that the portion of the brief being cited is actually the dissent (SB 18, 19, 21). Therefore, the analysis of the Jones court in the State's brief is not an accurate representation of the holding in the Jones court. The actual holding and opinion of the Jones court states knowledge, although not expressly stated in the statute, is an element of 3rd degree rape under subsection SDCL § 22-22-1(4). The substantial similarities of the statute in Jones and SDCL § 22-22-1(3) should not be ignored.

Jackson submits the authority and factual analysis in his original brief to support his claim that the trial court erred by failing to determine that Jackson's knowledge of any purported incapacity to consent was an element that must be proven by the State. By failing to include the knowledge element, the application of the statute to Jackson violated his substantive due process guarantees. Therefore, Jackson requests this court make a finding that knowledge is an element of SDCL § 22-22-1(3) and reverse and remand for a new trial, or find the statute violates Jackson's substantive due process rights and find the statute unconstitutional and remand for further proceedings.

III. THE TRIAL COURT ERRED IN RESTRICTING THE TESTIMONY OF DR. RODNEY SWENSON.

The State's brief repeatedly makes assertions that Dr. Swenson's testimony was a "personal theory." SB 26, 27. However, the Handbook referenced through the Daubert hearing by the Court and counsel discusses the different types of capacity as well as the analysis of a legal standard of consent. The Assessment of Older Adults with Diminished

Capacity – A Handbook for Psychologists was created by the American Bar Association/American Psychological Association to assist psychologists on precisely the issues of different capacities and the legal standards. The Handbook is 186 pages long and specifically states the legal standards of capacity as well as the different types of capacity. To suggest there was an agreement that there was "no basis in the law" is disingenuous. SB 27. The three-prong analysis discussed by Dr. Swenson is also discussed in the Handbook, which states that while there is no "universally accepted criteria for capacity to consent to sexual relations" as relied upon by the Court, there are legal standards. MH 6-18-18 P14. Prior to admissibility of expert testimony, there is not a requirement that the standards are universally accepted. Rather, the testimony must satisfy SDCL § 19-15-2. If the requirement was the opinion be **universally** accepted, very few experts would be allowed to testify and rarely would there be competing experts.

Dr. Swenson was deemed an expert but not allowed to testify regarding different types of capacity or the factors involving capacity to consent to sexual activities. The Court, as well as the State, relied heavily upon the assertion of no universal standard. However, SDCL § 19-15-2 requires (1) testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. There is nothing in the record to suggest that Dr. Swenson's testimony on types of capacity, and specifically sexual consent capacity, did not satisfy SDCL § 19-15-2.

Dr. Swenson's testimony was also limited in time. His testimony would have included specific and ongoing instances of K.S.'s mental health that would demonstrate

her capacity to consent. However, the Court arbitrarily limited the time frame to which he was allowed to testify.

As a result of these restrictions, Jackson was denied his right to put on a defense and fully dispute the allegations against him. Jackson submits the authority and factual analysis in his original brief to support his claim of that the trial court erred by restricting the testimony of Dr. Swenson.

IV. THE PROSECUTION'S FAILURE TO DISCLOSE THE EXCULPATORY OPINION OF THEIR EXPERT, DR. CHERRY, WAS MISCONDUCT AND VIOLATED DUE PROCESS PURSUANT TO BRADY V. MARYLAND.

The State's brief asserts the Trial Court suggested that the State "inquire as to Dr. Cherry's conclusory opinion" at the June 7, 2018 hearing. SB 28. However, the record is very clear the Court ordered the State to provide "that exact report, that opinion, to the defense and I need you to do that forthwith." MH 6-7-18 P23. The Court went further to specify the time with which the report of Dr. Cherry's opinion must be provided: "that within about five days to the defense, that opinion." MH6-7-18 P32. The State informed the court and counsel that Dr. Cherry's opinion was "that at the day that this happened or the time frame this happened that she – given his review of the medical records and his exam of her to date, that he is of the opinion she could not consent." Id. P18-19. The State failed to provide the report and formal opinion of Dr. Cherry, and instead withdrew him as an expert. The State has a duty under the Rules of Professional Conduct to "timely correct a false statement of material fact or law previously made to the tribunal." South Dakota Rules of Professional Conduct Rule 3.3. The State failed to make such correction until Jackson brought the issue to the Court's attention. The State acknowledged at the hearing on June 22, 2018, that its representation of Dr. Cherry's

opinion was in error. However, the State failed to timely correct it as the Rules of Professional Conduct require. The timely correction should have occurred at the hearing held on June 14, 2018 when the State withdrew Dr. Cherry as an expert. At that time, the State knew that the opinion of Dr. Cherry that the State had clearly represented to the Court just a few days prior was false. The attorney for the State actually asserted on the record that he spoke to Dr. Cherry and learned the State's representations to the Court were false on June 7, 2018. MH 6-22-19 P6.

The State also makes the suggestion that the opinion is not exculpatory. SB 32. However, trial counsel for the State suggests otherwise as counsel noted that if he had known Dr. Cherry's actual opinion when he filed the notice, he would not have filed it. MH6-18-18 P9. The State also suggests there was some duty on the part of Jackson to know the opinion of Dr. Cherry was contrary to the prior representations of the State. This duty is misplaced. The prosecutor has the affirmative obligation under Brady to disclose evidence favorable to the accused. United States v. Bagley, 473 U.S. 667, 675 (1985). Evidence that does not support the State's case is evidence favorable to Jackson.

Common sense would support the conclusion that it was exculpatory because had the evidence been inculpatory or helpful to the State, the State would have continued to offer the testimony of Dr. Cherry. However, the State determined it was detrimental to their case and withdrew the witness. Further, the State was disingenuous with the court when asserting the reason for the withdrawal. The State's brief acknowledges this deception in discussing the reason it withdrew Dr. Cherry as a witness: "the State cited the trial court's instruction that the medical evidence before the jury must be limited to the time frame of the offense." SB 29. The State's willful and reckless disregard to the

rights of the defendant under Brady v. Maryland, 373 U.S. 83, 83 S.Ct.1194 (1963), its violation of the Order for discovery, and its violation of the Court's specific Order to disclose the opinion of their expert warrants a reversal and a remand for a new trial.

Jackson further submits the authority and factual analysis in his original brief to support his claim that the prosecution's failure to disclose the exculpatory opinion of their expert was misconduct and violated Due Process pursuant to Brady v. Maryland.

V. THE TRIAL COURT ERRED WHEN IT DENIED JACKSON'S MOTION TO CONTINUE FOLLOWING THE LATE DISCOVERY OF EXCULPATORY EVIDENCE IN THE FORM OF THE CONTRARY OPINION OF THE STATE'S EXPERT.

Jackson moved to continue the trial to procure evidence and a witness whose testimony had been misrepresented by the State. When considering the request for a continuance, the trial court "must consider (1) whether the delay resulting from the continuance will be prejudicial to the opposing party; (2) whether the continuance motion was motivated by procrastination, bad planning, dilatory tactics or bad faith on the part of the moving party or his counsel; (3) the prejudice caused to the moving party by the trial court's refusal to grant the continuance, and (4) whether they have been any prior continuances or delays." State v. Beckley, 2007 S.D. 122, ¶ 21, 742 N.W.2d 841, 847 (emphasis added). The record is lacking whether the Court even considered these factors when denying Jackson's request for a continuance. Further, if the Court had considered these factors, the request for a continuance would have been granted. Any delay would not have prejudiced the State. The continuance was motivated by late discovery of misconduct on the part of the prosecution. The denial prohibited Jackson from not only calling Dr. Cherry as a witness, but also by exploring further his opinion and the reason

for his opinion, resulting in great prejudice. There were no other significant continuances or delays that would warrant a denial of this request by Jackson.

Jackson further submits the authority and factual analysis in his original brief to support his claim of that the trial court erred when it denied Jackson's Motion to Continue following the prosecution's failure to disclose the exculpatory opinion of their expert. The granting of the continuance would have been the most measured cure for the State's aforementioned misconduct and would have remedied the prejudice suffered by Jackson.

CONCLUSION

Roger Jackson respectfully requests this Court reverse his convictions, reverse the ruling the Motion to Dismiss re: Due Process, reverse the ruling of the determination of knowledge as an element, find there was prosecutorial misconduct, and find the court should have granted a continuance to remedy the prejudice suffered by Jackson based on the State's intentional misdirection to Jackson and the Court on the opinion of Dr. Cherry.

Dated this 27th day of November 2019.

Respectfully submitted,

/s/ Alecia E. Fuller
Alecia E. Fuller
Law Office of the Public Defender
for Pennington County
130 Kansas City St., Ste. 310
Rapid City, South Dakota 57701
(605) 394-2181
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12-point type. Appellant's Reply Brief contains approximately 2,302 words and is 8 pages in length, which is less than the total words permitted by the rule of this Court.

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

/s/ Alecia E. Fuller
Alecia E. Fuller
Attorney for Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of November 2019, a true and correct copy of Appellant's Reply Brief in the matter of State of *South Dakota v. Roger Jackson* was served via electronic mail, at the e-mail listed below, upon these individuals:

Mr. Mark A. Vargo
Pennington County States Attorney
vargo@pennco.org

Mr. Jason Ravnsborg
Attorney General
State of South Dakota
atgservice@state.sd.us

Sarah L. Larson
Assistant Attorney General
State of South Dakota
Sarah. Larson@state.sd.us

/s/ Alecia E. Fuller
Alecia E. Fuller
Attorney for Appellee