IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #30847

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

NANA ADDAE-MENSA,

Defendant and Appellant.

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

THE HONORABLE HEIDI LINNGREN

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Throughout this Appellant's Brief, Defendant below and Appellant here, Nana Addae-Mensa, will be referred to as "Defendant" or by name. Plaintiff and Appellee, the State of South Dakota, will be referred to as "State." Both alleged victims in this matter have the same initials, "S.G." They are also the biological son and daughter of Mr. Addae-Mensa. Therefore, to avoid confusion, the alleged victims in this matter will be referred to as "son" or "daughter." Citation to the transcript of the jury trial shall be referenced as "JT" followed by the volume number and the specific page number(s). All other documents within the settled record shall be referred to as "SR" followed by the page number. Transcripts of the court hearings from this matter will be cited by the initials of the hearing's name (e.g., Status Hearing, "SH") followed by the page number(s). SDCL 23A-44-5.1 will frequently be referred to as the "180-day rule." Citations to the appendix will be referred to as "APP" follow by the page number.

JURISDICTIONAL STATEMENT

On August 8, 2023, a Custer County grand jury issued a 6-count Indictment against Mr. Addae-Mensa. (SR 20). The grand jury charged Mr. Addae-Mensa with sexually assaulting his two biological children[1], his daughter, S.G. (D.O.B. 1/19/2014) and his son, also with initials S.G (D.O.B. 5/30/15). As to Mr. Addae-Mensa's daughter, the Indictment charged two counts of rape in the first degree (counts 2 and 3) and one count of sexual contact with a child under the age of sixteen (count 6). (Id.). As to Mr. Addae-Mensa's son, the Indictment alleged one count of rape in the first degree (count 1), and one count of sexual contact with a child under the age of sixteen (count 4). (Id.).

A jury trial was held on July 15 – 17 of 2024. On July 17, 2024, the jury returned its verdicts. (SR 308). As to the daughter, they found Mr. Addae-Mensa guilty of one count of rape in first degree and guilty of the sexual contact count. The jury found Mr. Addae-Mensa not guilty on the remaining counts, including all the counts related to his son. (Id.).

On September 5, 2024, the trial court sentenced Mr. Nana Addae-Mensa to serve 100 years on the rape in the first-degree count and an additional 15 years on the sexual contact count to run concurrently. (SR 408; see also, transcript of SH).

The Judgment of Conviction was filed on September 10, 2024. (Id.; APP 1.). Notice of Appeal was timely filed September 19, 2024. This appeal is brought as a matter of right pursuant to SDCL 23A-32-2.

STATEMENT OF THE LEGAL ISSUE

1. The circuit court violated Mr. Addae-Mensa's right to a trial within 180-days of his first appearance. SDCL 23A-44-5.1.

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[1] Count 5, which alleged that Mr. Addae-Mensa had sexual contact with an additional biological child was dismissed before trial. (See SR 169).

The circuit court overruled Mr. Addae-Mensa's motion to dismiss under SDCL 23A-44-5.1. The trial court found that 1) tolling occurred given that a written order was not entered granting "Defendant's Standard Pretrial Motions," 2) good cause for the delay due to the State's expert witnesses' vacation and work schedules, and 3) that defense counsel consented to the continuance of a trial date.

State v. Wimberly, 467 N.W.2d 499 (S.D. 1991).
State v. Seaboy, 2007 S.D. 24, 729 N.W.2d 370).
State v. Hagen, 600 N.W.2d 561 (S.D. 1999).

STATEMENT OF THE CASE AND RELEVANT FACTS

In this appeal, Mr. Addae-Mensa challenges the circuit court's denial of his Motion to Dismiss on the grounds his trial did not occur in compliance with the 180-day rule. 354 days had elapsed from the time of Mr. Addae-Mensa's first appearance until trial.

Mr. Addae-Mensa was charged with sexually assaulting his biological children while they were in his care. The children claimed the abuse occurred while their mother was working at nearby motel in Custer, South Dakota. The children described a number of brutal sexual acts. Although the home was small and all the children were being supervised by Mr. Addae-Mensa, both children claimed that they were unaware that the other sibling was being sexually assaulted. At trial, the defense was that Mr. Addae-Mensa's wife, the mother of the children, coached the children to make the allegations after she became convinced that Mr. Addae-Mensa had an affair with another woman.

The relevant timeline to the 180-day rule issue is as follows:

1. July 27, 2023, Mr. Addae-Mensa appeared before Magistrate Judge Hyronimus. Counsel was appointed and a preliminary hearing was set for August 15, 2023. (See transcript of IA).

2. August 8, 2023, a Custer County grand jury returned a six-count Indictment against Mr. Addae-Mensa. (SR 20). As to Mr. Mensa's daughter, the Indictment charged two counts of rape in the first degree (counts 2 and 3) and one count of sexual contact with a child under the age of sixteen (count 6). (Id.). As to Mr. Addae-Mensa's son, the Indictment alleged one count of rape in the first degree (count 1), and one count of sexual contact with a child under the age of sixteen (count 4). (Id.). Count 5 also charged Mr. Addae-Mensa with having sexual contact with his other minor son, who also has the initials S.G., however, this count was dismissed before trial. (See, SR 169). A Part II Information was also filed alleging that Mr. Addae-Mensa was a habitual offender under South Dakota law. (SR 25). This Information was dismissed after the jury trial. (SR 332).
3. August 24, 2023, an arraignment was held in circuit court before Judge Wickre. Mr. Addae-Mensa entered not guilty pleas to the charges and the defense requested that the case be set for a "nonevidentiary motions hearing when the Court has got time, sometime probably late September." (See, transcript of AH at p. 7). In order to accommodate defense counsel's trial schedule on another matter, the circuit court set a motions hearing for October 12, 2023. (Id.).
4. August 17, 2023, the defense filed "Defendant's Standard Pre-Trial Motions." (SR 31). The motions requested 15 separate items. These motions will be discussed in greater detail below, but the motions requested statutory discovery under Rule 16, exculpatory material under *Brady v. Maryland* and its progeny, notice of other acts evidence under Rule 404(b), notice of prior convictions for impeachment if the Defendant testified under Rule 609(a), the State's witness list,

and a request that all witnesses be sequestered for trial under SDCL 19-19-615. (See, SR 31; APP. 5)

5. October 12, 2023, a motions hearing was held before circuit Judge Wickre. During the hearing, the State noted that it had reviewed the "Defendant's Standard Pre-Trial Motions" and stated: "They are standard non-evidentiary motions, and the State has no objection." (See transcript of MH at p. 3). The circuit court then granted both parties discovery motions "in their entirety." (Id. at p. 4). In the seventh circuit, circuit judges are on a yearly rotation. Given that Judge Linngren would be taking the Custer County assignment, she was contacted by the parties to arrange trial dates. At the motions hearing, circuit Judge Wickre recognized this and stated for the record:

> I would also note that it appears that the parties have reached out to Judge Linngren, who will take over this case come January one, and have a four-day jury trial set in April. I don't know if there will be a pre-trial conference held, but I would leave that to the parties to confer with Judge Linngren if a pre-trial conference is needed in this matter.
>
> (Id. at p. 4).

6. April 2-19, 2023, the State requested by email that the circuit court continue the jury trial scheduled for June 11-14, 2023[2]. In its initial email, the State indicated that after issuing subpoenas, two of its expert witnesses were unavailable to attend trial due to work and vacation schedules. These emails were attached to the State's written objection to the defense's Motion to Dismiss for the 180-Day Rule

[2] The settled record does not indicate why the jury trial scheduled for April of 2024 was moved to June of 2024.

Violation (SR 150; see also, APP 14). These emails will be discussed in greater detail below.

7. April 22, 2023, the Custer County Clerk of Courts set new trial dates for July 15-18 of 2024 and canceled the June trial dates.

8. May 16, 2024, a status hearing was held before Judge Linngren. Both parties stated that they were prepared to move forward with trial. (See transcript of SH at p. 2).

9. June 20, 2024, the defense filed a written Motion to Dismiss the charges on the grounds that the 180-day rule was violated. (SR 121; APP 11).

10. June 24, 2024, the State filed its written objection to the defense's Motion to Dismiss based on the 180-day rule. (SR 150; APP 14).

11. June 27, 2024, a pretrial conference was held before Judge Linngren. With respect to the defense's Motion to Dismiss for the 180-day rule violation, the circuit court acknowledged that:

> There were some drafts of orders [for the "Defendant's Standard Pre-Trial Motions"] that he had presented not too long ago from the motions hearing, but they weren't signed because we weren't certain if deadlines needed to be altered or discussions needed to be had about any of the material information.
>
> I certainly know I have the motion to dismiss pending that the State filed their response to. I'll issue that decision in writing.
>
> (See transcript of PTC at p. 2).

Regarding the 180-day motion, later in the hearing, the following took place:

> THE STATE: The only thing I would note, Your Honor, is in addition to defendant's motion to dismiss, the State prior to that had filed a motion for tolling 180, which they're all the same issues for the most part. And I would note, obviously, the State's position is that we've not even broached the 180 with the trial date

currently, so there's really not a need to do it, but I felt it was necessary to clarify some of those tolling times so ...

THE COURT: Well, and I think I had required you to do it at one point when we were setting trials, the different dates and the unavailability of some witnesses and when we came up to the July 15th date.

(Id. at p. 3).

12. June 27, 2024, without a specific hearing or objection from the State, the circuit court entered an order granting the "Defendant's Standard Pretrial Motions." (SR 158).

13. July 12, 2024, the circuit court entered an Order Denying the Defendant's Motion to Dismiss for Violation of 180-Day Rule. (SR 208; see also APP 20)

14. July 15 - 17, 2024, the jury trial was conducted before Judge Linngren. Mr. Addae-Mensa was convicted on one count of rape in the first degree and one count of sexual contact. (SR 408; see also, APP 1).

Ultimately, 354 days passed from Mr. Addae-Mensa's first appearance on July 27, 2023, until trial took place on July 15, 2024.

ARGUMENT

The circuit court violated Mr. Addae-Mensa's right to a trial within 180-days of his first appearance. SDCL 23A-44-5.1.

Standard of review: This Court reviews the legal conclusions of a circuit court under the *de novo* standard. Additionally, this Court reviews "...whether the 180[-] day period has expired as well as what constitutes good cause for delay under a de novo standard." *State v. Two Hearts*, 2019 S.D. 17, 925 N.W.2d 503, *see generally, State v. Seaboy*, 2007 S.D. 24, 729 N.W.2d 370, 372. "A circuit court's findings of fact on the issue of the 180-day rule are reviewed using the clearly erroneous rule." *State v. Two Hearts, supra.*

Summary of the legal analysis: Do the State's mandatory discovery obligations under *Brady v. Maryland* and Rule 16, along with ministerial motions, such as a request for a witness list, require a written order to become effective under the 180-day rule?

More than 180 days passed from the time of Mr. Addae-Mensa's first appearance until the time of trial. As a result, a presumptive violation of the 180-day rule occurred[3]. However, early in the case, the defense filed "Defendant's Standard Pretrial Discovery Motions". This motion cites to *Brady v. Maryland*, Rule 16 discovery statutes and other ministerial requests. At a pretrial motions hearing, the State noted that the defense motions were "standard" and did not object to the requests. The defense motions were orally granted by the circuit court. However, a written order confirming the State's mandatory discovery obligations and the other ministerial motions was not provided to the circuit court until shortly before the jury trial took place. The trial court found, amongst other things, that the failure of defense counsel to provide a written order granting the "Defendant's Standard Pretrial Motions" tolled the 180-day rule. Essentially, the circuit court found that the defense's discovery motions had not reached a final disposition as is required by SDCL 23A-44-5.1(4)(b). The defense maintains that the State's mandatory discovery obligations and ministerial motions are not the type of pretrial motions that require a written order to become effective under SDCL 23A-44-5.1(4)(b).

The circuit court also found good cause to delay the June trial date due to the State's expert witnesses' vacation and work schedules. The defense maintains that the State did not establish "due diligence" or demonstrate that the expert witnesses were

[3] Mr. Addae-Mensa remained in custody from the time of his initial appearance until the time of trial.

"unavailable" simply due to work or vacation plans as required by SDCL 23A-44-5.1(4)(c).

Finally, the circuit court found that the defense consented to the June trial date being continued based on an email that the State wrote to the Court. A review of this email shows that the defense did not waive the 180-day speedy trial right. Additionally, the State did not comply with the "written order" requirement of SDCL 23A-44-5.1(4)(b).

Applicable law. If more than 180 days elapse between a defendant's first appearance and trial, a prima facia case has been established and the matter should be dismissed. SDCL 23A-44-5.1(5); *see, State v. Wimberly*, 467 N.W.2d 499 (S.D. 1991) (reversed on other grounds) (proof by the defendant that the 180th day has passed establishes a prima facie case for dismissal, and absent a showing of good cause delay, the case must be dismissed); *see also, State v. Seaboy*, 729 N.W.2d 370 (S.D. 2007) (conviction reversed where trial not held within 180 days of first appearance).

The 180-day rule (SDCL 23A-44-5.1), provides in relevant part:

> (1) Every person indicted, informed or complained against for any offense shall be brought to trial within one hundred eighty days, and such time shall be computed as provided in this section.
> (2) Such one hundred eighty day period shall commence to run from the date the defendant has first appeared before a judicial officer on an indictment, information or complaint.
>
> ***
>
> (4) The following periods shall be excluded in computing the time for trial:
>
> > (a) The period of delay resulting from other proceedings concerning the defendant...the time from filing until final disposition of pretrial motions of the defendant...
> > (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel provided it is approved by the court and a written order filed...;
> > (c) The period of delay resulting from a continuance granted by the court at the request of the prosecuting attorney if the

> continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date and provided a written order is filed;
> (h) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause. A motion for good cause need not be made within the one hundred eighty day period.
>
> (5) If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, prejudice to the defendant is presumed. Unless the prosecuting attorney rebuts the presumption of prejudice, the defendant shall be entitled to a dismissal with prejudice of the offense charged and any other offense required by law to be joined with the offense charged.
>
> Id.

This Court has recognized that certain days are excluded from the 180-day calculation, including "delay which is occasioned by the defendant's conduct, such as delay caused by pretrial motions ..." *State v. Webb*, 539 N.W.2d 92, 95 (S.D. 1995); SDCL 23A-44-5.1(4). Addressing the "final disposition of pretrial motions" requirement of SDCL 23A-44-5.1(4)(a), this Court has held that it is settled law that, "[o]rders [related to pretrial motions] are required to be in writing because the trial court may change its ruling before the order is signed and entered." *See*, *State v. Sparks*, 1999 S.D. 115, ¶ 6, 600 N.W.2d 550, 554; *see also*, *State v. Hagen*, 600 N.W.2d 561 (S.D. 1999). In support of the need for a written order, the Court in *Sparks* wrote, "...unrecorded rulings on motions are ineffective and need not be considered at a later date." *Id.* (citing *State v. Lowther*, 434 N.W.2d 747, 752 (S.D.1989) (citations omitted).

When determining "good cause" for delay under 180-day rule, this Court has held that the burden is on the State to provide both the legal and factual predicate to establish that the delay was justified. *State v. Seaboy*, 2007 S.D. 24, 729 N.W.2d 370 (this

Court reversing a trial court's finding of good cause delay where "the State has not argued that any part of the twenty-nine days can be attributed to Seaboy's substitution of counsel. Therefore, there is no evidence supporting a finding of good cause for delay…"); *see also, State v. Two Hearts*, 2019 S.D. 17, 925 N.W.2d 503.

Argument. Mr. Addae-Mensa has met his prima facia burden of establishing that more than 180 days elapsed from the time of his initial appearance until his trial occurred. A review of the record establishes that 354 days passed from Mr. Addae-Mensa's first appearance on July 27, 2023, until trial took place on July 15, 2024.

Despite this prima facia showing, the circuit court denied Mr. Addae-Mensa's motion to dismiss. The circuit court found that the 180-day rule was tolled given that a written order had not been entered granting the "Defendant's Standard Pretrial Motions." SDCL 23A-44-5.1(4)(b). Implicitly, the circuit court held that Mr. Addae-Mensa's right to a trial within 180 days was tolled from the date the defense filed the "Defendant's Standard Pretrial Motions" on August 17, 2023, until the circuit court entered a written order on June 27, 2024. (SR 209; APP 21). Under the circuit court's analysis, virtually no time would have elapsed under the 180-day rule. (Id.).

The circuit court also found that the State met its burden to establish "due diligence" and/or "good cause" to delay the trial in order to accommodate the State's expert witnesses' work and/or vacation schedules. SDCL 23A-44-5.1(4)(c).

The circuit court also appears to have found that the defense consented to the continuance of the June 2024 trial date. However, no written order was submitted under SDCL 23A-44-5.1(4)(c) to support this finding.

A. SDCL 23A-44-5.1(4)(a) does not apply to Mr. Addae-Mensa's Motion to Dismiss.

The "final disposition" requirement of SDCL 23A-44-5.1(4)(a) and the "written order" requirement of *State v. Sparks*, 1999 SD 115, ¶ 7, 600 N.W.2d 550, 554 do not apply to Mr. Addae-Mensa's case. Given the nature of the "Defendant's Standard Pretrial Motions", they do not require a written order to become effective. The fourteen[4] sections of the "Defendant's Standard Pretrial Motions" can be broken down into two separate categories. First, those sections that confirm the State's mandatory obligations to make disclosures to the defense. Second, the "Defendant's Standard Pretrial Motions" also contain non-substantive, ministerial motions such as a request for the prosecutions witness list.

Mandatory disclosure requirements under Brady v. Maryland and Rule 16. The defense motions for mandatory disclosure of discovery materials do not require a written order to become effective under SDCL 23A-44-5.1(4)(a). Rather, these disclosures are mandated by constitutional and statutory law. Sections 1-4 of the "Defendant's Standard Pretrial Motions" outline the State's obligation to disclose a defendant's statements, a defendant's criminal record, physical evidence, and the results of scientific testing and/or expert opinions. Under SDCL 23A-13-1-4 (Rule 16), these disclosure requirements are triggered "upon written request of a defendant." Once the written request is made by the defense, Rule 16 requires that the "...the prosecuting attorney *shall* furnish to the defendant..." (emphasis added). Under the plain language of Rule 16, a court order is not required to trigger the State's obligations to make these disclosures. Rather, the

[4] Section 15 of the "Defendant's Standard Pretrial Motions address ongoing effect of the State to continue to comply with its obligations to disclose new information as it become available. *See generally*, *Brady v. Maryland* and *State v. Blem*, 610 N.W.2d 803, 811 200 S.D. 69 (this Court recognizing an ongoing duty to disclose expert opinions).

legislature chose to use the mandatory word "shall[5]" in each of these statutes. *See*, *State v. Jensen*, 2007 S.D. 76, 737 N.W.2d 285 (this Court finding that no discovery violation occurred when the state failed to disclose a witness statement on the grounds that no oral or written discovery motion was made under SDCL 23A-13-3 but also noting that no written discovery order had been entered by the trial court).

Sections 6, 8, 9 and 10 detail the State's mandatory discovery obligations under *Brady v. Maryland* and its progeny. Specifically, sections 6, 8, and 9 outline the disclosure requirements for the State to provide its witnesses' criminal records for impeachment purpose under *Giglio*, disclosure of exculpatory *Brady*[6] material, and evidence that may be material to impeach a witness under *Giglio*[7]. Section 10 reiterates that the work product doctrine does not shield the State from making disclosures pursuant to *Brady* and its progeny. Disclosures as outlined by these sections are mandated by *Brady v. Maryland* and do not require a court order to trigger the State's disclosure obligations. *See*, *Smith v. Cain*, 565 U.S. 73, 75, 132 S.Ct. 627, 630 (2012) (Supreme Court noting the mandatory nature of the prosecution's duty to disclose *Brady* material and writing that a, "State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment").

Similarly, section 11 of the "Defendant's Standard Pretrial Motions" outlines the State's obligation to provide notice of the other-acts evidence it intends to introduce at trial under Rule 404(b). SDCL 19-19-404(b)(3) reads that "in a criminal case, the prosecutor must…provide reasonable notice of any such evidence…". By the statute's

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[5] *See*, *Discovery Bank v. Stanley*, 2008 S.D. 111, 757 N.W.2d 756 (When "shall" is the operative term in a statute, it is given obligatory or mandatory meaning).
[6] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).
[7] *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972).

own clear terms, this notice provision does not require an order from the trial court to be effective.

Section 14 requests sequestration of witnesses. Under the plain language of SDCL 19-19-615, upon a party's request, a trial court "must order witnesses excluded…". Given the plain language of the statute, a trial court is mandated to grant this motion. A written order is not required for this request to become effective.

Given that these Constitutional and statutory disclosure obligations are mandatory on the part of the trial court and/or prosecution, they do not require a court order to become effective. To the contrary, they are an operation of Constitutional and/or statutory law. A formal request from the defense for the State to comply with its constitutional and statutory discovery obligations should not be construed as a "pretrial motion" that requires a "written order" to become effective for purposes of the tolling provision of the 180-day rule. Such a reading would contradict the plain language of *Brady v. Maryland* and the relevant state statutes.

Ministerial motions. The second category of the "Defendant's Standard Pretrial Motions" are merely ministerial and apply to trial procedure to aid the parties and the court during the trial. Sections 5, 7, and 13, seek the State's witness statements, copies of search warrants, and the State's witness list. These sections each cite appropriate case law and/or statutory authority. These sections are clearly procedural. These ministerial sections should not be construed to be "pretrial motions" that require a "written order" to become effective.

Legal analysis related to mandatory discovery motions and ministerial motions. Although the plain language of SDCL 23A-44-5.1(4)(b) does not contain a "written order" requirement, the *Sparks* Court held that a "pretrial motion" must have a final disposition

by a "written order" because "the trial court may change its ruling before the written order is singed and entered." *State v. Sparks*, 1999 SD 115, ¶ 7, 600 N.W.2d 550, 554. Giving a trial court additional time to consider its ruling makes sense when it is considering substantive pretrial motions that will impact the trial. For example, in *State v. Sparks*, the trial court orally granted what appears to be a substantive motion to suppress. *Id.*: see also, SDCL 23A-8-3 (Defenses and objections raised by motion--Issues that must be raised before trial, listing a number of substantive motions that must be raised and disposed of before trial).

By contrast, motions seeking to have the state comply with *Brady*, statutory discovery, and sequestering witnesses, are not the types of motions that require delaying a trial or entering findings of fact. Moreover, almost all of these sections are mandatory obligations for the state and not discretionary decisions for a trial court to make. For example, a trial court is not permitted to give a prosecutor a blanket waiver of the requirement to disclose *Brady* material. For a further example, under SDCL 19-19-615, a trial court has no discretion to sequester witnesses and "[a]t a party's request, the court *must* order witnesses excluded so that they cannot hear other witnesses' testimony." (Emphasis added). Unlike the suppression motion at issue in *Sparks*, *supra*, a trial court will not need time to reconsider these "standard motions" that the state did not object to.

Importantly, during the motions hearing in this matter, the State recognized that the "Defendant's Standard Pretrial Motions" are in fact, standard. When the State was asked by the trial court if the State had reviewed the defense's motions, the State responded, "I have, Your Honor. They are standard non-evidentiary motions, and the State has no objection." (MH at p. 3) The trial court, without further comment or question, then orally granted the defense's motions. (Id. at p. 3-4).

Unopposed mandatory requests for *Brady* material, a ministerial request for a witness list, and sequestration of witnesses are not the types of "pretrial" motions the legislature had in mind when it drafted the tolling provision of the 180-day rule.

Additionally, this Court can find that *Brady* and Rule 16 discovery requests along with ministerial motions do not need a written order to become effective without doing violence to the plain language of SDCL 23A-44-5.1(4)(b). This portion of the 180-day rule, by its own clear terms, does not require a "written order" for a "final disposition" to take place. While the legislature elected to use the words "written order" in other portions of the statute, (see SDCL 23A-44-5.1(4)(a)), it did not do so here.

The *Sparks* Court emphasized the importance of a written order on substantive motions. However, traditionally, oral pronouncements of a trial court control written decrees or judgments. Recently, this Court cited the principle, "When there is a difference between the written and oral sentences, we review the sentence 'under the premise that the oral sentence controls.' " *State v. Washington*, 2024 S.D. 64, 13 N.W.3d 492, (citing *State v. Cook*, 2015 S.D. 46, ¶ 6, 865 N.W.2d 878, 880 (quoting *Thayer*, 2006 S.D. 40, ¶ 7, 713 N.W.2d at 611). Additionally, the official transcript of a court preceding is the record of a trial court's orders.

Trial courts frequently issue oral rulings, and counsel would be ill advised to ignore those pronouncements, even if they were not reduced to a written order.

Additionally, an oral order to have the state comply with its obligations under *Brady* or a motion to sequester witnesses at trial is not the same as an "ineffective" oral order on a motion to suppress. A motion to suppress is substantive, it requires the trial court to carefully consider both the law and the facts and then to enter written findings. This is why the legislature required that this type of motion be raised before trial and that

findings of fact be entered. See SDCL 23A-8-8, Determination of motions before trial--Deferment to trial--Findings as to fact. Nothing about an oral order from the trial court instructing the prosecution to produce a witness list will later delay the trial or will have a substantive impact on the trial. As a result, this Court should find that requests under *Brady* and Rule 16 along with ministerial motions do not toll the 180-day rule.

B. The State did not establish due diligence or good cause to justify delaying the trial.

The State's witnesses were subpoenaed to attend trial. Work and vacation schedules, without more information, do not make these witnesses "unavailable" under SDCL 23A-44-5.1(4)(c).

In the State's "Motion for Tolling of 180 Days and Good Cause Delay," the State noted that the "doctors that conducted the forensic examinations of children where both out of state over the originally scheduled trial dates." (SR 116; APP 23). The State also attached emails to this motion. In the State's initial email to the trial court and defense counsel, the State explained that after issuing the subpoenas, one of the doctors informed the State that he was out of state in Michigan for work and the other doctor informed the State that he would be on vacation.

Importantly, in addition to being expert witnesses, both doctors were also fact witnesses. Both doctors had conducted forensic interviews with children. This means that the State had the legal authority to subpoena the doctors and to order that they attend trial and to testify about the facts as they knew them. Once a fact witness is subpoenaed to appear at trial, the witness must attend, absent an order from the trial court. See SDCL 23A-14-2, 25. In order words, a witness can't simply "opt-out" from

attending trial and declare himself to be "unavailable." Only a trial court has the authority to quash a subpoena.

Given that the State's witnesses were served with subpoenas, they were presumptively available for trial. The issue seems to be that, like many witnesses, the State's doctors found it inconvenient to appear at the time of trial. The State has the burden to establish that these witnesses were "unavailable." However, beyond work and vacation schedules, the State did not detail how or why the witnesses were "unavailable." The State did not provide details about the nature of the work or vacation plans of the witnesses. The State did not provide details about why the witnesses would not be able to attend trial or the hardships that they might endure if they had to attend. For example, the State did not inform the trial court if the doctors had purchased expensive nonrefundable airline tickets for a vacation or if another doctor could have covered the work.

This Court addressed a somewhat similar issue in, *In re Issuance of Summons Compelling Essential Witness To Appear and Testify in State of Minnesota*, 2018 S.D. 16, 908 N.W2d 160. In the aforementioned case, witnesses who lived in South Dakota were subpoenaed to attend court in Minnesota. The witnesses appeared in a South Dakota circuit court and objected to the enforcement of the Minnesota subpoenas. The potential witnesses claimed undue hardship and that, "the proceedings were starting to cost…a lot of money to drive back and forth." In affirming the circuit court's decision to require one of the witnesses to travel to Minnesota to testify, this Court noted that the witness, "provided no specifics on what costs he would incur or whether those costs would exceed the statutory reimbursements…" *Id.* at ¶ 25.

Similarly, in Mr. Addae-Mensa's case, the State has not provided specific details on what costs or hardships the witnesses would have incurred had they complied with the subpoena. Without more detail, this Court should find that the State did not meet its burden to establish that the witnesses were unavailable for purposes of SDCL 23A-44-5.1(4)(c). Especially considering that Mr. Addae-Mensa was in custody awaiting trial.

C. The State did not establish that the defense consented to the continuance. Additionally, a written order was not submitted pursuant to SDCL 23A-44-5.1(4)(b).

Below, the State argued that the defense consented to the June 2024 trial date being continued. The State's argument was based on the email correspondence between counsel and the trial court. These emails are attached to the State's Motion for Tolling and Good Cause Delay. (SR 116; APP 23). The State initially wrote to the trial court on April 2, 2024, and explained that the June 2024 trial dates did not work for the State's experts due to vacation and work schedules. Later, on April 19, 2024, the State wrote to the trial court and defense counsel, "… I have found that we can make the week of July 8th or July 15th work [for the jury trial]…".

Defense counsel having availability on a certain date is not the same as defense counsel waiving his client's right to a trial within 180 days. The defense maintains that these emails do not address any type of tolling or waiving of the 180-day rule. While the State was understandably attempting to accommodate its expert witnesses' work and vacation schedules, an email from the State is not a waiver of an important statutory right.

Moreover, if the State is asserting that the delay of the June trial date is attributable to the defense, the State would have needed to comply with the "written order" requirement of SDCL 23A-44-5.1(4)(b). SDCL 23A-44-5.1(4)(b) reads, that delay

will be attributed to the defense if a "continuance [is] granted at the request or with the consent of the defendant or his counsel provided it is approved by the court and a written order filed."

In this matter, no written order was filed by the trial court to confirm that the continuance was granted with the consent of the defense and approved by the trial court. Without this written order, the State is statutorily unable to meet its burden to establish the delay was attributable to the defense under SDCL 23A-44-5.1(4)(b).

CONCLUSION

The 180-day rule was clearly violated in this case. Pretrial discovery requests that are nondiscretionary do not require a written order for purposes of a final disposition under the statute. Moreover, merely trying to accommodate the work and/or vacation schedules of expert witnesses does not amount to due diligence or good cause to delay a man's right to a speedy trial while he remains in pretrial custody. Defense counsel did not consent to tolling the 180-day rule. Additionally, no written order was filed by the trial court. Mr. Addae-Mensa requests that this Court enter an order reversing his conviction and remanding this action with instructions that his Motion to Dismiss be granted.

Dated this 13th day of January 2025.

GREY &
EISENBRAUN LAW

/s/ Ellery Grey
Ellery Grey
Attorney for Appellant
909 St. Joseph Street, 10th Floor
Rapid City, SD 57701
(605) 791-5454

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30847

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF COMPLIANCE

NANA ADDAE-MENSA,

Defendant and Appellant.

Pursuant to SDCL 15-26A-66, Ellery Grey, counsel for Defendant/Appellant, does submit the following:

The Appellant's Brief is 20 pages in length. It is typed in proportionally spaced typeface Baskerville 12 point. The word processor used to prepare this brief indicates that there is a total of 5,928 words in the body of the brief.

Dated this 13th day of January 2025.

GREY &
EISENBRAUN LAW

/s/ Ellery Grey
Ellery Grey
Attorney for Appellant

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30847

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF SERVICE

NANA ADDAE-MENSA,

Defendant and Appellant.

The undersigned hereby certifies that he served a true and correct copy of the Appellant's Brief upon the persons herein next designated, on the date shown, by e-service through the State of South Dakota e-filing system, Odyssey, to-wit:

Marty Jackley
Attorney General
atgservice@state.sd.us

Tracy Kelley
State's Attorney
tkelley@custercountysd.com

The undersigned further certifies that upon acceptance of the electronically filed Appellant's Brief, the paper brief will be mailed by United States Mail, first-class, postage prepaid, in envelopes addressed to said addressees, to wit:

Supreme Court of South Dakota
500 East Capitol Avenue
Pierre, SD 57501

Marty Jackley
1302 E. Highway 14, Suite 1
Pierre, SD 57501

Tracy Kelley
420 Mt. Rushmore Road
Custer, SD 57730

Which addresses are the last known addresses of the addressees known to the subscriber.

Dated this 13th day of January 2025.

GREY &
EISENBRAUN LAW

/s/ Ellery Grey
Ellery Grey
Attorney for Appellant

APPENDIX

Appendix **Page**

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
COUNTY OF CUSTER	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA Plaintiff	)	FILE NO.: 16CRI23-064
vs.	)	JUDGMENT OF CONVICTION AND
NANA ADDAE MENSA, Defendant	)	ORDER OF TRANSPORTATION

An Indictment was filed with this Court on the 8th day of August, 2023, charging the Defendant with the crimes of (Count 1) RAPE IN THE FIRST DEGREE, SDCL 22-22-1(1); (Count 2) RAPE IN THE FIRST DEGREE, SDCL 22-22-1(1); (Count 3) RAPE IN THE FIRST DEGREE, SDCL 22-22-1(1); (Count 4) SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN (16) YEARS, SDCL 22-22-7; (Count 5) SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN (16) YEARS, SDCL 22-22-7; (Count 6) SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN (16) YEARS, SDCL 22-22-7, committed between the 19th day of January, 2021, and the 17th day of July, 2023. A Part II Information for Previous Conviction of (1) Manufacture Hallucinogen, Schedule I or III or IV; (2) Sell Opium or Derivative, Schedule I or II; (3) Possess Marijuana with Intent to Sell/Manufacture/Deliver; (4) Possess and/or use Narcotic Equipment; and (5) Possess Cocaine with Intent to Sell/Manufacture/Deliver was filed with this Court on the 8th day of August, 2023.

The Defendant was arraigned and advised of the contents of said Indictment and Part II Information and received copies thereof in open Court at Custer, Custer County, South Dakota, on the 24th day of August, 2023. The Defendant, with his attorney, Paul Eisenbraun appearing on behalf of Ellery Grey; and Wendy T. Lampert McGowan, Custer County Deputy State's Attorney, appeared at the Defendant's arraignment. The Defendant, having been advised of all constitutional and statutory rights pertaining to the charge filed against him, including but not limited to the right to confront witnesses called against him, the right to subpoena witnesses on his behalf, the right to a Jury Trial, the privilege against self incrimination, and the right to counsel. The Defendant pled not guilty to the charges of (Count 1) RAPE IN THE FIRST

APP.1

DEGREE, SDCL 22-22-1(1); (Count 2) RAPE IN THE FIRST DEGREE, SDCL 22-22-1(1); (Count 3) RAPE IN THE FIRST DEGREE, SDCL 22-22-1(1); (Count 4) SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN (16) YEARS, SDCL 22-22-7; (Count 5) SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN (16) YEARS, SDCL 22-22-7; (Count 6) SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN (16) YEARS, SDCL 22-22-7 and denied the Part II Information for previous convictions of (1) Manufacture Hallucinogen, Schedule I or III or IV; (2) Sell Opium or Derivative, Schedule I or II; (3) Possess Marijuana with Intent to Sell/Manufacture/Deliver; (4) Possess and/or use Narcotic Equipment; and (5) Possess Cocaine with Intent to Sell/Manufacture/Deliver.

On the 15th day of July, 2024, a Jury Trial commenced. The on the 17th day of July, 2024, the Jury returned a verdict of Guilty to the charges of (Count 2) RAPE IN THE FIRST DEGREE, in violation of SDCL 22-22-1 and (Count 6) SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN (16) YEARS, in violation of SDCL 22-22-7. The State dismissed the Part II Information for previous convictions of (1) Manufacture Hallucinogen, Schedule I or III or IV; (2) Sell Opium or Derivative, Schedule I or II; (3) Possess Marijuana with Intent to Sell/Manufacture/Deliver; (4) Possess and/or use Narcotic Equipment; and (5) Possess Cocaine with Intent to Sell/Manufacture/Deliver.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; that the Defendant was represented by competent counsel, and that a factual basis existed for the verdict.

It is, therefore, the Judgment of this Court that the Defendant is Guilty of the offenses of (Count 2) RAPE IN THE FIRST DEGREE, in violation of SDCL 22-22-1, a Class C Felony and (Count 6) SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN (16) YEARS, in violation of SDCL 22-22-7, a Class 3 Felony.

SENTENCE

On the 5th day of September, 2024, a sentencing hearing was scheduled before the Honorable Heidi Linngren. The Defendant appeared personally and through counsel, Ellery Grey; and Tracy L. Kelley, Custer County State's Attorney, appeared on behalf of the State. The Court asked the Defendant if any legal cause existed to show why Judgment should not be

pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

IT IS ORDERED that on Count 2 of the Indictment, the Defendant, NANA ADDAE-MENSA, shall be sentenced to one hundred (100) years in South Dakota State Penitentiary; and it is further

ORDERED that the Defendant pay court costs in the amount of $116.50; and it is further

ORDERED that the Defendant shall receive credit for the four hundred eight (408) days already served in jail and all time awaiting transport; and it is further

ORDERED that in accordance with SDCL 23A-40-11 through SDCL 23A-40-13, the determined amount for services and expenses of court-appointed counsel, submitted to and approved by the Court, may be filed as lien against the property of the Defendant by the County; and it is further

ORDERED that the Defendant shall pay to the Custer County Clerk of Courts for reimbursement to Custer County for the costs of the grand jury transcript in the amount of $185.86; and it is further

ORDERED that on Count 6 of the Indictment, the Defendant, NANA ADDAE-MENSA, shall be sentenced to fifteen (15) years in South Dakota State Penitentiary; and it is further

ORDERED that the Defendant pay court costs in the amount of $116.50; and it is further

ORDERED that the Defendant shall receive credit for the four hundred eight (408) days already served in jail and all time awaiting transport; and it is further

ORDERED that the sentence for Count 6 of the Indictment shall be served concurrently to the sentence in Count 2 of the Indictment; and it is further

ORDERED that all costs incurred by Custer County associated with the Defendant's incarceration in the Pennington County Jail, shall be entered as a lien against the Defendant by the County of Custer; and it is further

ORDERED that the Defendant shall be remanded to the custody of the Custer County Sheriff or the Pennington County Sheriff to be transported to the South Dakota State Penitentiary; and it is further

ORDERED that any and all bond posted in this matter shall be discharged and the

bondsman exonerated; that the bond may be applied to fine and court costs herein.

Entered nunc pro tunc on the 5th day of September, 2024.

BY THE COURT:

9/10/2024 12:37:24 PM

Attest:
Salzsieder, Debbie
Clerk/Deputy

HONORABLE HEIDI LINNGREN
CIRCUIT COURT JUDGE

NOTICE OF RIGHT TO APPEAL

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

STATE OF SOUTH DAKOTA) SS. COUNTY OF CUSTER	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, v. NANA ADDAE-MENSA, Defendant.	)	COURT FILE NO. CRI23-064 DEFENDANT'S STANDARD PRE-TRIAL MOTIONS

Defendant hereby requests, through the undersigned attorney of record, that this Court enter an Order requiring compliance on the part of the prosecution with the following discovery requests and sequestration motion:

1. **Defendant's Statements.** The Defendant requests that this Court order that the State disclose any relevant oral, written, or recorded statements made by Defendant. See, SDCL 23A-13-1.
2. **Defendant's Criminal Record.** The Defendant requests that this Court order that the prosecution disclose a copy of Defendant's prior criminal record, as well as records of any and all pending criminal charges. See, SDCL 23-13-2.
3. **Physical Tangible Evidence.** The Defendant requests that this Court order the prosecution to disclose all recordings, reports, books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, known to the prosecution, which are material to the defense, or which the prosecution intends to offer in evidence at trial, or which have been obtained from or belong to Defendant. See, SDCL 23A-13-3.
4. **Results of Scientific Testing and Expert Opinions.** The Defendant requests that this Court order the prosecution to disclose all results or reports of

Filed: 8/17/2023 5:26 PM CST Custer County, South Dakota 16CRI23-000064

physical or mental examinations, and of scientific tests or experiments, known to the prosecution, which are material to the defense, inculpatory or exculpatory in any way, or which the prosecution intends to offer in evidence at trial (SDCL 23A-13-4). Defendant requests the prosecution disclose, in writing, the information for any testimony that the State intends to use at trial under Rules of Evidence 702, 703, or 705 during its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed. See Federal Rule of Evidence 16(a), *Gregory v. Solem,* 449 N.W.2d 827, 833 (S.D. 1989) ("Any procedural rule which encourages the result that the trial be as free of error as possible is thoroughly desirable…") and *State v. Blem*, 610 N.W.2d 803, 811, 2000 S.D. 69, ("Once an expert opinion is known to the State and the State determines that it will solicit that opinion in court, it must disclose the opinion to the defense…"). The Defendant requests that the written disclosure for each expert witness contain the following:

a. a complete statement of all opinions that the State will elicit from the witnesses in its case- in-chief, or during its rebuttal;
b. the basis and reasons for them;
c. the witnesses' qualifications, including a list of all publications authored in the previous 10 years; and
d. a list of all other cases in which, during the previous 4 years, the witnesses have testified as an expert at trial or by deposition.

5. **Witness Statements**. The Defendant requests that this Court order the prosecution to disclose any and all statements of the witnesses who testified for the

prosecution at the preliminary hearing and/or before the grand jury. See, SDCL 23A-13-6. In addition, the defense requests the disclosure of "all statements considered by the prosecution to be relevant to the alleged crime [or crimes] made by any person which would tend to incriminate or exculpate [the Defendant] whether reduced to writing or not." *See, State v. Krebs*, 714 N.W.2d 91, 97, 2006 S.D. 43.

6. **Witnesses' Criminal Records.** The Defendant requests that this Court order the prosecution to disclose any prior criminal record, as well as records of any pending criminal charges, of all persons the prosecution intends to call as a witness at trial. The Defendant does not object to these records being reviewed at the prosecutor's office. *See, Gregory v. Solem,* 449 N.W.2d 827, 833 (S.D. 1989) ("Any procedural rule which encourages the result that the trial be as free of error as possible is thoroughly desirable…"), *See also, Giglio v. United States*, 405 U.S. 150, 153-4, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (Supreme Court of the United States reversing conviction where prosecution had failed to disclose evidence that affected the credibility of a cooperating witness).

7. **Search Warrants**. The Defendant requests that this Court order the prosecution to disclose each search warrant obtained in connection with this case, together with each affidavit and other supporting documentation submitted in support, and also production of the search warrant returns filed in connection with the execution of the search warrant execution. See, SDCL 23-8-3(4) (statute requiring that motions to suppress be raised before trial).

8. ***Brady* Material**. The Defendant hereby requests that this Court order that the prosecution disclose all impeachment evidence or exculpatory evidence that it has

in its possession, or in the possession of law enforcement, or could otherwise be discovered with due diligence on the part of the prosecution. This motion is made pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). *See also, Strickler v. Greene*, 527 U.S. 263, 280-81, 119 S.Ct. 1936 (1999) (an individual prosecutor has a duty to learn of any evidence favorable to the defense which is known to the others acting on the prosecution behalf in the case, including the police).

9. ***Giglio* Material**. The Defendant requests that this Court order the prosecution to disclose any evidence affecting the credibility of any the prosecution's potential witnesses, including but not limited to, any consideration a prosecution witness hopes to receive or has already received in return from any prosecution agency or law enforcement agency for his or her cooperation and/or testimony, any prior inconsistent statement made by a witness, any motive known to the prosecution or to law enforcement that a witness may have to fabricate testimony, and any mental or physical defect that a witness may have had or has that may impact the witness's ability to testify or to accurately recall information. *See, Giglio v. United States*, 405 U.S. 150, 153-4, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (Supreme Court of the United States reversing conviction where prosecution had failed to disclose evidence that affected the credibility of a cooperating witness), *State v. Piper*, 2006 S.D. 1, P 19 (quoting *Rutter v. Solem*, 888 F.2d 578, 581 ("evidence that could be used to impeach a witness for the prosecution falls within the *Brady* rule"), *Reuter, supra*, at 582 (disclosure applies to express or implied benefits), *Napue v. People of the State of Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959) (a prosecutor has a duty to correct the testimony of witness who falsely claims that he or she is not

hoping to receive some benefit from the prosecution in exchange for his or her testimony), *United States v. Bagley*, 473 U.S. 667,678, 105 S.Ct. 3375 (1985) (prosecution has a duty to disclose information that might be helpful in conducting cross-examination).

10. **Prosecution Work Product Exempt from Protection**. The Defendant further requests that this Court order that the disclosure of all *Brady* and *Giglio* materials take place even if the impeachment and/or exculpatory evidence is considered work product protected by SDCL 23A-13-5. *Mincey v. Head*, 206 F.3d 1106, n. 63 (11th Cir. 2000) (work product exemption yields to constitutional disclosure requirements).

11. **Other-Acts Evidence**. The Defendant hereby requests that this Court order the prosecution to disclose and identify individuals, dates, statements, and transactions that it anticipates attempting to introduce against the Defendant at trial, under SDCL 19-19-404(b) (Rule 404(b)). This motion is made in the interest of justice and judicial economy so that proper objections can be interposed prior to trial. See, SDCL 19-19-404(b)(3).

12. **Evidence of Prior Convictions**. The Defendant hereby requests that this Court order the prosecution to identify any and all previous convictions that it anticipates attempting to introduce against Defendant pursuant to SDCL 19-19-609(a) (Rule 609(a)), in the event the Defendant should take the stand at trial. This motion is made in the interest of justice and judicial economy so that proper objections can be raised prior to trial. *See, Gregory v. Solem,* 449 N.W.2d 827, 833 (S.D. 1989) ("Any procedural rule which encourages the result that the trial be as free of error as possible is thoroughly desirable…").

13. **Prosecution Witness List.** The Defendant hereby requests that this Court enter an order requiring the prosecution to submit in a writing a list containing the names of each witness that it intends to call at the time of trial.

14. **Sequestration of Witnesses.** The Defendant hereby requests that this Court enter an order sequestering the witnesses of each party at the time of trial so that each witness is unable to hear the trial testimony of any other witnesses. See SDCL 19-19-615. The Defendant has no objection to this order being reciprocal to both sides.

15. **Ongoing Effect.** The Defendant requests that this Court grant the relief requested within this Motion for Discovery. It is further requested that this Court's order be continuing in effect. Should further evidence, statements, or other relevant information and items not presently known to, or in the possession, custody or control of the prosecution, law enforcement or other agencies becomes available, subsequent to the making of the order, it is further requested that the order require that the prosecution produce the same forthwith to counsel for the Defendant. *See, State v. Blem*, 610 N.W.2d 803, 811, 2000 S.D. 69, (Court recognizing that SDCL 23A-3-15 imposes an ongoing duty to disclose evidence, even if additional evidence is uncovered during trial).

Dated this 17th day of August 2023.

GREY &
EISENBRAUN LAW

/s/ Ellery Grey
Ellery Grey
909 St. Joseph Street, 10th Floor
Rapid City, SD 57701
(605) 791-5454
ellery@greyeisenbraunlaw.com

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF CUSTER	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	COURT FILE NO. CRI23-64
Plaintiff,	)	
v.	)	DEFENDANT'S MOTION TO DISMISS FOR VIOLATION OF 180 DAY RULE (SDCL 23A-44-5.1)
NANA ADDAE-MENSA,	)	
Defendant.	)	

Defendant Addae-Mensa, by and through his undersigned attorney, Ellery Grey, hereby approaches this Court and requests that this matter be dismissed pursuant to SDCL 23A-44-5.1. This motion is made upon the following grounds and for the following reasons.

APPLICABLE LAW

SDCL 23A-44-5.1 requires that every person indicted for any offense be brought to trial within 180 days of his first appearance before a judicial officer. At the time of filing this motion, more than 180 days have passed since Mr. Addae-Mensa's first appearance.

RELEVANT TIMELINE FOR PRIMA FACIA CASE

1. Mr. Addae-Mensa's first appearance in this matter was on July 27, 2023.
2. Mr. Addae-Mensa's jury trial is currently set to begin on July 16, 2024.
3. 329 days have elapsed from the date of Mr. Addae-Mensa's first appearance in this matter until the date this motion has been filed.
4. 355 days will have elapsed from the date of Mr. Addae-Mensa's first appearance in this matter until the jury trial is scheduled to being on July 16, 2024.

PRIMA FACIA CASE

Given that more than 180 days have elapsed from the Mr. Addae-Mensa's first appearance in this matter, and given that his trial has not taken place, a prima facia case has been established

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that this matter should be dismissed pursuant to SDCL 23A-44-5.1(5). *See, State v. Wimberly*, 467 N.W.2d 499 (S.D. 1991) (reversed on other grounds) (proof by the defendant that the 180th day has passed establishes a prima facie case for dismissal, and absent a showing of good cause delay, the case must be dismissed), *see also, State v. Seaboy*, 729 N.W.2d 370 (S.D. 2007) (conviction reversed where trial not held within 180 days of first appearance).

EXCLUDABLE TIME PERIODS AND REQUEST FOR ADDITIONAL BRIEFING

Given that the defense has established a prima facia case for dismissal, the burden then shifts to the prosecution to establish any good cause delay and/or any applicable tolling that may have occurred under SDCL 23A-44-5.1(4).

Once the prosecution has submitted its arguments related to this matter, the defense requests the opportunity to respond with any applicable case law and argument.

Dated this 20th day of June 2024.

GREY &
EISENBRAUN LAW

/s/ Ellery Grey
Ellery Grey
909 St. Joseph Street, 10th Floor
Rapid City, SD 57701
(605) 791-5454
ellery@greyeisenbraunlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the above and foregoing document upon the person herein next designated, on the date shown, by e-service, through the State of South Dakota e-filing system, Odyssey, to-wit:

Custer Co. States Attorney's Office
Tracy Kelley

Dated this 20th day of June 2024.

GREY &
EISENBRAUN LAW

/s/ Ellery Grey
Ellery Grey
Attorney for Defendant

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	MAGISTRATE DIVISION
COUNTY OF CUSTER	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	FILE: 16CRI23-064
	)	
Plaintiff,	)	
	)	
vs.	)	STATE'S OJBECTION TO
	)	MOTION TO DISMISS
NANA ADDAE-MENSA,	)	
	)	
Defendant.	)	

COMES NOW, Tracy L. Kelley, Custer County State's Attorney, and makes and files this objection to the Defendant's Motion To Dismiss For Violation of 180 Day Rule for the reasons set forth hereinbelow.

SDCL 23A-44-5.1(1) requires that "[e]very person, ... shall be brought to trial within one hundred eighty days, ..." SDCL 23A-44-5.1(4) excludes "the time from filing until final disposition of pretrial motions of the defendant," "period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel," and such other periods of delay not specifically set forth under statute for which the court finds that "they are for good cause," from the computation of the one hundred eighty days.

The Defendant is correct in that his initial appearance in this matter was held on July 27, 2023. Defendant filed certain pre-trial motions with the Court on August 17, 2024. The Defendant submitted proposed orders to the Court on said pre-trial motions via email March 22, 2024. Final orders have not been formally filed or entered herein as of the date of this objection. In accordance with SDCL 23A-44-5.1, the time from filing of said motions on August 17, 2023 until, at a minimum, March 22, 2024 when proposed orders were sent to the Court, would be

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excluded from computation of the one hundred eighty days. The exclusion of this time frame alone brings the current trial date of July 15, 2024 within the required one hundred eighty day time frame.

In addition the foregoing, the matter was originally scheduled for trial in April 2024 and continued at the State's request. It was thereafter, upon agreement of the parties, set to commence on June 11, 2024. Two of the State's witnesses, Dr. Hamilton and Dr. Mueller, whom conducted forensic examinations of the child victims, were scheduled to be out of the State and unavailable for trial. That prompted an additional request for a change of the trial date. After considering many dates during which the Court, defense counsel and State were unavailable, the parties agreed to commence trial on July 15, 2024. The continued trial date was agreed upon by Defense counsel. See email correspondence attached hereto and incorporated herein by this reference. Each of these circumstances constitutes grounds for good cause delay.

Lastly, the State has filed a Motion for Tolling of the 180 days and for a finding of good cause delay. That motion remains pending herein.

WHEREFORE the State respectfully requests the Court enter an order denying Defendant's Motion to Dismiss.

DATED this 24th day of June, 2024.

Tracy L. Kelley
Custer County State's Attorney
420 Mt Rushmore Rd, Ste 109
Custer, SD 57730
605-673-8175

Filed: 6/24/2024 6:08 PM CST Custer County, South Dakota 16CRI23-000064

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
COUNTY OF CUSTER	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	)	FILE NO.: 16CRI23-64
vs.	)	CERTIFICATE OF SERVICE
NANA ADDAE-MENSA, Defendant.	)	

The undersigned attorney hereby certifies that on the undersigned date, she served a true and correct copy of the following document upon Ellery Grey, attorney for Nana Addae-Mensa, by Electronic Service.

1. State's Objection to Defense Motion to Dismiss

Dated this 24th day of June, 2024.

/s/Tracy L. Kelley
Custer County State's Attorney
420 Mt Rushmore Road
Custer, SD 57730
(605)673-8175

APP.16

Filed: 6/24/2024 6:08 PM CST Custer County, South Dakota 16CRI23-000064

Tracy L. Kelley

From: Salzsieder, Debbie <Debbie.Salzsieder@UJS.STATE.SD.US>
Sent: Monday, April 22, 2024 10:14 AM
To: Linngren, Judge Heidi; Tracy L. Kelley; ellery@greyeisenbraunlaw.com
Cc: Lela Larson; Andrea, works for grey/eisenbraun; Ellen Barrera
Subject: RE: Addae-Mensa

I have added this to Judge Linngren's calendar in Custer for Monday, July 15th- Thursday, July 18th starting from 8:30-5:00 pm each day. If you have any questions, please let me know. Thank you.

Debbie Salzsieder
Custer County Clerk of Court

From: Linngren, Judge Heidi <Heidi.Linngren@ujs.state.sd.us>
Sent: Friday, April 19, 2024 2:46 PM
To: Tracy L. Kelley <tkelley@custercountysd.com>; ellery@greyeisenbraunlaw.com
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Subject: RE: [EXT] Addae-Mensa

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Subject: [EXT] Addae-Mensa

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Ellery and I have found that we can make the week of July 8th or July 15th work if either of these weeks would work for the court? If either week works we will get our subpoenas out asap. On a side note, I have extended a plea offer to Ellery but we will not know the status of that until after next week sometime at the earliest.
Tracy L. Kelley

Tracy L. Kelley

From: ellery@greyeisenbraunlaw.com
Sent: Thursday, April 4, 2024 3:17 PM
To: Linngren, Judge Heidi
Cc: Tracy L. Kelley; Debbie Salzsieder
Subject: Re: Addae-Mensa trial

Tracy and I will try and have an informal telephone conversation tomorrow and get back to you Judge.

And thank you!

From: Linngren, Judge Heidi <Heidi.Linngren@ujs.state.sd.us>
Date: Wednesday, April 3, 2024 at 5:35 PM
To: ellery@greyeisenbraunlaw.com <ellery@greyeisenbraunlaw.com>
Cc: Tracy L. Kelley <tkelley@custercountysd.com>, Salzsieder, Debbie <Debbie.Salzsieder@UJS.STATE.SD.US>
Subject: Re: Addae-Mensa trial

How do you feel about a conference call early next week? We will get something figured out. :). No one needs to sacrifice a vacation or tending to children. □

Heidi
Sent from my iPhone

> On Apr 3, 2024, at 5:24 PM, ellery@greyeisenbraunlaw.com wrote:
>
> My wife and oldest daughters are in Canada that week and I am watching my youngest while they are gone. The vacation has been planned for over a year and the tickets are paid for.
>
> That week will be difficult for me.
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> ---
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> **Date:** Tuesday, April 2, 2024 at 1:30 PM
> **To:** Tracy L. Kelley <tkelley@custercountysd.com>, ellery@greyeisenbraunlaw.com <ellery@greyeisenbraunlaw.com>
> **Cc:** Salzsieder, Debbie <Debbie.Salzsieder@UJS.STATE.SD.US>
> **Subject:** RE: Addae-Mensa trial
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> If it works for Mr. Grey, we could just do Monday and Tuesday and Then Thursday and Friday. (starting on June 17 and 18 and then 20 and 21) I will let him decide. Or if the two of you want to get together with expert dates and your respective calendars and give me some options, I will clear the week for you.
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Subject: [EXT] Addae-Mensa trial

Dear Judge/Ellery:

After issuing subpoenas for our trial dates of June 11-14th, both Dr. Mueller and Dr. Hamilton have informed me that they are out of state that week. Dr. Mueller is scheduled to be in Michigan working and Dr. Hamilton is out of state for vacation. I am not sure where this leaves us? One or both would be available the following week. We have Dustin Harrison scheduled for a 2 day trial the following week, June 20th and 21st that I have doubts will go as Mr. Harrison has been indicted federally and they should be taking custody of him making him unavailable to us. That said, June 19th is a holiday..... I am terribly sorry for this problem. I am available to discuss options at your convenience.

Tracy L. Kelley

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
COUNTY OF CUSTER	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	FILE: 16CRI23-064
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER DENYING
	)	DEFENDANT'S MOTION TO DISMISS
NANA ADDAE-MENSA,	)	FOR VIOLATION OF 180 DAY RULE
	)	
Defendant.	)	

This matter having come before this Court upon Defendant's Motion to Dismiss for Violation of 180 Day Rule; the State have previously filed its Motion For Tolling of 180 Days and Good Cause Delay and thereafter filing it's Objection to Defendant's Motion to Dismiss; and the Court having reviewed the Defendant's motion, the State's motion and objection, having reviewed the file herein, and having entered an Order Tolling 180 Days and Granting Good Cause Delay herein, does now hereby make and enter the following findings and conclusions:

1. That there is not a violation of the 180-day time period; and
2. That the Court incorporates herein the Order Tolling 180 Days and Granting Good Cause Delay in its entirety.

Based on the foregoing, the Court does hereby

DENY Defendant's Motion to Dismiss for Violation of 180 Day Rule.

7/11/2024 3:23:41 PM

BY THE COURT:

Attest:
Salzsieder, Debbie
Clerk/Deputy

HONORABLE HEIDI LINNGREN
CIRCUIT COURT JUDGE

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
COUNTY OF CUSTER	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	FILE: 16CRI23-064
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	TOLLING 180 DAYS AND
NANA ADDAE-MENSA,	)	GRANTING GOOD CAUSE DELAY
	)	
Defendant.	)	

This matter having come before this Court upon the State's Motion For Tolling of 180 Days and Good Cause Delay; the Defendant having subsequently filed a Motion to Dismiss for Violation of 180 Day Rule; and the Court having reviewed the State's motion, having considered Defendant's motion relative to the issue, and having reviewed the file herein, does now hereby make and enter the following findings and conclusions:

1. Defendant filed pre-trial motions with the Court on August 17, 2023 with proposed written orders submitted to the Court on March 22, 2024. Final written orders were not reduced to a written order of the Court until June 27, 2024.
2. In accordance with SDCL 23A-44-5.1, the time from filing of said motions until said motions are finally disposed of by written order are excluded from computation of the 180-day rule.
3. The doctors that conducted the forensic examinations of the alleged child victims in this case are necessary witnesses for the State and were unavailable and out of South Dakota during the scheduled trial date commencing June 11, 2024 and their absences

and unavailability constitute good cause delay.

4. That rescheduling of the trial to July 15, 2024 was done as expeditiously as possible given availability of the Court, State and Defense counsel and that the delay between June 11, 2024 and the current scheduled trial date of July 15, 2024 given the scheduling difficulties of all parties constitutes good cause delay.
5. That the trial date of July 15, 2024 was scheduled with the consent of Defendant's counsel and without objection.

Based on the foregoing, the Court does now hereby:

ORDER that the State's motion for tolling of 180 days is hereby granted and the time from August 17, 2024 until March 22, 2024 is excluded from computation of the 180-day rule; and

IT IS FURTHER ORDERED that the grounds for continuance of the trial from June 11, 2024 to July 15, 2024 set forth hereinabove constitute good cause delay and is hereby granted as such.

7/11/2024 3:24:18 PM

BY THE COURT:

HONORABLE HEIDI LINNGREN
CIRCUIT COURT JUDGE

Attest:
Salzsieder, Debbie
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	MAGISTRATE DIVISION
COUNTY OF CUSTER	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	FILE: 16CRI23-064
Plaintiff,	)	
vs.	)	MOTION FOR TOLLING
	)	OF 180 DAYS AND
NANA ADDAE-MENSA,	)	GOOD CAUSE DELAY
Defendant.	)	

COMES NOW, Tracy L. Kelley, Custer County State's Attorney, and moves this Honorable Court for an Order Tolling the 180 days required to bring the above-captioned matter to trial and Good Cause Delay for the following reasons:

1. The Defendant's initial appearance in this matter was July 27, 2023.
2. In accordance with SDCL 23A-44-5.1 and legal grounds for exclusion of time, the following time frames would be excluded from the calculation based on the following:
    a. Defendant filed certain pre-trial motions with the Court on August 17, 2023. Orders on said motions were provided to the Court via email on March 22, 2024; however, as of the date of this motion, final orders have not been filed or entered herein. In accordance with SDCL 23A-44-5.1, the time from filing until final disposition of pretrial motions of the defendant shall be excluded from the calculation.
    b. This case was scheduled for jury trial on the dates of June 11, 2024 through June 14, 2024. The State, upon receiving notice that the doctors that conducted the forensic examinations of the children in the case were both out of the state over the originally scheduled trial dates, notified Court and Defense counsel as quickly as possible to seek an alternate trial date. After considering many dates and time frames during which either the Court, Defense Counsel or State were unavailable, the parties agreed to scheduling of the jury trial herein on July 15-18, 2024. The continued trial date was set with the consent of Defendant's counsel. See email correspondence attached hereto and incorporated herein by reference.

Filed: 6/20/2024 5:20 PM CST Custer County, South Dakota 16CRI23-000064

3. Based upon the exclusion of the foregoing periods in accordance with SDCL 23A-44-5.1, the current scheduled trial date of July 15, 2024 is not in violation of the 180-day time period.

WHEREFORE the State respectfully requests the Court enter an order declaring that the time frames between August 17, 2023, the date of filing of Defendant's pretrial motions and the filing of a final order thereon is excluded from the 180-day period calculation and further, that the delay between the jury trial date of June 11, 2024 until July 15, 2024 constitutes good cause delay based on the unavailability of necessary witnesses and scheduling abilities of the parties herein which are grounds for exclusion from the 180-day calculation. The Defendant has not filed a waiver of the 180 day period herein.

DATED this 20th day of June, 2024.

Tracy L. Kelley
Custer County State's Attorney
420 Mt Rushmore Rd, Ste 109
Custer, SD 57730
605-673-8175

Filed: 6/20/2024 5:20 PM CST Custer County, South Dakota 16CRI23-000064

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
COUNTY OF CUSTER	)	SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff,	)	File No. 16CRI23-064
vs.	)	**CERTIFICATE OF SERVICE**
NANA ADDAE-MENSA, Defendant.	)	

The undersigned hereby certifies that she served a true and correct copy of the State's Motion for Tolling of 180 Days and Good Cause Delay upon the person herein next designated, all on the date shown, by electronic service through Odyssey File and Serve, to:

Ellery Grey
Attorney at Law

Dated this 20th day of June, 2024.

/s/Tracy L. Kelley
Custer County State's Attorney

Filed: 6/20/2024 5:20 PM CST Custer County, South Dakota 16CRI23-000064

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30847

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

NANA ADDAE-MENSA,

Defendant and Appellant.

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

THE HONORABLE HEIDI LINNGREN
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Jennifer M. Jorgenson
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Ellery Grey
Grey and Eisenbraun Law
909 St. Joseph Street, 10th Floor
Rapid City, SD 57701
Telephone: (605) 791-5454
Email: ellery@greyeisenbraunlaw.com

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed September 19, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30847

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

NANA ADDAE-MENSA,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as "State." Defendant/Appellant, Nana Addae-Mensa, is referred to as "Defendant." The settled record in the underlying case is denoted as "SR." Defendant's Brief is denoted as "DB." All references to documents are followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On September 10, 2024, the Honorable Heidi Linngren, Circuit Court Judge, Seventh Judicial Circuit, entered a Judgment of Conviction in *State of South Dakota v. Nana Addae-Mensa*, Custer County Criminal File Number 16CRI23-000064. SR:408-11. Defendant filed his Notice of Appeal on September 19, 2024. SR:412. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

I.

WHETHER THE CIRCUIT COURT VIOLATED DEFENDANT'S RIGHT TO BE BROUGHT TO TRIAL WITHIN 180 DAYS?

The circuit court tolled periods of time, which resulted in Defendant being tried within 180 days.

State v. Cooper, 421 N.W.2d 67 (S.D. 1988)

State v. Seaboy, 2007 S.D. 24, 729 N.W.2d 370

State v. Two Hearts, 2019 S.D. 17, 925 N.W.2d 503

SDCL 23A-44-5.1

STATEMENT OF THE CASE AND FACTS[1]

On July 24, 2023, in *State of South Dakota v. Nana Addae-Mensa*, Custer County Criminal File Number 16CRI23-000064, the State filed a Complaint against Defendant alleging five counts. SR:1-3. The State alleged Defendant sexually abused three of his children between July 17, 2021, and July 21, 2023. SR:1-3; *see generally* SR:800. Counts 1 and 2 alleged Rape in the First Degree, in violation of SDCL 22-22-1(1), Class C felonies. SR:1-2. Counts 3 through 5 alleged Sexual Contact with a Child Under the Age of 16 Years in violation of SDCL 22-22-7, Class 3 felonies. SR:2-3.

---

[1] The Statement of the Case and Statement of the Facts sections are combined because of the intertwined nature of the facts and procedural history related to the issue on appeal.

Defendant made his initial appearance on July 27, 2023. SR:424-29. The Custer County Grand Jury later indicted Defendant on the five charges in the Complaint, along with one additional count. SR:20-22. Counts 1 through 3 charged Rape in the First Degree in violation of SDCL 22-22-1(1), Class C felonies. SR:20-21. Counts 4 through 6 charged Sexual Contact with a Child Under the Age of 16 Years in violation of SDCL 22-22-7, Class 3 felonies. SR:21-22. Prior to trial, the State dismissed Count 5, leaving allegations regarding two of Defendant's children. SR:169.

On August 17, 2023, Defendant filed pretrial motions containing fifteen numbered items. SR:31-36. Each numbered item asked the circuit court to enter an order related to, in part, a discovery request, exculpatory material, notice of other acts evidence under Rule 404(b), notice of prior convictions for impeachment if Defendant testified under Rule 609(a), the State's witness list, and sequestration of witnesses. SR:31-36. The next day, the State filed pretrial motions and notices. SR:37-43.

On August 24, 2023, at Defendant's arraignment hearing, defense counsel requested the circuit court schedule a non-evidentiary motions hearing. SR:1257. Subsequently, on October 12, 2023, a motions hearing was held before the Honorable Stacy Wickre, Circuit Court Judge, Seventh Judicial Circuit. SR:1260. Neither party objected to the

other's motions. SR:1262. The circuit court orally granted the motions. SR:1263.

At the same hearing on October 12, 2023, Defendant made an oral motion regarding a private investigator. SR:1264. The next day, the circuit court entered an order on Defendant's motion. SR:72. On October 31, 2023, the circuit court entered an order on the State's pretrial motions. SR:73-75.

On January 1, 2024, the case was reassigned to the Honorable Heidi Linngren, Circuit Court Judge, Seventh Judicial Circuit. SR:1263. Defendant submitted a proposed order for his pretrial motions via email on March 22, 2024. SR:209. The settled record does not contain the email or the proposed order. *See* SR.

The circuit court scheduled a jury trial for June 11, 2024, through June 14, 2024. SR:116. The State received notice that the doctors who conducted the forensic examinations of the children were both out of state during that time. SR:116. One expert was working and the other was on vacation. SR:119. The State notified the circuit court and defense counsel to seek an alternate trial date. SR:116.

On April 2, 2024, the circuit court proposed via email that the trial commence June 17, 2024, if defense counsel's schedule allowed. SR:119. Defense counsel responded that the proposed dates would be difficult based on his prior obligations. SR:119. Defense counsel proposed that he have an informal conversation with the State to

determine an agreeable date. SR:154. The parties determined they were available on July 15, 2024, for a trial. SR:118.

On May 16, 2024, a status hearing was held. SR:440. Defense counsel informed the circuit court the parties were working through discovery issues but believed they would be ready for trial. SR:450. The State agreed. SR:450.

On June 20, 2024, the State filed a Motion for Tolling of 180 Days and Good Cause for Delay. SR:116-19. The same day, Defendant motioned to dismiss, alleging a violation of the 180-day rule under SDCL 23A-44-5.1. SR:121-23. The State objected. SR:150-51.

On June 24, 2024, the circuit court held a pretrial conference. SR:456. In an apparent reference to defense counsel's proposed order on his pretrial motions, the circuit court noted, "[t]here were some drafts of orders that [defense counsel] had presented not too long ago from the motions hearing, but they weren't signed because we weren't certain if deadlines needed to be altered or discussions needed to be had about any of the material information." SR:457. On June 27, 2024, the circuit court entered an Order Granting Defendant's Pre-Trial Motions. SR:158-60.

On July 11, 2024, the circuit court entered a written Order Denying Defendant's Motion to Dismiss for Violation of 180-Day Rule and Order Tolling 180 Days and Good Cause Delay. SR:208-10.

The case proceeded to a jury trial beginning on July 15, 2024. SR:314. At the end of the State's case, Defendant unsuccessfully moved for judgment of acquittal. SR:317; 1156. After settling jury instructions and closing arguments, the case was given to the jury. SR:317; 1158-211. Later that day, the jury found Defendant guilty of Count 2, Rape in the First Degree, and Count 6, Sexual Contact with a Child Under the Age of 16. SR:308-09; 317; 1212-13. The jury found Defendant not guilty on the remaining three counts. SR:308-09; 317; 1212-13.

On September 5, 2024, the circuit court sentenced Defendant to 100 years in the South Dakota State Penitentiary for Count 2, Rape in the First Degree, and fifteen years in the South Dakota State Penitentiary for Counts 6, Sexual Contact with a Child Under the Age of 16, with the sentences to run concurrently. SR:410.

ARGUMENT

I.

THE CIRCUIT COURT DID NOT VIOLATE DEFENDANT'S RIGHT TO BE BROUGHT TO TRIAL WITHIN 180 DAYS.

A. *Background.*

Defendant claims that his convictions for Rape in the First Degree and Sexual Contact with a Child Under the Age of 16 were obtained in violation of the 180-day rule. DB:7-10. The "180-day rule" in SDCL 23A-44-5.1 is a procedural rule that requires that a criminal defendant's case be brought to trial within 180 days of the initial appearance or be

subject to dismissal. *State v. Duncan*, 2017 S.D. 24, ¶ 14, 895 N.W.2d 779, 782. Yet the statute provides numerous exceptions requiring exclusion ("tolling") of certain time periods from the 180-day calculation, including days attributable to a defendant. SDCL 23A-44-5.1(4).

In Defendant's view, no time should be tolled for his pretrial motions. DB:16. Defendant maintains this view even though he requested the circuit court schedule a hearing and enter orders on his motions. Defendant attempts to distinguish his motions from other types of motions, DB:11-16, but the distinction that matters under SDCL 23A-44-5.1 is whether his motions caused a delay and whether good cause exists to toll periods of time. Because Defendant's motions tolled the 180 days and good cause exists to toll time, the circuit court properly denied Defendant's motion to dismiss.

B. *Standard of Review.*

This Court reviews a circuit court's findings of fact on the 180-day rule under the clearly erroneous standard. *State v. Two Hearts*, 2019 S.D. 17, ¶ 12, 925 N.W.2d 503, 509. But this Court reviews "whether the 180-day period has expired and the existence of good cause for delay under the de novo standard." *State v. Little Long*, 2021 S.D. 38, ¶ 57, 962 N.W.2d 237, 256 (citing *State v. Andrews*, 2009 S.D. 41, ¶ 6 n.1, 767 N.W.2d 181, 183 n.1).

C. *Defendant's Motions Tolled the 180 Days and Good Cause Existed to Toll the Time.*

When calculating the 180-day rule, some periods of time "shall be" excluded from the calculation, which includes, in part:

> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . the time from filing until final disposition of pretrial motions of the defendant, including motions brought under § 23A-8-3; . . .
>
> (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel provided it is approved by the court and a written order filed. . . .;
>
> (c) The period of delay resulting from a continuance granted by the court at the request of the prosecuting attorney if the continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date and provided a written order is filed;
>
> (d) The period of delay resulting from the absence or unavailability of the defendant; [and]
>
> . . .
>
> (h) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause. A motion for good cause need not be made within the one hundred eighty day period.

SDCL 23A-44-5.1(4). But even if the 180 days expired, dismissal is still not automatic:

> If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, prejudice to the defendant is presumed. Unless the prosecuting attorney rebuts the presumption of prejudice, the defendant shall be entitled to a dismissal with prejudice of the offense

> charged and any other offense required by law to be joined with the offense charged.

SDCL 23A-44-5.1(5).

Here, no violation of the 180-day rule occurred. The 180-day clock started on July 27, 2023, when Defendant first appeared before the circuit court. SR:424-29. Defendant's trial began 354 days later on July 15, 2024. If no periods of time were tolled, the 180 days would have ended January 23, 2024. *See* SR:424-29; SDCL 23A-41-1; SDCL 23A-44-5.1. But certain periods of time were properly tolled resulting in a trial well within the 180 days.

1. <u>After Tolling Time Under SDCL 23A-44-5.1(4)(a), Merely Thirty-Nine Days Occurred from Defendant's Initial Appearance to Trial.</u>

Under SDCL 23A-44-5.1(4), certain periods shall be tolled in computing the time for trial. One type of exclusion includes "[t]he period of delay resulting from . . . the time from filing until final disposition of *pretrial motions of the defendant*, including motions brought under § 23A-8-3." SDCL 23A-44-5.1(4)(a) (emphasis added). Defendant's August 17, 2023, pretrial motions tolled the 180 days from the "time from filing until final disposition." SDCL 23A-44-5.1(4)(a). Defendant's motions included fifteen numbered items asking the circuit court to enter an order regarding each. SR:31-36. The requests related to discovery, exculpatory material, notice of other acts evidence under Rule 404(b), notice of prior convictions for impeachment if the Defendant testified

under Rule 609(a), the State's witness list, and sequestration of witnesses. SR:31-36.

Not only did Defendant request in writing that the circuit court enter orders, Defendant also verbally requested the circuit court to schedule a hearing on the motions. SR:1257. The parties and the circuit court took time to address Defendant's pretrial motions at a hearing on October 12, 2023. SR:1260-62. The circuit court orally granted Defendant's motions, but the tolling of time continued. SR:1263.

A circuit court's oral rulings are not "final dispositions" that end a defendant's pretrial motion tolling under SDCL 23A-44-5.1(4)(a). *See State v. Sparks*, 1999 S.D. 115, ¶ 7, 600 N.W.2d 550, 554 (recognizing oral rulings do not finally dispose of motions under the 180-day rule). For example, in *State v. Seaboy*, the defendant filed a motion to sever on February 6, 2006—three days before trial. 2007 S.D. 24, ¶ 10, 729 N.W.2d 370, 373. The circuit court heard the motion the same day. *Id.* The circuit court entered a written order disposing of the motion on February 9, 2006. *Id.* This Court held that three days were excluded from the 180 days. *Id.* This Court noted, "It is settled law that for final disposition, '[o]rders are required to be in writing because the trial court may change its ruling before the order is signed and entered.'" *Id.* ¶ 9 n.4, 729 N.W.2d at 373 n.4 (quotation omitted).

Defendant had a duty to ensure written orders are entered on his motions to stop tolling. *See Sparks*, 1999 S.D. 115, ¶ 7 n.5, 600 N.W.2d

at 554 n.5 (noting that it is a party's duty to ensure written orders are entered on their motions). Indeed, Defendant specifically requested in his motions that the circuit court enter orders. SR:31-36. But Defendant did not submit a proposed order until March 22, 2024—a delay of 218 days. SR:209. Defendant delayed submitting a proposed order so long that a different judge presided over the case and signed the order than the judge who presided over the initial motions hearing. *Compare* SR:160, *with* SR:1260. Even if the tolling ended here when Defendant finally submitted a proposed order, only 136 days would have elapsed between Defendant's initial appearance and trial.

But the delay did not end on March 22, 2024, when Defendant merely submitted a proposed order. *See Sparks*, 1999 S.D. 115, ¶ 7 n.5, 600 N.W.2d at 554 n.5 ("[W]hen the trial court failed to act on his proposals, the burden of demanding entry of a written order remained with Sparks."); *State v. Sickler*, 334 N.W.2d 677, 679 (S.D. 1983) (the burden of demanding a ruling rests on the party desiring it). The settled record does not contain Defendant's email, the proposed order, or an insistence from Defendant that the order be signed. *See* SR. To the contrary, the circuit court noted on June 24, 2024, that the proposed order was not signed yet "because we weren't certain if deadlines needed to be altered or discussions needed to be had about any of the material information." SR:457. On June 27, 2024, final disposition of

Defendant's pretrial motions occurred when the circuit court entered an Order Granting Defendant's Pre-Trial Motions. SR:158-60, 209.

Defendant attempts to evade any tolling by arguing that his pretrial motions "are not the type of pretrial motions that require a written order to become effective under SDCL 23A-44-5.1(4)(b) [sic]." DB:8. Defendant argues that zero days should be attributed to his motions because SDCL 23A-44-5.1(4)(a) does not apply. DB:11-17.

Defendant's argument overlooks both what SDCL 23A-44-5.1 applies to and the facts of this case. SDCL 23A-44-5.1(4)(a) applies to delays caused by discovery requests, along with other types of motions. SDCL 23A-44-5.1(4)(a) specifically includes motions brought under SDCL 23A-8-3 regarding a defense, objection, or request capable of determination without the trial of the general issue. Motions brought under SDCL 23A-8-3 also include "[r]equests for discovery under chapter 23A-13." SDCL 23A-8-3. While Defendant contends his discovery motions categorically do not toll time, the plain language of the statutes dispose of his arguments. *See also State v. Hagan*, 1999 S.D. 119, ¶ 15, 600 N.W.2d 561, 565 (holding that a defendant's pretrial motions toll the time from filing until final disposition by written order). And the State is not responsible for delays resulting from periods in which his motions were pending. *See Two Hearts*, 2019 S.D. 17, ¶ 17, 925 N.W.2d at 511.

Accordingly, 315 days must be tolled under SDCL 23A-44-5.1(4)(a) due to Defendant's pretrial motions. This leaves only 39 days from

Defendant's initial appearance to trial when considering Defendant's pretrial motions standing alone. As a result, no good cause need be shown, no prejudice to the defendant is presumed, and the State need not rebut any preconceptions based on the delay. SDCL 23A-44-5.1(5); *Two Hearts*, 2019 S.D. 17, ¶ 11, 925 N.W.2d at 509.

2. Good Cause Exists to Toll Time Under SDCL 23A-44-5.1(4)(h).

Should this Court disagree that the time Defendant's motions were pending was properly tolled under SDCL 23A-44-5.1(4)(a), good cause exists for tolling the time along with additional time. This Court's "primary consideration in assessing good cause [under SDCL 23A-44-5.1(4)(h)] is whether the delay is attributable to the State or the defendant." *State v. Langen*, 2021 S.D. 36, ¶ 31, 961 N.W.2d 585, 592. Exceptional circumstances that may constitute good cause for delay include: (1) unique, nonrecurring events; (2) nonchronic court congestion; and (3) unforeseen circumstances, such as unexpected illness or unavailability of counsel or a witness. *State v. Cooper*, 421 N.W.2d 67, 70 (S.D. 1988).

Defendant's pretrial motions are a delay attributed to him and constitute good cause to toll. His request for a hearing on the motions is a delay attributed to him. His delay in submitting the proposed order until after a new judge presided over the case is a delay attributed to him. Defendant's failure to ensure entry of an order is a delay attributed

to him. For these reasons along with the reasons previously stated, good cause exists under SDCL 23A-44-5.1(4)(h) to toll 315 days—the time from when Defendant filed his motions until final disposition.

Exceptional circumstances constituting good cause for delay also exist because of the unforeseen circumstances of the unavailability of counsel and witnesses. *See Cooper*, 421 N.W.2d at 70. The circuit court found that the June 11, 2024, trial was rescheduled because "[t]he doctors that conducted the forensic examinations of the alleged child victims in this case are necessary witnesses for the State and were unavailable and out of South Dakota during the scheduled trial date." SR:209. The circuit court relied on this finding to support its conclusion to toll the time for good cause. SR:209; *see* SDCL 23A-44-5.1(4)(h).

Defendant challenges the circuit court's finding of fact that two witnesses were unavailable. DB:18. Defendant argues that the State did not "provide[] specific details on what costs or hardships the witnesses would have incurred had they complied with the subpoena." DB:18. Defendant made no such argument to the circuit court. And the circuit court treated the witnesses' unavailability similar to how it treated defense counsel's unavailability on June 17, 2024, as detailed below.

For a factual finding to be clearly erroneous, this Court must be left with "a definite and firm conviction that a mistake was made." *State v. Bowers*, 2018 S.D. 50, ¶ 9, 915 N.W.2d 161, 164. Such a mistake is not present here. And the unforeseen circumstance of the unavailability

of two witnesses constitutes good cause to toll the time from June 11, 2024, until trial on July 15, 2024.[2] SDCL 23A-44-5.1(4)(h).

The circuit court also found that all parties had scheduling difficulties in rescheduling the June 11, 2024, trial. SR:210. For example, the circuit court proposed the trial be rescheduled to June 17, 2024. SR:119. Defense counsel replied that the proposed date would be difficult based on his prior obligations. SR:119. The circuit court did not reschedule the trial for June 17, 2024. SR:118. Instead, the trial was scheduled for July 15, 2024. SR:118. The unforeseen circumstance of the unavailability of counsel constitutes good cause to toll the time from June 17, 2024, until trial on July 15, 2024. SDCL 23A-44-5.1(4)(h); *see Cooper*, 421 N.W.2d at 70.[3]

A rebuttal for the presumption of prejudice need only be offered when Defendant was "not brought to trial before the running of the time for trial, *as extended by excluded periods*." SDCL 23A-44-5.1(5) (emphasis added). Because the circuit court correctly ruled that days were "properly excluded" under either SDCL 23A-44-5.1(4)(a) for Defendant's pretrial motions or under SDCL 23A-44-5.1(4)(h) for good cause, no rebuttal for the presumption of prejudice is necessary.

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[2] The tolling due to witness unavailability partially overlaps with the number of days tolled from Defendant's pretrial motions.
[3] Defendant also argues on appeal that SDCL 23A-44-5.1(4)(b) does not apply. DB:18-19. The State does not rely on SDCL 23A-44-5.1(4)(b) in support of its arguments.

3. If the 180 Days as Extended by Tolled Periods Passed, Defendant was Not Prejudiced.

If this Court considers prejudice by any delay, the State rebuts the presumption of prejudice. *See* SDCL 23A-44-5.1(5). In evaluating prejudice under the related constitutional right to a speedy trial standard, this Court found prejudice arises from oppressive pretrial incarceration or damage to a defendant's ability to present his intended defense. *See State v. Tiegen*, 2008 S.D. 6, ¶ 18, 744 N.W.2d 578, 586. And when discussing prejudice in the context of a delayed indictment, this Court held that prejudice may arise when a delay "caused substantial prejudice to a defendant's rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *State v. O'Neal*, 2024 S.D. 40, ¶ 37, 9 N.W.3d 728, 745 (cleaned up). None of these instances of prejudice are present in this case.

First, Defendant did not suffer prejudice resulting from oppressive pretrial incarceration. "[W]hether pretrial incarceration was oppressive [is considered] in light of all of the circumstances of the incarceration." *Montana v. Hesse*, 519 P.3d 462, 467 (Mont. 2022). The length of the pretrial incarceration that is "oppressive" is less for a simple offense than it is for a complex charge. *Id.* If a defendant is detained for reasons in addition to the pending case, that weighs against prejudice. *See State v. Starnes*, 200 N.W.2d 244, 253 (S.D. 1972) (holding no oppressive pretrial

incarceration existed when the defendant was already in the penitentiary).

Defendant's charges, including Rape in the First Degree of children, were complex and serious. Defendant faced a penalty of up to life in prison. *See* SDCL 22-6-1; SDCL 22-22-1(1). The alleged victims were children, which posed additional challenges like how to cross-examine a young victim. And as of May 16, 2024, defense counsel was not prepared to move forward with a trial because the parties were working through discovery issues. SR:450. While Defendant was in custody for the pendency of the case, Defendant was also on a detainer from Homeland Security indicating he was subject to deportation and immigration rules. SR:734. Based on these circumstances including the complexity of the case and detainer from Homeland Security, Defendant did not suffer prejudice from oppressive pretrial incarceration.

Second, Defendant's defense was not impaired. Defendant's defense strategy was, in part, to challenge the credibility and alleged inconsistencies of the State's witnesses. *See* SR:1187-202 (defense counsel's closing argument). His defense did not suffer from one of his witnesses passing away. *See Starnes*, 200 N.W.2d at 253 (reasoning that prejudice from a delay may result if a defendant lost an alibi witness). His defense also did not suffer from a defense witness's lapse in memory since he did not call witnesses. *See State v. Jones*, 521 N.W.2d 662, 669 (S.D. 1994) (Prejudice can occur "when 'defense witnesses are unable to

recall accurately events of the distant past.'"). The time that passed did not prejudice Defendant's ability to present his defense.

Third, any delay was not for the State to gain some tactical advantage over Defendant. To the contrary, any lapse in memory of a State's witness was to Defendant's benefit. "As the time between the commission of the crime and trial lengthens, witnesses may become unavailable, or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so." *Id.* (*quoting Barker v. Wingo*, 407 U.S. 514, 521 (1972)). Indeed, Defendant was acquitted of Count 1, Count 3, and Count 4. SR:317. For these reasons, if this Court holds time was not tolled under either SDCL 23A-44-5.1(4)(a) or (h), the State rebuts any presumption of prejudice and Defendant is not entitled to dismissal.

CONCLUSION

Defendant's trial occurred within 180 days from when he first appeared before the circuit court after tolling time under SDCL 23A-44-5.1. The time from when Defendant filed motions on August 17, 2023, to when a written order was entered on June 27, 2024, is tolled under SDCL 23A-44-5.1(4)(a) and (h). Additional time attributed to attorney and witness unavailability is tolled under SDCL 23A-44-5.1(4)(h). Because the circuit court did not err in tolling time from the 180-day rule, Defendant is not entitled to dismissal. 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 4,003 words.

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

Dated this 25th day of February 2025.

/s/ Jennifer M. Jorgenson
Jennifer M. Jorgenson
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 25, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Nana Addae-Mensa*, was served via Odyssey File and Serve upon Ellery Grey at ellery@greyeisenbraunlaw.com.

/s/ Jennifer M. Jorgenson
Jennifer M. Jorgenson
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30847

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

NANA ADDAE-MENSA,

Defendant and Appellant.

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

THE HONORABLE HEIDI LINNGREN

APPELLANT'S REPLY BRIEF

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NOTICE OF APPEAL WAS FILED SEPTEMBER 19, 2024

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THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30847

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

NANA ADDAE-MENSA,

Defendant and Appellant.

PRELIMINARY STATEMENT

Appellant's Reply Brief will utilize the same abbreviations as were used in the Appellant's Brief. Additionally, the State's Appellee's Brief will be cited as "SB" for State's Brief, followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Mr. Mensa reasserts the Jurisdictional Statement from his Appellant's Brief.

STATEMENT OF THE LEGAL ISSUE

The circuit court violated Mr. Addae-Mensa's right to a trial within 180 days of his first appearance. SDCL 23A-44-5.1.

The circuit court overruled Mr. Addae-Mensa's motion to dismiss under SDCL 23A-44-5.1. The trial court found that 1) tolling occurred given that a written order was not entered granting "Defendant's Standard Pretrial Motions," 2) good cause for the delay due to the State's expert witnesses' vacation and work schedules, and 3) that defense counsel consented to the continuance of a trial date.

State v. Wimberly, 467 N.W.2d 499 (S.D. 1991).
State v. Seaboy, 2007 S.D. 24, 729 N.W.2d 370).
State v. Hagen, 600 N.W.2d 561 (S.D. 1999).

STATEMENT OF THE CASE AND FACTS

Mr. Addae-Mensa reasserts his Statement of the Case and Facts as presented in his Appellant's Brief.

ARGUMENT

The circuit court violated Mr. Addae-Mensa's right to a trial within 180 days of his first appearance.

Mr. Addae-Mensa respectfully maintains that the circuit court should have dismissed his case given that more than 180 days elapsed from the time of his first appearance until his jury trial. See SDCL 23A-44-5.1(4). Mr. Addae-Mensa responds to the State's arguments as outlined below.

1. *Did Mr. Addae-Mensa's standard pretrial motions toll the running of the 180-day rule?* The State argues that Mr. Addae-Mensa's failure to obtain written orders granting his standard discovery motions tolled his right to trial within 180 days. SB 9-12. The State cites to the "final disposition" language of SDCL 23A-44-5.1(4)(a) and this Court's decisions in *State v. Sparks*, 1999 S.D. 115, ¶ 7, 600 N.W.2d 550, 554, and *State v. Seaboy*, 2007 S.D. 24, P10, 729 N.W.2d 370, 373, where this Court held that written orders are required to finally dispose of motions under the 180-day rule, given that "the trial court may change its ruling before the order is signed and entered." *Id.* The State also specifically argues that the plain language of SDCL 23A-8-3 precludes the arguments that Mr. Addae-Mensa made related to this point in his Appellant's Brief, given that SDCL 23A-8-3 specifically addresses "[r]equests for discovery" in the context of motions that must be filed before trial. SB 12.

However, the plain language of the "final disposition" requirement of SDCL 23A-44-5.1(4)(a) does not contain a "written order" requirement. While this Court in *Sparks*

did hold that a "pretrial motion" must have a final disposition by a "written order" to be final, the rationale behind this holding was based on the reality that "the trial court may change its ruling before the written order is signed and entered." *State v. Sparks*, 1999 S.D. 115, ¶ 7, 600 N.W.2d 550, 554.

While the rationale for the requirement of a written order holds true for a contested or dispositive motion, motions seeking to have the state comply with *Brady v. Maryland*, statutory discovery, and sequestering witnesses, are not the types of motions that a trial court has the authority to change its ruling on to even deny. This is especially true where the State did not object to complying with that mandatory constitutional and statutory disclosures. For example, a trial court is not permitted to give a prosecutor a blanket waiver of the requirement to disclose *Brady* material. As Mr. Addae-Mensa argued in his Appellant's Brief, unlike a suppression motion, such as in *Sparks*, *supra*, a circuit court will not need time to reconsider ordering the prosecution to comply with mandatory constitutional and statutory discovery.

More to the point, written orders are not necessary to trigger the State's disclosure obligations under *Brady v. Maryland* and given the plain language of Rule 16, our discovery statutes do not require a written order from the trial court either. Under SDCL 23A-13-1-4 (Rule 16), disclosure requirements are triggered "upon written request of a defendant…" and that "…the prosecuting attorney shall furnish to the defendant…" (emphasis added). Nothing within the plain language of Rule 16 requires a written order from a trial court.

Given that Mr. Addae-Mensa's standard pretrial motions merely confirm the State's constitutional and statutory disclosure obligations, they do not require a court order to become effective. To the contrary, they are an operation of constitutional

and/or statutory law. A formal written request to the trial court from the defense for the State to confirm its constitutional and statutory disclosure obligations should not be construed as a "pretrial motion" that requires a "written order" to become effective for purposes of the tolling provision of the 180-day rule. Such a reading would contradict the plain language of *Brady v. Maryland* and the relevant state statutes.

While the undersigned can envision discovery litigation that could reasonably delay a trial and could be lawfully reconsidered by a trial court before it entered a written order (i.e., *State v. Waldner*, 2024 S.D. 67, 14 N.W.3d 229 (Court addressing discovery related to confidential records), unobjected to disclosures under Rule 16 and *Brady v. Maryland* are not among them.

2. *Did good cause exist to toll the time under SDCL 23A-44-5.11(4)(h)?* The State argues that Mr. Addae-Mensa's failure to obtain written orders granting his discovery motions should constitute a good faith delay under SDCL 23A-44-5.11(4)(h). SB 13-14. However, the State did not raise this analysis below nor was it addressed by the circuit court in its findings when it denied Mr. Addae-Mensa's motion to dismiss. Therefore, the circuit court has not had a chance to review this portion of the State's argument. Moreover, the absence of a written order that merely confirms the State's constitutional and statutory obligations to make disclosures hardly seems to rise to the level of necessitating the delay of trial; especially since the State did not object to Mr. Addae-Mensa's standard discovery requests.

The State's other argument to support good cause, is that the State filed a motion to continue the jury trial to accommodate the schedules of two of its expert witnesses. SB 14. The State notes that Mr. Addae-Mensa challenges the circuit court's finding of good cause delay given that the State below did not develop the record in more detail about

why the expert witnesses could not attend the scheduled trial. In response, the State argues that the circuit court "treated the witnesses' unavailability similar to how it treated defense counsel's unavailability…" SB 14. To be fair, the State was the party seeking to move the scheduled jury trial. When the State sought to delay the trial, the circuit court offered some additional dates that were open on its calendar. However, defense counsel was not open at least one of the proposed dates due to family obligations that had been scheduled for some time.

The fact that defense counsel had set his family calendar around the scheduled trial date should not be held against Mr. Addae-Mensa. The burden is on the State to establish that good cause existed to delay the trial. The fact that defense counsel was not readily available at the next available opening that the circuit court had on its calendar is not grounds to find good cause to delay the trial in the first place.

The fact remains that the State's expert witnesses were served with subpoenas, they were presumptively available for trial. The State has the burden to establish that these witnesses were "unavailable." However, the State's emails to the trial court only show that the expert witnesses had scheduling conflicts with work and vacation schedules. The State did not detail how or why the witnesses were "unavailable." The State did not provide details about the nature of the work or vacation plans of the witnesses. The State did not provide details about why the witnesses would not be able to attend trial or the hardships that they might endure if they had to attend. This limited amount of information does not establish that a witness is unavailable for trial.

3. *Was Mr. Addae-Mensa prejudiced by the delay of the trial date?* The State argues that Mr. Addae-Mensa was not prejudiced by "oppressive pretrial incarceration or damage to [his] ability to present his intended defense." SB 16. The State also cites to this Court's

decision in *State v Tiegen*, 2008 S.D. 6, ¶ 18, 744 N.W 2d 578, 586. In *Tiegen*, the defendant contended that, "he was denied his right to a speedy trial under the United States and South Dakota constitutions." However, the defendant in *Tiegen*, did, "…not argu[e] that our 180–day rule was violated. See SDCL 23A–44–5.1." *Id.* ¶ 15.

Unlike the defendant in *Tiegen*, here Mr. Addae-Mensa does argue that "our 180-day rule was violated." The 180-day rule reads that, "[i]f a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, prejudice to the defendant is presumed." SDCL 23A-44-5.1(5). Under the plain language of the 180-day rule, Mr. Addae-Mensa does not need to establish prejudice. All Mr. Addae-Mensa needs to establish to make a prima facie showing of presumed prejudice is that more than 180 days passed from the time of his first appearance until trial. The State has the burden of establishing excluded periods. If the State is unable to establish excluded period, the prejudice is presumed, and the relief should be granted.

CONCLUSION

Mr. Addae-Mensa's convictions should be reversed with instructions to the trial court to enter an order granting the motion to dismiss.

REQUEST FOR ORAL ARGUMENT

Mr. Addae-Mensa respectfully requests oral argument.

Dated this 27th day of March 2025.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #30847

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF COMPLIANCE

NANA ADDAE-MENSA,

Defendant and Appellant.

Pursuant to SDCL 15-26A-66, Ellery Grey, counsel for Defendant/Appellant, does submit the following:

The Appellant's Reply Brief is 6 pages in length. It is typed in proportionally spaced typeface Baskerville 12 point. The word processor used to prepare this brief indicates that there is a total of 1,611words in the body of the brief.

Dated this 27th day of March 2025.

GREY &
EISENBRAUN LAW

/s/ Ellery Grey
Ellery Grey
Attorney for Appellant

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30847

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF SERVICE

NANA ADDAE-MENSA,

Defendant and Appellant.

The undersigned hereby certifies that he served a true and correct copy of the Appellant's Reply Brief upon the persons herein next designated, on the date shown, by e-service through the State of South Dakota e-filing system, Odyssey, to-wit:

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Supreme Court of South Dakota

The undersigned further certifies that upon acceptance of the electronically filed Appellant's Reply Brief, the paper brief will be mailed by United States Mail, first-class, postage prepaid, in envelopes addressed to said addressees, to wit:

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Which addresses are the last known addresses of the addressees known to the subscriber.

Dated this 27th day of March 2025.

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/s/ Ellery Grey
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