SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

NOV 17 2015

Clerk

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, Plaintiff and Appellee, vs. BRAIDEN MCCAHREN, Defendant and Appellant.	ORDER REDACTING AND SEALING PORTIONS OF APPELLANT'S INITIAL BRIEF AND REPLY BRIEF #27325

Appellee State of South Dakota having served and filed a motion to seal or redact from public view portions of appellant's initial brief and reply brief set out in appellant's initial brief at page 28, entire last paragraph; appellant's reply brief page 12, starting with indented quote through the end of the page and reply brief pages 13-14, and the Court having considered said motion and temporarily sealed all briefs filed in the case above by order of November 17, 2015, now, therefore, it is

ORDERED that the portions of appellant's briefs set out above shall be redacted and sealed from public view.

DATED at Pierre, South Dakota, this 17th day of November, 2015.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27325

State of South Dakota,
Plaintiff and Appellee,
v.
Braiden McCahren, DOB:06/08/1996,
Defendant and Appellant.

Appeal from the Circuit Court, Sixth Judicial Circuit
Hughes County, South Dakota

The Honorable John L. Brown
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed on the 15th day of January, 2015

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JURISDICTIONAL STATEMENT

In this appeal, Braiden McCahren seeks review of the following orders: (1) Findings of Fact and Conclusions of Law Denying Braiden's Motion to Suppress December 18, 2012 Statements to Pierre Police Officer Martin Waller signed on December 19, 2014, filed on December 22, 2014, and Notice of Entry was filed and served on December 22, 2014; (2) Findings of Fact and Conclusions of Law Denying Braiden's Motion to Use Character Evidence of T.D. signed on December 19, 2014, filed on December 19, 2014 and Notice of Entry was filed and served on December 22, 2014; (3) Findings of Fact and Conclusions of Law Denying Braiden's Motion to Suppress Testimony by T.D. signed on December 19, 2014, filed on December 22, 2014 and Notice of Entry was filed and served on December 22, 2014; (4) Findings of Fact and Conclusions of Law Denying Braiden's Motion for Judgment of Acquittal signed on December 19, 2014, filed on December 19, 2014 and Notice of Entry was filed and served on December 22, 2104; (5) Second Amended Judgment of Conviction as to Aggravated Assault signed and filed on January 13, 2015.

Braiden respectfully submits that jurisdiction exists pursuant to SDCL §15-26A-3(1) (appeal from final judgment as a matter of right).[1]

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[1] For purposes of this brief, references are as follows: (1) "CR" designates the certified record; (2) "JT" designates the jury trial transcript; (3) "EH" designates the Evidentiary Hearing held on July 31-August 1, 2014; (4) "TT" designates the Transfer Hearing held on September 6, 2013; (5) "S" designates the Sentencing Hearing held on December 16, 2014; (6) "SH" designates the Suppression Hearing held on June 27, 2013; (7) "911 Call" designated the December 18, 2012 Phone Call to 911; (8) "GJ" designated the Grand Jury held on December 28, 2012; (9) "IT" designates Officer Waller's Interrogation of Braiden McCahren on December 18, 2012; (10) App. Designates Appellant's Appendix.

STATEMENT OF THE ISSUES

I. *Did the Trial Court commit error in overruling Defendant's objections and instructing the jury on the uncharged offense of Second Degree Murder in violation of Defendant's right to notice, right to be informed of the charges against him, and right to defend against the accusations?*

Relevant Cases and Statutes:

State v. Lohnes, 324 N.W.2d 409 (1982)

State v. Huber, 2010 SD 63, 789 N.W.2d 283

U.S. Const. Amend. V

U.S. Const. Amend VI

SDCL § 22-16-20.1

II. *Did the Trial Court commit error in instructing the jury on the uncharged offense of Second Degree Murder without evidence in the record to support such an instruction?*

Relevant Cases and Statutes:

Indiana v. Watts, 885 N.E.2d 1228 (Ind. 2008)

True v. Indiana, 954 N.E.2d 1105 (Ind. 2001)

Bignall v. Texas, 887 S.W.2d 21 (Tex.Crim.App. 1994)

SDCL § 22-16-20.1

SDCL § 22-16-20.2

III. *Did the Trial Court commit constitutionally reversible error in refusing to allow Braiden the opportunity to cross-examine T.D. on his mental health diagnosis and status?*

Relevant Cases and Statutes:

State v. Larson, 512 N.W.2d 732, 735 (S.D. 1994)

U.S. v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983)

U.S. v. Love, 329 F.3d 981, 984 (8th Cir. 2003)

U.S. Const. Amend. VI

S.D. Const. Art. 6, § 7

IV. *Did the Trial Court commit error in refusing to suppress statements Braiden made to T.D. during his stay at the Western Area Juvenile Services Center during which he was subject to an unconstitutional examination by Dr. Scovel?*

Relevant Cases and Statutes:

Silverthorne Lumber Co. v. U.S., 251 U.S. 385 (1920)

Wong Sun v. U.S., 371 U.S. 471 (1963)

State v. Labine, 2007 SD 48, 733 N.W.d 265

U.S. Const. Amend. V

U.S. Const. Amend. VI

S.D. Const. Art. 6, § 7

S.D. Const. Art. 6, § 9

V. *Did the Trial Court commit error in refusing to suppress Braiden's December 18, 2012 statements to Officer Martin Waller obtained without adhering to the immediate parental notification required pursuant to SDCL § 26-7A-15 and without advising Braiden of his Miranda rights?*

Relevant Cases and Statutes:

State v. Horse, 2002 SD 47, 644 N.W.2d 211

State v. Wright, 2009 SD 51, 768 N.W.2d 512

Miranda v. Ariziona, 384 U.S. 444 (1966)

SDCL § 26-7A-15

U.S. Const. Amend. V

S.D. Const. Art. 6, § 9

VI. Did the Trial Court commit error in imposing the maximum sentence on the charge of Aggravated Assault in violation of Braiden's 8th Amendment Rights?

Relevant Cases and Statutes:

State v. Springer, 2014 SD 80, 856 N.W.2d 460

State v. Brende, 2013 SD 56, 835 N.W.2d 131

Miller v. Alabama, 132 S.Ct. 2455, 2464 (2012)

U.S. Const. Amend. VIII

S.D. Const. Art 6, § 23

STATEMENT OF THE CASE

On December 18, 2012, Braiden McCahren, dob: 06/08/1996, was arrested and charged with First Degree Murder in the death of 16-year-old Dalton Williams. On December 28, 2012, Braiden was indicted by a Hughes County Grand Jury for First Degree Murder, Attempted First Degree Murder, and alternate counts of Aggravated Assault.

On September 6, 2013, a Hearing was held on Braiden's Motion to Transfer. During the Hearing, psychologist Dr. Kari Scovel testified over Braiden's objection. The Motion to Transfer was denied.

Braiden filed a Petition for Discretionary Appeal from Intermediate Order on November 6, 2013 seeking disqualification of Dr. Scovel and suppression of the statements elicited during her interrogation of Braiden. On December 2, 2013, the South Dakota Supreme Court issued an Order Reversing Transfer Order and Remanding for Reconsideration.

A Second Transfer Hearing was held on February 18, 2014. Again, the Transfer Motion was denied. Following a change in counsel, Braiden's jury trial was scheduled for September 2014.

A two-day evidentiary hearing was held on July 31 and August 1, 2014 to address the State's and Braiden's Motions. Testimony was presented by both sides during the multi-day hearing. In its August 19, 2014 written opinion, the trial court denied Braiden's Motion to Suppress Statements to Police Officer Martin Waller on December 18, 2012 and Motion to Suppress Testimony of T.D.

On August 28, 2014, the State filed Motion in Limine Character Evidence asking the Court to exclude testimony of character evidence of T.Y. and T.D. Character for T.D.'s reputation for truthfulness was limited to the examination of four witnesses and his criminal and juvenile adjudications were excluded unless it involved dishonest or untruthful crimes. The court excluded any testimony of T.D.'s mental illness.

The State also filed a Motion to Exclude Lessor [sic] Included Instruction Manslaughter Second Degree. The court reserved ruling.

On September 8, 2014, Braiden filed a Motion to Reconsider Exclusion of Evidence as to T.D.'s Mental Illness. It was denied.

Braiden's jury trial commenced on September 15, 2014. Two days of jury selection was conducted in Tripp County, Winner, South Dakota. Opening statements were given on September 17, 2014. The State presented its First Degree Murder case from September 17-19, 2014. On September 22, 2014, Braiden's defense to the indicted charges was presented to the jury. Evidence was closed on September 22, 2014. Closing arguments were scheduled for 1:00pm the following day.

Settlement of Jury Instructions began at 10:00am on September 23, 2014. No lesser-included homicide offenses were requested by Braiden. The State asked that the Jury be instructed on Second Degree "depraved mind" Murder and First Degree Manslaughter. The Defense objected on constitutional grounds. The Court gave instructions on First Degree Murder, Second Degree Murder, First Degree Manslaughter, and Second Degree Manslaughter, as well as the indicted charges of Attempted Murder and Aggravated Assault.

On September 23, 2014, Braiden was found not guilty of the indicted offenses of First Degree Murder and Attempted First Degree Murder. Braiden was found guilty of Second Degree Murder and Aggravated Assault.

Defendant's Motion for Judgment of Acquittal was filed on October 6, 2014. A Hearing on Defendant's Motion was held on November 7, 2014. The Motion was denied.

On December 16, 2014, Braiden was sentenced to 25 years in the South Dakota State Penitentiary, with 15 years suspended, for Second Degree Murder, and 15 years in the South Dakota State Penitentiary for Aggravated Assault.

The Second Amended Judgment and Conviction was signed, filed, and served on January 13, 2015. Notice of Appeal was filed with the Hughes County Circuit Clerk on January 15, 2015.

STATEMENT OF THE FACTS

At approximately 1:00am on December 19, 2012, 16-year-old Braiden McCahren was arrested and charged with First Degree Murder in the death of Dalton Williams ("Williams"). The State's theory from the outset was that Braiden picked up a 20-gauge Benelli shotgun in the midst of a heated, angry argument, intentionally loaded it, intentionally pointed it, and intentionally shot and killed Williams.

Tyus Youngberg ("T.Y."), the State's key witness and the only eyewitness, told the jury that on December 18, 2012, he, Braiden, and Williams were "messing around" when the shotgun went off. JT. 519:1-7. T.Y.'s first description of what occurred only minutes earlier was "We were – he was messing around with the gun and he pulled the trigger and it shot him." JT. 519:1-7; 911 Call. 1:24-2:1.

T.Y. testified that he told law enforcement on the night of December 18, 2012 that what had happened was an accident. JT. 491:13-14. T.Y. testified that Pierre Police Officer Cole Martin asked him if an argument had preceded the shooting and T.Y. responded "No. We were messing around." JT. 519:8-14. At trial T.Y. testified that he and Braiden were "screwing around," that no one was mad at anybody, and that he and Braiden argued "nine times a day at least." JT. 520:13-23. The State's key witness told the jury that December 18, 2012 "was just a normal day like any other day." JT. 520:24-25.

T.Y. testified at trial that he believed what he witnessed at the McCahren home on December 18, 2012 was an accident until he spoke with Special Prosecutor Michael Moore at the September 2013 Transfer Hearing. JT. 491:3-492:1.

> Question by Attorney Clint Sargent: Just so I get this straight, before you met with the Pierre Police Department on that night, before you testified before the Grand Jury, you hadn't had any chances to talk to Mr. Moore yet; is that right?
>
> Answer by T.Y.: Yes.
>
> Q. So the first time you had a chance to talk to Mr. Moore about your testimony was prior to the transfer hearing?
>
> A. Yes.
>
> Q. And so when you talked to the Pierre Police Department, when you talked to the former State's Attorney, when you talked to the Grand Jury, you were convinced that the gun was loaded in the barrel or the chamber; correct?
>
> A. Yes.
>
> Q. And then you had a chance to meet with Mr. Moore before the transfer hearing, and then it became that the gun was loaded in the magazine and in your mind it's no longer an accident?
>
> A. Yes.
>
> Q. And you had a chance to meet with Mr. Moore before you testified today?
>
> A. Yes.

JT. 551:22-552:20.

STANDARD OF REVIEW

On appeal, this Honorable Court will "review findings of fact under the clearly erroneous standard." *State v. Wright*, 2009 SD 61, ¶ 26, 754 N.W.2d 56, 64. "Once the

facts have been determined, however, the application of a legal standard to those facts is a question of law reviewed de novo." *Id.*

ARGUMENT

I. Braiden's Due Process Right to Notice and Opportunity to Defend Violated by Trial Court's Jury Instructions, Over Braiden's Objection, for Uncharged, Lesser-Included Homicide Offenses

The Second Degree Murder verdict, first charged to the jury by a lesser-offense instruction requested by the State two hours before closing arguments over Braiden's objection, afforded Braiden no opportunity to defend against the "depraved mind" murder charge. The trial court's decision to give the State's lesser offense instruction, violated the Fifth and Sixth Amendment of the U.S. Constitution and Article 6, § 2 and § 7 of the South Dakota Constitution and the South Dakota Supreme Court's 1982 decision in *State v. Lohnes*,

> It [is reversible] error to charge the jury that, in order to convict, it was *not necessary for the state to make out such case as it had set out in the indictment.*

324 N.W.2d 409, 413 (1982) (citing *State v. Reddington*, 7 S.D. 368, 380-81, 74 N.W. 170, 174 (1895)) (emphasis added); *cert denied*, 459 U.S. 1226 (1983).

The South Dakota Supreme Court has recognized that a defendant's constitutional right to be informed of the "nature and cause of accusation against him" is one of a defendant's most basic and critically important constitutional rights. *State ex rel. Kotilinic v. Swenson*, 18 S.D. 196, 202, 99 N.W. 1114, 1115 (1904); *Lohnes*, 324 N.W.2d at 412. The Court has consistently acknowledged that the criminally accused is constitutionally entitled to a fair opportunity to defend against the charges against him.

State v. Huber, 2010 SD 63, ¶ 37, 789 N.W.2d 283, 294-95; *State v. Lamont*, 2001 SD 92, ¶ 16, 631 N.W. 2d 603, 608-09; *State v. Iron Necklace*, 430 N.W.2d 66, 75 (S.D. 1988). "[D]ue process is in essence the right of a fair opportunity to defend against the accusations." *State v. Luna*, 378 N.W.2d 229, 233 (S.D. 1985) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

> When a defendant is denied the ability to respond to the State's case against him, he is deprived of his "fundamental constitutional right to a fair opportunity to present a defense." We cited in *State v. Iron Necklace*, 430 N.W.2d 66, 75 (S.D. 1988), notions of fundamental fairness require "that criminal defendants be afforded a meaningful opportunity to present a complete defense. It is only fair that a defendant in a criminal trial be allowed to present his theory of the case.

Lamont, ¶ 16, 631 N.W. 2d at 608-09.

A. U.S. Constitution and Lohnes' *Decision Requires Second Degree Murder Conviction Be Reversed*

On December 28, 2012, Braiden was indicted by the Hughes County Grand Jury for First Degree Murder, Attempted First Degree Murder and alternate counts of Aggravated Assault. Not guilty pleas were entered to all three charges. No additional charges were ever brought against Braiden McCahren.

Jury selection in *State v. Braiden McCahren* began on September 15, 2014 and lasted two days. Trial on the Indictment commenced on September 17, 2014. In the State's opening statement it told the jury that it would prove beyond a reasonable doubt that Braiden intentionally picked up a 20-gauge shotgun, intentionally loaded the shotgun, intentionally pointed the shotgun at T.Y. and Williams, and intentionally pulled the trigger with the intent to kill. JT. 382:17-24; 383:24-385:6. For three days, from September 17-19, 2014, the State put on its evidence in support of its First Degree Murder theory.

On Monday, September 22, 2014, Braiden began his defense against the Indictment. That morning witnesses were called to testify as to the character for truthfulness of the State's star witnesses, T.Y. and T.D. That afternoon, Benelli Shotgun Expert David Lauck testified as to how a Benelli functions and illustrated its differences from American-made shotguns. Lauck, both verbally and demonstratively, clarified for the jury what the Benelli would and would not do in each of the four shotgun sequences offered by T.Y. Lastly, Lauck educated the jury on Benelli's unexpected shell release phenomenon. Gina Harvey was the final witness called by the Defense to testify about her own experience with Benelli's unexpected shell release mechanism. The Defense then rested.

In rebuttal, the State called John Farnam to refute Lauck's testimony. As late as the last witness and the State's only witness on rebuttal, the State was still dedicated to its First Degree Murder theory.

By 4:30pm on September 22, 2014, the jury had received all evidence in which it was to consider whether the State had met its burden in proving the indicted charges against Braiden.

At approximately 10:30am on September 23, 2014, 150-minutes before closing arguments were scheduled to begin, the State requested jury instructions on Second-Degree Murder and First-Degree Manslaughter. The Defense objected on the grounds that inclusion of such offenses, especially Second-Degree "depraved mind" Murder, violated Braiden's right to be apprised as to the charges against him and to present a defense to those charges.

...

The Court: Go ahead, Mr. Butler.

> Attorney Michael Butler: Thank you, Judge. We object. We are now an hour and a half prior to making closing argument to the jury in this case, and for the first time the State says it wants additional charges for the jury to consider after nearly two years into this case.
>
> We prepared a defense to first-degree murder. We have received no proposed instructions. I think we've had ten days and at no time until this morning, two hours prior – and this Court has invited proposals, asked to be notified ahead of time. Fair notice should be given to the Defendant when he has prepared his closing argument. To now have to argue additional charges that were not presented and to be notified an hour and a half prior to closing argument I think is a fundamental due process violation.
>
> If the State at some point during its case lost confidence in its murder charge of premeditation, it would have been advisable to notify the parties that it had concerns about its charge and that it would be seeking lesser included instructions.
>
> We did not voir dire on the issue. Mr. Moore knows how to obtain superseding Indictments. The last case I had with him he got four of them.
>
> We object to that. We wish to go forward on the charges of attempted as well as first degree, as well as agg assault.

JT. 1006:25-1008:2.

For 634 days Braiden faced an Indictment for First-Degree Murder, Attempted First-Degree Murder, and Aggravated Assault. The jury acquitted Braiden on the indicted charges of First-Degree Murder and Attempted First-Degree Murder. Braiden was found guilty of Second-Degree Murder and Aggravated Assault. Of the offenses he was found guilty, Braiden only had the opportunity to defend himself against the Aggravated Assault charge.

In *State v. Lohnes*, the South Dakota Supreme Court ruled it was a constitutional error and a violation of the defendant's due process rights for the trial court to have instructed the jury on the offense of Second Degree Murder for which Lohnes, a 16-year-

old juvenile at the time of his arrest, was not charged. 324 N.W.2d 409, 412-13 (S.D. 1982). The Court relied, in part, upon *State v. Reddington* in which its judicial predecessors had held "it was reversible error to charge a defendant with murder with a premeditated design under one penal provision and instruct the jury under another penal provision." *Id.* (citing 7 S.D. 368, 64 N.W.170 (1895)). "While *Reddington* may be hoary with age it nevertheless contains reasoning that sounds of a constitutional dimension, which knows no aging until the constitution is amended." *Id.* The *Lohnes* Court vacated the defendant's second degree murder conviction, holding "it was error to charge the jury that, in order to convict, it was *not necessary for the state to make out such case as it had set out in the indictment.*" *Id.* at 413 (citing *Reddington*, 7 S.D. at 380-81, 74 N.W. at 174) (emphasis added)).

The trial court's instruction on uncharged, lesser-included homicide offenses at the State's request, without notice to Braiden after the State's case-in-chief or, at a minimum, before the Defense rested, violated Braiden's fundamental due process rights. All strategy decisions and considerations, including which witnesses to call and perhaps most significant, whether Braiden would testify, were premised upon a defense to the charge of premeditated murder, not depraved mind murder. 150-minutes before closing arguments Braiden faced *three* new homicide charges. The trial court's decision to instruct on Second Degree Murder, First Degree Manslaughter, and Second Degree Manslaughter without providing Braiden with the constitutionally required opportunity to defend against such accusations denied, deprived, and eviscerated Braiden's due process rights.

1. Right to Testify In One's Own Defense Protected by the Fifth and Sixth Amendments

The constitutional right of the accused to testify on his or her behalf is "essential to due process of law in a fair adversary process" and is derived from multiple Constitutional provisions. *Rock v. Arkansas*, 483 U.S. 44 (1987); *Faretta v. California*, 422 U.S. 806, 819, n. 15 (1975). The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony:

> A person's right to reasonable notice of a charge against him, and *an opportunity to be heard in his defense*—a right to his day in court—are basic in our system of jurisprudence; and these rights include, at a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

Rock, 483 U.S. at 51 (quoting *In re Oliver*, 333 U.S. 257, 273 (1948) (emphasis in original)).

The Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," also encompasses and supports a defendant's right to testify. *Washington v. Texas*, 388 U.S. 14, 17-19 (1967).

> Logically included in the accused's right to call witnesses whose testimony is "material and favorable to his defense," is a right to testify himself, should he decide it in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony.

Rock, 483 U.S. at 52 (internal citations omitted).

The U.S. Supreme Court has held that an accused's right to present his own version of events in his own words is more fundamental to a personal defense than the right of self-representation. *Id.* "A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness." *Id.*

A criminal defendant's opportunity to testify "is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.* "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Harris v. New York*, 401 U.S. 222, 225 (1971). "[The Fifth Amendment privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' ... The choice of whether to testify in one's own defense...is an exercise of the constitutional privilege." *Harris*, 401 U.S. at 230 (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)).

Braiden had no choice. By instructing the jury on uncharged, lesser-included homicide offenses that Braiden was not apprised of until after the close of evidence, Braiden was denied the opportunity to exercise his right to testify against the allegation of depraved mind murder.

2. Right to Propose Jury Instructions to Distinguish Between Alternate Homicide Offenses

Nowhere in the entire trial record, from voir dire through the close of evidence, was the jury confronted by the language "evincing a depraved mind" or "imminently dangerous." The jury heard these terms of art at the same time they learned they were to consider three new homicide charges...when Judge Brown read the jury instructions.

Due to the 11th-hour addition of three alternate homicide offenses Braiden was foreclosed from proposing instructions clarifying the distinctions between the charges he newly faced. Despite Braiden's constitutional entitlement to be apprised of *all* charges against him and a fair opportunity to defend against such accusations, he was denied the opportunity to propose jury instructions to assist and to explain the difference between

each homicide count. Most importantly, Braiden was unable to propose a "depraved mind" and "imminently dangerous" definition. Such a delineation is intrinsic to Braiden's constitutional right to defend himself.

"[D]epraved mind murder is not a substitute for deliberate intent murder; it is not a fallback position available whenever the State fails to prove deliberation." *State v. Reed*, 120 P.3d 447, 455 (New Mexico 2005); *See People v. Roe*, 542 N.E2d 610, 619 (N.Y. 1989) (warning that depraved indifference murder should not provide prosecutors with an unjust double opportunity for a top count murder conviction).

> Depraved mind murder carries a heavy but different evidentiary burden. The State must prove beyond a reasonable doubt that Defendant knew his act was greatly dangerous to the lives of others, and that Defendant's act was greatly dangerous to the lives of others indicating a depraved mind without regard for human life.

Id.

"Depraved mind" is "[a] corrupt, perverted, or immoral state of mind constituting the highest grade of malice [that equates] with malice in the commonly understood sense of ill will, hatred, spite or evil intent." *Id.* (internal citations omitted). "Depraved mind murder, therefore, requires outrageously reckless conduct performed with a depraved kind of wantonness or total indifference for the value of human life." *Id.* "Obviously, mere negligence or recklessness will not do." *Id.* at 454.

The jury heard the 911-call in which the State's key witness, and only eyewitness, T.Y. first described what had happened as "We were – he was messing around with the gun and he pulled the trigger and it shot him," T.Y.'s testimony that no one was mad or angry before the gun went off, T.Y.'s confirmation that he believed what happened was an accident, and testified as such until he spoke with Prosecutor Mike Moore in September 2013. The jury also heard the real-time audio of Braiden's multiple

statements to Pierre Police Officer Martin Waller that he checked the shotgun's barrel before picking it up and it was empty and that he pointed the shotgun at the wall, not at T.Y. or Williams. Braiden can be heard on the recording gagging. None of the evidence the State proffered in closing arguments as "evincing a depraved mind" illustrated ill will, hatred, viciousness, malice, or an extreme indifference to human life.

Braiden was foreclosed from proposing jury instructions to inform the jury that the State's failure to prove First Degree Murder may not result in a Second Degree Murder conviction by default. *Reed*, 120 P.3d at 455. Braiden was also precluded from proposing jury instructions that distinguished between reckless conduct and conduct "evincing a depraved mind." With the first and last word in closing arguments, the State elevated reckless conduct to that of depraved mind murder:

> Attorney Mike Moore: Guns are very dangerous. Everybody has them. We go hunting with them. We use them to defend ourselves. This isn't a case about guns are bad or guns are good. This is a case about everybody knows guns are dangerous. And if you own a gun or if you're possessing a gun, you're responsible for that, criminally responsible for that.
>
> And why are they so dangerous? Because they kill. If you point it at person and pull the trigger, it's not good for that other person. They're going to die. That's why we have to follow the rules that we heard about over and over again through this trial. Every time you pick up a gun, you assume it's loaded. Every time. No question. You don't point a gun at anybody for any reason unless you're defending yourself.
>
> The Defendant didn't follow either of those, neither one. And now they want to call that an accident? He violated the two cardinal rules of gun ownership and handling a gun. Everybody knows that. My seven-year-old knows. You don't play with guns.

JT. 1025:5-1026:1.

> Attorney Mike Moore: …I want to talk a little bit about the lesser included offenses, and you shouldn't speculate on why that was done. It's improper for you to do that. But does it serve Dalton justice if it's all or nothing on one charge? That's not what our system is set up for. It's not set up for me to make that call. It's set up for you to make that call and it's my job to allow you to do that. That's why you get the lesser included instructions.
> …
> Let's talk about murder in the second degree, and I'll just talk briefly about this one. The elements of that crime is that it was imminently dangerous, evincing a depraved mind. And if you go back there and you look at the evidence and you say, "You know what? Murder in the first degree, I'm not going there," your next question is murder in the second degree.
>
> Tell me an act, any act that's more imminently dangerous than pointing a gun at somebody, racking the action, and pulling the trigger. I can't think of any that causes immediate death. That's depraved.
>
> I mean if I grab that gun right now and I stood up here and I was pointing at each one of you, racking the action, pulling the trigger, you'd think I was insane. Imminently dangerous.

JT. 1071:1-1072:5.

"Depraved mind" murder must be more than breaking the rules of handling a firearm. The South Dakota legislature's assignment of a life without parole sentence is indicative of this reality. To allow anything less than vicious, malicious, hateful conduct to substantiate a Second Degree Murder conviction is contrary to South Dakota law and in disregard of Braiden and future criminal defendant's constitutional protections.

3. Constitutional Right to Call Witnesses On One's Behalf Denied

Had Braiden been provided notice of the State's intention to ask for lesser-included homicide offenses in advance of settlement of jury instructions, evidence as to Braiden's objective psychological status through the testimony of Dr. Rodney Swenson and Dr. Thomas Price, could have been presented to the jury. Both doctors had previously testified before the trial court and been cross-examined by the State in this matter.

Braiden was evaluated by Dr. Price, a licensed Psychologist, and Dr. Swenson, a Clinical Neuropsychologist. Dr. Price and Dr. Swenson testified at the September 6, 2013 Transfer Hearing as to their clinical diagnoses of Braiden's immature and impetuosity at the time of the shooting. Dr. Swenson diagnosed Braiden with delayed development of the frontal systems of his brain. TT. 263:4-6.

> Answer by Dr. Swenson: ...it would be basically behaviors that we would associate with knowing when to stop doing something, knowing when to start doing something, how to plan, how to organize, how to sequence what you're going to do, how to think ahead, how to understand the consequences of your actions will impact other people and so forth.
>
> ...
>
> He has delayed development of frontal system functions. It primarily is characterized by impulsivity, poor planning, not anticipating consequences. But also cognitively it's related to things like inaccuracies in attention, being impulsive, perseverating on certain responses that just don't work for you.

TT. 263:21-264:22.

Dr. Price also diagnosed and formulated an opinion as to Braiden's cognitive abilities. TT. 301:12-19.

> Question by Attorney William Taylor: And can you tell us what your diagnosis is in this case with respect to Braiden?
>
> Answer by Dr. Price: Primary diagnosis is attention-deficit/hyperactivity disorder, combined type. That would be the official diagnosis. However, my impression throughout the evaluation is that he has a very high level of impulsivity. There isn't a formal diagnosis of ADHD impulsive type, but really that would better characterize his presentation as far as his ADHD symptoms. It's a bit atypical. I do many, many ADHD evaluations and haven't seen this level of impulsivity in a youngster in quite some time.
>
> Q. What do you mean by that, you haven't seen this level?
>
> A. What Braiden's behavior is characterized by is a tendency to act without reflection, to act without thinking of the consequences.
>
> ...
>
> Q. And if I understand what you're saying is, in your years of practice, are you saying you have not seen this extreme level of impulsivity before?

A. I've seen it before but it's been some years.

Q. Fairly rare in your practice to see this level?

A. Yes.

TT. 301:20-303:11.

According to Dr. Price and Dr. Swenson, Braiden's psychological age was four to five years lower than his 16-year-old biological age. TT. 300:22-302:11. This placed Braiden's executive functioning capability at that of an 11 or 12 year old. TT. 256:15-260:16. This objective testimony, combined with a jury instruction defining "depraved mind," was intrinsic to Braiden's constitutional right to defend himself against the last-minute inclusion of Second Degree Murder.

Lohnes explicitly condemns the trial court's decision in Braiden's case to instruct the jury on Second Degree Murder. Braiden had no opportunity to propose jury instructions that would assist in delineating between the alternate homicide counts, no opportunity to present witnesses to defend against the new charges, and, most egregiously, no opportunity to take the stand in his own defense of the new accusations. The rationale enunciated and precedent established in *Lohnes* remains in effect until and unless the Constitution is amended. For these reasons, Braiden's conviction for Second Degree Murder must be vacated.

B. SDCL § 22-16-20.1 is Subordinate to the Federal and State Constitution; Statute Does Not Abrogate Braiden's Constitutional Rights

It is anticipated that the State will argue that SDCL § 22-16-20.1's existence alone puts all criminal defendants on notice that lesser included offenses are inevitable and expected. This claim is in complete contravention of the South Dakota and U.S.

Constitution. SDCL § 22-16-20.1 does not statutorily obviate Braiden's constitutional right not to be "deprived of life, liberty, or property, without due process of law" or his constitutional right to be "informed of the nature and cause of the accusation." The South Dakota Supreme Court has made it quite clear that constitutional due process rights include a fair opportunity to defend against the charges. *State v. Huber*, 2010 SD 63, ¶ 37, 789 N.W.2d 283, 294-95; *State v. Lamont*, 2001 SD 92, ¶ 16, 631 N.W. 2d 603, 608-09; *State v. Iron Necklace*, 430 N.W.2d 66, 75 (S.D. 1988) . Despite the State's probable claim to the contrary, SDCL § 22-16-20.1's presence does not trump Braiden's constitutional rights and does not overrule *Lohnes*. Furthermore, it was also reversible error for the trial court to instruct on a lesser included, uncharged offense without evidence submitted to the trier of fact that would support the offense.

C. Lohnes *Court Already Rejected the State's Argument*

The State's probable position that a state statute can circumvent constitutional notice requirements was explicitly rejected by the *Lohnes* Court in 1982. In *Lohnes*, the State argued that *State v. Reddington*, an 1895 case in which the South Dakota Supreme Court held it to be "reversible error to charge a defendant with murder with a premeditated design under one penal provision and instruct the jury under another penal provision," could no longer be relied upon because the homicide statutes had changed. 324 N.W.2d 409, 412. Specifically, the State pointed the Court to SDCL § 23A-36-7. *Id.*

> Whenever a crime is distinguished by degrees, a jury, if it convicts an accused, shall find the degree of the crime of which he is guilty and include that finding in its verdict. When there is a reasonable ground of doubt as to which of two or more degrees an accused is guilty, he can be convicted only of the lowest degree.

SDCL § 23A-36-7.

The State contended that SDCL § 23A-36-7's existence sufficiently informed Lohnes that he may be convicted of the lesser-offense of Second Degree Murder, "an offense that he was never charged with and which has distinctly different elements than first-degree murder." *Id.* The *Lohnes* Court disagreed.

> We hold, however, that the State's argument is misplaced in this context because the use of first and second degree by the legislature had no effect on the elements of the first and second-degree murder charge.

Id.

> The indictment charged a murderer of a specific class, and set forth the distinctive legal characteristics of such a murder, and that was the crime, and the kind of a crime, for which he was being tried. A plea of not guilty put only the allegations of the indictment in issue, and such allegations charged killing with express malice towards the deceased, and with a premeditated design to effect his death; and *in our judgment it was error to charge the jury that, in order to convict, it was not necessary for the state to make out such a case as it had set out in the indictment.*

Id. (quoting *State v. Reddington*, 64 N.W.2d 170, 174 (1895)).

The *Lohnes* decision is a reminder as to the primacy of the rights secured by the South Dakota and U.S. Constitution. The promulgation and inclusion of SDCL §§ 22-16-20.1 and 20.2 following the 2005 Legislative Session did not change the First Degree Murder and Second Degree Murder elements. The two homicide offenses still read as distinct and separate types of murder. SDCL § 22-16-4; SDCL § 22-16-7.

Any assertion that SDCL § 22-16-20.1 is a notice statute is equally as misplaced in this context as it was when the State made the same assertion as to SDCL § 23A-36-7 in *Lohnes*. Constitutional right to notice is never dwarfed by state statute. *Lohnes'* dedication to upholding the constitutional tenets of due process and notice is and will remain good law unless and until the U.S. and South Dakota Constitutions are amended. The State's argument should therefore be rejected.

D. Facts Don't Support Second Degree Murder Instruction; SDCL § 22-16-20.1 Not a Notice Statute

On December 28, 2012, Braiden was indicted by the Hughes County Grand Jury for First Degree Murder, Attempted First Degree Murder and alternate counts of Aggravated Assault. Not guilty pleas were entered to all three charges. It is undisputed that in the 21 months leading up to trial the State did not seek to nor brought any additional charges against Braiden.

Neither South Dakota statutory law nor South Dakota case law automatically entitles the State or a Defendant to a lesser-included offense instruction. *Id.* Rather, "SDCL 22-16-20.2 requires the trial court to complete a factual analysis before granting a requested instruction on a lesser included offense." *Id.* ¶ 32. The trial court must consider "whether there [is] some evidence to support giving the instruction." *State v. Hoadley*, 2002 SD 109, 651 N.W.2d 249, 264.

It is acknowledged that First Degree Murder, a Class A felony, and Second Degree Murder, a Class B felony, have separate sentencing schemes. Although the difference in possible punishment makes Second Degree Murder an inherently lesser offense of First Degree Murder, it does not intrinsically entitle any party to a jury instruction on the lesser offense if not charged. This is especially true when it is the prosecution asking for the lesser instruction as the State has the sole authority and discretion in charging decisions. A lesser-included offense instruction should only be given if facts supporting a lesser included offense have been submitted to the jury. SDCL § 22-16-20.2.

"The 'depraved mind' requirement is a genuine additional element which must be established in order to prosecute for second degree murder." *State v. Primeaux*, 328 N.W.2d 256, 258 (S.D. 1982). The South Dakota Criminal Pattern Jury Instruction 3-24-13 provides:

> "Evincing a depraved mind, regardless of human life" means conduct demonstrating an indifference to the life of others, that is not only disregard for the safety of another but a lack of regard for the life of another.

The critical distinction between indifference towards the life of others and disregard for another's safety is codified by South Dakota's Second Degree Murder statute, SDCL § 22-16-7.

Courts across the country, including South Dakota, have upheld Second Degree Murder convictions illustrating this central difference. Conduct evincing a depraved mind includes continued abuse of a child culminating in its death, *South Dakota v. Miller*, 2014 SD 49, 851 N.W.2d 703, beating one's elderly mother and then shooting her in the face, *State v. Laible*, 1999 SD 58, 594 N.W.2d 328, stabbing one's child 70 times, *State v. Jenner*, 451 N.W.2d 710 (S.D. 1990), randomly firing a gun over a crowd with one's eyes closed, *Kansas v. Jones*, 8 P. 3d 1282 (Kan. 2000), and opening fire into a crowd, *State v. Brooks*, 962 So.2d 1220 (La.App.2 Cir. 2007).

The State's theory from the date Braiden was arrested until 150-minutes before closing arguments was that Braiden had intentionally loaded a 20 gauge shotgun, intentionally pointed the shotgun at Williams, and intentionally pulled the trigger with the intent to kill. The State presented its theory at numerous bond, transfer, and motions hearings. At trial, the State put on its theory of intentional, premeditated murder through the testimony of numerous law enforcement officers, various forensic scientists, coroner

Dr. Habbe, eyewitness T.Y., Braiden's former cellmate T.D., and firearms expert John Farnam. The State played the 911-call from December 18, 2012 and Braiden's December 18, 2012 interview with Pierre Police Officer Martin Waller 10-minutes after the incident occurred. In addition to the multitude of pictures from the scene and Williams' autopsy, the State also used a computer animated demonstration to illustrate where each 20-gauge shotgun shell was found in the McCahren home.

Braiden maintained and continues to maintain that Williams' death was an accident. Braiden's case-in-chief focused on the unexpected shell release mechanism unique to Benelli shotguns, the unreliability and lack of believability of T.Y. and T.D., and the statements made and actions of Braiden and T.Y. immediately after the firearm discharged. Cross-examination of the State's witnesses concentrated on those same issues.

None of the testimony or evidence offered by Braiden was a surprise to the State. Prior to trial the State had had the opportunity to speak with, hear the testimony of and question nearly every witness identified for trial. The only exceptions being Defense witness Gina Harvey who provided supporting testimony to Benelli Shotgun Expert Dave Lauck and Defense witness Kim Buhl who testified as to T.Y.'s character for truthfulness. All of the evidence and testimony at Braiden's trial offered by the State and Braiden's counsel was specific to the indicted charge of First Degree Murder.

To date, the State has pointed to nothing more than SDCL § 22-16-20.1 to justify the Second Degree Murder instruction. JT. 1005:24-1006:5. "It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense; there must be some evidence directly germane to a lesser included offense for the factfinder to consider

before an instruction on a lesser included is warranted." *Bignall v. Texas*, 887 S.W.2d 21, 24 (Tex.Crim.App. 1994). The evidence relied upon must establish the lesser included offense as "a valid, rational alternative to the charged offense." *Arevalo v. Texas*, 943 S.W.2d 887, 889 (Tex.Crim.App. 1997). A lesser included offense cannot only be a fallback. *Reed*, 120 P.3d at 455. Braiden's conviction for Second Degree Murder does not retroactively establish that there was evidence supporting the lesser included instruction. This "ends justify the means" approach is constitutionally impermissible.

Additionally, no factual analysis as to whether a lesser included instruction was warranted for Second Degree Murder, or any of the other alternative homicide offenses, was undertaken by the trial court. SDCL § 22-16-20.2; JT. 1005:24-1012:16.

Rather, after listening to Defendant's constitutional arguments and the State's reliance upon SDCL § 22-16-20.1, the trial court offered vague, conclusory statements as its rationale.

> The Court: I'm going to include the lesser included offenses instructions and also as to manslaughter in the second degree.

JT. 1010:8-10.

> The Court: And I think under the circumstances of this case again, I don't think there's any particular surprise. Although certainly this could have been recharged in some fashion, I think that the elements of the lesser included offenses have always been out there and available. I don't think that Defense should be surprised that this is being brought forward at this time. Certainly evidence supports any of these potential offenses or none of them.

JT. 1010:20-1011:3.

Absence of "depraved mind" evidence precludes both the State and Braiden from receiving an instruction on Second Degree Murder. The trial court's instruction, and Braiden's subsequent conviction for Second Degree Murder, is an error of constitutional dimension warranting reversal, in addition to and independent of *Lohnes*.

E. Right to Request and Right to Receive Lesser Included Instruction Not Interchangeable

Multiple jurisdictions, including South Dakota, have discussed when a requesting party is entitled to a lesser included, uncharged offense instruction. Although the majority of courts have been faced with the request originating with the defendant, Indiana is one of the few states that have specifically addressed the scenario in which the prosecution is the requesting party. Indiana has consistently held that absent an evidentiary dispute distinguishing a lesser offense from the charged offense, a lesser included instruction is prohibited. *Indiana v. Watts*, 885 N.E.2d 1228 (Ind. 2008) (holding that a voluntary manslaughter instruction in a murder case is not appropriate if unsupported by evidence of sudden heat); *True v. Indiana*, 954 N.E.2d 1105 (Ind. 2001) (holding that even though misdemeanor domestic battery was a "pure" lesser included of the charged offense of felony domestic battery, lack of evidence on the uncharged, lesser offense precluded an instruction).

F. Remedy Requested

Consistent with *Lohnes*, SDCL § 22-16-20.2's explicit language and interpretation by the South Dakota Supreme Court, and, most importantly, Braiden's Fifth and Sixth Amendment Rights secured by the South Dakota and U.S. Constitution, Braiden's Second Degree Murder conviction must be vacated.

II. Braiden's Sixth Amendment Right to Confront and Cross-Examine Violated by Trial Court's Order Prohibiting Cross-Examination Regarding T.D.'s Diagnosed Mental Illness

The United States Constitution mandates that Braiden has a right to "be confronted with witnesses against him." The Confrontation Clause includes Braiden's right to effectively cross-examine the State's witnesses. *Davis v. Alaska*, 415 U.S. 308 (1974).

> The right of cross-examination is an essential safeguard of factfinding accuracy in an adversary system of justice and 'the principal means by which the believability of a witness and the truth of his testimony are tested.'

U.S. v. Lindstrom, 698 F.2d 1154, 1160 (11th Cir. 1983) (quoting *Davis*, 415 U.S. at 316).

The U.S. Supreme Court has emphasized that "it is the essence of a fair trial that reasonable latitude be given the cross-examiner." *Alford v. U.S.*, 282 U.S. 687, 691 (1931). This is especially true in matters relevant to a witness' credibility. *U.S. v. Williams*, 592 F.2d 1277, 1281 (5th Cir. 1979). "Where the witness the accused seeks to cross-examine is the 'star' government witness, providing an essential link in the prosecution's case, the importance of full cross-examination to disclose possible bias is necessarily increased." *Greene v. Wainwright*, 634 F.2d 272, 275 (5th Cir. 1981).

This portion of brief redacted and sealed from public view by order of the Supreme Court dated November 17, 2015, based on redacted and sealed documents in the record below.

Board Certified Psychiatrist Dr. David Bean reviewed T.D.'s mental health records, his juvenile adjudicatory record, and listened to his live testimony. Dr. Bean explained the recognized DSM-IV-TR criteria for T.D.'s diagnoses included lying, dishonesty, and deceitfulness, all of which were represented in T.D.'s records. EH. 141:1-142:15. Dr. Bean then explained that T.D.'s mental health conditions impeded development of his truthfulness versus non-truthfulness personality characteristics, making him prone to exaggeration, attention seeking behavior, and braggadocio. EH. 144:22-146:15. Dr. Bean cautioned the court that T.D.'s diagnoses and history indicate a serious concern as to T.D.'s ability to truthfully and honestly testify in an important criminal case. EH. 146:16-174:2.

In Braiden's case, full cross-examination as contemplated by the Confrontation Clause required inquiry into the adverse witness', T.D.'s, mental health history. "In simple language the defendant has the right to explore every facet of relevant evidence pertaining to the credibility of those who testify against him, and evidence on mental capacity may be especially probative of the ability to comprehend, know and correctly relate the truth." *Lindstrom*, 689 F.2d at 1165-66.

> Trivial incidents and casual remarks may be interpreted in a markedly biased way, as eloquent proof of conspiracy or injustice. In his telling them, these trivial incidents may by retrospective falsification be given a grossly distorted and sinister significance. Even incidents of a decade or more ago may now suddenly be remembered as supporting his suspicions, and narrated in minute detail.

Id. at 1160-61 (quoting Weihofen, *Testimonial Competence and Credibility*, 34 Geo.Wash.L.Rev. 53, 82 (1965)). Additionally, a witness' use of drugs, whether prescribed or illegal, may be used to attack a witness' ability to "perceive the underlying

events and to testify lucidly at trial." *U.S. v. Clemons*, 32 F.3d 1504, 1511 (11th Cir. 1994).

It is undisputed that T.D.'s inability to properly perceive and process events, relay his observations accurately in court, and his motivation to exaggerate, fabricate or lie without concern for the truth or the consequences of his actions for himself or others is inherent in the predispositions and symptoms recognized in his mental illness diagnoses. Due to the trial court's Order prohibiting Braiden from cross-examining T.D. as to his mental health condition the State unabashedly argued that T.D. had no reason or motive to lie or to fabricate his testimony.

> Attorney Michael Moore: ... And what I submit to you is look what [T.D.] told us. We know he was roommates with the Defendant. We know he had conversations with the Defendant. He had details about this crime that he would have never known had the Defendant not told him.
>
> ...He was able to tell first Agent Kavanagh and then you guys about what he knew.
>
> He describes the Defendant when he's talking about this as kind of joking around, laughing, giggling about it. Now, take that into context. The Defense is portraying one Defendant. Trevor is portraying someone different.
>
> You heard the phone calls of the Defendant. You tell me. Does he sound like the person that Trevor is talking about or does he sound like the Defendant that the Defense is trying to tell you he is? That shows that Trevor is telling the truth.
>
> And he says the Defendant straight out told him it wasn't an accident, that he wanted to be known as the lawyer that got away with murder. You judge Trevor's credibility. Look at what he told us, look at the accuracy of the information and make that decision.

JT. 1036:8-1037:12.

The evidence the court made off-limits would have provided the jury with information that may very well explain T.D.'s motivation or proclivity. *Olesen v. Class*,

962 F. Supp. 1556, 1574 (D.S.D. 1997) *aff'd in part, rev'd in part,* 164 F.3d 1096 (8th Cir. 1999) (stating that but for the admission of the State's juvenile witness' "drug usage, prior emotional and psychological problems and suicide attempts," a retrial would have been warranted due to ineffective assistance of counsel). T. D.'s diagnoses, and active psychoses, at the time he was incarcerated with Braiden was a central fact prime for discussion and inquiry on cross-examination. *Lindstrom,* 689 F.2d at 1165-66; *Clemons,* 32 F.3d at 1511. The trial court's ruling violated Braiden's fundamental right to confront and cross-examine T.D. Put more bluntly, the trial court tied Braiden's hands by guaranteeing that Braiden could not meaningfully "confront and cross-examine" one of the State's key witnesses. The trial court's ruling unquestionably and unfairly provided an advantage to the State to the detriment of the accused.

> A Confrontation Clause violation is shown when a defendant demonstrates that a reasonable jury might have received a significantly different impression of a witness's credibility had counsel been permitted to pursue the proposed line of cross examination.

U.S. v. Love, 329 F.3d 981, 984 (8th Cir. 2003) (citing *Harrington v. Iowa*, 109 F.3d 1275, 1277 (8th Cir. 1997)).

> A constitutional violation may constitute harmless error, and thus not require reversal, if the court can declare beyond a reasonable doubt that the error was harmless and did not contribute to the verdict obtained.

State v. Larson, 512 N.W.2d 732, 735 (S.D. 1994) (quoting *State v. Schuster,* 502 N.W.2d 565, 570–71 (S.D.1993)).

T.D. testified for more than an hour as to what Braiden allegedly said to him regarding the December 18, 2012 incident and Williams' death.

> ...he didn't really care that he did it.
>
> JT. 817:14.
>
> ...he talked about it like it was a joke.

JT. 817:16.

...he thought it was funny and thought it was just a joke, a big joke, that he was going to get away with it.

JT. 819:8-10.

That they were getting ready to go hunting and he was still mad at his friend for breaking his stereo head unit in his pickup, and that he grabbed one of the guns that was done being cleaned and prepared and pointed it at his friend.

And then his friend started to look like he was scared and back away, and he was pulling the trigger. And I can't remember if he said he was pumping it or what he was doing, but he kept pulling the trigger until it finally went off and then his friend dropped to the floor.

JT. 819:15-25.

...He said that he went and got some towels to clean – try cleaning up some of the blood and make it look like he was putting pressure on the wound.

JT. 821:21-23.

...He told me no, that he wanted it to look – he wanted it to seem like an accident, though.

JT. 822:11-12.

He said no, that he didn't really care.

JT. 823:10.

...He told me that he wanted to be a lawyer and have on his sign, "The lawyer that got away with murder."

JT. 826:16-18.

There is no way to discern whether T.D.'s testimony was accepted in its entirety or in a piecemeal fashion. The likelihood that the jury believed T.D.'s statements regarding alleged remarks or behavior by Braiden to be indicative of "depraved mind" murder or aggravated assault is exceptional. The prohibition on evidence regarding T.D.'s mental health condition, symptoms, and medication foreclosed the jury from making a

reliable credibility determination as to T.D. because it was denied knowledge of and the opportunity to weigh the relevant evidence. The Court's September 4, 2014 Order violated Braiden's Confrontation Clause rights and violated Braiden's Fifth and Sixth Amendment rights to a fair trial. It cannot be said "beyond a reasonable doubt" that the September 4, 2014 Order did not contribute to the verdict obtained. *Id.*; S. 19:5-6.

III. "Fruit of the Poisonous Tree" Testimony by T.D. Required Suppression; State's Exploitation of Already Recognized Constitutional Violation Demands Reversal

> Defendant's Fifth and Sixth Amendment rights were violated by breach of the agreement between the State and defense counsel on the scope of Dr. Scovel's examination of Defendant.

2013-12-02 South Dakota Supreme Court Order Reversing Transfer Order and Remanding for Reconsideration.

Braiden's Fifth and Sixth Amendment rights were violated from the moment former Hughes County State's Attorney Max Gors directed State retained Psychologist Dr. Scovel to breach the agreement entered into between the State and Braiden's counsel. Any and all tangible or testimonial evidence obtained from that point forward until Braiden returned to the Hughes County Juvenile Detention Center approximately 11 days later, was acquired in direct exploitation of the multiple illegalities Braiden indisputably suffered at the hands of the State. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). Such evidence should be suppressed as "fruit of the poisonous tree." *Wong Sun v. U.S.*, 371 U.S. 471, 487 (1963); *Nardone v. U.S.*, 308 U.S. 338 (1939); *Silverthorne*, 251 U.S. 385; *U.S. v. Fellers*, 397 F.3d 1090, 1094 (8th Cir. 2005).

It was the State's burden to purge the taint from the evidence obtained in exploitation of the constitutional rights violations suffered by Braiden. *Brown v. Illinois*,

422 U.S. 590 (1975). The State offered no evidence at the July 31, 2014 Motions Hearing that the taint of this Court's recognized constitutional violation had been purged. Rather, the trial court only received the undisputed testimony from Attorneys Bradley Schreiber and Bill Taylor that Braiden's stay at the Western JSC was elongated as a result of the constitutional rights violations. It was during this time that Braiden found himself housed with T.D. EH. 179:13-180:4. Absent evidence that the taint had been purged the State should not have been allowed to benefit from its violation of 16-year-old Braiden's Fifth and Sixth Amendment rights. *Silverthorne*, 251 U.S. at 487. All evidence derived from the State's violation of Braiden's constitutional rights was tainted by the primary illegality – Max Gors' breach of the agreement with Braiden's counsel.

Often, the exclusionary rule excludes all of the evidence even when the constitutional violation is due to a good faith mistake or negligent conduct. Neither of those situations was present in this matter. Mr. Gors actively, intentionally, and deliberately breached the agreement between the State and Braiden when he instructed Dr. Scovel to ignore the specific limitations placed on 16-year-old Braiden's psychological evaluation. SH. 23:3-25:8. Mr. Gors was not a new, inexperienced, well-meaning police officer who had a good faith belief in the actions he had taken. Rather, Mr. Gors had more than 40 years of legal experience, was the then Hughes County State's Attorney, was the former Presiding Judge of the Sixth Judicial Circuit of South Dakota, and had sat as an active South Dakota Supreme Court Justice.

Braiden knew that there was an agreement regarding the questioning parameters of Dr. Scovel's evaluation. EH. 169:8-19. Attorney Bradley Schreiber spent hours explaining to 16-year-old Braiden that the State's psychologist would not ask about case

details and that Braiden was instructed to remain silent on such matters. EH. 168:21-171:8. When Dr. Scovel began to question Braiden about the incident, he initially refused to answer. He told her he was not supposed to answer questions about his case and that his attorneys wouldn't want him to. SH. 28:6-15. Dr. Scovel had a copy of the agreement between the State and Braiden's attorneys but, per Mr. Gors direction to do so, she ignored the agreement's terms. SH. 23:3-25:8; EH. 174:2-22. Dr. Scovel told Braiden that he would not leave the Western JSC until he answered her case-specific questions. EH. 179:1-12. No one informed Braiden's counsel as to what was going on. Attorneys Schreiber and Taylor only learned that Braiden was forced to surrender his Fifth and Sixth Amendment rights upon his return.

The exclusionary rule is to be applied "where its deterrence benefits outweighs its 'substantial social costs.'" *State v. Labine*, 2007 SD 48, ¶ 22, 733 N.W.2d 265, 271 (quoting *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998)). It is hard to imagine a situation that the Court would want to deter more than the egregious conduct by a lawyer of Gors' experience and stature willfully and intentionally instructing someone to violate a minor's constitutional rights. *Id.*

Additionally, prohibiting T.D.'s testimony derived from the constitutional violation would not have disadvantaged the State from a procedural or a substantive standpoint. T.Y., as the only eyewitness to the December 18, 2012 incident, was the State's star witness. T.D.'s testimony was not consistent with that of T.Y. nor were many of the details provided by T.D. corroborated by other evidence. The State knew this prior to trial. However, due to the trial court's ruling that T.D.'s mental health diagnoses could not be inquired into, the State knew that questions as to T.D.'s credibility would remain

unasked. The State counted on T.D.'s assertion of inflammatory statements allegedly made by Braiden, such as "he wanted to be a lawyer and have on his sign, 'The lawyer that got away with murder,'" to influence and prejudice the jury. JT. 817:14; 817:16; 819:8-10; 819:15-25; 821:21-23; 822:11-12; 823:10; 826:16-18.

It was at the hands of a seasoned, experienced, and former member of the South Dakota Judiciary that Braiden, a juvenile, had his Fifth and Sixth Amendment rights violated. The value in deterring future willful and intentional State action of this caliber, especially when it involves juveniles, outweighs the social costs of precluding an unreliable, unstable, and uncorroborated jailhouse informant from testifying. *Id.* The trial court's allowance of T.D.'s testimony not only exploited the willful constitutional violations this Court already recognized but it condoned such egregious state action in the future. This Honorable Court should not sustain the precedent set by the trial court. *Id.*

IV. Braiden's Fifth Amendment Rights Violated by Failure to Follow Parental Notification Statute and Failure to Read Miranda

> Because "children can be easy victims of the law" and "may lack the sophistication, knowledge, or maturity to understand the ramifications of an admission[,]" we will "take special care to scrutinize the record when juveniles are involved." In fact, we afford a juvenile "additional, not less, protection of constitutional rights."

State v. Diaz, 2014 SD 27, ¶ 22, 847 N.W.2d 144, 154 (citing *People in the Interest of J.M.J.*, 2007 SD 1, ¶¶14-15, 726 N.W.2d 621, 627-28).

As noted by the United States Supreme Court, a juvenile is "a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights." *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).

Pursuant to SDCL § 26-7A-15, South Dakota law requires that a parent, guardian, or custodian be "immediately" notified when a minor is taken into custody. This notice requirement serves as a statutory safeguard to protect juveniles' due process rights. *State v. Horse*, 2002 SD 47, ¶ 17, 644 N.W.2d 211, 221. Numerous courts have suppressed juvenile confessions obtained in custodial interrogations where law enforcement failed to comply with parental notification statutes. *Id.* ¶ 18. The U.S. Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* ¶ 19 (citing *Miranda v. Arizona*, 384 U.S. 444 (1966)).

The South Dakota Supreme Court has enunciated a two-part test to determine whether an individual is in custody at the time of questioning:

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

State v. Wright, 2009 SD 51, ¶ 19, 768 N.W.2d 512, 520 (quoting *State v. Johnson*, 2007 SD 86, ¶ 22, 739 N.W.2d 1, 9).

Once an individual is subject to custodial interrogation the individual's Fifth Amendment right against self-incrimination is implicated and the individual is to be advised of his or her *Miranda* rights. "*Miranda* warnings safeguard the privilege against self-incrimination during 'incommunicado interrogation of individuals in a police-dominated atmosphere.'" *Id.* (*Miranda*, 384 U.S. at 445). "Such an atmosphere creates compelling pressures undermining the will to resist, compelling suspects to speak where they would not do so voluntarily." *Id.* (*Miranda*, at 467). "*Miranda* must be enforced

strictly in those situations where the concerns that generated the decision are implicated." *Id.* (citing *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984). When a juvenile is interrogated, the concerns articulated in *Miranda* and the protections afforded by the Fifth Amendment are heightened. *Id.*

A. Statements Obtained in Violation of Braiden's Fifth Amendment Rights Should be Suppressed

1. No Immediate Parental Notification

Officer Martin Waller ("Waller") arrived at the McCahren home at approximately 5:30pm on December 18, 2012 following notification that a shooting had occurred. After being asked to secure the "two male subjects standing in the driveway of the residence," Waller secured Braiden. Waller "asked Braiden who the shooter was" and Braiden replied that it was him. Braiden was then placed by Waller into the patrol car of Officer Cole Martin ("Martin").

Despite Braiden's admission as the shooter and Braiden's placement in a patrol vehicle for transport to the Pierre Police Department, Waller did not notify Braiden's parents that he was in the temporary custody of the Pierre Police.

"The officer or party who takes a child into temporary custody…shall immediately, without unnecessary delay in keeping with the circumstances, inform the child's parents, guardian, or custodian of the temporary custody . . . " SDCL § 26-7A-15. Such immediate notification is mandatory under South Dakota law. *State v. Horse*, 2002 SD 47, ¶ 17, 644 N.W.2d 211, 221 (citing SDCL § 2-14-2.1). Waller was one of many law enforcement and emergency medical services personnel to respond on December 18, 2012. When help arrived Braiden and T.Y. were standing in the driveway, pointing the

first responders toward Williams. Neither Braiden nor T.Y. mentioned any other person, beside themselves, being present, involved in, or a witness to what had happened in the McCahren home. Potential threats to the Pierre community were further extinguished when Braiden instantly informed Waller that he was the shooter. Instead of immediately contacting Braiden's parents, Waller proceeded to canvass him about what had happened. It was not until Waller finished interrogating Braiden that Waller told him to contact his father. By then, however, Braiden's due process rights had been violated. SDCL § 26-7A-15.

South Dakota's parental notification statute was acutely drafted to mandate increased protection for juveniles' due process rights. "Failure to comply with the parental notification statute prevents detained children from receiving assistance and advice from those persons they would normally look to for guidance." *Horse*, ¶ 27, 664 N.W.2d at 225. A violation of South Dakota's parental notification statute warrants suppression of any and all statements and evidence derived therefrom. *Id.* ¶ 18, 664 N.W.2d at 222 (citations omitted). "The enlargement of discretionary police power in derogation of statutory rights entails the danger of inconsistent law enforcement and the resultant evils of disrespect and distrust of legal institutions." *Horse*, ¶ 21, 664 N.W.2d at 223. To ensure South Dakota law enforcement consistently employs mandatory and immediate parental notification when a juvenile is taken into custody and to deter and prevent further violations of juveniles' due process rights, this Court should reverse the trial court's denial of Braiden's Motion to Suppress December 18, 2012 Statements to Officer Waller.

2. No Miranda *Advisement*

Upon arrival at the McCahren home Waller was tasked with making sure Braiden didn't go anywhere. In response to Waller's question, Braiden admitted to being the shooter. After placing Braiden in Martin's patrol vehicle for transport to the Pierre Police Department Waller climbed inside the vehicle with him. With his admission made and his movement restricted by law enforcement, Braiden was in custody and his Fifth Amendment rights were implicated. Further inquiry by Waller required Braiden to be advised of his *Miranda* rights. It is undisputed that Waller failed to *Mirandize* him.

Despite the absent *Miranda* warning, Waller proceeded to question Braiden about the sequence of events surrounding the shooting. A detailed, play-by-play of what happened and how Williams had been shot was elicited multiple times during Waller's interrogation. IT. 1:1-20:5.

The South Dakota Supreme Court demands that "*Miranda* must be enforced strictly in those situations where the concerns that generated the decision are implicated." *Horse*, ¶ 19, 644 N.W.2d at 221 (citing *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984)). This mandate receives even greater deference when the interrogation involves a juvenile. *Id.* Relegated to a law enforcement vehicle and questioned by a trained and experienced law enforcement agent, 16-year-old Braiden was subject to the type of police-dominated atmosphere infamously responsible for compelling individuals to talk when they otherwise would not. *Id.* (citing *Miranda*, 384 U.S. at 445, 447 and *Berkemer*, 468 U.S. at 437). This is the scenario *Miranda* and its progeny protect against. *Id.*

Without parental notification and absent *Miranda*, Braiden was completely at the mercy of law enforcement. Again, both in a separate and in a simultaneous manner, Waller deprived Braiden of his constitutional rights. This evidence was used by the State

in its case-in-chief against Braiden. It should have been excluded as it was obtained in violation of statutory law and the Fifth Amendment to the United States Constitution.

Lastly, Braiden's absent *Miranda* warning from Waller eliminated any need to discuss voluntariness or waiver since any such discussion presupposes that *Miranda* was read. *Interest of J.M.J.*, 2007 SD 1, ¶ 12, 726 N.W.2d 621, 627.

V. Maximum Sentence for Aggravated Assault Violated Braiden's 8th Amendment Rights

The Eighth Amendment of the U.S. Constitution and Article VI, Section 23 of the South Dakota Constitution prohibit the imposition of cruel and unusual punishments. *State v. Brende*, 2013 S.D. 56, ¶ 34, 835 N.W.2d 131, 145; U.S. Const. amend. VIII; S.D. Const. Art. 6, § 23. Embedded in the Eighth Amendment is the concept of "proportionality," which "flows from the basic precept of justice" and mandates that "punishment for a crime should be graduated and proportioned." *Id.* The U.S. Supreme Court has held that juveniles are categorically "less deserving of the most severe punishments." *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, (2010)).

> Sentencing courts must consider what the United States Supreme Court termed the "mitigating qualities of youth." *Miller*, 132 S.Ct. at 2467. These factors include: (1) the chronological age of the juvenile, (2) the juvenile's immaturity, impetuosity, irresponsibility, and recklessness, (3) family and home environment, (4) incompetency in dealing with law enforcement and the adult criminal justice system, (5) the circumstances of the crime, and, most importantly, (6) the possibility for rehabilitation. *See id.* at 2467–69. The United States Supreme Court has recognized that a juvenile's "traits are 'less fixed' and his actions are less likely to be 'evidence of irretrievabl[e] deprav[ity].' " *Id.* at 2464 (alterations in original) (quoting *Roper, v. Simmons*, 543 U.S. 551, 570). While a juvenile defendant may present any mitigating evidence at his sentencing hearing, the sentencing court should carefully weigh and consider the above mitigating qualities of youth.

State v. Springer, 2014 SD 80, ¶ 14, 856 N.W.2d 460, 465-66.

"The United States Supreme Court does not view the Eighth Amendment 'through a historical prism[,]' but rather the Court interprets the Eighth Amendment through the 'evolving standards of decency that mark the progress of a maturing society[,]' " *Id.* (quoting *Miller*, 32 S.Ct. at 2463); *see also State v. Bergel*, 2013 SD 1, ¶ 90, 826 N.W.2d 1, 27–28. This Honorable Court has adopted the same progressive position. *Id.*

"When a defendant challenges a sentence as cruel and unusual under the Eighth Amendment, this Court reviews it for gross disproportionality [.]" *State v. Craig*, 2014 SD 43, ¶ 33, 850 N.W.2d 828, 837.

> [W]e first determine whether the sentence appears grossly disproportionate. To accomplish this, we consider the conduct involved, and any relevant past conduct, with utmost deference to the Legislature and the sentencing court. If these circumstances fail to suggest gross disproportionality, our review ends. If, on the other hand, the sentence appears grossly disproportionate, we may, in addition to examining the other *Solem* factors, conduct an intra- and inter-jurisdictional analysis to aid our comparison or remand to the circuit court to conduct such comparison before resentencing. We may also consider other relevant factors, such as the effect upon society of this type of offense.

State v. Bonner, 1998 S.D. 30, ¶ 17, 577 N.W.2d 575, 580 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991)).

Braiden was convicted of aggravated assault for "attempt[ing] by physical menace with a deadly weapon to put another in fear of imminent serious bodily harm." SDCL § 22-18-1.1(5). Aggravated assault is a class 3 felony punishable by up to 15 years in the South Dakota State Penitentiary, a $50,000 fine, or both. SDCL § 22-18-1.1; SDCL § 22-6-1. Braiden's 15 year sentence is SDCL § 22-18-1.1's statutory maximum. Although this Court has recognized that "a sentence within the statutory maximum will rarely be disturbed," the absence of aggravating circumstances and the existence of "mitigating

qualities of youth" illustrate the sentence's gross disproportionality. *State v. Moran*, 2015 SD 14, ¶ 22; *Springer*, ¶ 14, 856 N.W.2d at 465-66; *Bonner*, ¶ 17, 577 N.W.2d at 480.

Braiden was a 16-year-old kid at the time of the offense. Victim T.Y. admitted that "We were – he was messing around" when the gun went off. T.Y. also admitted that no one was mad, angry, or upset prior to the gun's discharge and that he didn't believe Braiden meant to hurt anyone. T.Y. was not injured. When the police arrived T.Y. and Braiden were standing together in the driveway. At no time did Braiden attempt to or actually leave the McCahren property. Braiden immediately told law enforcement that he was the shooter.

When the incident occurred, Braiden's executive functioning capabilities were diagnosed to be at the level of an 11- or 12-year old child. TT. 256:15-260:16; 300:22-302:11. Dr. Price and Dr. Swenson explained that Braiden's "tendency to act without reflection" and his inability "to understand the consequences of [his] actions [impacting] other people" was both a symptom and a product of his clinical diagnosis of delayed frontal lobe development and attention deficit/hyperactivity disorder. TT. 263:4-6; 263:21-264:22; 301:12-303:11. Licensed Psychologist Dr. Price noted that Braiden's impulsivity level was atypical, and much higher than any level he had seen in someone Braiden's age "in quite some time." TT. 301:20-303:11.

At Sentencing, the circuit court discounted and second-guessed Dr. Price and Dr. Swenson's diagnoses of Braiden's psychological deficiencies active at the time of the incident.

> The Court: The most important consideration in mitigation of sentence is the possibility of rehabilitation. It's been testified to through the testimony at the transfer hearing of Dr. Price and Dr. Swenson that Braiden, at the time of the incident, because of his developmental issues, potential head

> injuries and genetic makeup, faced some circumstances that presented him as significantly immature with respect to others of his age.
> It was testified that this is something that typically someone may grow out of. I would hope that would be the case, and yet there are no guarantees in that regard.

S. 60:16—61:33.

Instead, the circuit court inflated Braiden's juvenile history and reiterated its personal belief that Braiden had not exhibited the requisite level of remorse. The trial court is not free to ignore the mitigating qualities of youth expressed by the U.S. Supreme Court in *Miller* and accepted by this Court in *Springer.*

Since December 18, 2012, Braiden has been labeled a cold-blooded, premeditated killer. After hearing all of the evidence, including the testimony challenging the credibility and believability of T.Y., the jury returned a verdict contrary to this characterization. The jury verdict must be read as a whole. The not-guilty verdict on First Degree Murder confirmed that the jury did not believe all of T.Y.'s version of events. If they had, Braiden would have been convicted of First Degree Murder. The jury's rejection of T.Y.'s account that had Braiden loading the gun, pointing it at him, and pulling the trigger is inconsistent with a maximum sentence for aggravated assault. As the trial court itself stated "…I don't believe that Braiden intended to take the life of Ty or Dalton. S. 59:9-10. The trial court's explicit acknowledgment is irreconcilable with a maximum sentence for aggravated assault.

In this case, imposition of the maximum statutory sentence violated Braiden's right against cruel and unusual punishment.

CONCLUSION

The amount of and cumulative nature of the constitutional violations present in this matter defeats any suggestion that there is "beyond a reasonable doubt" that the constitutionally deficient evidence did not impact the jury's verdict. *Larson*, 512 N.W.2d at 735 (quoting *Schuster*, 502 N.W.2d at 570–71). The State itself acknowledged that "[i]t's impossible for either myself or the Defense to sit here and say what the jury believed is true or not . . ." S. 19:5-6. Therefore, based upon the foregoing and this Honorable Court's duty to uphold the tenets of the U.S. and South Dakota Constitution, Braiden's Second Degree Murder conviction must be vacated due to constitutional violations and evidentiary insufficiency. The conviction must be vacated and not remanded because Braiden was never charged with Second Degree murder and the Jury returned a Not Guilty Verdict on the charged First Degree murder offense. Furthermore, this Honorable Court is respectfully requested to reverse and remand for a new trial on Aggravated Assault due to the trial court's unconstitutional admission of Waller's statements and T.D.'s testimony. Alternatively, Braiden respectfully requests this Honorable Court remand the Aggravated Assault conviction for sentencing consistent with *Miller*, *Springer*, the jury's explicit rejection of T.Y.'s version of events, and the undisputed testimony by Dr. Price and Dr. Swenson.

Respectfully submitted this 13th day of May, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellant's Brief and all appendices were mailed by first class mail, postage prepaid to:

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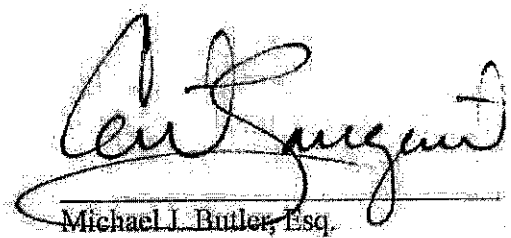
On this 13th day of May, 2015.



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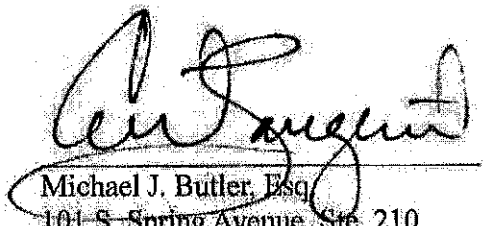
CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the May 5, 2015 Order Granting Motion for Permission to File Overlength Appellant's Brief. This brief was prepared using Microsoft Word, and contains 11,971 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 13th day of May, 2015.



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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27325

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

BRAIDEN McCAHREN,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN L. BROWN
Presiding Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed January 15, 2015

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27325

STATE OF SOUTH DAKOTA,

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Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff and Appellee, State of South Dakota, is referred to as "State." Defendant and Appellant, Braiden McCahren, is referred to as "Defendant." The settled record is denoted "SR." The transcripts are identified as: jury trial – "JT"; motion hearings – "MH", followed by the date of hearing. Other hearings are identified by name and date of hearing. The State's jury trial exhibits are referred to as "State's Exh."

JURISDICTIONAL STATEMENT

The State concurs that this Court has jurisdiction in this appeal.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT ERRED IN GIVING A LESSER-INCLUDED OFFENSE INSTRUCTION ON SECOND-DEGREE MURDER?

The trial court instructed on lesser-included offenses.

Schmuck v. United States, 489 U.S. 705 (1989)

State v. Hart, 1998 S.D. 93, 584 N.W.2d 863

State v. Hoadley, 2002 S.D. 109, 651 N.W.2d 249

State v. Waloke, 2013 S.D. 55, 835 N.W.2d 105

SDCL 22-16-20.1

SDCL 22-16-20.2

SDCL 23A-26-8

U.S. Const. amend. VI

II

WHETHER THE TRIAL COURT'S LIMITATIONS ON CROSS-EXAMINATION REGARDING T.D.'S MENTAL HEALTH HISTORY DENIED DEFENDANT HIS RIGHT TO CONFRONTATION?

The trial court limited Defendant's cross-examination regarding T.D.'s mental health history and specific instances of conduct.

State v. Honomichl, 410 N.W.2d 544 (S.D. 1987)

State v. Jolley, 2003 S.D. 5, 656 N.W.2d 305

State v. Steichen, 1998 S.D. 126, 588 N.W.2d 870

State v. Walton, 1999 S.D. 80, 600 N.W.2d 524

U.S. Const. amend. VI

III

WHETHER THE COURT PROPERLY REFUSED TO SUPPRESS DEFENDANT'S STATEMENTS MADE TO T.D. WHILE THEY ROOMED TOGETHER AT THE JUVENILE FACILITY?

The trial court denied Defendant's motion to suppress.

State v. Heney, 2013 S.D. 77, 839 N.W.2d 558

State v. Rosales, 2015 S.D. 6, 860 N.W.2d 251

United States v. Ceccolini, 435 U.S. 268 (1978)

Wong Sun v. United States, 371 U.S. 471 (1963)

U.S. Const. amend. V

U.S. Const. amend. VI

IV

WHETHER THE COURT PROPERLY REFUSED TO SUPPRESS DEFENDANT'S STATEMENTS MADE TO OFFICER WALLER WHILE ON THE SCENE IMMEDIATELY AFTER THE SHOOTING?

The trial court denied Defendant's motion to suppress.

Miranda v. Arizona, 384 U.S. 436 (1966)

State v. Bartunek, 323 N.W.2d 121 (S.D. 1982)

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

State v. Herting, 2000 S.D. 12, 604 N.W.2d 863

SDCL 26-7A-15

U.S. Const. amend. V

V

WHETHER DEFENDANT'S MAXIMUM SENTENCE OF FIFTEEN YEARS FOR AGGRAVATED ASSAULT WAS CRUEL AND UNUSUAL PUNISHMENT?

The trial court did not rule on this issue.

State v. Bonner, 1998 S.D. 30, 577 N.W.2d 575

State v. Coleman, 2015 S.D. 48, 865 N.W.2d 848

State v. Garreau, 2015 S.D. 36, 864 N.W.2d 771

State v. Schmidt, 2012 S.D. 77, 825 N.W.2d 889

SDCL 22-6-1

SDCL 22-18.1.1

U.S. Const. amend. VIII

STATEMENT OF THE CASE

The State concurs with the case history presented in Appellant's Brief. Additional procedural history will be provided in the argument section, as necessary.

STATEMENT OF FACTS

On December 18, 2012, sixteen-year-old Defendant was hanging out after school with two of his friends, Tyus Youngberg and Dalton Williams, who were also sixteen. JT 457, 460, 496. After driving around they stopped by Defendant's house in Pierre to get something to eat. JT 462.

Defendant and Tyus got into an argument about an incident that happened the prior year after a paintball game. *Id.* The paintball gun was in Defendant's vehicle and accidently discharged, firing a paintball into the touchscreen of the dash and damaging it. *Id.* During the argument Defendant blamed Tyus for causing the paintball gun to go off, but Tyus insisted he did not do it and said it was the

result of Defendant and another friend wrestling over the paintball gun. JT 463. Defendant and Tyus continued to argue back and forth, similar to the way the friends had argued in the past; at that point they were joking and "messing around." JT 464, 519.

It soon turned deadly serious.

At the time, the boys were all in the kitchen. Defendant went to the front hallway and retrieved one of the shotguns from the gun rack by the front door. JT 466, 478; State's Exh. 5B. It was a 20-gauge Benelli semiautomatic shotgun, one of several weapons in the McCahren home, as they were avid hunters. State's Exh. 50; JT 497-98, 703-06.

Defendant came around the corner into the kitchen and was about ten to twelve feet away from Tyus. JT 466. Defendant shouldered the gun, pointed it at Tyus and pulled the trigger, but it only "clicked." *Id.* Tyus called him a name and started moving through the kitchen. JT 467.

Tyus watched as Defendant then opened a kitchen drawer and pulled out a live 20-gauge shotgun shell. JT 468. He loaded the shell into the shotgun and pointed it at Tyus again. *Id.*; *see* Transfer Hearing(9/6/13) Defendant's Exh. M at 24 (transcript of interview).

By that time Tyus became scared and headed toward the sliding door leading outside. JT 468-69, 482; State's Exh. 184. He heard the shotgun "click" again, but it did not fire. JT 469, 481. Tyus tried to

open the sliding door but could not. JT 470. He turned around, thinking he would try to escape out another door. *Id.*

Defendant stood between him and the front door, approximately five to ten feet away, and Dalton was positioned right in front of Tyus as they both faced Defendant. JT 484, 720; State's Exh. 185. Tyus put his hands on Dalton's shoulders to move him as he went past. JT 470. At that moment Defendant pulled the trigger again and this time the gun fired. JT 484; State's Exh. 174A at 3. The shot missed Tyus but instead hit Dalton, passing through his raised wrist and into the center of his chest. JT 440, 484, 523. The shotgun pellets scattered throughout Dalton's chest cavity, causing significant internal damage. JT 435.

Tyus ran past Defendant and out the front door. JT 485. Dalton stumbled forward and collapsed in the hallway near the front door. JT 486; State's Exh. 5. He lay on the floor, bleeding and gasping for air. JT 421-24.

Outside, Tyus immediately called 911. JT 485. He saw Defendant go in and out of the house a few times. JT 487. Defendant had to step over or around Dalton to get past him. JT 579. While inside, Defendant gathered the 20-gauge Benelli, as well as all the other firearms from the gun rack, and took them downstairs to the basement, placing them in the gun cabinet. JT 478, 574, 578.

Law enforcement and paramedics arrived on the scene within minutes of the 911 call. JT 405, 419. Paramedics attended to Dalton, who was still alive. JT 421. Soon thereafter, Dalton's heart stopped beating and they performed CPR and transported him to the hospital. JT 424. He was declared deceased upon arrival. JT 425.

In the meantime, law enforcement talked to Tyus and Defendant, who were both standing outside, to find out what happened. MH(8/1/14) 220. Defendant identified himself as the shooter. *Id.* at 221. Officer Martin Waller of the Pierre Police Department interviewed him in the patrol car, while another officer interviewed Tyus separately. *Id.* While in the patrol car with Waller, Defendant made several statements about his involvement in the shooting. *See infra* pp. 25-26. After officers learned from Tyus that Defendant had loaded the shotgun before pulling the trigger, they decided to take Defendant into custody and transport him to the police station for further questioning. JT 623. He was later arrested and charged with first-degree murder. SR 1.

Tyus was interviewed again at the police station approximately an hour later. JT 556; Transfer Hearing(9/6/13) Defendant's Exh. M (transcript of interview). As he had previously told the officer on the scene, he confirmed that he saw Defendant get the shell out of the drawer and load the shotgun before firing it the second time. JT 558, 623. However, that night Tyus said he thought the shooting was an

accident and he did not believe Defendant's actions were intentional. JT 491, 559. That is because Tyus believed the Benelli shotgun Defendant used was a 12-gauge, and Tyus did not think the 20-gauge shell would work. JT 547, 559. It was only months later, prior to one of the hearings, that Tyus learned from the state's attorney that the weapon was indeed a 20-gauge. JT 491-92, 581. His reaction was shock and disbelief. *Id.* Tyus never wavered, however, in his statement that he saw Defendant load a shell into the shotgun. JT 494, 550, 558, 580.

Early in the case, the court granted the State's motion (agreed to by Defendant) for a psychological evaluation to determine whether Defendant was a danger to himself or the community. MH(2/6/13) at 2-3; SR 26. Defense counsel and the prosecutor, Max Gors, thereafter corresponded regarding the scope of the exam to be completed by clinical psychologist, Dr. Kari Scovel, in Rapid City. SR 87-89.

Then in custody, Defendant was transported to Rapid City for the evaluation and placed in the Western S.D. Juvenile Service Center (WSDJSC). While there he shared a cell with another juvenile, T.D. Their placement together was random; law enforcement investigators had no involvement in their cell placement. SR 744. During this time Defendant made numerous statements to T.D. about how and why he shot Dalton. JT 817-23. He relayed details of what occurred before, during and after the shooting. *Id.* Defendant told T.D. the reason he

shot at Tyus was because he was still upset at him over the paintball incident. JT 822. Defendant seemed unconcerned, and described the shooting by joking and laughing. JT 821-23.

Defendant told T.D. the shooting was not an accident, but Defendant wanted it to appear so. JT 822. He said he wanted to be a lawyer and have a sign that said, "The lawyer that got away with murder." JT 823. He also said he wanted to put a sign on his pickup with a picture of a 20-gauge gun with the saying, "It's taken many lives. Watch out. You'll be next." JT 838.

T.D. had no previous knowledge of the murder, or any of the details, until Defendant told him about it. JT 839. After T.D. left WSDJSC, he went to another juvenile facility. Approximately a month later, he told facility staff he wanted to talk to law enforcement because he had information about Defendant's case. JT 844. On April 26, 2013, he was interviewed by DCI Agent Sam Kavanaugh. *Id.* Kavanaugh did not offer, and T.D. did not seek, anything in exchange for his information. MH(7/31/14) 81-82. T.D. relayed what Defendant told him at WSDJSC. While all the information was not entirely consistent with the investigation, T.D. did know details that had not been publicly released. *Id.* at 83; JT 845-46.

STANDARD OF REVIEW

Defendant raises several constitutional claims. This Court has held:

> [A]n alleged violation of a constitutionally protected right raises a question of law, requiring de novo review. . . . Factual findings of the lower court are reviewed under the clearly erroneous standard, but once those facts have been determined, the application of a legal standard to those facts is a question of law reviewed de novo.

State v. Heney, 2013 S.D. 77, ¶ 8, 839 N.W.2d 558, 561-62 (internal citations omitted).

ARGUMENTS

I

THE TRIAL COURT DID NOT ERR IN GIVING A LESSER-INCLUDED OFFENSE INSTRUCTION ON SECOND-DEGREE MURDER.

A. Background.

After all the evidence was in and during the settling of final jury instructions, the State requested that lesser-included offense instructions on second-degree murder and first-degree manslaughter be given, citing SDCL 22-16-20.1. JT 1005-06.

Defendant objected to the giving of any lesser-included instructions, claiming lack of notice. JT 1007-08. He requested, however, that if the court instructed on first-degree manslaughter, it should also instruct on second-degree manslaughter, citing SDCL 22-16-20.1 and 22-16-20.2. JT 1008.

The court noted the lesser-included offenses "have always been out there and available" and there should be no surprise the instructions were proposed. The court found the evidence supported

the instructions and ruled that instructions on all three lesser-included offenses of first-degree murder would be given. JT 1010-12. The parties discussed the pattern instructions to be used; Defendant did not seek additional time to offer non-pattern instructions. JT 1012-14.

After the jury found Defendant guilty of second-degree murder, he filed a Motion for Judgment of Acquittal. SR 632. The court ruled there was "some evidence" presented at trial warranting submission of the instruction to the jury and denied the motion. MH(11/7/14) 31. Findings and conclusions were entered. SR 726-33.

B. Based On Statutory Authority, Case Law, And The Record In This Case, Defendant Had Notice That Lesser-Included Offense Instructions Could Be Given.

Defendant challenges the court's decision to instruct the jury on the lesser-included offenses over his objection. He raises due process claims in terms of denial of his rights: to testify in his own defense; to propose additional (non-pattern) jury instructions explaining the various homicide offenses; and to call witnesses on his behalf. But these are not the true issues. Defendant was not *prevented* from doing any of these things. Rather, the basis for all his claims can be distilled into this: Did Defendant have sufficient notice that lesser-included instructions could be given in this case, such that he was constitutionally apprised of the nature of the charges against him?

Related is another question: Was it proper for the court to instruct the jury on offenses not charged in the indictment?

The State submits the answer to both is "yes." Notwithstanding Defendant's protests of surprise, he was indeed provided constitutionally sufficient notice of the charges against him and the trial court did not err in giving the instructions.

1. Statutes.

In homicide cases, lesser-include offenses are statutorily set forth:

> Murder in the second degree is a lesser included offense of murder in the first degree. Manslaughter in the first degree is a lesser included offense of murder in the first degree and murder in the second degree. Manslaughter in the second degree is a lesser included offense of murder in the first degree, murder in the second degree, and manslaughter in the first degree.

SDCL 22-16-20.1. Furthermore, the Legislature established that:

> A lesser included offense instruction shall be given at any homicide trial whenever any facts are submitted to the trier of fact which would support such an offense pursuant to this chapter. The state and the defendant each have the separate right to request a lesser included offense instruction. The failure to request a lesser included offense instruction constitutes a waiver of the right to such an instruction.

SDCL 22-16-20.2. These statutes, enacted in 2005, are a codification of lesser-included offense principles regarding homicide cases. In addition, SDCL 23A-26-8 (Rule 31(c)) is also relevant. It reads:

> A defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit

> either the offense charged or an offense necessarily included therein if such attempt is an offense.

2. Brief history of lesser-included offense doctrine.

The concept of lesser-included offenses—or more specifically, the concept of giving a jury the option to convict a defendant of an offense not charged in the indictment—is derived from common law. This common law has existed for centuries and pre-dates the United States Constitution. *See* James Shellenberger and James Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. 1, 97-103 (1995). Its rationale is explained in *Beck v. Alabama*:

> At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged.[ ] This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged. See 2 C. Wright, Federal Practice and Procedure § 515, n. 54 (1969). But it has long been recognized that it can also be beneficial to the defendant because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal.

447 U.S. 625, 633 (1980).

South Dakota codified the concept statutorily in 1865. *See State v. Stumbaugh*, 132 N.W. 666, 670 (S.D. 1911); *People v. Odell*, 46 N.W. 601, 602 (Dakota 1875) (citing Code of Crim. Proc. § 402, which contains, in relevant respects, the same language as in current SDCL 23A-26-8). The federal government enacted its version of the statute

in 1872. *Schmuck v. United States*, 489 U.S. 705, 718-19 (1989) (referring to Fed. R. Crim. P. 31(c) and its predecessor).

This Court has long relied on SDCL 23A-26-8 and its predecessors when discussing the propriety of instructing on offenses other than those contained in the indictment.[1] The question was never whether the law *allowed* a jury to be instructed and convict on a lesser-included offense, but rather, under what circumstances. Over the years case law evolved in our courts, as well as state and federal courts throughout the nation, with differing and sometimes inconsistent results. *See* Honorable Tim Tucker, *State v. Black: Confusion in South Dakota's Determination of Lesser Included Offenses in Homicide Cases*, 41 S.D.L. Rev. 465 (1996). This evolution is particularly evident in this Court's decisions regarding homicide cases. *Compare, e.g.,* several of the cases cited in n.1, *supra* (mandating that manslaughter be instructed as a lesser-included offense of murder) with *State v. Waff,* 373 N.W.2d 18 (S.D. 1985) (recognizing a legal/factual test for lesser-included offenses and overruling prior inconsistent precedent to the extent it mandated such instructions). The law continued to develop, largely focusing on the legal prong of the test. *See Black II,* 506 N.W.2d at 742 (establishing corpus delicti test). The factual-prong requirement that a lesser-included offense

[1] *See, e.g., State v. Hubbard*, 104 N.W. 1120 (S.D. 1905); *State v. Godlasky*, 195 N.W. 832 (S.D. 1923); *State v. Lewis*, 244 N.W.2d 307 (S.D. 1976); *State v. Black*, 506 N.W.2d 738 (S.D. 1993) ("*Black II*").

instruction be supported by the evidence at trial has historically been present. *See generally,* Tucker, 41 S.D.L. Rev. 465.

Finally, in 2002 this Court abandoned its prior tests, which were described as "confusing and problematic." *State v. Hoadley,* 2002 S.D. 109, ¶ 58, 651 N.W.2d 249, 262 (Konenkamp, J., writing majority opinion on this issue). The Court adopted the "elements test" and held "a lesser-included offense instruction should be given when (1) the elements test is met and (2) some evidence in support of such instructions exists in the record." *Id.* ¶ 64, 651 N.W.2d at 264. The Court declared that the offenses of second-degree murder, as well as first-degree and second-degree manslaughter, all met the elements test as lesser-included offenses of first-degree murder. *Id.*

Three years later the Legislature enacted SDCL 22-16-20.1 and 22-16-20.2. This Court recently described these statutes in *State v. Waloke:*

> [T]he Legislature validated [the Court's approach] and simplified the application of the elements test in homicide cases by codifying the possible lesser included offenses for various degrees of murder and manslaughter. The Legislature also codified the requirement that a trial court conduct a factual analysis before a lesser included offense instruction is given to the jury.

2013 S.D. 55, ¶ 29, 835 N.W.2d 105, 113-14 (cites and footnotes omitted). The Court maintained the "some evidence" rule for purposes of the factual analysis that must be done. *Id.* at ¶ 30, 835 N.W.2d at 114.

As relevant here, this legislation codified (at least) three principles: (1) the possible lesser-included offenses available in a first-degree murder trial are conclusively established, and second-degree murder is one of them; (2) a lesser-included instruction *shall* be given whenever the facts at trial support it[2]; and (3) either party may request such an instruction.

This last principle, called mutuality, is not new. Mutuality means that the prosecutor has as much right as the defendant to request such instructions. Indeed, this is consistent with the very origins of lesser-included offenses. *Schmuck*, 489 U.S. at 717 n.9 (interpreting Fed. R. Crim. P. 31(c) and citing *Beck*, 447 U.S. at 633). Thus, an instruction may be given even if a defendant objects. *State v. Cook*, 319 N.W.2d 809, 813 (S.D. 1982) (a defendant cannot preclude the giving of a proper lesser-included instruction, even if it interferes with the defendant's strategy of forcing an "all-or-nothing" verdict).

C. *Defendant Was Not Deprived Of His Constitutional Right To Be Apprised Of The Charges Against Him.*

Defendant does not claim second-degree murder, or any of the other instructed offenses, are not lesser-included offenses of first-degree murder. Nor could he. Rather, he seems to argue that the trial

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[2] "Shall" has a mandatory meaning. SDCL 2-14-2.1. But it also must be considered in the context of the balance of the statute. *South Dakota State Federation of Labor AFL-CIO v. Jackley*, 2010 S.D. 62, ¶ 25, 786 N.W.2d 372, 379. Under SDCL 22-16-20.2, the facts at trial must warrant the instruction.

court should not have instructed on offenses not charged in the indictment, and he had no constitutionally sufficient notice the court would do so.

1. Right to notice.

Clearly, an accused is entitled to be informed of the nature and cause of the accusation against him. U.S. Const. amend. VI. A properly plead indictment certainly provides notice of the charged offense. But that same indictment also puts a defendant on sufficient constitutional notice that he may be called to defend against *uncharged* offenses that are lesser-included. *United States v. Walker*, 418 F.2d 1116, 1119 (D.C. Cir. 1969); *United States v. No Neck*, 472 F.3d 1048, 1053 n.5 (8th Cir. 2007); *State v. Morris*, 316 N.W.2d 80, 83 (N.D. 1982); *see also State v. Ramirez*, 328 P.3d 1075, 1078 (Kan. 2014) (charging the greater offense satisfies due process notice requirements for lesser offense); *State v. Keffer*, 860 P.2d 1118, 1132 (Wyo. 1993); *People v. Cooke*, 525 P.2d 426, 428 (Colo. 1974) (defendant presumed to be on notice of lesser-included offenses); *State v. Brent*, 644 A.2d 583, 587 (N.J. 1994) (same, quoting Model Penal Code comments). These courts rejected claims that a lesser-included offense instruction deprived a defendant of his Sixth Amendment right to notice.

The United States Supreme Court affirmed this principle as well. In *Schmuck*, the Court adopted the "elements test" for lesser-included

offense instructions given under Fed. R. Crim. P. 31(c). The Court held that under this test, a defendant is given notice he may be convicted of either the charged offense or a lesser-included offense. 489 U.S. at 718; *see* Tucker, 41 S.D.L. Rev. at 491. *See also Paterno v. Lyons*, 334 U.S. 314, 320-22 (1948) (discussing, in another context, that an indictment provides constitutionally sufficient notice of lesser offense).

2. *State v. Lohnes.*

Defendant relies on *State v. Lohnes*, 324 N.W.2d 409 (S.D. 1982) to claim it was reversible error to have instructed on second-degree murder when Defendant was charged solely with first-degree murder. His reliance on *Lohnes* is misplaced.

The *Lohnes* Court relied on *State v. Reddington*, 64 N.W. 170 (S.D. 1895), which held the trial court should not have instructed the jury on depraved mind murder when the defendant was charged solely with premeditated murder. *Id.* at 173. The *Reddington* Court noted that one purpose of an indictment is to apprise the defendant of what he is charged with, and that "a plea of not guilty put only the allegations of the indictment in issue[.]" *Id.* at 173-74.

Writing the 3-2 majority opinion in *Lohnes*, Justice Morgan adopted this same reasoning after noting the defendant was convicted of second-degree murder, "an offense that he was never charged with

and which has distinctly different elements than first-degree murder." 324 N.W.2d at 412-13. The Court reversed and remanded for retrial.

Lohnes provides no support for Defendant's claims because its holding, like that in *Reddington,*[3] has questionable validity in light of other controlling decisions of this Court and changes in the law.

First, the *Lohnes* holding was premised largely on the fact the defendant was instructed on "an offense that he was never charged with." 324 N.W.2d at 412. Such language cannot be reconciled with the long-standing and firmly established lesser-included offense doctrine which permits just that. By their nature, lesser-included offenses are *never* charged in the indictment; otherwise they would be called alternative charges. Rather, they are presented to a jury as an option because they are "included" within the charged offense, and it is determined that the evidence presented at trial supports them. If Defendant's argument is correct—that a court cannot instruct on an uncharged offense—then there could never be a lesser-included instruction, at either party's request. Any discussion of *Lohnes* must take into consideration that it fails to address in any manner the

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[3] *Reddington* was not a lesser-included offense case. At that time murder was not divided into different degrees but was classified as an offense committed in three possible ways; one of these was premeditated murder and another was depraved mind murder. *Reddington,* 64 N.W. at 173. The Legislature first divided murder into different degrees (with different penalties) in 1980, the same year Lohnes committed his offense. *See* 1980 S.D. Sess. Laws ch. 173, §§ 9-12.

lesser-included offense doctrine, the long history of SDCL 23A-26-8, and this Court's case law approving instructions on lesser, uncharged offenses.

Second, the *Lohnes* Court noted only that second-degree murder had "different elements than first-degree murder." *Id.* at 412. There was no analysis of how the offenses might be considered under the "legal test" (or, for that matter, the "factual test") then in effect. *See Cook*, 319 N.W.2d at 813 (two-step test in effect in 1982). In any event, even the decision's limited reference to the elements of the offenses has no bearing today, in light of this Court's adoption of the elements test in *Hoadley* and the Legislature's enactment of SDCL 22-16-20.1 and 22-16-20.2. The legal issue of second-degree murder being a lesser-included offense of first-degree murder is definitively determined, and has been since at least 2002 when *Hoadley* was decided.

Finally, *Lohnes* cites only the general constitutional principle that a defendant is entitled to be apprised of the nature of the charges against him. There was no explanation of how or why a defendant fails to have adequate notice simply because he is confronted with a lesser-included offense.[4] The Court certainly did not address the body

[4] The State notes that lack of notice as an alleged constitutional deprivation was never raised as an issue in that appeal. Rather, the defendant challenged the instruction solely on the grounds it did not

(continued . . .)

of case law (*supra* pp. 17-18) that holds no constitutional violation exists in that instance. To the extent this Court may have held concerns about notice and the constitutional implications of lesser-included offenses, they were alleviated with the Court's adoption of the elements test in *Hoadley*. As the *Hoadley* Court acknowledged, "the elements test provides certainty and predictability in determining lesser-included offenses and is compatible with the constitutional principles of double jeopardy, due process, and notice[.]" 2002 S.D. 109, ¶ 66, 651 N.W.2d at 264 (quoting Tucker, 41 S.D.L. Rev. at 501). These principles certainly hold true regarding SDCL 22-16-20.1 and 22-16-20.2.

In light of the above, the continued viability of *Lohnes* is doubtful. To the extent it is inconsistent with the development of lesser-included-offense law by this Court and the Legislature, it should be overruled.

D. Defendant's Claim of Lack Of Timely Notice Rings Hollow.

Defendant was on notice of the possible lesser-included offenses from the indictment itself, this Court's jurisprudence and state statutes. Moreover, he cannot claim surprise that lesser-included offenses were offered in this case.

(. . . continued)
meet the legal or factual tests. *See* briefs of the parties in *State v. Lohnes*, S.Ct. #13572 (judicial notice requested).

The topic of lesser-included offenses was referred to as early as February 2014 during the second transfer hearing. *See* Second Transfer Hrg.(2/18/14) 27-28, 42. It was raised again after the State filed a pretrial motion to exclude any lesser-included offense instruction on second-degree manslaughter, in the event Defendant were to request it. SR 544. At a hearing eleven days before trial, Defendant's counsel, Mr. Butler, argued against the motion:

> Well, one, it's certainly premature to ask the Court to preemptively rule now on whether there will be evidence of recklessness introduced in the course of the proceedings. *On that basis alone the motion should certainly be deferred until settlement of jury instructions.* . . . [T]he law now as codified by the legislature and recognized and explained in *State v. Waloke*[.] The sole test on homicide lesser includeds, it says there's some evidence that would support giving of it.

Pretrial Conf.(9/4/14) 3-4 (emphasis added). Arguing that the giving of an instruction would depend on the evidence at trial, counsel stated, "I think it's premature to ask the Court to rule before the first witness is sworn in trial as to whether or not a lesser on second-degree manslaughter should be given or first degree, for that matter, until the time is appropriate." *Id.* at 5. The court agreed, ruling that "whether such an instruction will be requested or whether any evidence at trial would tend to support such an instruction will await then for settling instructions at trial." *Id.* at 5-6. While the conversation did not address second-degree murder specifically, Defendant's counsel clearly was well-aware that a determination of which, if any, lesser-included-

offense instructions would be appropriate could not be made until after the trial evidence concluded.

Moreover, at a post-trial hearing Defendant's counsel admitted he anticipated the first-degree manslaughter lesser-included instruction. MH(11/7/14) 13. Defendant cannot have it both ways. He cannot claim he was aware of *one* of the lesser-included offenses identified in SDCL 22-16-20.1, but not *all* of them. Not after *Hoadley*, and not in light of the clear and unequivocal language of SDCL 22-16-20.1.

Furthermore, Defendant cannot complain the instructions were not offered until the settling of final jury instructions. As his counsel acknowledged at the pretrial hearing, only then (after all the evidence is in) is a court able to evaluate, under *Waloke*, whether "some evidence" was presented at trial warranting the lesser-included instructions. The State simply followed the court's directive in that regard.[5]

E. The Facts Supported A Lesser-Included Instruction On Second-Degree Murder.

Defendant argues there was an absence of evidence supporting a "depraved mind" murder instruction. He contends depraved mind is a "corrupt, perverted, or immoral state of mind constituting the highest

[5] The prosecutor also apparently took guidance from an off-the-record conversation with the court, in defense counsel's presence, at the pretrial hearing regarding the proper timing of submitting proposed lesser-included offense instructions. *See* JT 1008-09.

grade of malice [that equates] with malice in the commonly understood sense of ill will, hatred, spite or evil intent." Appellant's Brief 16 (citing *State v. Reed*, 120 P.3d 447, 454 (N.M. 2005)).

This is not the standard in South Dakota. Under the pattern instruction given below (SR 815), the phrase "evincing a depraved mind, regardless of human life" means "conduct demonstrating an indifference to the life of others, that is[,] not only disregard for the safety of another but a lack of regard for the life of another." *See* S.D. Crim. Pattern Jury Instruction 3-24-13; *State v. Primeaux*, 328 N.W.2d 256, 258 (S.D. 1982).

This language was approved again in *State v. Hart*, 1998 S.D. 93, 584 N.W.2d 863. There, the defendant proposed a jury instruction containing the language in *Reed*. *Id.* ¶ 11, 584 N.W.2d at 865. The trial court refused it and gave the South Dakota pattern instruction instead. On appeal this Court held the trial court's instruction was consistent with South Dakota law. *Id.* ¶ 16, 584 N.W.2d at 866. The Court also rejected the depravity definition used in death penalty cases, holding the term is different in that context. *Id.* ¶¶ 17-18 and n.4, 584 N.W.2d at 866-67 and n.4; *see State v. Laible*, 1999 S.D. 58, ¶ 13, 594 N.W.2d 328, 332.

This Court has reaffirmed that if a person acts "with 'a lack of regard for the life of another,' then that person can be convicted of second-degree murder." *Laible*, 1999 S.D. 58, ¶ 13, 594 N.W.2d at

332. Whether his conduct evinces a depraved mind "is to be determined from the conduct itself and the circumstances of its commission." *Id.* ¶ 14, 594 N.W.2d at 333.

Pointing a loaded gun at a person and pulling the trigger certainly demonstrates a lack of regard for the life of another. It has been described as "the paradigm of extreme indifference to human life." *Neitzel v. State*, 655 P.2d 325, 337 (Alaska Ct. App. 1982). This Court upheld a conviction for depraved murder in *State v. Lyerla*, 424 N.W.2d 908 (S.D. 1988). There, the defendant was travelling the interstate highway and fired his gun at the victims' vehicle from some distance away, killing one of the two occupants. The Court upheld the sufficiency of the evidence for depraved-mind murder. *Id.* at 913.

The facts here are even more egregious as Defendant was within feet of Tyus and Dalton, in a confined space in the kitchen. Evidence showed Defendant retrieved a shotgun, pointed it at Tyus and pulled the trigger. He then loaded it with a shell and "clicked" it a second time. Finally, Defendant again pointed the gun at Tyus and pulled the trigger. This time the gun fired, shooting a bullet that struck Dalton in the chest. *See* FOF & COL at SR 698-99.

While Defendant never took the stand at trial, his interview with Officer Waller was introduced. JT 613; State's Exhs. 174, 174A (audio and transcript). The evidence included Defendant's admission that he got the gun and pulled the trigger more than once. *Id.* He said he did

it because he was "trying to scare the shit out of [Tyus]" because of something Tyus had done to him. *Id.* He claimed in his statements to Waller that the gun wasn't pointed at Tyus but toward the wall, and that he thought the gun was unloaded. *Id.* But Tyus testified he personally saw Defendant take a shell out of the kitchen drawer and load it into the gun before pulling the trigger. JT 468, 494.

Even though the State presented evidence of premeditated first-degree murder, the evidence also supported an instruction on depraved-mind murder. As *Hart* explains, it was not necessary to show Defendant exhibited "vicious, malicious, hateful conduct." Appellant's Brief 18. Rather, the circumstances surrounding Defendant's actions demonstrate he acted with "a lack of regard for the life of others."

Courts have held this type of conduct shows an indifference to human life, and thus depraved murder. *See Neitzel*, 655 P.2d 325; *People v. Dellemand*, 205 A.D.2d 551 (N.Y. App. Div. 1994) (defendant, sitting 10 feet away, aimed gun at victim and pulled trigger three times; gun fired the third time); *Brinkley v. State*, 233 A.2d 56 (Del. 1967) (defendant was 6-8 feet away when he fired shots in decedent's direction, but not aimed directly at her, because he wanted to frighten her); *Hines v. State*, 227 So.2d 334 (Fla. Dist. Ct. App. 1969) (defendant pointed gun, "funning around" and joking, when gun went off); *People v. Wilkens*, 8 A.D.3d 1074 (N.Y. App. Div. 2004) (defendant

brought gun to scare victim and pulled trigger; court held jury could have determined shooting was impulsive and intended to frighten victim rather than kill him). Another court found depravity of mind existed where a defendant "pointed a rifle at his wife without knowing (and thus not caring) whether or not it was loaded, and then deliberately pulled the trigger." *Dellinger v. State*, 495 So.2d 197, 198-99 (Fla. Dist. Ct. App. 1986).

Based on this case law, as well as the entirety of the trial, there was "some evidence" that supported an instruction on second-degree murder, as the trial court found. JT 1011; SR 696-97.[6]

F. Defendant's Proposed Remedy Is Contrary To Law.

Citing alleged error in giving the instruction, Defendant asserts his conviction for second-degree murder should be vacated but not remanded for a new trial. His only rationale is that the jury acquitted him on first-degree murder and he was never charged with second-degree murder. Appellant's Brief 27, 45. He cites no authority.

That is not the proper remedy in the event this Court concludes the trial court erred in instructing on second-degree murder because

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[6] Defendant's reliance on *Bignall v. Texas*, 887 S.W.2d 21 (Tex. Crim. App. 1994) and *Arevalo v. Texas*, 943 S.W.2d 887 (Tex. Crim. App. 1997) is curious. Appellant's Brief 26. In *Bignall* the court reversed, holding a lesser-included instruction *should have been given* because some evidence was presented to support it. Moreover, *Arevalo* is no longer good law, having been overruled in *Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009). The *Grey* Court upheld a lesser-included instruction requested by the State and given over the defendant's objection.

Defendant lacked constitutionally adequate notice of that offense. Rather, the Court may reverse and remand for a new trial. Interestingly, this is the exact remedy granted in *Lohnes*, the case relied upon by Defendant. 324 N.W.2d at 413. (Because the jury expressly acquitted Defendant of first-degree murder, he may not, of course, be retried on that count.)

The United State Supreme Court considered this issue in *Price v. Georgia*, 398 U.S. 323 (1970), where a defendant was convicted of a lesser-included offense and succeeded in getting a reversal of the conviction because of an erroneous jury instruction. The Court held the defendant may properly be retried on the lesser offense. *Id.* at 327; *see also Montana v. Hall*, 481 U.S. 400, 402 (1987) (successful appeal of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on that charge).

II

THE TRIAL COURT'S LIMITATIONS ON CROSS-EXAMINATION REGARDING T.D.'S MENTAL HEALTH HISTORY DID NOT DENY DEFENDANT HIS RIGHT TO CONFRONTATION.

A. *Background.*

On Defendant's motion (SR 178), and after an *in camera* review, the trial court granted Defendant access to T.D.'s confidential juvenile records. These include adjudications, police reports, and reports by

staff and mental health professionals at juvenile facilities. SR 223-24, 301, 445. *See* Telephonic Hrg.(12/4/13) 9-13. Additionally, after an apparent email exchange with the court (not contained in the settled record), Defendant was given access to T.D.'s records from two additional mental health facilities, over the State's objection. SR 453, 455. At least some of the above records are contained in the file, identified as [Clerk's] Sealed Exhibits C, D.

The State and Defendant both filed pleadings relating to T.D.'s mental health history. SR 434, 532, 539. None of Defendant's pleadings identifies what particular evidence he sought to use, nor did he present the subject matter of his proffered character witness testimony.[7] It appears Defendant sought to cross-examine T.D. on specific instances of conduct and statements attributed to him in the various reports. MH(6/9/14) 42-48; Pretrial Conf.(9/4/14) 37-8. This includes statements he made to his mental health professionals for purposes of diagnosis and treatment. Defendant also sought to inquire as to T.D.'s psychiatric diagnoses and the criteria attributable to them, particularly as they relate to T.D.'s ability to be truthful.[8] *Id.*

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[7] Defendant filed a notice of character evidence regarding T.D. SR 532. He listed 57 potential character witnesses, some of whom were to purportedly testify about T.D.'s mental health issues (among other matters); most likely this would have involved specific instances of conduct in T.D.'s past.

[8] The documents at issue are sealed, as is the transcript of the July 31 hearing regarding this issue, at Judge Brown's direction.

(continued . . .)

The trial court denied Defendant's request to inquire into the specifics of T.D.'s mental health history, ruling that such evidence presented a "trial within a trial" as to T.D. and would lead to jury confusion. Pretrial Conf.(9/4/14) 41; JT 368; SR 551, 735. The court ruled that Defendant could present evidence of T.D.'s adjudications reflecting on veracity, and also call up to four witnesses to testify about his reputation for truthfulness. SR 551-52.

At trial, Defendant cross-examined T.D., who admitted multiple crimes of dishonesty. JT 824. This included stealing people's identity and using their credit cards, and stealing property. *Id.* He conceded he had testified about having "a lying problem," and admitted he may have said things in the past to brag or seek attention. JT 824, 831. T.D. acknowledged he assaulted Defendant while housed together at the juvenile facility, and lied to Agent Kavanaugh about the reason. JT 830-31.

In his case-in-chief Defendant called an impeachment witness, a juvenile facility doctor who testified about a statement attributed to T.D.; during cross-examination T.D. had denied making that statement. JT 836-37, 872-73.

(. . . continued)
MH(7/31/14) 3-4, 68; SR 564. Consequently, Appellee will not recite the contents of those materials, including the particular events or statements described therein and T.D.'s mental health diagnoses and treatment. Suffice it to say that T.D. had a troubled past, marked predominantly with anger, self-harm and substance abuse issues. He also had instances of lying and deceitfulness.

Defendant also called T.D.'s father, who testified about T.D.'s history of thefts, drug use, and loss of employment due to crimes of dishonesty, including the specific details. JT 875-76. When asked his opinion on T.D.'s truthfulness, the father said, "He lies quite a bit, at least 80 to 90 percent of the time." JT 877.

B. Defendant's Constitutional Right To Confrontation Was Not Violated.

On appeal, Defendant contends the trial court's limitation on cross-examination violated his Sixth Amendment right to confrontation. U.S. Const. amend. VI. A defendant has a constitutional right to confrontation, including cross-examination. This Court has held, however, that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *State v. Walton*, 1999 S.D. 80, ¶ 27, 600 N.W.2d 524, 531 (emphasis in original). The Court has further held:

> [t]he trial court retains broad discretion concerning the limitation of cross-examination and it will be reversed only when there is a clear showing of abuse of discretion and a showing of prejudice to the defendant. . . . The defendant has the burden of establishing that a reasonable jury probably would have a significantly different impression if otherwise appropriate cross-examination had been permitted.

Id. ¶ 25, 600 N.W.2d at 530 (internal quotations and citations omitted); *State v. Johnson*, 2007 S.D. 86, ¶ 35, 739 N.W.2d 1, 13.

While Defendant does not identify exactly what mental health history he sought to use, in his brief he states:

> It is undisputed that T.D.'s inability to properly perceive and process events, relay his observations accurately in court, and his motivation to exaggerate, fabricate or lie . . . is inherent in the predispositions and symptoms recognized in his mental illness diagnoses.

Appellant's Brief 30. Not only does Defendant fail to cite to the record in support of all these allegations, *as applied to T.D. particularly*, but the statement is misleading.

At most, Defendant's expert, psychiatrist Dr. David Bean, testified at the motion hearing regarding his review of T.D.'s records. MH(7/31/14) 123-59. Dr. Bean never evaluated nor personally diagnosed T.D. *Id.* at 151. He did testify about the general criteria for certain mental health diagnoses attributed to T.D. by other professionals in the reports.[9] Lying and deceitfulness is just one of the several criteria. Dr. Bean certainly did not testify (nor did anyone else) that T.D. had an "inability to properly perceive and process events." Appellant's Brief 30.

Furthermore, Defendant argues "T.D.'s diagnoses, and active psychoses, at the time he was incarcerated with [Defendant] was a central fact prime for discussion and inquiry on cross-examination."

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[9] The State submits that a careful scrutiny of T.D.'s sealed records is warranted to assess the exact nature of the diagnoses, the basis for them, and their relative relevance (or lack of relevance) to the issue of T.D.'s credibility.

Id. at 31. Again, the premise for Defendant's argument is unsupported. In fact, as acknowledged by Dr. Bean, the records show that T.D. did *not* have any psychoses. MH(7/31/14) at 158. *See also* Clinical Interpretive Summary dated 4/23/13 at 1 (in Clerk's Sealed Record C, Tab 4).

These points are important because they distinguish this case from the authorities cited by Defendant. He relies heavily on *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), which held it was reversible error to curtail cross-examination of the government's crucial main witness. The witness was diagnosed with schizophrenia and had a history of hallucinations and delusions. *Id.* at 1162. The Court noted the characteristics of the witness' diagnoses, including an impaired ability to observe and recollect actual events, and a memory distorted by delusions, hallucinations and paranoid thinking. *Id.* at 1160. Defendant cites a portion of this description in his brief (at 29), but neglects to say that the passage reflects the Court's description of a "litigious paranoiac" who may have a gross distortion of reality (*id.* at 1160), a situation not present here. The *Lindstrom* Court found that the witness' condition, and her central role as an insider to the scheme in bringing forward the criminal accusations against the defendants, had specific relevance to the facts at issue in the conspiracy prosecution. *Id.* at 1163.

Such is not the case here, and the federal cases Defendant relies on are not dispositive, including *United States v. Love*, 329 F.3d 981 (8th Cir. 2003) (government's sole eyewitness was diagnosed with schizophrenia as well as short- and long-term memory impairment; because his memory loss directly implicated his ability to recall and relate events, defendant should have been permitted to cross-examine). *Compare United States v. Jimenez*, 256 F.3d 330 (5th Cir. 2001) (witness' history of conduct order, hyperactivity, depression and attempted suicide did not affect his ability to comprehend and tell the truth; court's restriction on cross-examination did not violate confrontation rights).

Here, there is no legitimate issue regarding T.D.'s ability to comprehend or perceive what Defendant told him, or to relay the information to Agent Kavanaugh or the jury. While Defendant suggests T.D.'s medications may have played a factor, there is nothing in the record to substantiate that. Moreover, T.D. was taking no medications at the time he testified at trial. JT 825.

Rather, the focus of Defendant's claim is on T.D.'s ability to be truthful. He argues the court's ruling impermissibly prevented him from presenting evidence to the jury regarding T.D.'s lack of truthfulness. But this argument ignores the fact that Defendant was given wide latitude to cross-examine T.D. in that regard, and was allowed to introduce impeachment and character evidence. This

includes the testimony of T.D.'s own father, who provided not only his opinion of T.D.'s reputation for veracity, but also specific instances of conduct involving dishonesty. Defendant's attorney explored the matter of T.D.'s credibility during closing. JT 1056-57. It is obvious Defendant's hands were not "completely tied" by the court's ruling.

This Court has upheld a court's restrictions on cross-examination—and found no Confrontation Clause violation—where the defense was able to cross-examine and present evidence that provided the jury with the opportunity to assess credibility. *State v. Jolley*, 2003 S.D. 5, ¶¶ 29-30, 656 N.W.2d 305, 311-12 (Zinter, J., concurring specially); *State v. Steichen*, 1998 S.D. 126, ¶ 38, 588 N.W.2d 870, 878; *State v. Honomichl*, 410 N.W.2d 544, 548 (S.D. 1987).

In this case the jury heard plenty of evidence to gauge T.D.'s truthfulness. But more importantly, it heard critical testimony from Tyus, the surviving eyewitness with direct knowledge of the crimes. Defendant has failed to show prejudice and establish that "a reasonable jury probably would have a significantly different impression," had he been permitted to inquire into T.D.'s history even further. *Jolley*, 2003 S.D. 5, ¶ 30, 656 N.W.2d at 312; *Steichen*, 1998 S.D. 126, ¶ 38, 588 N.W.2d at 878. Defendant thus fails to establish a Confrontation Clause violation.

Finally, even if the Court were to find a constitutional deprivation exists, any error was harmless, for the same reasons cited

above. In light of the substantial cross-examination and impeachment evidence the jury did hear regarding T.D., as well as the direct eyewitness testimony from Tyus and other evidence presented at trial, it cannot reasonably be said that additional evidence regarding T.D.'s truthfulness would have changed the jury's verdict. *State v. Larson*, 512 N.W.2d 732, 735 (S.D. 1994).

III

THE COURT PROPERLY REFUSED TO SUPPRESS DEFENDANT'S STATEMENTS MADE TO T.D. WHILE THEY ROOMED TOGETHER AT THE JUVENILE FACILITY.

A. Background.

Defendant arrived at the WSDJSC on March 14, 2013. MH(7/31/14) 12. Beginning March 15, Defendant shared a cell with T.D., who then moved out on March 19. *Id.* at 18, 27. Defendant remained until his evaluation was completed, and returned to Hughes County on March 25. *Id.* at 13.

While at WSDJSC, Defendant underwent the court-ordered psychological evaluation by Dr. Scovel and her associate. They conducted three hours of interviews and nineteen hours of psychological testing over three days (March 15, 18, 21). SR 214; MH(6/27/13) at 26. During the interviews Dr. Scovel asked, and Defendant answered, questions about the circumstances surrounding the shooting and the allegations against him. *Id.* at 16, 28.

Defendant moved to exclude Dr. Scovel's testimony and report on the basis she exceeded the permissible scope of the evaluation. SR 84. The trial court denied the motion and also denied the transfer to juvenile court. SR 122, 221. After Defendant appealed to this Court, the Court reversed and remanded the transfer order, ruling that "Defendant's Fifth and Sixth Amendment rights were violated by breach of the agreement between the State and defense counsel on the scope of Dr. Scovel's examination of Defendant." SR 237.

The trial court held another transfer hearing without relying on Scovel's report or testimony, and again denied transfer. SR 294. The court barred the State's use of the Scovel report and testimony in any manner. SR 247. Defendant moved to suppress the statements he made to T.D. SR 299, 504. The court denied the motion. SR 504, 745.

B. Defendant Failed To Show The Voluntary Statements Defendant Made To T.D. Were The Product Of Illegal Governmental Activity.

This issue is not about the use of any statements obtained during Defendant's interviews with Dr. Scovel, which were determined by this Court to have violated Defendant's Fifth and Sixth Amendment rights. U.S. Const. amends. V, VI. Rather, Defendant seeks to suppress his statements about the crime, and his reaction to it, that he chose to disclose to his cellmate T.D., a non-law enforcement third-party witness. There was no State involvement in acquiring these statements; they were revealed to law enforcement by T.D. after he

voluntarily came forward a month after leaving WSDJSC. SR 744. Defendant claims, however, that these statements were "fruit of the poisonous tree" evidence related to the Scovel interviews.

The exclusionary rule prohibits the State's use of evidence obtained as a direct result of an illegal search and seizure, and also to other evidence derived from the improperly obtained evidence, or "fruit of the poisonous tree." *Heney*, 2013 S.D. 77, ¶ 9, 839 N.W.2d at 562. This principle is not limited to violations of the Fourth Amendment, but extends to violations of the Fifth and Sixth Amendments as well. *Nix v. Williams*, 467 U.S. 431, 442 (1984).

As the movant, Defendant bore the burden of proving that the statements law enforcement acquired from T.D. were tainted. "When the issue is whether challenged evidence is the fruit of a [constitutional] violation, the defendant bears the initial burden of establishing the factual nexus between the constitutional violation and the challenged evidence." *Heney*, 2013 S.D. 77, ¶ 11, 839 N.W.2d at 562. "Suppression is not justified unless 'the challenged evidence is in some sense the product of illegal governmental activity.' " *Id.* (quoting *Segura v. United States*, 468 U.S. 796 (1984)). Defendant must show that the illegality of the initial violation was the "but-for" cause of the discovery of the evidence. *Id.* ¶ 12.

Defendant failed to meet his burden of identifying "specific evidence demonstrating taint." *State v. Rosales*, 2015 S.D. 6, ¶ 13,

860 N.W.2d 251, 256. He spends the vast majority of his argument condemning Dr. Scovel's and Mr. Gors' actions, which are not at issue in this appeal. He then leaps to the conclusory statement that *all* of T.D.'s testimony is "derived," and thus tainted, from the primary illegality (breach of the agreement regarding the scope of the evaluation). Nowhere does he explain, with evidentiary support, how or why this is so. He proves no causal connection.

Defendant seems to be arguing that "but-for" his unconstitutional interviews with Dr. Scovel, he never would have roomed with T.D., which provided him the opportunity to talk about his crimes. But that is not the case. Defendant was at WSDJSC because of a valid court order, granted after his agreement to undergo a psychological evaluation in Rapid City. There has been no determination that the purpose of the evaluation was improper, only its ultimate scope. Even if Dr. Scovel had not expanded the scope of the interviews, some form of evaluation would have occurred regardless. Defendant would have still been at WSDJSC, roomed with T.D., and talked to T.D. about his crimes.

At most, Defendant suggests that the length of his stay at WSDJSC was somehow "elongated as a result of the constitutional rights violations." Appellant's Brief 34. This is untrue. Defendant began rooming with T.D. on Defendant's second day at WSDJSC (March 15), and told T.D. about the shooting soon thereafter. JT 818.

All of the challenged statements occurred before T.D. left on March 19. Thereafter, Defendant's evaluation continued and he left on March 25. Whatever length of time Defendant ultimately spent at WSDJSC had nothing to do with his statements to T.D.

Defendant presents nothing other than allegations that he was subjected to unconstitutional interviews, and then he talked about his crimes to T.D. Such bare assertions, without more, fall short of establishing a causal nexus demonstrating the statements were the fruits of illegal government activity and therefore tainted. *Rosales*, 2015 S.D. 6, ¶ 14, 860 N.W.2d at 257. On that basis alone, suppression was not warranted. *Id.*

C. Law Enforcement Obtained The Statements Through Means That Were Independent, And Sufficiently Attenuated, From Defendant's Interviews With Dr. Scovel.

Even if, *arguendo*, Defendant had shown the challenged statements were somehow tainted by his interviews with Dr. Scovel, the statements were still admissible because even the fruit-of-the-poisonous-tree doctrine recognizes that "original lawless conduct [does] not taint all evidence forever." *Heney*, 2013 S.D. 77, ¶ 9, 839 N.W.2d at 562. The independent source doctrine allows the admission of evidence obtained by means that are independent of any constitutional violation. *Id.* ¶ 15; *Murray v. United States*, 487 U.S. 533, 537 (1988). Challenged evidence may also be admissible if its discovery was "so attenuated as to dissipate the taint" of the initial

illegality. *Wong Sun v. United States*, 371 U.S. 471, 487 (1963); *United States v. Ceccolini*, 435 U.S. 268, 274 (1978). Both of these principles apply in this case.

Here, the critical point is that law enforcement obtained the statements—not from Defendant or Dr. Scovel or anyone related to her interviews with Defendant—but from an independent third-party witness who voluntarily came forward after Defendant willingly made statements to him. Both these acts are sufficient to purge any taint that may have existed from the initial interviews with Dr. Scovel.

Indeed, no matter what happened during his interviews with Dr. Scovel, Defendant chose to confide in T.D., and assumed the risk his statements might be repeated. His was an act of free will, uncompelled by the State and not directed to any State actor. This alone is sufficient to purge any taint. *Autry v. Estelle*, 706 F.2d 1394 (5th Cir. 1983).

Moreover, T.D. brought the evidence to the attention of law enforcement on his own free will as well. He was not given any promises or incentives to do so, nor did he ask for benefit. There was no law enforcement action involved in how the statements were obtained from Defendant, or how that information was ultimately discovered by law enforcement. SR 744. In the context of a fruit-of-the-poisonous-tree analysis, the United States Supreme Court has made a distinction between law enforcement's discovery of inanimate

physical evidence and the testimony of a live witness, particularly a third party. *Ceccolini*, 435 U.S. at 276-77. The Court found that the witness' free-will decision to relay information to law enforcement likely dissipates any taint that may have existed regarding the initial illegality involving the defendant. *Id.* The Court also found the purpose of the exclusionary rule—to deter law enforcement misconduct—is not served by suppressing such witness testimony. *Id.* at 277; *Michigan v. Tucker*, 417 U.S. 433, 449-50 (1974).

Here, the remedy for violating Defendant's rights during the interviews was already exacted—Dr. Scovel's report and testimony were suppressed. That is the remedy contemplated by the exclusionary rule. But it should not be extended to suppressing T.D.'s testimony. As the Court noted, preventing a third-party witness from testifying about relevant and material facts creates a "serious [obstruction] to the ascertainment of truth." *Ceccolini*, 435 U.S. at 277; *see Tucker*, 417 U.S. at 450 ("when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence"). Because the cost of excluding live-witness testimony is so great, the Court requires a closer, more direct link between the initial illegality and the testimony sought. *Ceccolini*, 435 U.S. at 278. In this case, that link simply does not exist. The trial court properly refused to suppress T.D.'s testimony.

IV

THE COURT PROPERLY REFUSED TO SUPPRESS DEFENDANT'S STATEMENTS MADE TO OFFICER WALLER WHILE ON THE SCENE IMMEDIATELY AFTER THE SHOOTING.

A. Background.

Upon arrival on the scene, officers interviewed Tyus and Defendant separately to try to learn what happened. Officer Waller told Defendant to have a seat in the patrol car. MH(8/1/14) 222. Waller knew only that there had been a shooting and Defendant was the shooter; at that point, he assumed it was an accident. *Id.* at 223, 238.

The two sat in the front seat of the vehicle. Defendant was not handcuffed and the doors were unlocked. *Id.* at 222, 224. He was never told he was not free to leave. *Id.* Defendant was upset and kept saying he was going to jail; Waller told him he was not. State's Exh. 174A at 4. At one point Waller thought Defendant was going to vomit, so he reminded him the door was unlocked and told him to get out if he needed to. *Id.* at 5.

The entire conversation did not last long. State's Exh. 174. Defendant had his cell phone with him. After some of the questioning, Waller had Defendant call his father, whom Waller spoke to and explained what was going on. *Id.* at 8-9; MH(8/1/14) 228.

Waller left Defendant alone in the vehicle and talked to the other officers. MH(8/1/14) 228. It was only then that Waller learned that Tyus said Defendant loaded the shotgun before pointing it at him and firing. *Id.* at 243-44. The decision was then made to take Defendant into custody and transport him to the police station for further questioning. *Id.* Another officer had Defendant get out of the patrol car, pat searched him, took his phone away, and put him in the back seat of the vehicle for transport.[10] *Id.* at 244-45.

B. Defendant's Statements Were Admissible Because He Was Not In Custody When He Made Them.

Defendant sought to suppress the statements made to Waller while they were in the patrol car on the scene. SR 466. The court denied the motion. SR 504.

Defendant claims his Fifth Amendment rights were violated because Waller did not immediately comply with the parental notification statute (SDCL 26-7A-15), nor advise Defendant of his *Miranda* warnings, before interviewing Defendant in the patrol car. *See* U.S. Const. amend. V. The entire premise of his argument is flawed, however, because those requirements apply only if a defendant

[10] Defendant's father arrived at the station approximately 2 1/2 hours later; any further interview of Defendant was denied at that time. MH(8/1/14) 250; *see* DCI Narrative Report at 8 (in sealed Presentence Investigation). Other statements Defendant made to law enforcement while being transported to the station and while waiting for his father to arrive were suppressed by the court. SR 498-500.

is *in custody*. Defendant was not in custody when Waller questioned him on the scene immediately after the shooting.

Under SDCL 26-7A-15, an officer "who takes a child into temporary custody . . . shall immediately, without unnecessary delay in keeping with the circumstances, inform the child's parents, guardian, or custodian of the temporary custody[.]" This Court has held that failure to comply with this statute may lead to suppression of statements made by the juvenile. *State v. Horse*, 2002 S.D. 47, ¶ 18, 644 N.W.2d 211, 221. But in order for this notice statute to apply, the juvenile must be in custody. *Id.* ¶ 19.

Moreover, it is clear that a person subjected to custodial interrogation by law enforcement must first be advised of his *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436 (1966). However, such warnings are required only when the person is "in custody or deprived of his or her freedom to leave," as judged by an objective view of the circumstances. *State v. Herting*, 2000 S.D. 12, ¶ 9, 604 N.W.2d 863, 865.

It is well-established that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by [the *Miranda*] holding." *State v. Bartunek*, 323 N.W.2d 121, 124 (S.D. 1982) (citing *Miranda*, 384 U.S. at 477); *see also State v. Bowker*, 2008 S.D. 61, ¶ 31, 754 N.W.2d 56, 66. This Court explained the rationale in *Herting*:

> General on-the-scene questioning and fact gathering is absolutely essential for law enforcement officers to perform their jobs well and to investigate possible crimes. . . .
>
> When circumstances demand immediate investigation by the police, the most useful, the most available tool for such investigation is general on-the-scene questioning, designed to bring out the person's explanation or lack of explanation of the circumstances which aroused the suspicion of the police, and enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.

2000 S.D. 12, ¶ 10, 604 N.W.2d at 865-66 (internal citation omitted). In addition, the questioning is not converted to a custodial situation just because it occurs in a patrol vehicle. *State v. Gesinger*, 1997 S.D. 6, ¶ 21, 559 N.W.2d 549, 553; *State v. Deal*, 2015 S.D. 51, ¶ 18, 866 N.W.2d 141, 147.

Here, the circumstances surrounding Waller's general, on-the-scene questioning of Defendant in the patrol vehicle, viewed objectively, do not indicate he was "so deprived of his freedom as to be 'in custody' for *Miranda* purposes." *Deal*, 2015 S.D. 51, ¶ 18, 866 N.W.2d at 147. Because Defendant was not in custody during Waller's questioning at the scene of the crime, neither the parental notification statute nor *Miranda* applies. The court therefore properly denied the motion to suppress.

V

DEFENDANT'S MAXIMUM SENTENCE OF FIFTEEN YEARS FOR AGGRAVATED ASSAULT WAS NOT CRUEL AND UNUSUAL PUNISHMENT.

A. *Background.*

The jury declared Defendant guilty of second-degree murder for his killing of Dalton, and guilty of aggravated assault (physical menace with a deadly weapon) for his actions toward Tyus. SR 17, 625. For the murder count Defendant faced a possibility of up to life in prison. SDCL §§ 22-16-7, 22-16-12, 22-6-1(2); *see Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012). He was sentenced to twenty-five years, with fifteen suspended and credit for time served.

On the aggravated assault conviction, Defendant faced fifteen years for the class 3 felony. SDCL §§ 22-18.1.1(5), 22-6-1(6). The court sentenced Defendant to the fifteen-year maximum, to be served concurrently and with credit for time served.

By the time of trial and sentencing, Defendant (DOB 6/8/1996) was eighteen years old. He is parole eligible in March 2021, when he is almost twenty-five. SDCL 24-15A-32; *see* http://doc.sd.gov/adult/lookup/details/?id=38657 (last accessed on August 25, 2015) (judicial notice requested).

On appeal, Defendant challenges only his sentence for aggravated assault.

B. Defendant's Sentence Was Not Grossly Disproportionate.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. This Court reviews claims of Eighth Amendment violations under the gross disproportionality standard. *State v.*

Coleman, 2015 S.D. 48, ¶ 10, 865 N.W.2d 848, 851. This Court explained:

> [w]e first determine whether the sentence appears grossly disproportionate. To accomplish this, we consider the conduct involved[ ] and any [other] relevant . . . conduct. . . . If these circumstances fail to suggest gross disproportionality, our review ends. If, on the other hand, the sentence appears grossly disproportionate, we may, in addition to examining the other Solem factors, conduct an intra- and inter-jurisdictional analysis to aid our comparison or remand to the circuit court to conduct such comparison before resentencing. We may also consider other relevant factors, such as the effect upon society of this type of offense.

Id. ¶ 11, 865 N.W.2d at 851-52 (ellipses in original). The Court held that generally, "a sentence within the statutory maximum will not [be] disturbed on appeal." *Id.* (citing *State v. Bonner*, 1998 S.D. 30, ¶ 10, 577 N.W.2d 575, 578) (additional citation omitted).

As the Court explained in *Bonner*, it is a "rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." 1998 S.D. 30, ¶¶ 10, 27, 577 N.W.2d at 578, 582. This is true even where, as here, Defendant received the maximum possible sentence for the aggravated assault. This Court has upheld the constitutionality of maximum sentences as being "within the statutory limitations" established by the Legislature. *Id.* ¶ 27; *see State v. Schmidt*, 2012 S.D. 77, ¶ 41, 825 N.W.2d 889, 900; *Steichen v. Weber*, 2009 S.D. 4, ¶ 31, 760 N.W.2d 381, 394.

Defendant relies on *Miller v. Alabama* to argue that his sentence deserves special considerations because he was a juvenile when he committed the offense. But *Miller* and the related case, *Graham v. Florida*, 560 U.S. 48 (2010), are inapplicable to this sentence. As this Court noted in the juvenile sentencing case, *State v. Springer*, 2014 S.D. 80, ¶ 15, 856 N.W.2d 460, 466, *Graham* and *Miller* apply to juvenile sentences of life without parole, the harshest punishment possible short of the death penalty. That is far from the case here. These cases do not prevent a court from imposing a maximum sentence on a juvenile for a crime that does not call for life imprisonment.[11]

What this Court does consider in an Eighth Amendment disproportionality review is the gravity of the offense and harshness of the penalty. *Coleman*, 2015 S.D. 48, ¶ 17, 865 N.W.2d at 853. In *Coleman* the defendant received a lengthy sentence for aggravated assault against a police officer. In affirming the sentence, this Court recognized:

> [I]t is by no means the most severe punishment, or most egregious offense, under South Dakota law. The offense of first-degree murder carries the highest penalty, punishable by death or life without parole. SDCL 22–16–12; SDCL 22–6–1. Trooper Steen nearly died as a result of Coleman's actions. If he had done so, Coleman would have faced a potential murder charge. "Thus, [Coleman's] sentence is far

[11] The court did consider the *Miller* mitigating factors, which was required for the second-degree murder sentencing. Sentencing Hrg.(12/16/14) 59-60.

> from 'the most severe punishment that the State could have imposed on any criminal for any crime.'

Id. ¶ 18 (citing *State v. Garreau*, 2015 S.D. 36, ¶ 10, 864 N.W.2d 771, 775) (additional citation omitted).

In *Garreau*, the defendant received a twenty-five year sentence, the maximum possible for his crime of attempted first-degree murder. In upholding the sentence, this Court looked at examples of statutory maximum sentences authorized by the Legislature, including the death penalty (class A felony), life imprisonment (class A and C felonies), and fifty years imprisonment (class 1 felony). 2015 S.D. 36, ¶ 10, 864 N.W.2d at 775. The Court noted that although Garreau received the maximum sentence possible for his crime, it was substantially less than these other maximum sentences the Legislature has authorized. *Id.* Under the reasoning of *Garreau* and *Coleman*, Defendant's fifteen-year sentence cannot be considered excessively harsh.

This is particularly true in light of Defendant's conduct. He took a deadly weapon—a 20-gauge shotgun—pointed it at Tyus and pulled the trigger. He then loaded it with a shell, pointed it, and pulled the trigger again. All because he wanted to "scare the shit out of Tyus." Well, Defendant certainly succeeded.

This Court may properly consider other circumstances, including the fact that Defendant killed Dalton as a result of his actions, which the jury determined was done with a depraved mind

and a lack of regard for the life of another. Defendant's actions could have easily resulted in the death of Tyus instead, or even in addition.

Finally, Defendant's past conduct is also relevant, as reflected in the presentence investigation and the prior transfer hearing. The sentencing court noted that Defendant exhibited a considerable amount of reckless and dangerous conduct in his past, including his use of weapons. Sentencing Hrg.(12/16/14) 58. Some of these incidents include: putting a needle in a piece of bubble gum and giving it to a fellow student, and then showing a lack of remorse for the incident; shooting at other people's feet or near them with a 22-gauge rifle; shooting other kids with candy sprinkles using a pellet gun, resulting in visible injury; and threatening to shoot another individual the day before the incident occurred here. Findings of Fact [and] Conclusions of Law: Motion to Transfer at SR 277-94. The sentencing court also noted Defendant's failure to accept responsibility and lack of remorse for these and other incidents. Sentencing Hrg.(12/16/14) 58.

Based on the entire circumstances of this case, including the extreme dangerousness of Defendant's conduct, the potential and actual deadly consequences, and Defendant's past history, Defendant's fifteen-year sentence is not grossly disproportionate.

CONCLUSION

The State respectfully requests that the Second Amended Judgment and Conviction be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief uses Bookman Old Style typeface in 12 point type, and is within the word limitation authorized in this Court's *Order Granting Appellee's Motion to File Brief Exceeding Word Limitation* filed August 7, 2015. Appellee's Brief contains 11,343 words.

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

Dated this 27th day of August, 2015.

/s/ Patricia Archer
Patricia Archer
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of August, 2015, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Braiden McCahren* was served via electronic mail upon the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27325

State of South Dakota,
Plaintiff and Appellee,
v.
Braiden McCahren, DOB:06/08/1996,
Defendant and Appellant.

Appeal from the Circuit Court, Sixth Judicial Circuit
Hughes County, South Dakota

The Honorable John L. Brown
Circuit Court Judge

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Notice of Appeal filed on the 15th day of January, 2015

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I. Fundamental Right to Notice

a. Second Degree Murder Is Not A Fallback Position

To this day the State has refused to abandon its position that Braiden committed First Degree Murder. Despite the verdict to the contrary, the State continues to advance a version of events that involves Braiden intentionally loading, intentionally pointing, and intentionally pulling the trigger, resulting in Williams' death. Had the jury accepted these allegations as true, Braiden would have been convicted of both First Degree Murder and Attempted Murder. He was not convicted of either offense.

It cannot be disputed that there are distinct elements separating First Degree Murder from Second Degree Murder. Most notably, the difference between specific intent and general intent. The State, however, dismissed this distinction in its closing argument when it addressed Second Degree Murder for the first time in this case. The State flippantly and erroneously asserting in its closing that First Degree Murder means "he intended to kill Dalton with premeditation" and the "other ones there doesn't have to be any intent, but the law holds a person accountable for their actions." TT. 1024:11-1025:4. Defendant objected to this misstatement of the law, "Intent is required, general and specific, as to the different offenses." TT. 1024:18-21. Judge Brown replied to the objection, "That's been instructed on." TT. 1023: 22-23.

No further discussion was offered by the State until Defense counsel concluded his Closing Argument and was no longer able to address the jury. TT. 1022:22-1042:4. Armed with the new charge of Second Degree Murder, the State told the jury it was doing little more than providing the jury with options in the event "you go back there and you

look at the evidence and say, 'You know what? Murder in the first degree, I'm not going there,' your next question is murder in the second degree." TT. 1071:18-22.

State made no distinction between pulling the trigger of a gun knowing it to be loaded versus pulling the trigger of a gun you believe to be unloaded. Central to the defense was the real time evidence that Braiden checked the gun and believed that the gun was unloaded. General intent required proof that Braiden intended to fire a loaded weapon. Defense presented expert testimony on the phenomenon of "ghost loading" exclusive to the Benelli shotgun model. State simply asserted its premeditated murder theory and bookended it with Second Degree Murder language.

> Tell me an act, any act that's more imminently dangerous than pointing a gun at somebody, racking the action and pulling the trigger. I can't think of any that causes immediate death. That's depraved.
>
> I mean if I grab that gun right now and I stood up here and I was pointing at each one of you, racking the action, pulling the trigger, you'd think I was insane. Imminently dangerous.

TT. 1071:23-1072:5.

Finally, in its quest for a compromise verdict, State appealed to the jury's sympathies with the knowledge that all had heard the Williams' family audibly sobbing throughout trial.

> I didn't know Dalton Williams but if I ever seen him at some point in the future, I hope he says, "You did all right for me."

TT. 1073:3-5.

"[D]epraved mind murder is not a substitute for deliberate intent murder; it is not a fallback position available whenever the State fails to prove deliberation." *State v. Reed*, 120 P.3d 447, 455 (New Mexico 2005); *See People v. Roe*, 542 N.E2d 610, 619 (N.Y. 1989) (warning that depraved indifference murder should not provide prosecutors

with an unjust double opportunity for a top count murder conviction). State's Closing Argument and Rebuttal confirms not only that a compromise verdict was sought, but that an instruction on Second Degree Murder should never have been given and a Second Degree Murder conviction should not be sustained.

b. Constitutional Dimension of Notice Requirement

The State relies exclusively SDCL § 22-16-20.1 and SDCL § 22-16-20.2 in support of its contention that sufficient notice was provided to Braiden that the jury may be instructed on Second Degree Murder despite Braiden only being indicted for First Degree Murder. Relying on the statutes, State continues to dismiss Braiden's arguments regarding deprivation of notice pursuant to the federal and state constitutions. Consistent with both statute and practice, however, all state laws, including SDCL § 22-16-20.1 and SDCL § 22-16.20.2, are subordinate to the U.S. and South Dakota Constitution. SDCL § 1-1-23.

> The will of the sovereign power is expressed:
>
> (1) By the Constitution of the United States;
> (2) By treaties made under the authority of the United States;
> (3) By statutes enacted by the Congress of the United States;
> (4) By the Constitution of this state;
> (5) By statutes enacted by the Legislature;
> (6) By statutes enacted by vote of the voters;
> (7) By the ordinances of authorized subordinate bodies;
> (8) Rules of practice and procedure prescribed by courts or adopted by departments, commissions, boards, officers of the state, or its subdivisions pursuant to authority to do so.

SDCL §1-1-23.

Additionally, although enactment of SDCL § 22-16-20.1 and SDCL § 22-16-20.2 following *Hoadley* is historically accurate, it is not material to the procedural and factual

history of this case. A state statute does not supersede state or federal constitutional protections. SDCL § 1-1-23.

c. *Lohnes* Decision Controlling in Instant Case

In *Lohnes*, the juvenile-Defendant was charged with First Degree Murder. At the close of evidence and after the defense rested, the prosecution sought and received an instruction on Second Degree Murder. This Court reversed Lohnes' Second Degree Murder conviction because it was "an offense he was never charged with and which has distinctly different elements than first-degree murder." 324 N.W.2d 409, 412-13 (S.D. 1982). This decision affirmed the 1895 *State v. Reddington* decision which "held that it was reversible error to charge a defendant with murder with a premeditated design under one penal provision and instruct the jury under another penal provision." *Id.*

In support of Lohnes' Second Degree Murder conviction, State argued on appeal that "*Reddington* is ancient and not to be relied upon because the homicide statutes have changed." *Id.* State relied on the argument that only one degree of murder existed in 1895 and at the time of *Lohnes* "...murder with premeditated design is designated first degree, SDCL § 22-16-4, and murder perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of human life, but without any premeditated designed to effect the death of the person killed is second degree. SDCL § 22-16-7." *Id.* The Court rejected State's argument. *Id.*

State, in its attempt to discredit and reverse *Lohnes'* core constitutional notice holding, argued in this appeal that the homicide statutes have changed. This argument remains no less flawed than it was 33 years ago. Statutes addressing lesser included offenses have been added, but the definitions of First Degree Murder and Second Degree

Murder remain virtually identical to the statutes in effect in *Lohnes*. *Compare* SDCL § 22-16-4 with SDCL § 22-16-4 (1982 version) and SDCL § 22-16-7 with SDCL §22-16-7 (1982 version).

The legislative enactment of SDCL § 22-16-20.1 and SDCL §22-16-20.2 did not overrule this Court's decision in *Lohnes* which affirmed an accused's constitutional right to be apprised of the charges against him and to defend against those charges. For the same reasons articulated by the *Lohnes* Court, and because neither the state nor federal constitution has been amended to reflect otherwise, Braiden's Second Degree Murder conviction should be vacated.

d. True Lesser Included Offense Has One Less Element Than Charged Crime; State Cites No Case Law to the Contrary

> Under federal law an offense is not a lesser-included offense of another offense "unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no [lesser-included-offense] instruction is to be given...."

U.S. v. Barrett, --- F.3d ----, 2015 WL 4926800, *10 (10th Cir. 2015) (citing *Schmuck v. U.S.*, 489 U.S. 705, 716 (1989)).

This Court has recognized that Second Degree Murder, unlike First Degree Manslaughter, contains "a genuine additional element, [depraved mind], which must be established in order to prosecute for second-degree murder." *State v. Primeaux*, 328 N.W.2d 256, 258 (S.D. 1982). It is not, as the State argued at trial, a simple case of the absence of intent. As recognized by this Court, an additional element must be affirmatively proved. *Id.* The ability to commit First Degree Murder without committing Second Degree Murder precludes a lesser included instruction for Second Degree Murder in this case.

The cases relied upon by the State are exclusive to true lesser included offenses in which a defendant was convicted of an offense with one less element than the charged crime. *Walker v. U.S.*, 418 F.2d 1116 (D.C. Cir. 1969) (indictment for robbery, conviction for grand larceny which does not include the use of force; defendant testified that victims voluntarily gave him money "to avoid being 'rolled' by the girls.'"); *U.S. v. No Neck*, 472 F.3d 1048 (8th Cir. 2007) (indictment for aggravated sexual abuse, convicted of one count of aggravated sexual abuse and three counts of abusive sexual contact which does not include the use of force or threat); *State v. Morris*, 316 N.W.2d 80 (N.D. 1982) (indictment for Corruption of Minors, convicted of Criminal Attempt of indicted offense); *State v. Ramirez*, 328 P.3d 1075 (Kan. 2014) (indicted for kidnapping, aggravated assault, and endangering a child, convicted of aggravated burglary, endangering a child, and criminal restraint which did not include confinement by force, threat or deception); *People v. Cooke*, 525 P.2d 426 (Colo. 1974) (indictment for possession with intent to distribute sufficient notice to defend against possession).

The State's cited cases confirm the rationale that presumptive notice is not applicable here. Standing alone, SDCL § 22-16-20.1 and SDCL § 22-16-20.2 does not constitutionally place Braiden, or any other defendant, on "presumptive notice" that he must defend against Second Degree Murder when it is uncharged. When State indicts a Defendant for First Degree Murder without charging in the alternative for Second Degree Murder, a Defendant cannot be presumed to be on notice to defend against an additional uncharged element. Notions of due process are offended by a procedure that condones and allows the prosecution to sit on its hands until the defense rests and then seek a conviction for an offense a defendant never had the opportunity to defend against.

Indeed, even the Rules of Civil Procedure do not allow pleadings to be amended at the 11th-hour without a genuine inquiry as to notice and prejudice to the non-moving party. SDCL § 15-6-15(b). "The test for allowing an amendment under SDCL 15-6-15(b) is whether the opposing party will be prejudiced by the amendment, i.e. did he have a fair opportunity to litigate the issue, and could he have offered any additional evidence if the case had been tried on the different issue." *Beyer v. Cordell*, 420 N.W.2d 767, 769 (quoting *Bucher v. Staley*, 297 N.W.2d 802, 806 (S.D.1980)). To reconcile State's position with the South Dakota Rules of Civil Procedure results in greater notice protection afforded to civil litigants than the criminally accused.

II. Implications of State's Presumption of Notice Requirement

It is undisputed that an accused's right to be informed of the "nature and cause of accusation against him" is one of the most basic and critically important constitutional rights. *State ex rel. Kotilinic v. Swenson*, 18 S.D. 196, 202, 99 N.W. 1114, 1115 (1904); *Lohnes*, 324 N.W.2d at 412. Defendants are arraigned by Circuit Court Judges and informed of the charges, the elements of said charge(s), the maximum possible penalties, and defendants' right to defend against the charges. This right to defend is not limited to a general crime, such as homicide, but to each individual element of the crime charged. When, as in this case, two forms of homicide contained genuinely distinct and separate elements to be affirmatively proved, the defendant has the constitutionally guaranteed right to defend against each charge and each element of the charges.

The record here is devoid of any reference to Braiden being informed that he could be convicted of the uncharged offense of Second Degree Murder, nor Braiden's constitutional right to defend against the additional "depraved mind" element. The record

only supports that the jury was told after the close of evidence that Braiden could be convicted of Second Degree Murder. The State's sole argument that Braiden was advised is in reference to state statutes.

If the State's position is affirmed, in cases such as this where the State only charges First Degree Murder, a defendant would have to guess whether the State will seek a Second Degree Murder instruction and defend on that probability. State is placed in the position to first hear the defense out before notifying whether they will seek a conviction for the uncharged offense of Second Degree Murder which includes an additional element the defendant was not afforded a chance to defend against at trial. This casino style process allows State to force defendants to roll the dice in the exercise of their constitutional rights. It cannot be assumed that the evidence put on to defend against First Degree Murder would be the same in a defense to Second Degree Murder because of the separate and distinct elements in issue. This is especially critical when it comes to a defendant's constitutional right whether to testify.

At trial, voir dire will require jurors to be canvassed on the elemental distinctions and proof necessary to be established for First Degree Murder and the uncharged offense of Second Degree Murder in the event the State chooses to seek such an instruction. Jurors will then need to confirm that they understand that at the commencement of trial a defendant is only facing First Degree Murder charges

During trial, the defendant will be forced to put on expert witnesses to defend against the possibility of an instruction on a lesser included offense that contains an additional element. An expert's testimony that is critical to a defendant's defense to specific intent, premeditated First Degree Murder, may not be the same expert that is vital

to a defendant's defense to "depraved mind" Second Degree Murder. This Court has acknowledged that a "criminally accused's right to proffer a defense is fundamental." *State v. Huber*, 2010 SD 63, ¶ 37, 789 N.W.2d 283, 294. If a criminally accused may be convicted and sentenced on a lesser included offense which includes an additional element, the accused's right to defend against the lesser included offense which contains an additional element is equally fundamental.

III. Effect, if any, of Presumptive Notice Should be Prospective

In the event this Court overrules the principles articulated in *Lohnes* and holds that SDCL § 22-16-20.1 and SDCL § 22-16-20.2 put defendants on constitutionally sufficient notice that a jury may convict a defendant at trial of a lesser included, uncharged offense which contains an additional element, such a ruling should be prospective in nature and not applied to Braiden's case.

"Generally, unless a court declares otherwise, a decision has both prospective and retroactive effect." *Hohm v. City of Rapid City*, 2008 SD 65, ¶ 21, 753 N.W.2d 895, 906 (citing *Burgard v. Benedictine Living Communities*, 2004 SD 58, ¶ 9, 680 N.W.2d 296, 299). "Courts, however, have inherent power to apply decisions prospectively only." *Id.* In determining whether a decision should be given prospective effect, courts consider the following factors:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in questions, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable

> results if applied retroactively, there is amply bases in our cases for avoiding the injustice or hardship" by a holding of nonretroactivity.

Id. (*Burgard*, ¶ 10, 680 N.W.2d at 299 (quoting *Brown v. John Morrell & Co.*, 511 N.W.2d 277, 278 (S.D. 1994)).

A decision that accepts SDCL § 22-16-20.1 and SDCL § 22-16-20.2 as constitutionally permissive notice statutes would override *Lohnes*' 30 year precedent. Despite SDCL § 22-16-20.2's language, factual and procedural history did not foreshadow a Second Degree Murder instruction. If this Court decides to accept the State's presumptive statutory notice argument, it should only be given prospective effect. Braiden should not be punished by retroactive application. *See Burgard*, 2004 SD 58, ¶ 12, 680 N.W.2d 296, 301 (noting that the principal rationale for allowing prospective applications is the reliance of the parties on the old rule of law).

IV. Arrest Irrelevant in Mandatory Parental Notification and *Miranda* Analysis

It is undisputed that Braiden was a juvenile when he admitted to shooting Williams. He was separated from his friend Tyus, placed in the back of a law enforcement vehicle, and questioned repeatedly about the sequence of events by Officer Martin Waller, who, admittedly, did not notify Braiden's parents prior to questioning him, nor did he advise Braiden of his *Miranda* rights. EH. 218:20-239:16.

> Question by Attorney Michael Butler: If Braiden had decided just to get out of your car and start walking away, would you have permitted that to take place?
>
> Answer by Officer Martin Waller: I would have allowed him to get out of my vehicle.
>
> Q. And leave the scene?
>
> A. Probably not leave the scene, no.
>
> Q. You didn't give him any indication he could do that?

A. I'm not sure what you mean.

Q. You didn't tell him, "Hey, you're free to leave anytime you want"?

A. No, I didn't say that.

Q. That's not in there. You didn't say to him in this transcript that he had an option or a choice but to answer your questions, did you?

A. Correct.

Q. In fact, you said you needed to get to the bottom of what happened?

A. Right.

EH. 238:23-239:16.

Whether parental notification pursuant to SDCL § 26-7A-15 or *Miranda* is required is not based on whether an arrest takes place. Rather, it is an objective determination which turns on whether a juvenile is subject to custodial interrogation based upon (1) "the circumstances surrounding the interrogation" and (2) "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *State v. Wright*, 2009 SD 51, ¶ 19, 768 N.W.2d 512, 520.

No reasonable person, much less a juvenile, would have felt free to end the interrogation with Officer Waller and depart the scene. Officer Waller's testimony serves as further confirmation of this reality. EH. 238:23-239:16.

The State reliance upon *State v. Bartunek* supports the fact that Braiden was in custody for purposes of *Miranda*. 323 N.W.2d 121 (S.D. 1982). In *Bartunek*, the Court agreed that *Miranda* was unnecessary for "general on-the-scene questioning" regarding injuries and who was driving the car. *Id.* at 124. Likewise, in this case Braiden does not claim that the initial inquiry as to who shot the gun was subject to *Miranda*. Rather, Braiden's argument is that after admitting to being the shooter, being placed in a patrol

vehicle, and subjected to interrogation he was thereafter in custody for purposes of *Miranda* and South Dakota's parental notification mandate.

Officer Waller's conduct foreclosed Braiden from conferring with his parents prior to questioning and making a voluntary decision as to whether to speak with law enforcement. This situation dictates strict *Miranda* enforcement and exclusion of all statements by Braiden to Officer Waller on December 18, 2012.

This portion of brief redacted and sealed from public view by order of the Supreme Court dated November 17, 2015, based on redacted and sealed documents in the record below.

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EH. 76:16-77:1.

Despite Braiden's constitutional right to "be confronted with the witnesses against him" and his right to an effective cross-examination, Braiden's cross-examination of T.D. was strictly curtailed by the trial court. *Davis v. Alaska*, 415 U.S. 308 (1974). The State painted T.D., both through his testimony and in closing arguments, as a troubled youth with no motive to lie. Neither the State nor T.D. had to contend with the disturbing, graphic, sordid fantasies that T.D. had threatened others with when T.D. testified at trial. Because of this, the State capitalized on T.D.'s allegations against Braiden, including a supposed statement by Braiden that his future office sign would read "the lawyer that got away with murder." Inarguably the jury "might have received a significantly different impression of [T.D.'s] credibility had counsel been permitted to pursue [this] [ ] line of cross examination." *U.S. v. Love*, 329 F.3d 981, 984 (8th Cir. 2003) (citing *Harrington v. Iowa*, 109 F.3d 1275, 1277 (8th Cir. 1997)).

Additionally, prohibiting Braiden from inquiring into T.D.'s drug use, both illegal and prescribed, violated his Confrontation Clause rights and truncated the jury's ability to fairly weigh T.D.'s credibility. The conversation and interaction T.D. claimed to have with Braiden is not without the shadow of drug use and its side effects. It doesn't matter that T.D. was not under the influence of any medication at the time he testified at trial. Rather, it is T.D.'s drug abuse history and the medication T.D. was on at the time he was housed with Braiden and talked to Agent Kavanagh that goes directly to his ability to properly "perceive the underlying events and to testify lucidly at trial." *U.S. v. Clemons*, 32 F.3d 1504, 1511 (11th Cir. 1994). Foreclosing Braiden from exploring and preventing the jury from knowing that T.D. was testifying as to events he perceived while under the

influence is directly contrary to long established precedent. *Id.*; *U.S. v. Lindstrom*, 698 F.2d 1154, 1165-66 (11th Cir. 1983).

The "depraved mind" murder and aggravated assault verdicts raise considerable concern which statements by T.D. were accepted by the jury as true. Because the jury was not allowed to weigh T.D.'s testimony against T.D.'s diagnoses, examples of his symptoms, and his drug use, this Court cannot "declare beyond a reasonable doubt" that the Court's September 4, 2014 Order did not contribute to the Second Degree Murder and Aggravated Assault verdicts. *State v. Larson*, 512 N.W.2d 732, 735 (S.D. 1994) (quoting *State v. Schuster*, 502 N.W.2d 565, 570–71 (S.D.1993)); S. 19:5-6.

VI. T.D.'s Statements Should Be Suppressed As Part of this Court's 2012-12-02 Order

This Court, without any reference as to the "valid court order" sending Braiden to WSDJSC, suppressed all of Braiden's statements to Psychologist Scovel because they were obtained in direct violation of Braiden's Fifth and Sixth Amendment rights. *2012-12-02 SDSC Order Reversing Transfer Order and Remanding for Reconsideration.* It is not disputed that after being forced to discuss the facts and circumstances of his case with Dr. Scovel, Braiden was precluded from calling his attorneys or father, and housed with an individual who physically assaulted him, commandeered his tests to make him look guilty, and had a well-documented history of tall tales. The proximity in time and the context of events surrounding the recognized constitutional violation and Braiden's interaction with T.D is inextricably co-existent. It is irrelevant that T.D. waited a month before reaching out to the authorities. T.D. is not an independent source and the lull does not cure the taint. Braiden's conversations with T.D. are about the exact matters Dr.

Scovel questioned Braiden about and this Court summarily held violated Braiden's Fifth and Sixth Amendment rights. The conversations between Braiden and T.D. are a direct by product of the unconstitutional questioning conducted by Dr. Scovel. All statements to T.D. should have been suppressed as fruit of the poisonous tree and excluded at trial. Such error cannot be considered harmless as discussed in the prior section.

CONCLUSION

For the reasons set forth above, Defendant Braiden McCahren respectfully requests this Honorable Court vacate his Second Degree Murder conviction and Order any other relief this Court deems just and equitable.

Respectfully submitted this 14th day of September, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Reply Brief and all appendices were mailed by first class mail, postage prepaid to:

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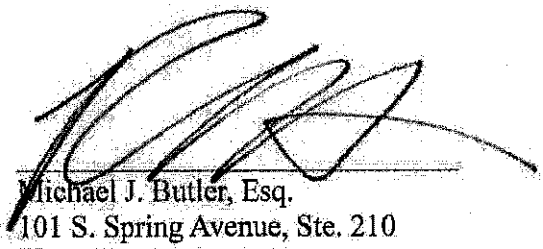
On this 14th day of September, 2015.



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CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 4,868 words from the Arguments through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 14th day of September, 2015.

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