
IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

TROY MCFATE,
Plaintiff-Appellee

v.

State of South Dakota
Defendant-Appellant

BRIEF OF THE APPELLANT
TROY MCFATE
FILED BY ATTORNEY FOR
APPELLANT J. SCOTT JAMES

STATE OF SOUTH DAKOTA,
APPELLEE REPRESENTED BY
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ORAL ARGUMENT REQUESTED

APPEAL FROM THE CIRCUIT COURT OF FALL RIVER COUNTY, SOUTH DAKOTA
THE HONORABLE SCOTT A. ROETZEL, CIRCUIT COURT JUDGE
CIRCUIT COURT CASE NO.
23CRI24-134

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NATURE OF THE CASE

This is an appeal of a conviction by the Defendant, Troy McFate. The Defendant appeals from the Circuit Court's denial of his motion to suppress, the Circuit Court's handling of jury instructions, and the denial of a motion for acquittal.

ISSUES ON APPEAL

Issue I: Did the Circuit Court err when it denied the Defense's motion to suppress based on a complete lack of evidence to support a search warrant?

Issue II: Did the Court's Jury Instructions correctly state the law and allow the jury to make all required factual findings?

Issue III: Is there sufficient evidence to support a conviction for Threateuing a Law Enforcement Officer in the context of a true threat analysis?

STATEMENT OF FACTS

1. On or about March 29, 2024, Officer Lexy Deneke of the Hot Springs Police Department was conducting a routine traffic stop with another individual at approximately 10:00 PM in the parking lot of the Dairy Queen and Taco Johns (Transcript of Jury Trial, p. 80 line 18 through p. 81 line 3).
2. While Officer Deneke was conversing with the subject of the traffic stop in her patrol vehicle, Troy McFate approached her vehicle and stood outside of it, holding a piece of paper (*Ibid.*, p. 81, lines 4 through 14).
3. Eventually, Officer Deneke opens her patrol car window and Mr. McFate hands her a piece of paper and tells her "You'll see it Monday" (*Ibid.*, p. 86, lines 6 through 9). This incident was captured in part on Officer Deneke's body-worn camera which was admitted as State's Exhibit 1.
4. Officer Deneke later read the piece of paper from Mr. McFate (which was admitted as State's Exhibit 2) which read as follows:

“Dear All Police Worldwide:

Let me make this clear with everyone within the fake corporation I you have given you (*sic.*) 48 hours as from Today date 13th March 2024 you must stand down from your current position within the illuminati police forces you must give up your warrant card because you have committed crimes against humanity and you have breached your oath to the people I will make this clear with you that if you don’t stand down from your current position you will be arrested by United States Military and executed on my order without any trial do you understand.

Yours Sincerely
John Kahlooni Jr”

Officer Deneke noted that the document bore a stamp stating “International Common Law Court of Justice” (*Ibid.*, p 85, lines 10 through 23, and States Exhibit 2).

5. Significantly, the letter also had the date of March 13, 2024 in the upper right hand corner crossed out and “4/1/24” was written in handwriting over that date (*Ibid.*, p. 85, lines 8 through 9).

6. Officer Deneke did not have any information that Troy McFate was the author of the letter or went by any alias of John Kahlhooni, Jr, only that he had handed it to her and that she assumed he was threatening her because of his statement of “you’ll see it Monday” (*Ibid.*, p. 95, lines 9 through 23).

7. Officer Maxfield investigated the incident and was advised by Mr. McFate’s employer that he had made copies of the letter at work. Troy McFate’s boss, Duane Fisher testified that he had seen the letter previously in their break room (*Ibid.*, p. 157 line 22 through p. 158, line12).

8. Troy McFate testified at trial that he had pulled the letter off the internet (See Defendant’s Exhibit A) from a poster online identified as “Ultra Far-Right Trump” (*Ibid.*, p. 186).

9. Mr. McFate testified that he was “trying to give law enforcement a heads up” as to the reason why he disseminated the document to Officer Denke (*Ibid.* p. 188 lines 12 through 21).

10. Mr. McFate also testified that he was the person who marked through the date, because he was “decoding the date” to make it more accurate. (*Ibid.*, p 189 line 13 through p. 190 line 5).

11. Officer Maxfield, as part of his investigation, also conducted a search of Mr. McFate's residence. Maxfield obtained a search warrant for the premises, the object of which was to search for additional copies of the John Kahlhooni letter. (Transcript of Evidentiary Hearing, p. 8, lines 7 through 24, State's Exhibit 1 for Evidentiary Hearing).

12. During the search for copies of the letter, Officer Maxfield came across items in Mr. McFate's bedroom nightstand which he believed were drug paraphernalia (*Ibid.*, p. 11, lines 5 through 18). Officer Maxfield did not field test these items prior to applying for the updated search warrant, but later they tested negative for drugs (*Ibid.*, p. 19, lines 7 through 22)

13. Based on this discovery, Officer Maxfield applied for an updated search warrant to search Mr. McFate's home for drug evidence, but also to search the person of Mr. McFate for a blood sample (*Ibid.*, p. 12, lines 2 through 9).

14. Notably, at the time of the search of the home, Mr. McFate had already been taken into custody at his place of work and was not at the location of the suspected drug paraphernalia (*Ibid.*, p. 7 line 7 through p. 8, line 11).

15. Upon questioning at a suppression hearing, Officer Maxfield testified that "he did not see any signs or symptoms [of Mr. McFate using drugs that day]." (*Ibid.*, p. 19, lines 23 through 25).

16. Further, Officer Maxfield candidly testified as follows about what information supported searching Mr. McFate's blood on that date:

"Q: I mean, do you have any information at all that would have led you to believe he would have ingested drugs that day?

A: No I do not" (*Ibid.*, p. 20, lines 1 through 3)

17. Officer Maxfield agreed that he conducted no testing on Mr. McFate, and further stated as follows to summarize:

"Q: Didn't you just basically assume since you found drugs in his house he must be using?

A: Correct." (*Ibid.*, p. 20, lines 21 through 23).

18. Officer Maxfield further agreed that he had put nothing in the search warrant application that was relevant to Mr. McFate using drugs. (*Ibid.*, p. 22, lines 1-3).

19. Lastly, Officer Maxfield responded as follows to a final follow up question:

“Q: Or that you would have had any suspicion or knowledge of [Mr. McFate using drugs]

A: No.”

20. The Court denied suppression of evidence in an Opinion dated January 23, 2025, finding that the letter constituted a “true threat” and that there was probable cause to search Mr. McFate’s blood for drug ingestion evidence. Additionally, the Court found that the good faith exception should apply. (See Order Denying Defendant’s Motion to Suppress).

21. During the trial, the Defendant made a motion for a judgment of acquittal (see Transcript of Jury Trial, p. 182, line 21 through p. 183 line 11).

22. After the close of evidence, the Defendant submitted a proposed jury instruction on the issue of what constitutes a “true threat”. The Defendant’s proposed jury instruction requested that the jury make a finding that the Defendant had “adopted the third party’s threat as his own.” (See Defendant’s Proposed Jury Instruction filed March 20, 2025).

23. The Court fashioned its own jury instruction defining threat numbered 21 which was objected to by the Defendant.

24. The Court denied the use of the Defendants proposed instruction, stating as follows:

“Additionally the Court will note that the Defendant did state this wasn’t simply a letter from a third party he handed out. The evidence is that he changed the date, after knowing it was a threat to law enforcement, he changed the date with the understanding that it changed the dynamic of the threatening letter. The threat would have already passed, he changed it to make it an updated threat to law enforcement. So that information or that testimony shows that he adopted this as his.” (*Ibid.*, p. 216, lines 16 through 25).

25. The Court then inserted instruction 21 over the objection of the Defendant. A law clerk in attendance noted that the instruction had been fashioned after SD Pattern Instruction 3-15-34 “Theft-Threat-Definition.” (Transcript of Jury Trial, p. 217, line 15 through p. 221 line 11).

26. The jury deliberated for roughly 2.5 hours and returned with a verdict convicting

Mr. McFate of both counts (*Ibid.*, p. 262 lines through 14).

ARGUMENT AND AUTHORITIES

Issue I: Did the Circuit Court err when it denied the Defense's motion to suppress based on a complete lack of evidence to support a search warrant?

STANDARD OF REVIEW

The review standard for motions to suppress can be found in *State v. Kleven*, 887 N.W.2d 740 (S.D. 2016):

“We review the circuit court's grant or denial of a motion to suppress involving an alleged violation of a constitutionally protected right under the de novo standard of review.” *State v. Smith*, 2014 S.D. 50, ¶ 14, 851 N.W.2d 719, 723. We review the circuit court's factual findings for clear error. *State v. Mohr*, 2013 S.D. 94, ¶ 12, 841 N.W.2d 440, 444. Once the facts have been determined, we give no deference to the court's application of a legal standard to those facts. *State v. Fierro*, 2014 S.D. 62, ¶ 12, 853 N.W.2d 235, 239. Those questions of law are reviewed de novo. *Id.*” *State v. Kleven*, 887 N.W.2d 740 (S.D. 2016)

Because the Defendant is challenging a search based on a warrant, some additional standards apply:

When reviewing a search warrant issued by a magistrate, the affidavit supporting the warrant must “contain sufficient information to enable a neutral and detached magistrate to make a determination that probable cause existed for the issuance of a search warrant within the meaning of Article VI, § 11 of the south Dakota Constitution. 2...” *State v. Glidden*, 246 N.W.2d 779 (S.D. 1976)

The validity of such warrants, “like the validity of any search warrant, depends on the probable cause offered to support it.” *Id.* ¶ 14 (citing *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238, 245 (1979)).

“Additionally, we look to the four corners of the affidavit in determining whether it provided probable cause for issuing the warrant. *Id.* ¶ 11, 616 N.W.2d at 416. Thus, “the existence of probable cause for the search

warrant must rise or fall on the affidavit itself which was the only evidence presented to the [court] for [its] determination of probable cause." Id. (quoting *State v. Smith*, 281 N.W.2d 430, 433 (S.D.1979))." *State v. Babcock*, 718 N.W.2d 624, 2006 SD 59 (S.D 2006).

ARGUMENT

A. The complete lack of any evidence of recent drug ingestion meant there was no probable cause to support the search warrant for the Defendant's blood.

The Defendant concedes at the outset, that because law enforcement obtained a search warrant in this matter, there is an amount of deference given that does not exist in warrantless searches. This deference, however is not infinite, as there are limits that still constrain searches based on a warrant from a magistrate. Primarily, there must be some evidence upon which a neutral magistrate could have based his probable cause decision. In this case it appears that law enforcement simply assumed that because drug paraphernalia was seen at one location, that it was grounds to believe they may find evidence of drug ingestion in the defendant's blood. Indeed, Officer Maxfield's testimony was quite candid on this topic, admitting that he had no evidence whatsoever that the Defendant had ingested drugs (*see supra* ¶ 7). While other State and Federal Courts have not had occasion to review a scenario with this specific factual dynamic, since South Dakota is the only state in the country that has a separate crime for drug possession by ingestion, they have roundly rejected such an approach of assuming probable cause in other locations simply because evidence was found at a separate location.

The trial court overlooked this lack of evidence by citing a South Dakota case, *State v. Hanson*, 1999 SD 9, 588 NW 2d 885 (1999). The trial court cited language from *Hanson* which stated "If the officers had probable cause to arrest Hanson for possession

of marijuana, it would follow they had probable cause to test her for traces of the illegal substance for which she was arrested”. This is a line taken out of important context from *Hanson*, which, when the facts are reviewed becomes clear that it had a different meaning than what the Court attempted to apply to this case.

In *Hanson*, the defendant, Ms. Hanson was in a car that smelled of *burnt* marijuana. A pipe with burned marijuana residue and a partially burned marijuana leaf were found in the car with Hanson and two juveniles. Police then obtained a urine sample from Hanson at the jail without consent or a warrant. *Hanson*, 588 NW 2d 885 at 889.

Hanson differs in several important and salient respects from the instant case. Additionally, the court has misread the key language which it drew from the case. The probable cause analysis was not simply a correlation between the fact that drugs were located, then *ispro facto*, police were entitled to search their bodily fluids. Instead this was a case where the police had abundant evidence that there was *recent* use of marijuana in the vehicle (e.g., the partially burnt leaf, and the odor of *burnt* marijuana). They had three suspects in the car, and it was entirely reasonable to conclude that, if they searched the bodily fluids of all three suspects, they would discover evidence of who had recently consumed. This becomes clear from the court’s description of the probable cause in the case:

“In this case, however, there was more than mere proximity involved. All three occupants denied any knowledge of the marijuana and paraphernalia, but all had access to the rear seat of the small compact car. Possession requires that an individual be aware of the presence and character of the drug and intentionally and consciously possess such drug...” *State v. Hanson*, 1999 SD 9, 588 NW2d 885 (S.D. 1999).

This can be contrasted heavily with the present case in which there was absolutely no evidence of recent use. Officer Maxfield stated that he could not even articulate a *suspicion* that the Defendant had used drugs (see Statement of Facts, *supra* ¶ 19).

The Court's misreading of the language it cited is also clear from the review of the context surrounding the quoted language:

“Hanson claimed she was merely getting a ride to the grocery store. Yet the scene of the stop was not the most direct route from her home to the grocery store. The other two passengers indicated to law enforcement that Hanson had been in the car for twenty-five minutes to make a ten block trip to the grocery store. *If the officers had no probable cause to search Hanson, then they had no probable cause to search the other two occupants of the car leaving the officers with a car containing marijuana and no occupant to hold accountable as the source of the illegal drug.*

If the officers had probable cause to arrest Hanson for possession of marijuana, it would follow they had probable cause to test her for traces of the illegal substance for which she was arrested.” *State v. Hanson*, 1999 SD 9, 588 NW2d 885 (S.D. 1999). (original emphasis)”

The *Hanson* Court was articulating that *based on these facts*, it was logical to conclude that both there was probable cause to search to arrest Hanson, and that there was probable cause to test her. It was not announcing an axiomatic principle of jurisprudence that anytime one is arrested for a crime of possession that there is automatically cause to search other places or persons for evidence of ingestion, no matter how remote in time or space the facts separate them.

Probable cause demands “a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). That nexus cannot be inferred merely because evidence of drug activity is found somewhere else.

Additionally, while few other courts have commented on the facts needed to justify a nexus between drug possession and drug ingestion (because other states do not have an ingestion law), several courts have commented on the inverse fact scenario that evidence of ingestion is not *per se* evidence of possession. In *State v. Schmitz*, 299 Or App 170, P. 3d 699 (2019), an Oregon Appellate Court examined whether an officer's observations about a Defendant's intoxicated condition led to a conclusion that they possessed controlled substances:

“The only specific and articulable fact directly related to defendant is that he appeared intoxicated based on his jerky movements, head shaking, body vibrations, and mumbling. *We have emphasized that an officer's observation of a defendant's intoxication is insufficient to establish the inference that a defendant presently possesses a controlled substance...*” *State v. Schmitz*, 299 Or App 170, 448 P.3d 699 (Or. App. 2019) (emphasis added).

Outside of a direct inference between drug possession and drug ingestion, however, courts have routinely held that there must be a factual nexus between the evidence of a crime and the probability that it will be found in a particular place. One such analogous case is *United States v McPhearson*, 469 F. 3d 518 (6th Cir, 2006).

In *McPhearson*, 469 F.3d 518 (6th Cir. 2006), police went to the defendant's house to serve an arrest warrant for assault. McPhearson was standing on the porch when they arrested him. A pat-down revealed a small bag of crack cocaine in his pocket. After he refused consent to search his home, officers obtained a search warrant for the residence, relying mainly on the discovery of drugs on his person and the fact that he lived there.

The Sixth Circuit suppressed the fruits of that home search. It held the affidavit failed to establish a sufficient nexus between McPhearson's drug possession and his home, explaining:

"Nothing in the affidavit indicated that McPhearson was a known drug dealer, that drugs were recently sold or used at the residence, or that any drug-related activity was connected to that address." *Id.* at 524.

Because the drugs were found on McPhearson's person outside the home, the officers could not bootstrap probable cause from one location to justify a search of another.

The nexus requirement obliges officers to demonstrate facts tying the specific place or item to be searched to the suspected criminal activity" *United States v. Tellez*, 217 F. 3d 547, 550 (8th Cir. 2000). Here, of course, there were no facts whatsoever tying the paraphernalia of unknown age or origin found in the Defendant's home to controlled substances in his bodily fluids from recent use.

A further problem with relying upon *Hanson*, is that it is a 1999 case, and predates much of the US Supreme Court guidance on blood-based searches of evidence. A compelled blood draw is a search of the person under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767 (1966). Such a search is permissible only where officers have timely, individualized facts indicating that the blood itself contains evidence of a crime—such as signs of intoxication contemporaneous with an arrest. *Id.* at 770–71.

"The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Schmerber v. State of California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) See also *Missouri v. McNeely*, 569 U.S. 141 (2013). After *McNeely*, exigent

circumstances were no longer held to be sufficient to justify warrantless blood searches. *Hanson* explicitly states that bodily fluid do not require a warrant and can be justified by exigent circumstances, which is no longer accurate. *Hanson* also states that bodily fluid searches are not intrusive: "It is a less intrusive search than the withdrawal of blood from the human body. It involves no risk of trauma or pain..." *State v. Hanson*, 1999 SD 9, 588 NW2d 885 (S.D. 1999). This is again, directly the opposite conclusion of the US Supreme Court in *McNeely*: "That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy." *Missouri v. McNeely*, 133 S. Ct. 1552, 185 L. Ed. 2d 696, 569 U.S. 141 (2013). *Hanson* should not be viewed by this Court as binding authority on this topic nor persuasive in this context.

B. The Good Faith Exception should not apply in this case.

The Trial Court in this matter specifically found that the good faith exception under *United States v. Leon*, 468 US 897 (1984) should apply because "none of the four situations appl[ied] as cited in *State v Sorenson*, 2004 SD 108, 688 NW 2d 193 (2004).

"In *Leon*, the Supreme Court identified four situations in which the good faith exception to the exclusionary rule would not apply. First, evidence should be suppressed if the issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false but for the affiant's reckless disregard for the truth. Second, the exception will not apply when the issuing magistrate wholly abandons the judicial role. Third, the good-faith exception will not apply when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Thus, the exception does not extend to situations in which the officer obtains a warrant based on a "bare bones" affidavit and then relies on good faith execution by innocent colleagues in order to sustain the warrant. *Leon*, 468 US at 923 n24. Fourth, the exception

will not apply when a warrant is so facially deficient that the executing officer could not reasonably believe it was valid. The *Leon* rule will not exclude evidence, however, when an officer's reliance on a technically sufficient warrant is objectively reasonable..." *State v. Sorensen*, 2004 SD 108, 688 NW 2d 193 (S.D. 2004)

The trial court stated that "the affidavit states that there was a white crystalline substance found in a bag in the bedside table of the defendant's bedroom, along with paraphernalia that could have been or could be used to ingest said white crystalline substance." (See Order Denying Defendant's Motion to Suppress at p. 5). This fact, the Court concluded was the evidence supporting probable cause. The question remains, however as to probable cause of *what crime* being committed by the Defendant. Again, there is an assumption here, based on the Court's misapplication of *Hanson*, that any drug evidence found supports an inference that drug ingestion recently occurred by that person. Such a conclusion, if generalized to other cases, would have widespread significance to the conduct of law enforcement everywhere.

The affidavit in this case rested solely on the discovery of alleged drug paraphernalia in the defendant's home. There were no observations of intoxication, no odor of drugs, no admissions, and no evidence the defendant had used drugs that day. The arrest occurred hours earlier at a different location and for a different offense. The affidavit thus failed to provide any factual nexus between the paraphernalia items in the home and any evidence likely to be found in the defendant's bloodstream. It merely assumed that possession of paraphernalia implied recent ingestion.

Such assumptions have been squarely rejected. In analyzing a good faith exception to a lack of probable cause, courts have referenced a "minimal nexus" of facts

connecting the crime to the person/place to be searched. The *McPhearson* Court also explained why the good faith exception did not apply to its analogous facts:

“The third limitation on the good-faith exception, which the district court applied in this case, prevents introduction of evidence seized under a warrant that issued on the basis of a "bare bones" affidavit. *Id.* at 748. A bare bones affidavit is one that merely "states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge."...

“...The affidavit in this case was so bare bones as to preclude any reasonable belief in the search warrant that the affidavit supported. As noted above, the affidavit failed to establish a nexus between McPhearson's residence and evidence of wrongdoing that would support a finding of probable cause. However, the failure to establish probable cause is not dispositive of whether the affidavit could support a reasonable belief in the validity of the search warrant for purposes of the exclusionary rule. "We previously found *Leon* applicable in cases where we determined that the affidavit contained a minimally sufficient nexus between the illegal activity and the place to be searched to support an officer's good faith belief in the warrant's validity, even if the information provided was not enough to establish probable cause." *Carpenter*, 360 F.3d at 596. *The minimal nexus required to support an officer's good faith belief was not present in this case.*

The only connection in the affidavit between 228 Shelby Street and drug trafficking was that Jackson police arrested McPhearson at his residence and found crack cocaine in his pocket in a search incident to the arrest. This connection cannot establish the minimal nexus that has justified application of the good-faith exception in cases where the nexus between the place to be searched and the evidence to be sought was too weak to establish probable cause.” *U.S. v. McPhearson*, 469 F.3d 518 (6th Cir. 2006)

Similarly, South Dakota Courts have found that *Leon* does not protect warrants where the investigating officer knew he did not supply any facts which would support probable cause:

“[t]he officer cannot claim good faith reliance on a search warrant based on less than probable cause where he has failed to place in the affidavit information known to him that would support probable cause. The officer's reliance on the warrant can be objectively reasonable only if his belief that the affidavit contains facts sufficient to create probable cause is itself objectively reasonable.” *State v. Belmontes*, 2000 SD 115, 615, NW 2d 634 (SD 2000).

In this case, Officer Maxfield candidly admitted that he put no facts in his warrant application which could have supported probable cause that Mr. McFate was ingesting drugs. Therefore, Officer Maxfield knew or should have known that he should not have relied upon such a warrant. The Trial Court's conclusion that evidence of finding paraphernalia in a house supports a different crime of ingestion at a different location is belied by the record. The motion to suppress should have been granted by the Trial Court.

Issue II: Did the Court's Jury Instructions correctly state the law and allow the jury to make all required factual findings?

A. The Defendant's Requested Jury instruction was a correct statement of the law and was supported by the evidence.

In consideration of this issue, South Dakota Courts have employed the following standard to whether a Defendant is entitled to a jury instruction:

"Upon proper request, defendants are entitled to instructions on their defense theories if evidence supports them. *State v. Helmer*, 1996 SD 31, p 42, 545 N.W.2d 471, 478; *State v. Blue Thunder*, 466 N.W.2d 613, 620 (S.D.1991); *State v. Esslinger*, 357 N.W.2d 525, 532 (S.D.1984). To warrant reversal, defendants must show that refusal to grant an instruction was prejudicial, meaning "the jury ... probably would have returned a different verdict if [the] requested instruction had been given." *Rhines*, 1996 SD 55 at p 111, 548 N.W.2d at 443; *Bartlett*, 411 N.W.2d at 415 (quoting *Grey Owl*, 295 N.W.2d at 751). *State v. Pellegrino*, 1998 SD 39, 577 N.W. 2d 590 (S.D. 1998)

In this matter, the Defense suggested a jury instruction which read as follows:

"SUPPLEMENTAL- DEFINITION OF TRUE THREAT

If a defendant's repetition of a third party's threat is reasonably interpreted as a simple disclosure of the existence of the threat for informational purposes, no illegality has occurred. {If, on the other hand, a defendant's repetition of a third party's threat is reasonably interpreted as communicating the defendant's own intent, purpose, or goal to "kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by

means of fire or an explosive," the defendant has violated the law and committed a crime. In the latter scenario, the defendant has effectively adopted the third party's threat as his own.} (Source: *U.S. v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999))

"Threat" defined- to constitute a threat, a person must consciously disregard a substantial and unjustifiable risk that his conduct will cause harm to another person. (Source: *Counterman v Colorado*, 143 S. Ct 2106, 216 L. Ed 2d 775) (see Defendant's Proposed Jury Instruction).

Evidence was adduced at trial supporting this theory. A plain reading of the statement at issue, (hereinafter referenced as the "John Kalhooni Letter") shows that it does not purport to be authored by the Defendant (See State's Trial Exhibit 2). Neither the complaining witness, Officer Deneke, nor any other State witness had any information that the Defendant authored the letter (see Statement of Facts, *supra* ¶ 6). The Defendant testified that he found the letter on the internet and was trying to disseminate the information (see Defendant's Trial Exhibit A and Statement of Facts, *supra*, ¶ 8-9). There was abundant evidence that the letter at issue in this case was not authored by the Defendant, indeed the fact was uncontroverted.

In *Counterman v. Colorado*, 143 S. Ct 2106 (2023), the United States Supreme Court was faced with an analogous case in which the Defendant, Counterman, had sent hundreds of Facebook messages to the victim, C.W., stating things like "Was that you in the White Jeep", "Staying in cyber life is going to kill you", and "you're not being good for human relations. Die" (*Counterman*, 143 S. Ct 2106, at 2112). Counterman had argued that there was a subjective intent requirement which was needed to prove a true threat under the First Amendment, but the lower Colorado court had assessed the true threat under a 'reasonable person' standard. The Supreme Court found that a *mens rea* requirement needed to be adopted and that

“We follow the same path today, holding *that the State must prove in true-threats cases that the defendant had some understanding of his statements' threatening character*. The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again guided by our precedent, we hold that a recklessness standard is enough.” *Counterterman v. Colorado*, 143 S.Ct. 2106, 216 L.Ed.2d 775 (2023) (emphasis added).

During the jury instructions conference in this case, the Defendant attempted to highlight this concern to the Court, emphasizing that *Counterterman* meant that the Court needed to insert a Defendant’s subjective awareness requirement into its instructions (see Transcript of Jury Trial, p. 212 lines 13 through p. 214 line 1).

Additionally, because this case involved a fact pattern where a third party had made the statement at issue and the Defendant was alleged to have disseminated that same threat, the Defendant argued that an instruction was needed to explain to the jury that the Defendant needed to take some action to adopt the threat as his own, as was explained in *U.S. v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999).

Similarly, in *Viefhaus*, recorded a statement which was used on a telephone hotline which disseminated a lengthy white supremacist manifesto making a very similar conditional statement that:

“As an added ultimatum to those of you who are still unwilling to pick up a sword, a letter from a high ranking revolutionary commander has been written and received demanding that action be taken against the government by all white warriors by December 15th and if this action is not taken, bombs will be activated in 15 pre-selected major U.S. cities. That means December 15, 1996, one week from today. In [other] words, this war is going to start with or without you. For all of you out there that have been bragging about being ready and willing to jump in when the time comes, well you better lace up your jump boots.” *U.S. v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999)

Viefhaus also argued that he was merely relaying a message from a third party (though perhaps less credibly than McFate). In analyzing whether Viefhaus's conduct amounted to a true threat, the Tenth Circuit held that:

“If a defendant's repetition of a third party's threat is reasonably interpreted as a simple disclosure of the existence of the threat for informational purposes, no illegality has occurred. If, on the other hand, a defendant's repetition of a third party's threat is reasonably interpreted as communicating the defendant's own intent, purpose, or goal to “kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive,” the defendant has violated 18 U.S.C. § 844(e). *In the latter scenario, the defendant has effectively adopted the third party's threat as his own.* There is no requirement that the defendant convey an intent to carry out the threatened conduct himself. *U.S. v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999)

The Defendant asserts that *Viefhaus* represents a correct statement of the law concerning third party messages and threats. To hold otherwise creates a danger under the First Amendment that simply conveying a third party message will result in criminal penalties if interpreted as a threat. Requiring that the subject conveying a third party message adopt said message as their own is a reasonable safeguard to ensure that freedom of expression will not be otherwise inhibited. The instructions, as given, allow the possibility that the jury decided that the Defendant “knowingly” passed the letter, whether he intended it as a threat or not, thus potentially criminalizing otherwise innocent and protected conduct.

It is anticipated that the State may argue that McFate's accompanying statement—“you'll see it Monday”—converted the otherwise third-party John Kahlhooni letter into a personal act of menace. Yet this brief utterance does not, standing alone, supply the requisite *mens rea* or transformation of authorship. The phrase is temporally

ambiguous and equally consistent with the Defendant's testimony that he was warning officers of information he had found online. Under *Counterman*, the State still bore the burden to prove that McFate was at least reckless as to the threatening character of the combined communication. The mere act of handing over a document authored by another, coupled with a vague reference to "Monday," does not meet that standard unless the jury first finds that McFate adopted the third party's threat as his own under *Viefhaus*. The court's failure to give that instruction left the jury free to treat the letter and the comment as intrinsically threatening, without determining whether McFate himself understood or intended them to convey a threat.

On both the *Counterman mens rea* issue, as well as the *Viefhaus* third party threat issue raised in the Defendant's proposed instruction, the Court denied the Defendant's jury Instruction without further comment. In the context of a third party threat communications context, both instructions should be given to the jury to avoid criminalizing free speech. While *Viefhaus* is directly analogous to this case in terms of the way the threat was made and should apply, *Counterman's* directives from the Supreme Court were not optional for the Trial Court to ignore. The Court had to reference a *mens rea* element in their instructions of at least recklessness with respect to the Defendant's subjective awareness of the threat for the instructions to pass muster. These elements were both missing from the instructions as a whole. It is important to acknowledge that Jury instructions 19 and 20 both referenced a standard of "knowingly and intentionally" communicating a threat. But, as pointed out in the instructions requirement, without language referencing the Defendant's subjective understanding of the threat, this language could criminalize merely dissemination of information that

someone took as threatening; thus it fails to adhere to *Counterman's* direction. Missing the required *mens rea* for an offense in jury instructions is prejudicial and constitutes reversible error under *State v. Jones*, 804 N.W.2d 409, 2011 S.D. 60 (S.D. 2011)

Compare the instructions given as a whole to the instructions given in *Elonis v United States*, 575 U.S. 723 (2015). *Elonis* involved a case where a defendant had used the social networking Web site Facebook to post self-styled rap lyrics containing graphically violent language and imagery concerning his wife, co-workers, a kindergarten class, and state and federal law enforcement.

In reversing this case, the United States Supreme Court summarized as follows:

“Elonis requested a jury instruction that “the government must prove that he intended to communicate a true threat.” *Id.*, at 21. See also *id.*, at 267–269, 303. The District Court denied that request. The jury instructions Cite as: 575 U. S. ____ (2015) Opinion of the Court instead informed the jury that “A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.” *Id.*, at 301. The Government’s closing argument emphasized that it was irrelevant whether Elonis intended the postings to be threats—“it doesn’t matter what he thinks.”

The Supreme Court then reasoned as follows:

“But communicating something is not what makes the conduct “wrongful.” Here “the crucial element separating legal innocence from wrongful conduct” is the threatening nature of the communication. *Id.*, at 73. The mental state requirement must therefore apply to the fact that the communication contains a threat. Elonis’s conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a “reasonable person” standard is a familiar feature of civil liability in tort law, but is inconsistent with “the conventional requirement for criminal conduct— awareness of some wrongdoing.” *Staples*, 511 U. S., at 606–607 (quoting *United States v. Dotterweich*, 320 U. S. 277, 281 (1943); emphasis added). Having liability turn on whether a “reasonable person” regards the communication as a threat—regardless of what the

defendant thinks— “reduces culpability on the all-important element of the crime to negligence,” Jeffries, 692 F. 3d, at 484 (Sutton, J., dubitante), and we “have long been reluctant to infer that a negligence standard was intended in criminal statutes”

Similarly, in this case, Instruction 21 (as well as 19 and 20), does have the effect of reducing the question of whether the communication is a threat to “would a reasonable person perceive it as a threat” because it would “unsettle” an ordinary person’s mind. The instructions as presented also misleadingly applied the “knowing and intentional” *mens rea* only to the act of communicating, instead of the subjective awareness of the threatening nature of the communication.

B. The Court invaded the province of the jury when it made a factual finding that the Defendant had adopted the threat as his own.

As stated in subsection III (A), *supra*, the jury needed to find that the Defendant had a subjective understanding of the threat under *Counterman*, and that he adopted that threat as his own under *Viefhaus*.

During the Jury Instructions conference, the Trial Court, in denying the Defendant’s proposed jury instruction stated:

“Additionally the Court will note that the Defendant did state this wasn’t simply a letter from a third party he handed out. The evidence is that he changed the date, after knowing it was a threat to law enforcement, he changed the date with the understanding that it changed the dynamic of the threatening letter. The threat would have already passed, be he changed it to make it an updated threat to law enforcement. So that information or that testimony shows that he adopted this as his.” (Transcript of Jury Trial, p. 216, lines 16 through 25).

While a Court may need to make a factual ruling as to whether a jury instruction is supported by evidence in the case, it must not make such a ruling where doing so

deprives the fact finder, the jury, of the opportunity to rule on a contested issue. While no South Dakota pattern instruction states that the subjective awareness of a threat is a requirement, *Counterman* does require such an element be found by the jury. This was clearly a contested issue at trial, as a good deal of argument was spent by both sides on whether the Defendant's action of changing the date on the letter amounted to "adopting the threat as his own". The Defendant testified that his action on changing the date was an act of "decoding" and that his real intent was just to communicate the danger to the police. Essentially, the Trial Court made a determination that Mr. McFate's testimony should be disregarded and found under *Counterman* and *Viefhaus sua sponte* that McFate had adopted the threat as his own without allowing the jury to do so. "The law is peculiarly jealous of any encroachment by a trial court on the province of the jury, who are the exclusive judges of the weight to be attached to the evidence of any witness, and it is error for a court in the trial of the case to intimate any opinion in reference to matters of fact which might in any degree influence the verdict. ..." *State v. Johnson*, 70 S.D. 322, 17 N.W.2d 345 (S.D. 1945) Under both *Counterman* and *Viefhaus*, the jury was required to make those determinations.

C. The Circuit Court's issuance of Jury Instruction No. 21 defining the term "threat" based on language from SDCL 22-30A-4 compounded the instructional error.

South Dakota Courts apply the following standard to jury instructions supplied by the trial court:

"a court has no discretion to give incorrect or misleading instructions, and to do so prejudicially constitutes reversible error." *Id.* (citation omitted). We consider jury instructions as a whole, and "[i]f they 'correctly state the law and inform the jury, they are sufficient.'" *State v. Kryger*, 2018 S.D. 13, ¶ 41, 907 N.W.2d 800, 814 (citations omitted). We review whether the

jury instruction correctly states the law de novo. *State v. Walohe*, 2013 S.D. 55, ¶ 28, 835 N.W.2d 105, 113. *State v. Nelson*, 2022 S.D. 12, 29410-a-SPM (S.D. Feb 16, 2022)

The Defendant objected to the issuance of Jury Instructions 19, 20, and 21 for the dual reason that they failed to include the *mens rea* requirement of *Counterman v Colorado*, but also because they did not require the jury to find that the Defendant adopted the threat as his own. However, Jury Instruction 21 amplified the problem by inserting new language defining a threat as an attempt to “unsettle the mind of the person to whom it is directed”. As argued during the instructions conference, the phrase “unsettle the mind” in this context is problematic. According to Merriam Webster’s Online Dictionary, “unsettle” can mean “to perturb or agitate mentally or emotionally”.¹ In a theft context, this may be a useful instruction, as it can highlight a situation where, for instance a robber makes gestures with a knife to demand money, but didn’t use verbal speech to accomplish his mission. In this context, however, it becomes misleading to the jury as it both lowers the burden of proof for what the jury must find and emphasizes the recipient of the threat’s perception of the communication over the subjective intent of the threat-maker as required by *Counterman*.

Many communications passed out in political pamphlets may have information which “perturb” or “agitate emotionally” the recipient. This does not convert them into threats. The burden for what constitutes a threat in political speech can and must be different in kind than what constitutes a threat with nonverbal innuendo of a common robber. The fact that instructions should be read as a whole here does not insulate the incorrectness of this instruction, because it purported to define what constituted a

¹ <https://www.merriam-webster.com/dictionary/unsettle>

“threat”, and so, if read with the other instructions, should be inserted at every other part of the instruction packet where the term is used. Thus, this incorrect definition of the term “threat” contaminated the juror’s deliberations. It also colored the closing arguments of both sides who were now forced to wrestle with the terms in Instruction 21.

The phrase “unsettle the mind” is not a legal term of art in threat jurisprudence; it was drawn from SDCL 22-30A-4, a theft-by-threat statute addressing coercive behavior in property crimes. In that economic-coercion context, the phrase simply identifies intimidation sufficient to overbear a victim’s free will. Transposed into the speech-crime context, however, it lowers the threshold from a true threat of unlawful violence to any statement that causes emotional agitation or discomfort. The jury could thus convict without finding that McFate intended, or even consciously disregarded a substantial risk, that his communication would be perceived as a serious expression of violent intent.

A valid “true threat” instruction must require the jury to find that:

1. the defendant knowingly communicated the statement; and
2. the defendant was aware, at least recklessly, that the statement would be understood as a serious expression of his intent to commit unlawful violence.

Instruction 21 excised the second element. It told jurors they could convict if the statement merely “unsettled” the recipient’s mind “so as to prevent voluntary action,” language that tracks neither *Counterman* nor *Elonis*. That phrasing risks criminalizing protected political or hyperbolic speech, since any controversial or conspiratorial message might “unsettle” its audience. By converting the First Amendment inquiry into a question of the listener’s emotional response, the court effectively transformed the

mental-state element into a negligence standard—whether a reasonable person’s mind would be unsettled—contrary to *Elonis* (“criminal liability may not turn solely on whether a reasonable person would regard the statement as threatening”).

The erroneous instruction directly affected the verdict. The entire case turned on whether McFate’s act of handing over the “John Kahlhooni” letter was a true threat or a misguided political communication. By instructing that a “threat” exists whenever a statement “unsettles the mind,” the court invited the jury to convict based on Officer Deneke’s subjective fear rather than on McFate’s intent or awareness. This impermissibly reduced the State’s burden from proving a constitutionally required *mens rea* to proving only that the communication caused discomfort. Under *State v. Nelson*, 2022 S.D. 12, ¶ 41, such a misleading instruction constitutes reversible error because it misstates the law and prejudices the defense on the central issue of the case.

Issue III: Is there sufficient evidence to support a conviction for Threatening a Law Enforcement Officer in the context of a true threat analysis?

STANDARD OF REVIEW

South Dakota recently re-articulated the standard for reviewing the sufficiency of the evidence in a criminal case:

"In measuring the sufficiency of the evidence, we ask 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Seidel*, 2020 S.D. 73, ¶ 32, 953 N.W.2d at 313) (other citation omitted). The Court "will not resolve conflicts in the evidence, assess the credibility of witnesses, or evaluate the weight of the evidence." *Id.* (quoting *Seidel*, 2020 S.D. 73, ¶ 32, 953 N.W.2d at 313). "Instead, 'we accept the evidence and the most favorable inferences fairly drawn therefrom, which will support the verdict.'" *Id.* (quoting *Seidel*, 2020 S.D. 73, ¶ 32, 953 N.W.2d at 313). "It is the jury's

responsibility, not ours, 'to decide what conclusions should be drawn from evidence admitted at trial.'" Id. (quoting *State v. Strozier*, 2013 S.D. 53, ¶ 24, 834 N.W.2d 857, 865)...*State v. Hillyer*, 2025 S.D. 30, 30444-a-JMK (S.D. Jun 25, 2025)

ARGUMENT

A. The Defendant's communication does not constitute a true threat under present South Dakota "true threat" jurisprudence.

Whether speech constitutes a "true threat" that does not receive First Amendment Protection has been looked at by many courts including South Dakota Courts. A useful test is found *Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833 (8th Cir. 2001)

The Supreme Court has not established a bright-line test for distinguishing a true threat from protected speech. In *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996), however, we outlined a number of factors to consider when determining whether a statement constitutes a true threat: the reaction of the recipient of the threat and of other listeners, *United States v. J.H.H.*, 22 F.3d 821, 827-28 (8th Cir. 1994); whether the threat was conditional, *United States v. Bellrichard*, 994 F.2d 1318, 1321 (8th Cir. 1993); whether an objectively reasonable recipient would view the message as a threat, *id.*; whether the threat was communicated directly to its victim, *id.*; whether the maker of the threat had made similar statements to the victim in the past, *United States v. Whitfield*, 31 F.3d 747, 749 (8th Cir. 1994); whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence, *id.*; and whether the recipient of the alleged threat could reasonably conclude that it expresses "a determination or intent to hurt presently or in the future." *Martin v. United States*, 691 F.2d 1235, 1240 (8th Cir. 1982).

Many if not most of these factors, weigh in favor of viewing this statement handed by the Defendant to the officer as not a true threat. It was conditional. It expressed a future and not an immediate threat. The Officer had no knowledge of the Defendant to be violent (did not know who he was).

The statement, in some respects, though undoubtedly less eloquent, is similar to the statement in *Watts v. US*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). In *Watts*, the Defendant was protesting the Vietnam War and made the following statement:

“They always holler at us to get an education. And now I have already received my draft classification as 1—A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.' 'They are not going to make me kill my black brothers.' (emphasis added).”

The Court found that *Watts* could not be charged with threatening the life of the president because:

“But whatever the 'willfulness' requirement implies, the statute initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'”

While Watt’s intentions as a defendant might be seen as in the service of a nobler cause than Mr. McFate, that is not the test. The conditional nature of each, based on perceived political grievance with a public policy is what makes them similar.

Pulaski, was cited by the South Dakota Supreme Court in *Austad v. Bd. of Pardons and Paroles*, 719 N.W.2d 760, 2006 SD 65 (S.D. 2006):

It is well established that "the First Amendment . . . permits a State to ban a 'true threat.'" Id. at 359, 538 U.S. 343, 123 S.Ct. at 1548, 155 L.Ed.2d 535; see also *Watts v. United States*, 394 U.S. 705, 707-08, 89 S.Ct. 1399, 1401-02, 22 L.Ed.2d 664 (1969); *People ex rel C.C.H.*, Page 765, 2002 SD 113, ¶ 12, 651 N.W.2d 702, 706. The "true threat" doctrine originated in the context of a criminal prosecution.¹ See *Watts*, 394 U.S. at 707-08, 89 S.Ct. at 1401-02, 22 L.Ed.2d 664. It has since been applied by many courts to determine whether speech was punishable or protected by the First Amendment. See, e.g., *Doe v. Pulaski County Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002) (considering whether expulsion of a student for making threats violated the First Amendment); *C.C.H.*, 2002 SD 113, 651 N.W.2d at 702 (reversing a delinquency adjudication of a boy who made threatening statements at school). It is important in this case to note that the "true threats" doctrine also has been applied to statements made inside prison walls. See, e.g., *United States v. Stewart*, 420 F.3d 1007 (9th Cir. 2005) (finding that statements made by inmate to informant constituted "true threats" despite inmate's incarcerated status and affirming inmate's conviction for threatening to murder a federal judge); *United States v. Miller*, 115 F.3d 361 (6th Cir. 1997) (affirming conviction for threatening President based on "true threats" contained in inmate-defendant's letter); *United States v. Glover*, 846 F.2d 339 (6th Cir. 1988) (finding that inmates' letters threatening the President contained "true threats" and upholding their convictions).

Another South Dakota Case, *State v Draskovich*, 904 N.W.2d 759 (S.D. 2017)

dealt with whether speech constituted a "true threat" under the above analysis. In *Draskovich*, a disgruntled Defendant told the court clerk: "Now I see why people shoot up courthouses." *Draskovich* then stepped toward the door, opened it, and said: "Not that I would." *Allenstein* was "startled and alarmed."

He then was upset about not being able to obtain a work permit and the following occurred:

“Draskovich began to complain that Judge Mark Salter would not give Draskovich his work permit.¹ Anderson attempted to diffuse his anger by informing him that it was not Judge Salter's fault because by law Draskovich could not receive a work permit until he completed treatment. Draskovich then proclaimed: "Well, that deserves 180 pounds of lead between the eyes," and he left the office. *State v. Draskovich*, 904 N.W.2d 759 (S.D. 2017)

The South Dakota Supreme Court also highlighted how Draskovich's statements were “unconditional” and did not deal with “future events”. “Draskovich's statements were also unconditional. The statement made in *Watts* is illustrative of a conditional threat. There, in the course of a political protest, the defendant stated: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Watts*, 394 U.S. at 706, 89 S.Ct. at 1400–01. The Supreme Court held this statement was of a conditional nature because it depended upon "induction into the Armed Forces—which [the defendant] vowed would never occur." *Id.* at 706–07, 89 S.Ct. at 1401. The Court also noted that several people laughed in response. *Id.* at 707, 89 S.Ct. 1399.

In contrast, Draskovich was angry and agitated. Additionally, his statement, "Now I see why people shoot up courthouses," implied direct action. The statement was not conditioned on a future event. We acknowledge that Draskovich combined his shooting statement with a departing statement, "Not that I would." But his coy way of combining the statements did not alleviate Allenstein's concern—it only exacerbated Allenstein's fear that the threatened violence could possibly occur. Draskovich's other statement was clearly unconditional. *State v. Draskovich*, 904 N.W.2d 759 (S.D. 2017)

The John Kalhooni letter was both conditional and stated in vague, uncertain terms, as was the Defendant's statement “You'll see it Monday”. Further it did not state that the Defendant would personally do anything to the officer, or that he had any

connection to the United States military or “John Kahlhooni” who might do something in the future. For these reasons, though distasteful, it should be seen by this court as protected speech rather than criminally punishable speech.

B. The Defendant’s communication cannot qualify as a “threat to a law enforcement officer” because it did not threaten any particular officer with any particular action under SDCL 22-11-15.6.

SDCL 22-11-15.6 reads as follows:

“22-11-15.6. Threatening law enforcement officer or family--Violation as misdemeanor--Provisions superseded.

Any person who, knowingly and intentionally, communicates any threat not subject to § 22-11-15.5 to take the life of or to inflict serious bodily harm *upon a law enforcement officer of the state or a member of the officer's immediate family*, is guilty of a Class 1 misdemeanor. However, if any such threat is made which otherwise would constitute a violation of § 22-11-4 or 22-18-1.1, the provisions of such sections supersede the provisions of this section, and the penalties provided in § 22-11-4 or 22-18-1.1 apply.”

This language appears to require that a specific law enforcement officer is targeted or threatened with harm, or that their specific family is threatened with the same. In this case, however, the John Kahlhooni letter doesn’t threaten any specific law enforcement officer, nor their family. Instead it purports to state that harm will befall the institution of law enforcement if it is not reformed.

The Defendant’s communications constitute political speech, and therefore must be afforded a higher level of protection than ordinary speech.

One of the problems with analyzing this case under Current South Dakota law, is that most South Dakota cases have only dealt with non-political, interpersonal communications. Other states have employed a higher threshold when addressing speech that is political in nature. One recent case to illustrate this is *State v. Ketterling*, A23-1411 (Minn. App Aug 26, 2024).

In *Ketterling*, the Defendant a statement at issue on a blogging website named Gettr. The Gettr Post included the following language from Ketterling:

“This is a WARNING AND A PROMISE-
Either the election is decertified BY May 22nd, or we will start killing ANYONE AND EVERYONE we feel is involved with the DEEPSTATE . . .
You now have 11 days!

and

This is going to happen here in my State of Minnisomaliota . . . BY FORCE IF NEED BE!!! Ellison and Omar are on our KILL LISTS as are EVERY MUSLIME in this State! This is a WARNING to EVERY MUSLIME-Assililate [sic], leave this country, or WE WILL HUNT YOU DOWN AND KILL YOU! Man, woman, or child! GET THE F--- OUT!!! This is a warning to ALL MUSLIME in the USA or Canada- assimilate, get out, or WE WILL KILL YOU! MAN, WOMAN, OR CHILD . . .”...*State v. Ketterling*, A23-1411 (Minn. App. Aug 26, 2024)

The Minnesota Court of Appeals found that Ketterling’s speech was protected political speech reasoning as follows:

For Kettering's post charged in the amended count 2 to be a true threat it must "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359 (emphasis added). In the post at issue, Ketterling threatened to kill individuals "involved with the deep state" in the context of making a political statement about the 2020 presidential election. But whether a "deep state" even exists is-at most-a matter of political opinion. By its very definition, the "deep state" is "an alleged secret network . . . operating extralegally to influence and enact government policy." Deep State, Merriam-Webster.com, [<https://perma.cc/T3AK-68MB>] (emphasis added). And the true threats exception to free speech protection serves a narrow purpose: to protect individuals, and groups of individuals, from the fear-and possibility-of violence. *Black*, 538 U.S. at 359-360. It is unclear what individuals, or group of individuals, if any, would fear violence as a result of this particular politically laden threat. *State v. Ketterling*, A23-1411 (Minn. App. Aug 26, 2024)

Much as in the present case, the John Kahlooni letter does not threaten Officer Deneke, or the Hot Springs police Department, or even state law enforcement officers in

South Dakota, but instead the “fake corporation Illuminati police” which, like the “deep state” in *Ketterling*, is not a real entity. Ketterling’s rantings are very similar in nature to the John Kahlooni letter in this case, perhaps more violent in their expression. It is also different in that Ketterling personally wrote the message posted to the Gettr user and was not conveying a third party’s message. For these reasons, there is insufficient evidence that McFate’s tendering of the John Kalhooni letter is a “true threat” or a specific threat under SDCL 22-11-15.6.

CONCLUSION

Therefore, the Circuit Court’s denial of the Defendant’s Motion to Suppress and Motion for Acquittal should be reversed. The Circuit Court’s errors on Jury Instructions on their own merit a new trial.

Respectfully submitted,

/s/ J. Scott James

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southernhillslaw@gmail.com
Attorney for the Appellant

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the above and foregoing BRIEF OF APPELLANT was served upon Attorney General Marty Jackley and Fall River County State's Attorney Lance Russell by electronic filing and by us postal mail at the address listed below on this 17th Day of October, 2025:

OFFICE OF THE ATTORNEY GENERAL
APPELLATE DIVISION
1302 E Hwy 14 Suite 1
Pierre, SD 57501

Lance Russell
Fall River State's Attorney
906 N. River St
Hot Springs, SD 57747

Respectfully submitted,

/s/ J. Scott James

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APPENDIX

(MEMORANDUM OPINION DENYING SUPPRESSION ATTACHED)
(DEFENDANT'S PROPOSED JURY INSTRUCTION)
(JURY INSTRUCTIONS)
(VERDICT FORM)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF FALL RIVER	)	SEVENTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH DAKOTA	)	FILE NO. 23 CRI 24-134
Plaintiff,	)	
v.	)	
	)	ORDER DENYING DEFENDANT'S
TROY MCFATE	)	MOTION TO SUPPRESS
	)	
Defendant.	)	
	)	

On September 16, 2024, Defendant filed a Motion to Suppress Evidence. The Court held a Motions Hearing on November 22, 2024. Having reviewed the motions, notices, and other submissions by parties, having heard arguments by parties, and being otherwise familiar with the record, Defendant's Motion to Suppress Evidence is hereby **DENIED**.

BACKGROUND

On March 29, 2024, at approximately 9 p.m., Officer Lexi Deneke was conducting a routine traffic stop in Hot Springs, South Dakota. While seated in her patrol car during the stop, Officer Deneke spotted a man 10 to 15 feet away, waving a piece of paper in her direction. Officer Deneke motioned for the man to go away, but the man stayed until he was waived over to the patrol vehicle. At that point, the man handed Officer Deneke a piece of paper and said something along the lines of "You'll see it Monday." After Officer Deneke finished the traffic stop, she then examined the piece of paper and determined it to be a threat.¹ Officer Deneke then contacted other officers regarding the note. The next day, Officer Matthew Maxfield went to Lynn's Dakota Mart to discuss

¹ The note reads as follows: "DEAR ALL POLICE WORLDWIDE[.] LET ME MAKE THIS CLEAR WITH EVERYONE WITHIN THE FAKE CORPORATION I YOU HAVE GIVEN YOU 48 HOURS AS FROM TODAY DATE 13th MARCH 2024 YOU MUST STAND DOWN FROM YOUR CURRENT POSITION WITHIN THE ILLUMINATI POLICE FORCES YOU MUST GIVE UP YOUR WARRANT CARD BECAUSE YOU HAVE COMMITTED CRIMES AGAINST HUMANITY AND YOU HAVE BREACHED YOUR OATH TO THE PEOPLE I WILL MAKE THIS CLEAR WITH YOU THAT IF YOU DON'T STAND DOWN FROM YOUR CURRENT POSITION YOU WILL BE ARRESTED BY UNITED STATES MILITARY AND EXECUTED ON MY ORDER WITHOUT ANY TRIAL DO YOU UNDERSTAND. YOURS SINCERELY[.] HIS MAJESTY KING JOHN KAHLOONI JR[.]"

the encounter with the defendant. Officer Maxfield told the defendant that they were there to discuss the note, and when asked what the note meant the defendant replied with “something’s coming.” At this point the defendant was placed under arrest. Officer Maxfield then executed a search warrant on the defendant’s home in search of other evidence of the crime. While searching the home, the officer found a white substance in a baggy. This led to the officer executing an amended search warrant that allowed for searches of drugs and drug related paraphernalia, as well as the defendant’s blood which ultimately tested positive for methamphetamine. The defendant now moves to suppress evidence obtained from the search of the home.

LEGAL DISCUSSION

1. Whether the note constituted a “true threat” establishing probable cause of a crime.

The defendant contends that the note is constitutionally protected speech and is not a true threat. A statute that “makes criminal a form a pure speech [] must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.” *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 1401, 22 L.Ed.2d 664 (1969). “A statement that constitutes a ‘true threat’ does not fall within the realm of protected speech.” *State v. Draskovich*, 2017 S.D. 76, ¶ 8, 904 N.W.2d 759, 762 (citing *Austad v. S.D. Bd. of Pardons & Paroles*, 2006 S.D. 65, ¶ 10, 719 N.W.2d 760, 764-65). True threats are:

Those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protects individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.”

Virginia v. Black, 538 U.S. 343, 359-60, 123 S.Ct. 1536, 1548, 155 L.Ed.2d 535 (2003) (citations omitted). To determine if a statement was a true threat, we “analyze an alleged threat ‘in the light of its entire factual context’ and decide whether the recipient of the alleged threat could reasonably conclude that it expresses ‘a determination or intent to injure presently or in the future.’” *Austad*,

2006 S.D. 65, ¶ 13, 719 N.W.2d at 766 (quoting *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996)).

To determine whether the recipient could reasonably conclude that the statement was a true threat, we consider: (1) “the reaction of those who heard the alleged threat”; (2) “whether the threat was conditional”; (3) “whether the person who made the alleged threat communicated it directly to the object of the threat”; (4) “whether the speaker had a history of making threats against the person purportedly threatened” ; and (5) “whether the recipient had a reason to believe that the speaker had a propensity to engaged in violence.”

Draskovich, 2017 S.D. 76, ¶ 9, 904 N.W.2d at 762.

Here, Officer Deneke testified that the note caused her great concern, taking it as a threat on her life. She testified that she felt scared and worried, and that something serious was going to happen to her physically. Preliminary Hearing (P.H.) Page 8, Lines 16-18. The threat was communicated directly to Officer Deneke, as it was handed to her during a traffic stop along with the spoken phrase of “You’ll see it Monday.” P.H. Page 6, Lines 14-17. Even though the threatening note did not name Officer Deneke in particular, she is a law enforcement officer and would be included within the group that the note is targeting. While the note was not signed by the defendant, the defendant was the one who handed the note to Officer Deneke, as indicated by his interactions with Officer Maxfield the next day. While the threat was couched in conditional language, the condition was clearly going to be met. It would be unreasonable to think the Hot Springs Police Department would all collectively stand down in response to this note. There is nothing in the record to suggest that the defendant had a history of making threats like this, or that the defendant had a propensity to engaged in violence.

The *Draskovich* balancing test should not be done in a vacuum, and the threat must be looked at “in the light of its entire factual context.” When asked what the note meant by saying that officers would be executed on his command, the defendant replied with “something’s coming,” indicating that something would happen in the future in connection with the note.

Taking the note in the entire context of the encounter, the search warrant affidavit contains enough information to allow for the circuit judge signing the warrant to make a reasonable finding of probable cause to approve the warrant request.

2. Whether there was probable cause to support a search warrant for a blood draw.

Defendant contends that probable cause didn't exist to request a search warrant for a blood draw, as Officer Maxfield testified that there was no indication that the defendant was under the influence of a narcotic at the time of his arrest. In the search warrant affidavit, Officer Maxfield stated that a white crystalline substance was found in the defendant's bedside table, along with paraphernalia that could be used to ingest said white crystalline substance. It is reasonable for an officer to believe that a defendant might have traces of an illegal substance in their blood if they find said illegal substance in their possession. See *State v. Hanson*, 1999 S.D. 9, ¶ 33, 588 N.W.2d 885, 892 ("If the officers had probable cause to arrest Hanson for possession of marijuana, it would follow they had probable cause to test her for traces of the illegal substance for which she was arrested."). The search warrant affidavit contained enough facts to allow the issuing circuit judge to make a finding of probable cause to search the defendant's blood.

3. Officer Maxfield's use of the search warrant for the defendant's blood would qualify for the good faith exception.

Even if the police lacked probable cause to conduct the search for the defendant's blood, the evidence would still be admissible under the good faith exception to the exclusionary rule. "[E]vidence is admissible when police officers reasonably rely on a warrant that is subsequently invalidated because a judge finds there was an insufficient basis for the issuing magistrate to find good cause." *State v. Saiz*, 427 N.W.2d 825, 828 (S.D. 1988).

In *Leon*, the Supreme Court identified four situations in which the good faith exception to the exclusionary rule would not apply. First, evidence should be suppressed if the issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false but for the

affiant's reckless disregard for the truth. Second, the exception will not apply when the issuing magistrate wholly abandons the judicial role. Third, the good-faith exception will not apply when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Thus, the exception does not extend to situations in which the officer obtains a warrant based on a "bare bones" affidavit and then relies on good faith execution by innocent colleagues in order to sustain the warrant. Fourth, the exception will not apply when a warrant is not facially deficient that the executing officer could not reasonably believe it was valid.

State v. Sorensen, 2004 S.D. 108, ¶ 10, 688 N.W.2d 193, 197 (citations omitted).

Here, none of the four situations apply. There is no evidence that the affidavit contains false information, or that the circuit judge that issued the warrant was misled or wholly abandoned the judicial role. The affidavit is not so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable. The affidavit states that there was a white crystalline substance found in a bag in the bedside table of the defendant's bedroom, along with paraphernalia that could have been or could be used to ingest said white crystalline substance. The warrant is not so facially deficient so that the executing officer, Officer Maxfield, could not reasonably believe it was valid. Officer Maxfield could have relied on the probable cause determination made by the circuit judge who issued the warrant in this scenario.

CONCLUSION

When looked at through the context of the entire encounter, the note given to Officer Deneke was a "true threat" and not constitutionally protected speech, and therefore the search warrant for the defendant's home and vehicle were based on valid probable cause. In addition, Officer Maxfield had probable cause when requesting the warrant for the defendant's blood. Even if he didn't Officer Maxfield could have relied on the probable cause determination of the issuing circuit judge under the good faith exception to the exclusionary rule.

ORDER

Considering the foregoing, it is hereby

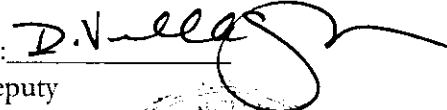
ORDERED that Defendant's Motion to Suppress Evidence is **DENIED**.

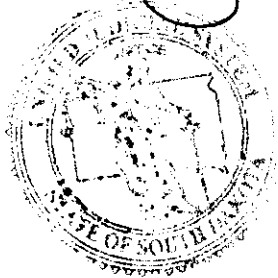
Dated this 23 day of January 2025.

BY THE COURT


The Honorable Scott A. Roetzel
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:
TAMMY GRAPENTINE
CLERK OF COURTS

By: 
Deputy
(SEAL)



FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD
JAN 23 2025
By: 

STATE OF SOUTH DAKOTA)
)ss:
COUNTY OF FALL RIVER) SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA)
 Plaintiff,)
)
v.)
)
TROY MCFATE)
 Defendant.)

23CRI24-134

DEFENDANT’S PROPOSED JURY INSTRUCTION

COMES NOW, the Defendant, Troy McFate, by and through counsel, J. Scott James, of Southern Hills Law PLLC, and hereby submits to the Court the following additional, supplemental proposed jury instructions for the Trial set for May 29, 2025. Proposed Instructions are listed below:

3-23-20

THREATENING LAW ENFORCEMENT OFFICER OR FAMILY – STATUTE

Instruction No. _____

Any person who knowingly and intentionally communicates any threat (see definition) to take the life of or to inflict serious bodily harm upon a law enforcement officer of the state, is guilty of a crime.

SUPPLEMENTAL- DEFINITION OF TRUE THREAT

If a defendant's repetition of a third party's threat is reasonably interpreted as a simple disclosure of the existence of the threat for informational purposes, no illegality has occurred. {If, on the other hand, a defendant's repetition of a third party's threat is reasonably interpreted as communicating the defendant's own intent, purpose, or goal to "kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive," the defendant has violated the law and committed a crime. In the latter scenario, the defendant has effectively adopted the third party's threat as his own.}

(Source: *U.S. v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999))

"Threat" defined- to constitute a threat, a person must consciously disregard a substantial and unjustifiable risk that his conduct will cause harm to another person.

(Source: *Counterman v Colorado*, 143 S. Ct 2106, 216 L. Ed 2d 775).

Respectfully submitted on this 20th day of March, 2025.

/s/ J. Scott James

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the above and foregoing DEFENDANT'S PROPOSED JURY INSTRUCTIONS was sent via email to sa.office@frcounty.org to the Fall River State's Attorney's Office and Electronically filed with the Clerk of the Circuit Court, on this 20th Day of June, 2024.

/s/ J. Scott James

J. Scott James

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD
MAY 29 2025

STATE OF SOUTH DAKOTA,)
)SS
COUNTY OF FALL RIVER)
)
STATE OF SOUTH DAKOTA,)
)
Plaintiff,)
)
vs.)
)
TROY MCFATE,)
)
Defendant.)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

FILE NO. 23 CRI 24-134

JURY INSTRUCTIONS

LADIES AND GENTLEMEN OF THE JURY:

It now becomes my duty to instruct you in the law. All questions of fact are to be decided by you, the Jury, and to these facts you will apply the law given to you in these instructions, even though you believe that the law is, or should be, otherwise.

No attempt has been made to embody all the law applicable to this case in any one instruction. Therefore, you must consider these instructions as a whole and not single out one instruction to the exclusion of the others.

INSTRUCTION NO. 11

In this action the defendant, **TROY MCFATE**, is accused by the State of South Dakota in an Information charging that on or about the 29th day of March, 2024, in Fall River County, State of South Dakota, the defendant did commit the public offense of **COUNT 1: INGESTION OF CONTROLLED DRUG OR SUBSTANCE**, in that he did knowingly ingest a controlled drug or substance or have a controlled drug or substance in an altered state in the body, in violation of SDCL 22-42-5.1, and;

COUNT 2: THREATENING LAW ENFORCEMENT OFFICER OR FAMILY, in that he did, knowingly and intentionally, communicate any threat to take the life of or to inflict serious bodily harm upon a law enforcement officer of the state or a member of the officer's immediate family, in violation of SDCL 22-11-15.6, and;

COUNT 3: POSSESSION OF DRUG PARAPHERNALIA, in that he did, knowing the drug related nature of the object, use or possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body any controlled drug or substance or marijuana, in violation of SDCL 22-42A-3.

To the charges in the Information, the defendant has pled not guilty.

INSTRUCTION NO. 12

An Information is the statutory method of accusing a defendant of a crime. It is not evidence and does not create any presumption or permit you to form any inference of guilty.

INSTRUCTION NO. 13

It is a fundamental principle of our law that a defendant in a criminal case is presumed to be innocent. This presumption follows the defendant throughout the trial and must continue unless you are satisfied from all the evidence beyond a reasonable doubt that the defendant is guilty.

INSTRUCTION NO. 14

The State has the burden of proving every element of the offense charged beyond a reasonable doubt. The burden of proof never shifts to the defendant, but rests upon the State throughout the trial. A mere preponderance of the evidence is not enough. In case of a reasonable doubt as to whether the defendant's guilty is satisfactorily proven by the evidence, your verdict must be not guilty.

INSTRUCTION NO. 15

By reasonable doubt of guilt is meant doubt of guilt reasonably arising from all the evidence, facts and circumstances or lack of evidence in the case. It is not mere possibility of doubt. It is not an imaginary doubt nor a doubt of absolute certainty of guilt of a defendant, because everything relating to human affairs may be open to some conjectural or imaginary doubt and because absolute certainty is not required by law. A reasonable doubt is one which would ordinarily impress the judgment of a prudent person so as to cause the person to pause or hesitate to act in the more important affairs of life. If after a consideration of the whole case any juror entertains a reasonable doubt of the guilt of the defendant, it is the duty of that juror not to vote for a verdict of guilty or be influenced in so voting for the single reason that other members of the jury may be in favor of a verdict of guilty.

This does not mean, however, that a juror should not fairly consider the views and arguments of the other jurors. The jury is sent out by the court to deliberate upon the evidence taken at the trial, and it is the duty of each juror during the entire time the jury is deliberating to honestly consider the views and arguments of the other jurors as to the evidence with a view of arriving at a true verdict.

INSTRUCTION NO. 16

Any person who knowingly ingests a controlled drug or substance, or who has a controlled drug or substance in an altered state in their body, is guilty of a crime.

INSTRUCTION NO. 17

The elements of Count 1: Ingestion of a Controlled Drug or Substance, namely, Methamphetamine, each of which the State must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant knowingly ingested a controlled drug or substance or had a controlled drug or substance in an altered state in their body, namely Methamphetamine.
2. The drug or substance was not obtained directly pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice.

INSTRUCTION NO. 18

By a law of this state, methamphetamine is classified and defined as a controlled drug or substance.

INSTRUCTION NO. 19

Any person who, knowingly and intentionally, communicates any threat to take a life of or to inflict serious bodily harm upon a law enforcement officer of the state or a member of the officer's immediate family, is guilty of a crime.

INSTRUCTION NO. 20

The elements of Count 2: Threatening Law Enforcement Officer or Family, each of which the State must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant knowingly and intentionally communicates any threat to a law enforcement officer.
2. The defendant threatened to take the life of or to inflict serious bodily harm upon the law enforcement officer.

INSTRUCTION NO. 21

A threat is a declaration or a show of disposition or determination to unsettle the mind of the person to whom it was directed so as to prevent voluntary action. The threat may be communicated in any manner. No specific words are necessary to constitute a threat. A threat may be made by innuendo or suggestion. You may consider such things as the relationship between the defendant and the police officer, as well as the circumstances under which the statement was made, to determine whether or not a threat was made.

INSTRUCTION NO. 22

Any person who, while knowing the drug related nature of the object, uses or possesses with intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body any controlled substance or marijuana, is guilty of a crime.

INSTRUCTION NO. 23

The elements of the crime of Count 3: Use or Possession of Drug Paraphernalia, each of which the State must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant knew the drug related nature of the object.
2. The defendant used or possessed with intent to use the object to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, or otherwise introduce into the human body any controlled substance or marijuana.

INSTRUCTION NO. 24

The words “intent” or “intentionally,” or any derivatives thereof, as used in these instructions means a specific design to cause a certain result.

INSTRUCTION NO. 25

The words “knowledge” or “knowingly,” or any derivative thereof, means only a knowledge that the facts exist which bring the act or omission within the provisions of any statute. It does not require knowledge of the unlawfulness of the act or omission.

INSTRUCTION NO. 26

A separate offense is charged in each of the counts of the Information. You must separately consider each count and the evidence that applies to it. The fact that you may find the defendant guilty or not guilty on any one count of the Information must not control or influence your verdict on any other count or counts of the Information.

INSTRUCTION NO. 27

The Information charges that the offense was committed “on or about” a certain date. The proof need not establish with certainty the exact date of the offense alleged. It is sufficient if the evidence establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

INSTRUCTION NO. 28

In the crimes of Ingestion of a Controlled Drug or Substance, Threatening Law Enforcement Officer or Family, and Use or Possession of Drug Paraphernalia, the defendant must have criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. When a person intentionally does an act which the law declares to be a crime, the person is acting with criminal intent, even though the person may not know that the conduct is unlawful.

INSTRUCTION NO. 29

The intent with which an act is done is shown by the circumstances surrounding the act, the manner in which it is done, and the means used.

INSTRUCTION NO. 30

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You are instructed that you should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 31

A statement made by a defendant other than at his trial may be either an admission or a confession.

An admission is a statement by a defendant admitting one or more facts at issue. It is not sufficient by itself to prove guilt of the crime charged, but it may prove one or more of the elements of the crime charged.

A confession is a statement by a defendant which admits every element of the crime charged, thus admitting guilt of the crime charged.

You are the exclusive judges as to whether an admission or a confession was made by the defendant and if the statement is true in whole or in part. If you find that such statement is entirely untrue, you must reject it. If you find that it is true in part, you may consider that part which you find to be true. It is for you to determine which weight, if any, to give to a purported admission or confession. However, evidence of a claimed oral admission or confession of the defendant ought to be viewed with caution and weighed with care.

The guilt of a defendant may not be established only by any admission or confession made outside of this trial. Before any person may be convicted of a criminal offense, there must be proof, independent of the statement, that the crime in question was committed, but it is not necessary the independent proof include proof as to the identity of the person by whom the offense was committed.

INSTRUCTION NO. 32

The weight of the evidence is not determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

INSTRUCTION NO. 33

A person is qualified to testify as an expert if the person has special knowledge, skill, experience, training or education sufficient to qualify as an expert on the subject to which the testimony relates.

Qualified experts may give their opinions on questions in controversy at the trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert. You are not bound to accept an expert's opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

INSTRUCTION NO. 34

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement on a matter of fact or acted in a manner inconsistent with the witness's testimony in this case on a matter material to the issues. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness, but you must not consider any such prior statement as establishing the truth of any fact contained in that statement.

INSTRUCTION NO. 35

You are the exclusive judges of all questions of fact and the credibility of the witnesses and the weight that should be given to their testimony.

In judging the credibility of the witnesses and determining the weight to be given their testimony, you may and should consider the opportunity and capacity of the several witnesses for seeing and knowing and remembering the matters about which they have testified; their conduct and demeanor while testifying; their apparent candor, fairness, bias or prejudice, if any appears; their interest or lack of interest in the result of the case; the motive, if any, actuating them as witnesses; the reasonableness of their statements; and all the evidence, facts and circumstances shown tending to shed light upon the truth or falsity of the testimony of any witness in the case and the weight to be given the testimony.

If you believe that any witness has knowingly sworn falsely to any material fact in the case, you may reject all of the testimony of the witness.

INSTRUCTION NO. 36

The function of the jury is to determine the facts under the instructions of the court without prejudice, fear or favor, solely upon a fair consideration of the evidence in the light of your own observations and experience in the affairs of life.

Offered testimony stricken, or not received and statements of counsel not supported by the evidence or a fair inference drawn therefrom should not be considered by you in arriving at your verdict.

You must accept and apply the law as stated in these instructions which you must consider as a whole. You should not disregard any instruction, or give special attention to any one instruction, or question the validity of any rule of law.

The actions of the court during the trial in ruling on motions or objections by counsel or in comments to counsel or in setting forth the law in these instructions are not to be taken by you as any indication of an opinion by the court as to how you should determine the issues of fact. What your verdict shall be is your sole and exclusive responsibility.

INSTRUCTION NO. 37

In arriving at a verdict in this case, you shall not discuss or consider the subject of penalty or punishment, as that is a responsibility of the court.

INSTRUCTION NO. 38

The function of the court is to conduct the trial in an orderly, fair and efficient manner, to rule upon questions of law arising during the course of the trial, and to instruct the jury as to the law which applies to this case.

The actions of the court during the trial in ruling on motions or objections by counsel, in comments to counsel, in questions to any person involved in the trial, or in setting forth the law in these instructions, are not to be taken by you as any indication of any opinion by the court as to how the jury should determine any issue of fact. As you are the exclusive judges of all questions of fact in the case, the court in the conduct of the case does not express or intimate any opinion as to the facts which are for your sole determination.

INSTRUCTION NO. 39

If under the court's instructions and the evidence you find beyond a reasonable doubt that the defendant committed the acts constituting the elements of the offense charged, then it is your duty to find the defendant guilty.

If any member of the jury, has any reasonable doubt that the defendant committed the offense charged, or any reasonable doubt upon any single fact or element necessary to constitute the offense charged as defined for you by the court, then it is that juror's duty to give the defendant the benefit of the doubt and vote for a verdict of not guilty.

INSTRUCTION NO. 40

At the conclusion of these instructions, you will hear argument by counsel, which is an explanation of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you. Counsel may refer to instructions that I gave you. If there is any inconsistency between what counsel might say about the instructions and the instructions which I gave you, you must accept my statement as being correct.

INSTRUCTION NO. 41

Consider this case carefully and honestly with due regard for the interests of society and the rights of the defendant. You should decide the case fairly and impartially upon the evidence and the instructions of the court. It must not be decided from any feeling of bias or prejudice against or sympathy for the defendant.

Your duty upon such fair consideration of the case is to determine whether the defendant is guilty or not guilty of the offense charged.

INSTRUCTION NO. 42

In order to return a verdict, all jurors must agree.

The jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment.

Each juror must decide the case independently, but only after an impartial consideration of the evidence with the other jurors.

In the course of deliberations, jurors should not hesitate to re-examine their own views and change their opinions if convinced they are erroneous. However, no juror should surrender an honest belief as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 43

When you have retired to your jury room, you will select a foreperson. All twelve of you must agree upon any verdict.

When all twelve of you have agreed upon a verdict, and the foreperson has completed, dated, and signed the verdict form, you will report to the bailiff. You will then be brought into court where your verdict will be received. Return to court these instructions and any exhibits sent out with you.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the bailiff. The jury is not to reveal to the court or to any person how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused until after you have reached a unanimous verdict and reported the same into court.

Written forms of verdict will be furnished to you for your convenience.

Dated this 29th day of May 2025.



The Honorable Scott A. Roetzel
Circuit Court Judge
Seventh Judicial Circuit

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF FALL RIVER

SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

23CRI 24-134

vs.

TROY MCFATE

JUDGMENT AND SENTENCE

Defendant.

DOB: 11-18-1970

DATE OF ARREST: 3-29-2024 PLEA DATE: 5-29-2025 PLEA: CONVICTED @ JURY TRIAL
COUNT: #1 INGESTION of CONTROLLED SUBSTANCE

HABITUAL OFFENDER ☐ SDCL 22-7-7 ☐ SDCL 22-7-8 ☐ SDCL 22-7-8.1

SENTENCE:

☒ Judgment of Suspended Execution ☐ Judgment of Suspended Imposition
☐ Judgment ☐ Deferred Imposition ☒ Concurrent with Ch 2-3 ☐ Consecutive with _____
☒ Penitentiary Term 5 yrs. ☒ Suspended 5 yrs. ☐ CTS _____
☒ County Jail 180d ☒ Suspended 180d ☐ CTS _____ ☐ WR/EM
☒ Placed on Probation 3 yrs.

COUNT: #2 THREATEN LAW ENFORCEMENT

HABITUAL OFFENDER ☐ SDCL 22-7-7 ☐ SDCL 22-7-8 ☐ SDCL 22-7-8.1

SENTENCE:

☒ Judgment of Suspended Execution ☐ Judgment of Suspended Imposition
☐ Judgment ☐ Deferred Imposition ☒ Concurrent with Ch 1-3 ☐ Consecutive with _____
☐ Penitentiary Term _____ yrs. ☐ Suspended _____ yrs. ☐ CTS _____
☒ County Jail 1 year ☒ Suspended 1 year ☐ CTS _____ ☐ WR/EM
☐ Placed on Probation _____ yrs.

COUNT: #3 POSSESS DRUG PARAPHERNALIA

HABITUAL OFFENDER ☐ SDCL 22-7-7 ☐ SDCL 22-7-8 ☐ SDCL 22-7-8.1

SENTENCE:

☒ Judgment of Suspended Execution ☐ Judgment of Suspended Imposition
☐ Judgment ☐ Deferred Imposition ☐ Concurrent with _____ ☐ Consecutive with _____
☐ Penitentiary Term _____ yrs. ☐ Suspended _____ yrs. ☐ CTS _____
☒ County Jail 30d ☒ Suspended 30d ☐ CTS _____ ☐ WR/EM
☐ Placed on Probation _____ yrs.

☐ The Defendant is given credit for all days while awaiting to the state Penitentiary.

Concurrent with File # _____ Consecutive with File # _____

☐ The Defendant is remanded to the custody of the Sheriff to be delivered to the Warden of the State Penitentiary.

☐ The Defendant is remanded to the Sheriff to be incarcerated in jail.

☐ The Defendant is remanded to Court Services Department to scheduled incarceration.

☐ Other _____

☐ Fine _____ ☒ Attorney Fees to be liened \$ <u>by order</u> ☒ Court Cost \$ <u>116.50</u> ☐ Grand Jury Transcripts \$ _____ ☒ Drug Test \$ <u>190.00</u> ☐ Blood \$ _____ ☐ Extradition \$ _____ ☐ UA \$ _____ ☐ DV Fee \$ _____ ☐ DUI \$ _____ ☐ Restitution \$ _____ ☒ SDHL LAB Exam: \$ <u>400.00</u>	<u>Dismissed File Costs</u> File # _____ ☐ UA \$ _____ ☐ Drug Test \$ _____ ☐ Blood \$ _____ ☐ Transcripts \$ _____ ☐ Other _____
---	---

TERMS AND CONDITIONS

- ☒ 1. That the Defendant remain on his/her good behavior and obey all laws and Court orders.
- ☒ 2. That the Defendant obey all orders, rules, and regulations of the Court Services Department.
- ☒ 3. That the Defendant keep his/her Court Services Officer advised of any change in his/her employment or residence and shall obtain permission from the Court Services Officer before leaving this judicial circuit or state.
- ☒ 4. That the Defendant remain gainfully employed and support any dependants through the probationary period.
- ☐ 5. That the Defendant shall not purchase or possess any type of firearm.
- ☐ 6. That the Defendant shall take all medications as prescribed by his/her primary care provider.
- ☒ 7. That the Defendant shall not consume alcoholic beverages, including beer, wine, no bars, liquor stores.
- ☒ 8. That the Defendant neither use nor possess any controlled drugs or substances, be present where such substances are being used. Defendant shall request prior approval to use medical cannabis while on probation by including proof of nonresident registration issued by the South Dakota Department of Health as well as a copy of the practitioner's written certification listing the debilitating medical condition consistent with SDCL 34-20G-1(8) provided to the Department of Health. Defendant must inform the Court Services Officer if Defendant has been issued, applied for, or has in his/her possession, a registry identification card for the use of medical cannabis in the State of South Dakota. If he/she is under probation supervision in South Dakota, a medical cannabis registry identification card or documentation issued by another state related to the use of medical cannabis does not permit the use of medical cannabis while on probation unless such use has been approved by the sentencing Court. Any use of medical cannabis while on probation must be in conformity with the medical instructions of his/her physician and must be in compliance with South Dakota Law.

- ☒ 9. That the Defendant submit to random testing of his/her breath or bodily fluids as directed by the Court Services Officer or any law enforcement officer and pay for costs of testing.
- ☒ 10. That the Defendant submit his/her person and property to warrantless search and seizure upon demand by the Court Services Officer at any time of the day or night, with or without a search warrant.
- ☐ 11. That the Defendant's driver's license is unconditionally revoked for _____
- ☐ Work permit authorized if eligible.
- ☐ 12. That the Defendant shall not associate or have contact with any known felons or drug dealers.
- ☐ 13. That the Defendant have no contact with the victim(s).
- ☐ 14. That the Defendant obtain a high school diploma or GED
- ☐ 15. That the Defendant undergo an chemical dependency evaluation within 30 days and satisfactorily complete any treatment recommendations within 90 days and all aftercare recommendations. Further treatment shall be at the discretion of his/her court services officer.
- ☐ 16. That the Defendant shall attend _____ Victim Impact Panel/MADD Impact Panel(s).
- ☐ 17. That the Defendant shall obtain a mental health evaluation and follow any treatment recommendations.
- ☐ 18. That the Defendant attend and complete Cognitive-Based Intervention for Substance Abuse (CBISA) and follow the recommendations thereof.
- ☐ 19. That the Defendant attend and complete Moral Reconation Therapy (MRT).
- ☐ 20. That the Defendant attend ☐ AA / ☐ NA _____ timer per week; Obtain a sponsor Yes/No
- ☐ 21. That for a period of _____ days, the Defendant shall submit to ☐ random UA's, ☐ _____ UA's Per week; ☐ _____ PBT's per day ☐ SCRAM, per the requirements of the 24/7 Sobriety Program, 906 N River Street, and pay for the same; ☐ thereafter at the discretion of Court Services Officer.
- ☒ 23. Other Conditions: Defendant shall participate in the 24-7 sobriety program at his court services officer's discretion.

☐ Pursuant to SDCL 22-6-11, a Court shall sentence a Defendant convicted of Class 5 or Class 6 Felony to a term of probation unless the Court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation; and the Court having found the following aggravating factors exist justifying a deviation, to-wit:

- | | |
|--|---|
| ☐ Failure to comply with terms of probation | ☐ Criminal history |
| ☐ Poor performance on bond | ☐ Multiple files |
| ☐ Escalating behavior | ☐ Picking up new files while on bond |
| ☐ Failure to accept responsibility | ☐ On Parole when committed offense |
| ☐ | |

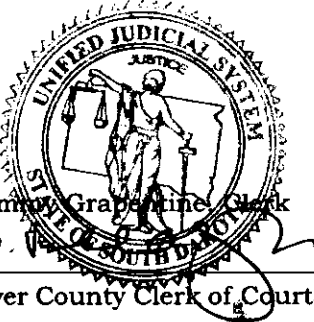
Pursuant to agreement of the parties, the State's Attorney is dismissing all remaining counts to include any Part II information, if applicable.

Dated this 30 day of June, 2025

Attest:

/s/ Tammy Grapevine, Clerk

Fall River County Clerk of Courts



Scott A. Roetzel Circuit Court Judge

NOTICE OF RIGHT TO APPEAL

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

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD
JUN 30 2025
By: DV

IN THE SUPREME COURT OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	
	)	Appellate Case No. 31134
v.	)	Circuit CASE NO.: 24CRI-134
	)	
	)	
TROY MCFATE,	)	
Defendant.	)	

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 15-26A-66(b), I certify that the Brief of Appellant contains 9,964 words and complies with the type volume limitation imposed. The brief utilized Times New Roman 12 point font which is a serif font.

Respectfully submitted on this 17th day of October, 2025.

/s/ J. Scott James

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the above and foregoing CERTIFICATE OF COMPLIANCE was served upon Attorney General Marty Jackley and Fall River County State's Attorney Lance Russell by electronic filing and by us postal mail at the address listed below on this 17th Day of October, 2025:

OFFICE OF THE ATTORNEY GENERAL
APPELLATE DIVISION
1302 E Hwy 14 Suite 1
Pierre, SD 57501

Respectfully submitted,

/s/ J. Scott James

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Attorney for the Appellant

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31134

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

TROY MCFATE,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

THE HONORABLE SCOTT A. ROETZEL
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed July 3, 2025

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 31134

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

TROY MCFATE,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as “State.” Defendant/Appellant, Troy McFate, is referred to as “Defendant.” The settled record in the underlying case is denoted as “SR.” Trial exhibits are referenced as “Ex” followed by the exhibit number. Defendant’s Brief is denoted as “DB.” All references to documents will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On June 30, 2025, the Honorable Scott A. Roetzel, Circuit Court Judge, Seventh Judicial Circuit, entered a Judgment and Sentence in *State of South Dakota v. Troy McFate*, Fall River County Criminal File Number 23CRI24-000134. SR:331-34. Defendant filed his Notice of Appeal on July 3, 2025. SR:335. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE AFFIDAVIT IN SUPPORT OF A REQUEST FOR A SEARCH WARRANT WAS SUFFICIENT TO SHOW PROBABLE CAUSE TO ISSUE A SEARCH WARRANT FOR A BLOOD SAMPLE FROM DEFENDANT?

The circuit court found the search warrant affidavit contained sufficient evidence to support the issuance of the search warrant.

State v. Buchholz, 1999 S.D. 110, 598 N.W.2d 899

State v. Hanson, 1999 S.D. 9, 588 N.W.2d 885

State v. O'Neal, 2024 S.D. 40, 9 N.W.3d 728

State v. Sorensen, 2004 S.D. 108, 688 N.W.2d 193

II.

WHETHER THE CIRCUIT COURT PROPERLY INSTRUCTED THE JURY REGARDING DEFENDANT'S MENS REA AND THE DEFINITION OF THREAT?

The circuit court denied Defendant's proposed adoption and threat instruction, reasoning that the instructions adequately and properly explain the law.

SDCL 22-11-15.6

Counterman v. Colorado, 600 U.S. 66 (2023)

State v. Armstrong, 2020 S.D. 6, 939 N.W.2d 9

State v. Paulson, 2015 S.D. 12, 861 N.W.2d 504

State v. Rouse, 2025 S.D. 29, 23 N.W.3d 467

III.

WHETHER SUFFICIENT EVIDENCE ESTABLISHED A TRUE THREAT TO SUSTAIN DEFENDANT'S CONVICTION?

The circuit court denied Defendant's motion for judgment of acquittal as to Threatening a Law Enforcement Officer, finding the State presented sufficient evidence for the jury to deliberate on that count.

SDCL 22-11-15.6

State v. Draskovich, 2017 S.D. 76, 904 N.W.2d 759

United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996)

Watts v. United States, 394 U.S. 705 (1969)

STATEMENT OF THE CASE

On August 30, 2024, in Fall River County File Number 23CRI24-000134, the State filed an Amended Complaint charging Defendant with three counts. SR:74-75. Count 1 charged Ingestion of a Controlled Drug or Substance in violation of SDCL 22-42-5.1, a Class 5 felony. SR:74. Count 2 charged Threatening a Law Enforcement Officer in violation of SDCL 22-11-15.6, a Class 1 misdemeanor. SR:74. Count 3 charged Possession of Drug Paraphernalia in violation of SDCL 22-42A-3, a Class 2 misdemeanor. SR:74.

Defendant moved to suppress evidence claiming, in part, that all evidence obtained pursuant to two search warrants should be suppressed because the initial alleged criminal conduct was protected speech under the First Amendment. SR:83. Defendant argued that his initial conduct that started the criminal investigation—delivering a law enforcement officer a letter and the contents of the letter—was protected speech. SR:83. Defendant asked the circuit court to apply a First

Amendment multifactor test derived from *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), hold that his speech was protected speech, and ultimately suppress all evidence. SR:83-85.

He also argued that Hot Springs Police Officer Matthew Maxfield's affidavit in support of a second search warrant did not contain probable cause to obtain a blood sample from Defendant. SR:81-86. The affidavit stated that when law enforcement executed the first search warrant on Defendant's apartment, law enforcement discovered a glass pipe and drug paraphernalia. SR:152. The affidavit also stated that law enforcement discovered "a clear plastic bag containing a white crystalline substance" in Defendant's nightstand. SR:152. Officer Maxfield then applied for the second search warrant for Defendant's blood. SR:152. Defendant argued the affidavit was deficient because it did not show he was currently intoxicated. SR:82-86.

On November 22, 2024, the Honorable Scott A. Roetzel, Circuit Court Judge, Seventh Judicial Circuit, held an evidentiary hearing. SR:166-96. The circuit court heard testimony from Officer Maxfield, received evidence, and considered written arguments of counsel. SR:81-86, 91-145, 148-96, 199-216. The circuit court then entered a written Order Denying Defendant's Motion to Suppress. SR:217-22. After applying the multifactor test, the circuit court held, "When looked at through the context of the entire encounter, the note given to [the law enforcement officer] was a 'true threat' and not constitutionally protected

speech, and therefore the search warrant for the defendant's home and vehicle were based on valid probable cause." SR:218-21. The circuit court also held that the second warrant for the blood sample was supported by probable cause, or alternatively, the good faith exception to the exclusionary rule applied. SR:217-22.

The case proceeded to a jury trial on May 29, 2025. SR:431. At the close of the State's case, Defendant unsuccessfully moved for judgment of acquittal. SR:620-22. At the close of Defendant's case, the parties settled jury instructions.¹ SR:645-63; *see* SR:265-98 (Final Jury Instructions). After closing arguments, the case was given to the jury. SR:681-701. Later that day, the jury found Defendant guilty on all counts. SR:304, 702.

STATEMENT OF FACTS

On March 29, 2024, at approximately 10:00 p.m., Hot Springs Law Enforcement Officer Lexi Jo Deneke conducted a routine traffic stop in Hot Springs, South Dakota. SR:517-20. Officer Deneke decided to issue the driver a warning ticket. SR:519. While seated in her patrol car writing the warning ticket, Officer Deneke spotted an unknown man, later identified as Defendant, standing approximately ten to fifteen feet away persistently waving a piece of paper in her direction. SR:519-20,

¹ During the settling of jury instructions, Defendant referenced that the circuit court made a preliminary ruling regarding some of the instructions via email. SR:650. That email is not part of the settled record. *See* SR.

526; Ex:1. Officer Deneke motioned for Defendant to go away because she considered his presence at the traffic stop a safety hazard. SR:526-27.

Defendant would not leave. SR:526-27. Officer Deneke partially rolled down her window and requested, “Can you just back up and wait a bit?” Ex:1 at 0:00:15. Defendant refused. *See* Ex:1 at 0:00:20. Instead, Defendant approached the patrol car. Ex:1 at 0:00:20. Defendant handed Officer Deneke a piece of paper and stated, “You’ll see it Monday.” SR:525; Ex:1 at 0:00:20. Defendant walked away, disappearing into the dark. SR:526-27, 538; Ex:1 at 0:00:30. Officer Deneke returned her attention to writing the warning ticket. SR:526-27, 538; Ex:1 at 0:00:30.

After Officer Deneke concluded the traffic stop, she examined the paper Defendant handed her. SR:522, 538-39; Ex:2.² The top upper right portion of the letter contained a typed date of “13th March, 2024.” SR:524. That text was crossed off and “4-1-24” was handwritten in marker. SR:87, 524. The remainder of the letter contained typed text:

DEAR ALL POLICE WORLDWIDE:

LET ME MAKE THIS CLEAR WITH EVERYONE WITHIN THE
FAKE CORPORATION I YOU [SIC] HAVE GIVEN YOU 48
HOURS AS FROM TODAY DATE 13TH MARCH, 2024.[] YOU

² Trial Exhibit 2, the note Defendant handed Officer Deneke, is not contained in the settled record. That said, the contents of Exhibit 2 is reflected in the jury trial transcript and is partially visible in Exhibit 1. SR:524; Ex:1. The note is also part of settled record marked as Plaintiff’s Exhibit 1 from the preliminary hearing. SR:87.

MUST STAND DOWN FROM YOUR CURRENT POSITION
WITHIN THE ILLUMINATI POLICE FORCES[.] YOU MUST
GIVE UP YOUR WARRANT CARD BECAUSE YOU HAVE
COMMITTED CRIMES AGAINST HUMANITY AND YOU HAVE
BREACHED YOUR OATH TO THE PEOPLE[.] I WILL MAKE
THIS CLEAR WITH YOU THAT IF YOU DON'T STAND DOWN
FROM YOUR CURRENT POSITION YOU WILL BE
ARRESTED BY UNITED STATES MILITARY AND EXECUTED
ON MY ORDER WITHOUT ANY TRIAL[.] DO YOU
UNDERSTAND.

YOURS SINCERELY,
[SIGNATURE]
HIS MAJESTY KING JOHN F. KAHLOONI JR

See SR:87, 524. The letter also contained a stamp that said,

“International Common Law Court of Justice.” SR:524.

After Officer Deneke read the letter, she was scared for her life as well as for the lives of other law enforcement officers. SR:525. She believed the letter was threatening because it stated law enforcement officers would be executed. SR:525. Officer Deneke interpreted the execution date to be the letter’s handwritten modified date of April 1, 2024, which was approximately forty-eight hours from when she received the letter. SR:525, 528.

Officer Deneke abruptly drove away. SR:525, 539. Officer Deneke did not know where Defendant went, did not know if he was watching her, and was scared he could follow her. SR:539-40. As she drove away, she immediately contacted Captain Shively to explain the threat. SR:525, 539.

On Monday, April 1, 2024, Hot Springs Police Officer Matthew Maxfield and another law enforcement officer went to Lynn’s Dakotamart,

Defendant's place of employment, to discuss the encounter with him. SR:543-45. When law enforcement arrived, they spoke with Dakotamart's manager, Duane Fisher. SR:590. Law enforcement showed Duane a copy of the letter Officer Deneke received. SR:596-97.

Duane recognized the letter. SR:590-99. The week before, Duane noticed a stack of copies of the letter on the printer in the break room. SR:590, 597. Defendant collected the copies from the break room and stated to Duane that he planned to distribute the letters on law enforcement vehicles throughout town. SR:590, 598. Duane told Defendant that he had friends and family in law enforcement. SR:597. Defendant responded, "I'm sorry." SR:598, 632.

Defendant was working at Dakotamart when law enforcement arrived and spoke with law enforcement. Ex:3. Officer Maxfield informed Defendant that they were there to discuss the letter. SR:548. When asked what the letter meant, specifically the language "executed on my order without any trial," Defendant replied, "something's coming." SR:548; Ex:3. Officer Maxfield believed Defendant was threatening harm to law enforcement, specifically that officers would be executed. SR:549. At that point, Defendant was arrested. SR:548-50.

Next, Officer Maxfield completed a search warrant affidavit and applied for a search warrant. SR:550; Ex:4. He sought a warrant to search Defendant's apartment and vehicle for other evidence of threatening communications. SR:550.

The search warrant was granted, and law enforcement executed the search warrant on Defendant's apartment. SR:552; Ex:5-6. While searching the apartment, Officer Maxfield searched Defendant's nightstand. SR:554; Ex:6-7. He discovered a glass pipe, drug paraphernalia, and a clear plastic bag containing a white crystalline substance. Ex:7; *see* SR:554. Law enforcement immediately ended the search. SR:554; Ex:6.

Officer Maxfield then completed a second search warrant affidavit. Ex:7; SR:554-55. That affidavit included the original information from the first affidavit, along with the new information about the drug paraphernalia and crystalline substance. Ex:7; SR:554-55. A second search warrant was granted that allowed a search for drugs and drug related paraphernalia. Ex:8. The second search warrant also allowed law enforcement to obtain a blood sample from Defendant. Ex:8.

Law enforcement executed the second search warrant on Defendant's apartment. SR:558-64; Ex:9. Law enforcement seized three torch lighters, a glass pipe with burnt residue in it, a small baggie containing the crystalline substance, a scale, and a red cut straw. SR:558-64; Ex:9-12. These items were discovered inside of an envelope with Defendant's name and address. SR:559.

Pursuant to the second warrant, law enforcement also obtained a blood sample from Defendant. Ex:8. The blood sample was collected and tested positive for methamphetamine. SR:565, 613-15; Ex:13.

Law enforcement also executed the search warrant on Defendant's vehicle. SR:569-74; Ex:17. The vehicle contained five copies of the letter given to Officer Deneke. SR:572; Ex:17. The five copies were identical, but unlike the letter Officer Deneke received, the "13th March, 2024" date was not altered. SR:573; Ex:2, 16-21.

Defendant testified at trial and admitted that Exhibit 2 was a copy of a letter he retrieved from the internet. SR:623-24; Ex:A. After discovering the letter, he admitted he made ten copies of the letter at Dakotamart. SR:627. Defendant admitted he delivered the letter to Officer Deneke. SR:624.

When asked why he made copies of the letter, Defendant testified, "I was trying to do a good thing on trying to give the law enforcement heads-up, so I figured if I made multiple copies, I give it to multiple people, not being so much as a threat, but just trying to be as a warning." SR:627. He alleged he was "trying to be a good Samaritan." SR:641.

Defendant testified regarding the threatening nature of the letter. SR:628-42. The following exchange occurred:

[STATE]: So you knew that others thought that that was threatening before you ever gave it to Officer Deneke, didn't you?

[Defendant]: I did not know I was going to get in trouble for giving a letter.

[STATE]: That wasn't the question. The question was: Because of what [Duane] said to you, and you apologized about the threatening nature of that note towards law

enforcement, but you still went out later, a day or two later, and gave it to Officer Deneke; isn't that correct?

[Defendant]: Yes, I did do that.

[STATE]: So you knew the threatening nature towards law enforcement before you ever gave it to Officer Deneke; isn't that correct?

[Defendant]: I guess so.

SR:624.

Defendant admitted he changed the date on the letter. SR:628-42.

But he provided contradicting stories about why he changed the date.

SR:628-42. In one story, Defendant testified,

I was just doing some math in my head on a photocopy. . . . I was figuring out that this could be the date is all I was doing. I wasn't trying to threaten an officer or nothing. It was just something that had popped in my head, and I jumped to conclusions, and I should have never done it.

SR:628-29. On cross-examination, Defendant agreed that April 1, 2024, was the date he intended to write because that was forty-eight hours after he handed Officer Deneke the letter. SR:633. In a different story, he made a reference that April 1 was April Fool's Day. SR:628.

ARGUMENTS

I.

THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OF BLOOD ANALYSIS.

A. *Background.*

Defendant argues that the second affidavit law enforcement submitted in support of a warrant for his blood lacked probable cause,

the good-faith exception does not apply, and thus the evidence of the blood analysis required suppression. DB:10-18. He argues the affidavit lacked evidence of recent drug ingestion and supports his argument by highlighting hearing testimony. DB:10-18. These arguments fail. When looking at the totality of the circumstances contained in the four corners of the affidavit, evidence exists to uphold the circuit court's probable cause determination. Further, even absent probable cause, the good-faith exception to the exclusionary rule applies because law enforcement reasonably relied on a facially valid warrant.

B. *Standard of Review.*

This Court reviews the issuing court's probable cause determination to issue a search warrant "independently of any conclusion reached by the judge in the suppression hearing." *State v. O'Neal*, 2024 S.D. 40, ¶ 15, 9 N.W.3d 728, 737 (quoting *State v. Ostby*, 2020 S.D. 61, ¶ 13, 951 N.W.2d 294, 298). "Reviewing courts are not empowered to conduct an after-the-fact de novo probable cause determination; on the contrary, the issuing [court]'s legal basis for granting the warrant is examined with 'great deference.'" *Id.* (quoting *Ostby*, 2020 S.D. 61, ¶ 13, 951 N.W.2d at 298).

C. *The Affidavit in Support of the Search Warrant Contained Probable Cause to Support the Issuance of the Warrant.*

Under the Fourth Amendment, a person may be required to submit to blood testing when a warrant supported by probable cause requires

such. *State v. Fierro*, 2014 S.D. 62, ¶¶ 22-24, 853 N.W.2d 235, 242-43. When reviewing the sufficiency of a search warrant, “[this Court is] limited to an examination of the facts as contained within the four corners of the affidavit.” *O’Neal*, 2024 S.D. 40, ¶ 15, 9 N.W.3d at 737 (quoting *Ostby*, 2020 S.D. 61, ¶ 13, 951 N.W.2d at 298). The affidavit will not be reviewed in a hyper-technical manner; it is reviewed as a “whole, interpreted in a common-sense and realistic manner.” *State v. Dubois*, 2008 S.D. 15, ¶ 14, 746 N.W.2d 197, 203 (quoting *State v. Habbena*, 372 N.W.2d 450, 456 (S.D. 1985)). “All reasonable inferences that can be drawn will be construed ‘in support of the issuing court’s determination of probable cause to support the warrant.’” *State v. Wilkinson*, 2007 S.D. 79, ¶ 16, 739 N.W.2d 254, 259 (quoting *State v. Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d 262, 269).

There is no specific formula for determining the amount of evidence sufficient for probable cause. *Helland*, 2005 S.D. 121, ¶ 15, 707 N.W.2d at 268 (citing *State v. Jackson*, 2000 S.D. 113, ¶ 22, 616 N.W.2d 412, 420). “In determining whether probable cause exists to support the issuance of a search warrant, ‘[t]here must be “a showing of probability of criminal activity.”’ *O’Neal*, 2024 S.D. 40, ¶ 16, 9 N.W.3d at 737 (quoting *Ostby*, 2020 S.D. 61, ¶ 14, 951 N.W.2d at 299). “Probable cause ‘is a fluid concept—turning on the assessment of probabilities in particular contexts—not readily, or even usefully, reduced to a neat set of legal rules.’” *Id.* (quoting *Ostby*, 2020 S.D. 61, ¶ 15, 951 N.W.2d at 299).

This Court therefore considers “the totality of the circumstances to decide if there was at least a ‘substantial basis’ for the issuing judge’s finding of probable cause.” *Id.* (quoting *Ostby*, 2020 S.D. 61, ¶ 15, 951 N.W.2d at 299).

This Court has considered circumstances when probable cause to obtain a blood sample may exist. In *State v. Hanson*, this Court reasoned that, under the circumstances of that case, “if the officers had probable cause to arrest Hanson for possession of marijuana, it would follow they had probable cause to test her for traces of the illegal substance for which she was arrested.”³ 1999 S.D. 9, ¶ 33, 588 N.W.2d 885, 892. Further, in *State v. Buchholz*, this Court reasoned, “An open vial containing methamphetamine is no less an indication of consumption of that substance than a half-empty open container of alcoholic beverages or an odor of alcoholic beverages emanating from a car.” 1999 S.D. 110, ¶ 16, 598 N.W.2d 899, 903 (citing *State v. Tilton*, 1997 S.D. 28, ¶ 13, 561 N.W.2d 660, 663).

Here, when looking at the four corners of the affidavit, the affidavit established probable cause for a blood sample. The totality of the circumstances established a fair probability that evidence of drug ingestion would be found in Defendant’s blood. The affidavit stated that

³ While *Hanson* related to a probable cause determination under exigent circumstances, it is nevertheless instructive here when applied to a probable cause determination to issue a search warrant.

on the night of March 29, 2024, an unknown white male, later identified as Defendant, delivered Officer Deneke a letter. SR:150. The affidavit recited the contents of the threatening letter. SR:150-51. It also stated that Defendant's manager told law enforcement that Defendant made copies of the letter at work. SR:151. When law enforcement asked Defendant what the letter meant when it stated, "executed on my order without any trial," Defendant replied, "something's coming." SR:151-52. Based on this information, along with other information contained in the affidavit for a search warrant, a search warrant was issued, in part, for Defendant's apartment. See SR:154-56.

When executing the first search warrant on Defendant's apartment, law enforcement located a bag inside Defendant's nightstand that contained "a clear plastic bag containing white crystalline substance, [a] glass pipe and other drug paraphernalia." SR:152. Law enforcement "set all contents on the bed[,] exited the residence[,] and securely locked the door." SR:152. Law enforcement requested a second search warrant for a blood sample. SR:150-52. A second search warrant was issued. SR:153.

The issuing court's role was to determine whether there was a substantial basis to believe that evidence of an illegal substance would be found in Defendant's blood. The court read the affidavit as a whole and interpreted it in a common-sense and realistic manner. See *Dubois*, 2008 S.D. 15, ¶ 14, 746 N.W.2d at 203 (citing *Habbena*, 372 N.W.2d at

456). The observations described in law enforcement’s affidavit provided a substantial basis to support the issuing court’s determination of probable cause that Defendant ingested an illegal substance. The affidavit contained information about Defendant’s behavior, which can be reasonably characterized as odd. It also contained information regarding law enforcement’s discovery of a white crystalline substance in Defendant’s nightstand and paraphernalia that could be used to ingest the substance. Considering the totality of the circumstances recounted within the four corners of the affidavit, the circuit court was well within its discretion to issue the warrant allowing a draw of Defendant’s blood.

“[P]robable cause determinations do not demand that an officer’s belief be proven correct, as “[t]he process does not deal with hard certainties, but with probabilities.” *State v. Parris*, 2025 S.D. 27, ¶ 22, 23 N.W.3d 159, 165 (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion)). To the extent that Defendant is arguing that probable cause was lacking because law enforcement did not observe Defendant ingest drugs or appear under the influence, DB:16, this Court has never held that those personal observations are necessary *elements* to issue a warrant for a blood sample. Only a *probability* of criminal activity must be shown for probable cause. *O’Neal*, 2024 S.D. 40, ¶ 20, 9 N.W.3d at 739.

Defendant correctly reiterated this Court’s standard that it “look[s] to the four corners of the affidavit in determining whether it provided

probable cause for issuing a warrant.” DB:9. But then he incorrectly supports his argument by citing testimony from Officer Maxfield at the motion to suppress hearing. DB:12. This Court has undisputedly prohibited reliance on such after-the-fact hearing testimony when reviewing probable cause determinations to issue a search warrant. *O’Neal*, 2024 S.D. 40, ¶ 15, 9 N.W.3d at 737.

When each piece of evidence contained in the affidavit is viewed as a whole and in a practical, common-sense manner, there was sufficient evidence to support the issuance of the warrant. Accordingly, the issuing judge’s probable cause determination should be upheld. Since probable cause existed, it is unnecessary to consider whether the good-faith exception applies to the exclusionary rule. *See Ostby*, 2020 S.D. 61, ¶ 23, 951 N.W.2d at 301.

D. *Even Absent Probable Cause, the Good Faith Exception Applies.*

Even if this Court determines the affidavit was deficient, the exclusionary rule should not apply because law enforcement relied in good faith on a facially valid warrant. The “good-faith exception is reviewed de novo.” *State v. Running Shield*, 2015 S.D. 78, ¶ 6, 871 N.W.2d 503, 505.

The exclusionary rule was judicially created to “deter constitutional violations by government officials.” *Id.* ¶ 7, 871 N.W.2d at 506 (quoting *State v. Sorensen*, 2004 S.D. 108, ¶ 8, 688 N.W.2d 193, 196). This Court recognizes:

When the police exhibit “deliberate,” “reckless,” or “grossly negligent” disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively “reasonable good-faith belief” that their conduct is lawful, or when their conduct involves only simple, “isolated” negligence, the “deterrence rationale loses much of its force,” and exclusion cannot “pay its way.”

Id. (quoting *Davis v. United States*, 564 U.S. 229, 238 (2011)).

“Under the good-faith exception, evidence may be admissible, even when a warrant is subsequently invalidated, if law enforcement’s reliance on the warrant was objectively reasonable.” *Id.* ¶ 6, 871 N.W.2d at 505 (citing *Sorensen*, 2004 S.D. 108, ¶ 9, 688 N.W.2d at 197). Suppression of evidence obtained by a search warrant is appropriate only if:

(1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his judicial role; (3) the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) the warrant is so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Id. ¶ 7, 871 N.W.2d at 506 (cleaned up) (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)).

None of these exceptions are present here. Defendant does not claim that the search warrant affidavit for the blood sample was misleading or that the circuit judge abandoned its judicial role when finding probable cause existed. The record also lacks any omission by law enforcement that would have affected the circuit court’s finding of

probable cause. Instead, Defendant argues that because of Officer Maxfield's testimony at the motion to suppress hearing, his belief probable cause existed was unreasonable. *See* DB:18. At the hearing, Officer Maxfield was asked on cross-examination, "[D]o you have any information at all that would have led you to believe [Defendant] would have ingested drugs *that day?*" SR:185 (emphasis added). Officer Maxfield responded, "No, I do not." SR:185. Even so, he also testified that he believed that both search warrants he received were supported by probable cause. SR:178.

Defendant fails to show the affidavit was so lacking in indicia of probable cause as to render Officer Maxfield's belief in its existence entirely unreasonable. Officer Maxfield's testimony was consistent with the facts set forth in the affidavit—that while executing the first search warrant on Defendant's apartment, Officer Maxfield discovered a glass pipe, drug paraphernalia, and a clear plastic bag containing a white crystalline substance in Defendant's nightstand. SR:176-77. These specific factual circumstances supported a reasonable inference that Defendant likely possessed and ingested a controlled substance. And notably, on April 1, 2024, law enforcement applied for and received not just one search warrant, but two. SR:177.

Based on the showing of probable cause detailed above, and the lack of any misleading information in the affidavit, law enforcement reasonably relied on the search warrant to obtain the blood sample. Law

enforcement relied on the search warrant in good faith to conduct its search; therefore, suppression is inappropriate as it has no deterrent value.

II.

THE CIRCUIT COURT PROPERLY INSTRUCTED THE JURY REGARDING DEFENDANT’S MENS REA AND THE DEFINITION OF THREAT.

A. *Background.*

On appeal, Defendant argues that the circuit court abused its discretion by instructing the jury on the definition of a threat. *See* DB:2. He also argues that the way the circuit court instructed the jury allowed him to be convicted of Threatening a Law Enforcement Officer if he “‘knowingly’ passed the letter, whether he intended it as a threat or not, thus potentially criminalizing otherwise innocent and protected conduct.” DB:21. Defendant’s argument overlooks that the State was required to prove Defendant both knowingly and intentionally communicated the threat. SR:275. No relief is justified because the instructions, when read as a whole, correctly state the law and inform the jury.

B. *Standard of Review.*

This Court generally reviews a circuit court’s decision to grant or deny a proposed jury instruction for an abuse of discretion. *State v. Ortiz-Martinez*, 2023 S.D. 46, ¶ 36, 995 N.W.2d 239, 246 (quoting *State v. Schumacher*, 2021 S.D. 16, ¶ 25, 956 N.W.2d 427, 433). A defendant has the burden to “show not only that a particular instruction was

erroneous, but also that it was prejudicial.” *State v. Liaw*, 2016 S.D. 31, ¶ 18, 878 N.W.2d 97, 102 (quotation omitted).

“However, when the question is whether a jury was properly instructed overall, that issue becomes a question of law reviewable de novo. Under this de novo standard, [this Court] construe[s] jury instructions as a whole to learn if they provided a full and correct statement of the law.” *State v. Rouse*, 2025 S.D. 29, ¶ 42, 23 N.W.3d 467, 480 (quoting *State v. Pfeiffer*, 2024 S.D. 71, ¶ 38, 14 N.W.3d 636, 647).

C. *First Amendment Jurisprudence Requires the State Prove a Reckless Mens Rea for Threatening Speech.*

“[N]ot all speech is of equal First Amendment importance.” *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). The South Dakota Supreme Court has made clear that “threatening or harassing” speech is of no First Amendment importance. *Erickson v. Early*, 2016 S.D. 37, ¶ 15, 878 N.W.2d 631, 635 (“freedom of expression does not include threatening or harassing conduct”); *State v. Hauge*, 1996 S.D. 48, ¶ 10, 547 N.W.2d 173, 176 (“one is not free . . . to send threatening or harassing letters”); *State v. Crelly*, 313 N.W.2d 455, 457 (S.D. 1981) (“obscene telephone calls” are “obviously not protected by the guarantees of free speech”).

Accordingly, “the First Amendment . . . permits a State to ban a ‘true threat.’” *Austad v. South Dakota Bd. of Pardons and Paroles*, 2006

S.D. 65, ¶ 10, 719 N.W.2d 760, 764 (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). “True threats of violence are outside the bounds of First Amendment protection and punishable as crimes.” *Counterman v. Colorado*, 600 U.S. 66, 69 (2023). True threats are defined as:

statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protects individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.”

State v. Draskovich, 2017 S.D. 76, ¶ 8, 904 N.W.2d 759, 762 (quoting *Black*, 538 U.S. at 359-60).

“[W]hat is required to overcome a First Amendment challenge and what is required to meet the elements of a particular statute criminalizing threatening speech” are not the same. *State v. Armstrong*, 2020 S.D. 6, ¶ 37, 939 N.W.2d 9, 18. In *State v. Armstrong*, this Court explained, a First Amendment challenge “center[s] upon the effect of the communication on the recipient, while the latter requires an analysis of an additional factor—the intent of the author.” *Id.* ¶ 37, 939 N.W.2d at 18. “This additional factor requires proof that the author knew that the communication is threatening in nature, and inherent in that knowledge is an understanding of the effect such a communication will have on its recipient.” *Id.* ¶ 37, 939 N.W.2d at 18-19. “As one federal district court aptly explained: these two tests apply in tandem such that ‘the defendant

must be subjectively aware that his conduct is objectively intimidating.” *Id.* ¶ 37, 939 N.W.2d at 19 (quoting *United States v. Carr*, 314 F. Supp. 3d 272, 281 n.12 (D.D.C. 2018)).

A few years after *Armstrong* was decided by this Court, in *Counterman v. Colorado*, the Supreme Court of the United States considered “whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements.” 600 U.S. at 69 (2023). In *Counterman*, the Supreme Court of the United States adopted a subjective mental-state element but held that a mental state of recklessness is sufficient. *Id.* at 73. It reasoned, “[g]iven that a subjective standard here shields speech not independently entitled to protection—and indeed posing real dangers—we do not require that the State prove the defendant had any more specific intent to threaten the victim.” *Id.* at 72.

D. *The Jury Instructions Correctly Stated the Law on Defendant’s Mens Rea and Threats.*

A jury found Defendant guilty, in part, of Threatening a Law Enforcement Officer in violation of SDCL 22-11-15.6. SDCL 22-11-15.6 provides, “Any person who, knowingly and intentionally, communicates any threat . . . to take the life of or to inflict serious bodily harm upon a law enforcement officer . . . is guilty of a [crime]” SDCL 22-11-15.6. The jury was instructed accordingly in arriving at its verdict. *See* SR:266, 274-75 (Instructions No. 11, 19-20).

The circuit court gave numerous jury instructions:

INSTRUCTION NO. 11

...

COUNT 2: THREATENING LAW ENFORCEMENT OFFICER OR FAMILY, in that he did, knowingly and intentionally, communicate any threat to take the life of or to inflict serious bodily harm upon a law enforcement officer of the state or a member of the officer's immediate family, in violation of SDCL 22-11-15 .6, and;

...

INSTRUCTION NO. 19

Any person who, knowingly and intentionally, communicates any threat to take a life of or to inflict serious bodily harm upon a law enforcement officer of the state or a member of the officer's immediate family, is guilty of a crime.

INSTRUCTION NO. 20

The elements of Count 2: Threatening Law Enforcement Officer or Family, each of which the State must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant knowingly and intentionally communicates any threat to a law enforcement officer.
2. The defendant threatened to take the life of or to inflict serious bodily harm upon the law enforcement officer.

INSTRUCTION NO. 21

A threat is a declaration or a show of disposition or determination to unsettle the mind of the person to whom it was directed so as to prevent voluntary action. The threat may be communicated in any manner. No specific words are necessary to constitute a threat. A threat may be made by innuendo or suggestion. You may consider such things as the relationship between the defendant and the police officer, as well as the circumstances under which the statement was made, to determine whether or not a threat was made.

...

INSTRUCTION NO. 24

The words "intent" or "intentionally," or any derivatives thereof, as used in these instructions means a specific design to cause a certain result.

INSTRUCTION NO. 25

The words "knowledge" or "knowingly," or any derivative thereof, means only a knowledge that the facts exist which bring the act or omission within the provisions of any

statute. It does not require knowledge of the unlawfulness of the act or omission.

...

INSTRUCTION NO. 29

The intent with which an act is done is shown by the circumstances surrounding the act, the manner in which it is done, and the means used.

SR:266, 274-76, 279-80, 284.

While Defendant attempts to isolate parts of jury instructions, specifically part of Instruction No. 21, this Court has repeatedly held that jury instructions should be considered as a whole and should not be singled out to the exclusion of others. *See Rouse*, 2025 S.D. 29, ¶ 42, 23 N.W.3d at 480. Indeed, the circuit court instructed the jury accordingly. SR:265, 665.

The circuit court's instructions, taken as a whole, correctly stated the law regarding threats and included an appropriate mens rea requirement above recklessness. Instruction No. 19 required that Defendant "knowingly and intentionally, communicate[d] any threat to take a life of or to inflict serious bodily harm upon a law enforcement officer." SR:274. Instruction No. 20 reiterated this requirement as an essential element. SR:275. Instruction No. 24 defined "intent" as "a specific design to cause a certain result," and Instruction No. 25 defined "knowledge" as "knowledge that the facts exist which bring the act or omission within the provisions of any statute." SR:279-80. Then, Instruction No. 29 explained that intent "is shown by the circumstances

surrounding the act, the manner in which it is done, and the means used.” SR:284.

Defendant’s reliance on *Elonis v. United States*, 575 U.S. 723 (2015) and *Counterman* is misplaced. Unlike the negligence standard rejected in those cases, the jury instructions here required the State to prove that Defendant acted with actual knowledge and intent. The jury instructions did not allow him to be convicted for “deliver[ing] a sealed envelope without knowing that a threatening letter [was] inside.” See *Counterman*, 600 U.S. at 72 n.2 (citing *Elonis*, 575 U.S. at 738).

When read as a whole, the instructions, required the jury to find that Defendant had both knowledge of the threatening nature of the communication and the intent to communicate that threat—a standard higher than the reckless requirement in *Counterman*. The circuit court’s definition of threat in Instruction No. 21 did not lower the required mens rea but provided a practical explanation of what constituted a threat. See SR:276. The plain language of the instructions state that “knowingly and intentionally” applied to the communication of “any threat.” See SR:275. This necessarily includes awareness of the threatening content—specifically a threat “to take the life of or to inflict serious bodily harm upon the law enforcement officer.” SR:275.

Accordingly, the instructions as a whole properly conveyed the required mental state and did not permit conviction based on a negligence standard. The jury instructions appropriately advised on a

mens rea higher than reckless and instructed the jury on threats. The circuit court instructed the jury that it “must accept and apply the law as stated in these instructions which [it] must consider as a whole. [It] should not disregard any instruction, or give special attention to any one instruction” SR:291 (Instruction No. 36). This Court generally presumes that juries follow the circuit court’s instructions and have no reason to believe they failed to do so here. *State v. Nelson*, 2022 S.D. 12, ¶ 41, 970 N.W.2d 814, 828.

E. *The Circuit Court Properly Rejected Defendant’s Adoption Instruction.*

During the settling of jury instructions, Defendant proposed the following jury instruction, but clarified he was open to its modification:

SUPPLEMENTAL- DEFINITION OF TRUE THREAT

If a defendant’s repetition of a third party’s threat is reasonably interpreted as a simple disclosure of the existence of the threat for informational purposes, no illegality has occurred. {If, on the other hand, a defendant’s repetition of a third party’s threat is reasonably interpreted as communicating the defendant’s own intent, purpose, or goal to “kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive,” the defendant has violated the law and committed a crime. In the latter scenario, the defendant has effectively adopted the third party’s threat as his own.} (Source: *U.S. v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999))

“Threat” defined- to constitute a threat, a person must consciously disregard a substantial and unjustifiable risk that his conduct will cause harm to another person. (Source: *Counterman v Colorado*, 143 S.Ct 2106, 216 L. Ed 2d 775)

SR:226-27, 652-53.

The circuit court had discretion to reject Defendant's proposed instruction requiring the jury to find that he adopted the third-party threat as his own. The given instructions accurately stated the law and the adoption concept was subsumed within the requirement that Defendant "knowingly and intentionally" communicated the threat.

South Dakota law does not require a separate instruction on adoption of third-party threats. For example, in *State v. Paulson*, the defendant was convicted of threatening a judicial officer. 2015 S.D. 12, ¶ 4, 861 N.W.2d 504, 506. A person is guilty of threatening a judicial officer when the person, "directly or indirectly, utters or addresses any threat or intimidation to any judicial . . . with intent to induce the person either to do any act not authorized by law, or to omit or delay the performance of any duty" SDCL 22-11-15. The defendant alleged that the evidence submitted to the jury was insufficient to support his conviction under this statute because the writings at issue were derived from another source and were not his own. *Paulson*, 2015 S.D. 12, ¶ 15, 861 N.W.2d at 508. This Court rejected his argument, not only because evidence suggested he was in fact the author, but also because this Court concluded that one may indirectly threaten a judicial officer by offering another's work. *Id.* ¶ 16, 861 N.W.2d at 508.

The same is true here. SDCL 22-11-15.6 criminalizes the act of knowingly and intentionally communicating a threat, regardless of its authorship. The fact that Defendant did not entirely author the letter

does not absolve him of responsibility for knowingly and intentionally communicating its threatening content.

F. *Any Alleged Error in the Instructions Was Not Prejudicial.*

Even assuming arguendo that the circuit court erred by declining to give a recklessness mens rea instruction and Defendant's proposed adoption instruction, Defendant fails to show prejudice. The jury would not have returned a different verdict if Defendant's instructions were given.

First, the jury was instructed on a higher mens rea standard than recklessness. The instructions necessarily required the jury to find that Defendant was aware of the threatening nature of his communication and intended to convey it as such—not merely that he acted recklessly or negligently.

Second, the evidence overwhelmingly established that Defendant did, in fact, adopt the threatening content as his own. Defendant retrieved the letter from the internet, made ten copies of it, and planned to put the copies on law enforcement vehicles throughout town. SR:590, 598, 627. Defendant admitted knowing the threatening nature of the letter and changing the execution date to April 1, 2024, before delivering it to Officer Deneke. SR:624, 628-42. Defendant admitted changing the date to April 1, 2024, was intentional because that was forty-eight hours after he handed Officer Deneke the letter. SR:633. If Defendant did not change the date, the threat would have already passed. See SR:628-42.

When confronted by law enforcement about the letter’s meaning, specifically the “executed on my order without any trial” language, Defendant ominously replied, “something’s coming.” SR:548; Ex:3. Any adoption instruction would have been superfluous given the substantial evidence showing Defendant knowingly and intentionally communicated the threat while understanding its threatening nature. In light of the record, the jury could not have convicted Defendant without finding that he adopted the threat as his own and acted with knowledge and intent.

Third, Defendant’s theory—that he was merely passing along a third-party message or acting as a “good Samaritan”—was fully presented to the jury through his testimony and argument. The jury was free to accept or reject this explanation, and the verdict demonstrates that the jury found, beyond a reasonable doubt, that Defendant’s conduct satisfied the statutory and constitutional requirements for the conviction for Threatening a Law Enforcement Officer.

Finally, reversal is not warranted unless there is “a reasonable probability that, but for [the error], the result of the proceeding would have been different.” *State v. Turner*, 2025 S.D. 13, ¶ 49, 18 N.W.3d 673, 690, *reh’g denied* (Apr. 29, 2025) (quotation omitted). Here, the overwhelming evidence and the instructions given ensured that the jury’s verdict rested on a proper finding of knowing and intentional adoption of the threat. There is no reasonable probability that a different instruction would have changed the result.

Accordingly, Defendant cannot show prejudice warranting reversal. The jury would have reached the same verdict even if Defendant's proposed instruction had been given. Thus, the circuit court correctly instructed the jury on the law and did not abuse its discretion in denying Defendant's proposed instruction.

III.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION FOR THREATENING A LAW ENFORCEMENT OFFICER.

A. *Background.*

Defendant challenges the sufficiency of the evidence related to his conviction for Threatening a Law Enforcement Officer. DB:28-35.

Defendant contends his communication was not a "true threat" under this Court's jurisprudence and he did not threaten any particular law enforcement officer as required by SDCL 22-11-15.6. DB:28-35. These arguments are unavailing considering the overwhelming evidence and the applicable legal standards.

B. *Standard of Review.*

This Court reviews de novo the denial of a motion for judgment of acquittal and questions about the sufficiency of the evidence. *State v. Hillyer*, 2025 S.D. 30, ¶ 21, 23 N.W.3d 782, 781 (quoting *State v. Bolden*, 2024 S.D. 22, ¶ 39, 6 N.W.3d 238, 246-47). This Court's "task is to determine whether the evidence was sufficient to sustain the conviction."

State v. Solis, 2019 S.D. 36, ¶ 17, 931 N.W.2d 253, 258 (quotation omitted).

To do so, [this Court] ask[s] whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. If the evidence, including circumstantial evidence and reasonable inferences drawn therefrom sustains a reasonable theory of guilt, a guilty verdict will not be set aside.

Id. (cleaned up). Likewise, “this Court will not resolve conflicts in the evidence, assess the credibility of witnesses, or reweigh the evidence.”

State v. Fasthorse, 2009 S.D. 106, ¶ 6, 776 N.W.2d 233, 236 (citations omitted).

C. *The Evidence Satisfies the “True Threat” Standard.*

When considering a First Amendment challenge to speech, this Court analyzes an alleged threat “in the light of its entire factual context” and asks, “whether the recipient of the alleged threat could reasonably conclude that it expresses ‘a determination or intent to injure presently or in the future.’” *Draskovich*, 2017 S.D. 76, ¶ 9, 904 N.W.2d at 762 (quoting *Austad*, 2006 S.D. 65, ¶ 13, 719 N.W.2d at 766); see *Dinwiddie*, 76 F.3d at 925. To determine whether the recipient could reasonably conclude that the statement was a true threat, this Court is guided by five non-exhaustive factors:

(1) the reaction of those who heard the alleged threat; (2) whether the threat was conditional; (3) whether the person who made the alleged threat communicated it directly to the object of the threat; (4) whether the speaker had a history of making threats against the person purportedly threatened;

and (5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

Draskovich, 2017 S.D. 76, ¶ 9, 904 N.W.2d at 762 (cleaned up) (quoting *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 623 (8th Cir. 2002) (en banc));⁴ see *Dinwiddie*, 76 F.3d at 925; *In re C.C.H.*, 2002 S.D. 113, ¶ 14, 651 N.W.2d 702, 706.

The record is replete with evidence that Defendant’s speech was a true threat and not protected speech under this Court’s jurisprudence. The evidence showed that Defendant made a direct, targeted delivery of the letter. Defendant personally delivered the threatening letter to Officer Deneke during a traffic stop, stating, “You’ll see it Monday.” SR:525, 627. He admitted making ten copies of the letter and he told his manager he planned to place them on law enforcement vehicles throughout town. SR:598, 627.

The execution date was imminent. Defendant altered the date on the letter from a past date of March 13, 2024, to Monday, April 1, 2024—a date forty-eight hours after delivery—making the threat relevant and signaling an imminent threat. SR:524, 633. Defendant stated “You’ll see

⁴ Defendant states, “A useful test is found [in] *Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833 (8th Cir. 2001).” DB:29. “However, the *Pulaski County* decision was vacated on rehearing en banc, and [this Court] ha[s] since applied the test set forth by the en banc Eighth Circuit Court of Appeals that originated from *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996).” *Armstrong*, 2020 S.D. 6, ¶ 21, 939 N.W.2d at 14.

it Monday” when delivering the letter, which Officer Deneke reasonably understood as a reference to the execution deadline. SR:525, 528. On that Monday, when law enforcement questioned Defendant about the letter’s meaning, specifically the phrase “executed on my order without any trial,” Defendant ominously replied, “something’s coming.” SR:548; Ex:3. On cross-examination, he admitted the date change was intentional. SR:633.

When considering the reaction of the person who received the threat, the threat caused real fear. Officer Deneke testified she was scared for her life as well as for the lives of other law enforcement officers. SR:525. She interpreted the letter as a threat of execution, with the modified date as the deadline. SR:525, 528. Her fear was so acute that she abruptly left the scene, uncertain if Defendant was watching or following her, and immediately contacted Captain Shively about the threat. SR:525, 539-40.

These facts distinguish this case from *Watts v. United States*, where the Supreme Court of the United States found that political hyperbole in a conditional statement made at a political protest was not a true threat. 394 U.S. 705, 705-08 (1969). In *Watts*, during a political protest, the defendant stated, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” *Id.* at 706. The Supreme Court of the United States reasoned that this statement was of a conditional nature because it depended on “induction into the Armed Forces—which

[the defendant] vowed would never occur.” *Id.* at 706–07. Unlike the conditional, political speech in *Watts*, Defendant’s communication was direct, targeted, and suggested imminent harm—not abstract political speech.

This Court’s decision in *State v. Draskovich*, supports this conclusion. In *Draskovich*, this Court found a true threat when the defendant made statements about shooting up courthouses, even though he immediately qualified them with “Not that I would.” 2017 S.D. 76, ¶¶ 14, 18, 904 N.W.2d at 763-64. Here, Defendant’s conduct was more egregious: he directly delivered a written threat to a law enforcement officer, set an imminent deadline, and made multiple copies for distribution. Defendant’s communication constituted a true threat.

D. *Sufficient Evidence Supports Defendant’s Conviction for Threatening a Law Enforcement Officer.*

Under SDCL 22-11-15.6, “Any person who, knowingly and intentionally, communicates any threat . . . to take the life of or to inflict serious bodily harm upon a law enforcement officer . . . is guilty of a [crime]” SDCL 22-11-15.6. Defendant narrowly challenges the sufficiency of the evidence on whether his threat was directed at a particular law enforcement officer. DB:33-35.

Defendant’s challenge is meritless. While the letter was addressed to “All Police Worldwide,” Defendant’s personal delivery to Officer Deneke during her official duties, coupled with his direct statement to Officer Deneke, “You’ll see it Monday,” made her the specific target. SR:525,

627. Officer Deneke's testimony confirms she reasonably perceived the threat as directed at her. SR:525, 539-40.

The jury heard and weighed all the evidence, including Defendant's own admissions, the circumstances of delivery, and Officer Deneke's credible testimony regarding her fear and the immediacy of the threat. The jury was entitled to reject Defendant's self-serving claim that he was merely providing a "heads up" as a "good Samaritan," especially given his knowledge of the letter's threatening nature and his actions to make the threat current and imminent. The jury was also entitled to reject Defendant's inference that his statement was some sort of April Fool's Day joke.

When viewing the evidence in the light most favorable to the verdict, a rational jury could—and did—find that Defendant's actions constituted Threatening a Law Enforcement Officer. The evidence overwhelmingly supports the conviction, and the circuit court properly denied Defendant's motion for judgment of acquittal. The jury's verdict should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 8,165 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 365.

Dated this 25th day of November 2025.

/s/ Jennifer M. Jorgenson
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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 25, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Troy McFate*, was served via Odyssey File and Serve on J. Scott James at southernhillslaw@gmail.com.

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