APPELLANTS' BRIEF

*** ***

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

*** ***

STATE OF SOUTH DAKOTA, Plaintiff and Appellee,
vs.
RYAN ALAN KRAUSE, Defendant and Appellant

*** ***

STATE OF SOUTH DAKOTA, Plaintiff and Appellee,
vs.
BRIAN MICHAEL KRAUSE, Defendant and Appellant,

*** ***

APPEAL FROM THE CIRCUIT COURT, THIRD JUDICIAL CIRCUIT

GRANT COUNTY, SOUTH DAKOTA

*** ***

APPEAL NO. 27628 and NO. 27629

*** ***

THE HONORABLE VINCENT F. FOLEY, CIRCUIT JUDGE, PRESIDING

*** ***

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Notice of Appeal Filed October 27, 2015

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Defendant and Appellant.

– –

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
vs. #27629

BRIAN MICHAEL KRAUSE,
Defendant and Appellant.

PELIMINARY STATEMENT

All references to the Settled Record are referred to as "SR." Because these appeals are combined for purposes of jurisdictional economy, reference to "SR" will be from Defendant/Appellant's Brian Krause Clerk's Certificate. The transcript of the sentencing trial will be referred to as "ST." Any document appended to this brief will be referred to as "APP". All abbreviations will be followed by the appropriate page numbers.

JURISDICTIONAL STATEMENT

The State charged the Defendant and Appellants, Brian Krause and his twin brother, Ryan Krause, by information with one count of Grand Theft (Class 4 Felony) in violation of SDCL 22-30A-1 and SDCL 22-30A-17(1) and four counts of "Unlawful Use of a Computer System" (Class 6 Felony) in violation of SDCL 43-43B-1(2). Brian and Ryan pleaded guilty to all five counts pursuant to a written plea bargain agreement on July 10, 2015. A Presentence Investigation Report was completed and the Krauses were sentenced on September 15, 2015. (SR 30). An Amended Judgment of Conviction was entered on October 7, 2015 whereby Brian and Ryan were sentenced as follows: Count One: a sentence of four years in the South Dakota State Penitentiary. (SR 19). Counts Two through Five: Sentences of 2 years in the South Dakota State Penitentiary for each count to be served consecutively. (SR 97 – 103). With all counts ordered to be served consecutively, this gave Brian and Ryan 12 years to serve individually.

The Krauses' appeal from the Trial Court's Amended Judgments of Convictions dated September 15, 2015 for Counts Two through Five inclusive. They do not appeal their convictions or sentences for Grant Theft. Notice of Appeal was filed on October 27, 2015 (SR 105). Jurisdiction is proper pursuant to SDCL 23A-32-2.

CONCISE STATEMENT

1) Whether the sentences for counts 2 through 5 (for unauthorized use of a computer system) were grossly disproportionate to the offenses committed and were therefore cruel and unusual punishment under the Eighth Amendment.

a. The trial court sentenced Brian and Ryan to two years for each of the counts (2 through 5 inclusive) to be served consecutive to each other and consecutive to the sentence for count 1 (Grand Theft).

i. List of Relevant Cases and Statutes:

State v. Bonner, 577 NW2d 575 (SD 1998)
State v. Blair, 721 NW2d 55, 63 (SD 2006)
People v. Milbourn, 435 Mich. 630, 461 NW2d 1, 17 (Mich 1990).

2) Whether the sentencing court erred when it cited, a) punishment for the defendants and b) deterrence to the public as aggravating factors for deviating from a presumptive probation sentence for counts 2 through 5 at the sentencing hearing instead of whether or not the defendants posed a significant risk to the public.

a. The sentencing court cited punishment for the defendants and deterrence to the public as aggravating circumstances but did not cite that the defendants posed a significant risk to the public. The sentencing court also made a specific finding that the appellants did not need rehabilitation.

i. List of Relevant Cases and Statutes:

SDCL 22-6-11
Berger v. United States, 295 US 78, 88, 55 SCt 629, 79 Led 1314 (1935).

3) Whether it is error for the aggravating factors to be absent from the judgment of conviction for counts 2 through 5 when the sentencing court ordered penitentiary sentences instead of probation.

a. The judgments of conviction do not list aggravating factors.

i. List of Relevant Cases and Statutes:

State v. Blair, 721 NW2d, 55, 67 (SD 2006)
State v. Stahl, 2000 SD 154, P7, 619 NW2d at 872
Ganrude v. Weber, 2000 SD 96, P12, 614 NW2d, 807, 810
SDCL 43-43B-1(2)

STATEMENT OF THE CASE AND FACTS

At all times relevant to this case, Brian and Ryan Krause lived in Milbank, South Dakota. Brian has been married to Amanda Krause for 3 years. He also worked at Valley Queen Cheese in Milbank in a computer and technologies position. His twin brother Ryan was single and held a comparable position at Big Stone Therapies. During the course of their respective employment, the Krauses eventually began to take property belonging to their employers and then they would sell those items on EBay. Additionally, they were able to access private information – much of it financial - which was obtained from the computers of various individuals who worked at Valley Queen Cheese Factory and Big Stone Therapies. This information included such things as private bank statements, personal balance sheets, and private email correspondence. Brian and Ryan would share this information with each other. There is no evidence that they shared this information with anyone else or attempted to profit from it in any way.

ISSUE I

Whether the sentences for unauthorized use of a computer were grossly disproportionate to the offenses committed and were therefore cruel and unusual under the Eighth Amendment.

In addition to the sentences resulting from the conviction for Grant Theft, which the Krauses do not appeal, they were convicted and sentenced on four counts of "Unlawful Use of Computer System" under SDCL 43-43B-1(2). Brian and Ryan each received the maximum of two years in the state penitentiary for each of these convictions for a total of eight years and each sentence was ordered to be served consecutively to each of the others. Brian and Ryan were sentenced

then to a total of twelve years – four years for the Grand Theft and two years each for the Unlawful Use of Computer System convictions.

It is well settled that this Court will, upon review, "…take an extremely deferential review of sentencing - - generally, a sentence within the statutory maximum will not be disturbed on appeal. State v. Bonner, 577 NW2d 575 (SD 1998) referencing State v. Kaiser, 526 NW2d 722 (SD 1995). And generally, "…any sentence within the minimum and maximum limits set by the Legislature will ordinarily be left undisturbed." Id. And of course, outside of capital cases, "successful challenges to the proportionality of particular sentences [will be] exceedingly rare." Id quoting Solem v. Helm, 463 US 277, 290, 103 SCt 3001, 3009, 77 LEd 2d 637, 649 (1983).

However, our Constitution does afford citizens protection against gross disproportionality because the Eighth Amendment "…reflects our nation's belief in the dignity of every human being and the view that legislative and judicial power to punish criminal conduct, though given high deference, is not absolute." Id referencing Coker v. Georgia, 428 US 153, 173, 96 SCt 2909, 2925, 49 LEd 2d 859 (1976). This belief at least partially stems from the notion that, "[g]ross disparity in punishment erodes public confidence in our institutions of justice." Id. As such, Justice Henderson has stated, "the day of approving a sentence – simply because it is within statutory limits is gone – like sod huts on the prairie." Id quoting State v. Pack, 516 NW2d 665, 672 (SD 1994). In fact, the Blair court has said that "[c]ourts must 'reserve the most severe sanctions for the most serious combinations of the offense *and the background of the offender*.'"

(Emphasis added). State v. Blair, 721 NW2d 55, 63 (SD 2006) citing Bonner and quoting People v. Milbourn, 435 Mich. 630, 461 NW2d 1, 17 (Mich 1990).

So, to assess a challenge to proportionality, it must be determined "whether the sentence appears grossly disproportionate." Id. As such, the conduct of the defendant and any relevant past conduct of his must be considered "with utmost deference to the Legislature and the sentencing court." Id. As stated previously, the conduct related to the "Unlawful Use of Computer System" counts consisted of Brian and Ryan accessing private information belonging to other individuals and sharing it between the two of them. The Krauses acknowledge that this information was highly personal in nature given that it largely consisted of personal financial information of the people to whom it belonged. (SR 7). For example, Brian Krause obtained unauthorized access to Mark Leddy's secured and restricted personal file folder (Mark Leddy is Valley Queen's Chief Executive Officer) then copied and saved the confidential pdf file containing Mark Leddy's personal financial statement. Brian Krause then sent a copy of that file to Ryan via Skype-chat file transfer. (SR 10).

The Conduct Involved

But that is where the conduct stopped. While they did gain possession of the confidential information, in order to understand the conduct involved, an analysis needs to take into account what they did not do with that information. They did not share it with any other person, they did not sell it to others nor did they attempt to extort anyone with it. (ST 24, 16-17). It was more a case of curiosity and for the ill-gotten information to be a topic of discussion between the

two of them. As invasive as the act was - and the Krauses acknowledged the invasiveness at sentencing - the damage could obviously have been significantly worse. Importantly, given that these crimes happened over a period of months, it also demonstrates the Krauses' lack of intent to use that information for any nefarious purpose – they merely were "peeping" at the information because had they intended to use it further, they had ample time and opportunity to do so.

Brian and Ryan cooperated immediately with law enforcement when initially confronted. (ST 20:6-8 and 30:1-2). "They told law enforcement what they knew. They admitted what they had done. They didn't clam up and ask for an attorney or give misdirection." (ST 20:8-10). Not only did they cooperate during their interviews but they assisted in the investigation against them by turning over computing equipment that wasn't located at the workplace. They also provided law enforcement with the password to an encrypted Apple laptop at law enforcement's request. (ST 20:10-13). In fact, much of what the State had in terms of evidence was taken from a thumb drive which was personal to Brian. (ST 20:14-15).

Brian and Ryan also immediately put themselves into counseling at Lutheran Social Services and continued until they were discharged by their counselor. (ST 20:16-20). The Krauses also repaid approximately $100,000.00 in restitution prior to the sentencing hearing as it related to the grand theft charge. They paid $80,000.00 cash to the victims and turned over the title and possession to a pontoon and trailer valued at approximately $20,000.00. (ST 22:12-15).

Relevant Past Conduct

As the pre-sentence investigation report demonstrates, Brian and Ryan had virtually no criminal record before these convictions. The entirety of their criminal record consisted of one minor traffic offense each. (ST 22:4-5). Brian and Ryan were lifelong members of the Milbank community (ST 18:17). The prosecutor, in his remarks at sentencing, acknowledged that they were respected in their community. (ST 6:12-13). Additionally, even the sentencing court acknowledged that Brian and Ryan were not in need of rehabilitation because they had learned their lessons. (ST 28:15-16). Their past conduct was that of law abiding citizens who were gainfully employed and self-supporting. They were not individuals who made a habit of appearing in court or required community resources to take care of them in some manner.

Remorse

It is appropriate for the sentencing court to take into account the defendant's remorse when imposing a sentence. State v. Blair, 721 NW2d 55, 67 (SD 2006) citing State v. Stahl, 2000 SD 154, P7, 619 NW2d at 872; Ganrude v. Weber, 2000 SD 96, P12, 614 NW2d 807, 810. Brian and Ryan unequivocally expressed deep regret and remorse. Apologizing and expressing remorse comprised almost the entirety of their remarks at sentencing but some more succinct statements were as follows – first Brian:

> First of all, I would like to truly apologize to Valley Queen, Mark Leddy, Brian Sandvig, and Keith Weber. I am very sorry for what I have done and the friendships that I have ravaged.

(ST 25:19-22).

He went on to say:

> I recognize that by saying that I am deeply sorry, it might not be enough and sufficient to address the pain and hurt that I have caused you. Therefore, I ask you for your forgiveness for my actions, and I hope that you can find in your heart to forgive me.

(ST 26:13-17).

Ryan also expressed his sincerest remorse:

> First off, I would like to also apologize to Valley Queen, Mark Leddy, Brian Sandvig, Keith Weber, Big Stone Therapies, and Wade VanDover. I am truly sorry for what I have done. There is also not a day goes by that I don't think about what I have done and the friendships at work and friends in the community that I have ruined and how truly sorry I am.

(ST 26:19-25).

> There isn't a day go by that I don't think about the consequences of my actions, how wrong they have been, and I can assure everyone that this will never happen again. I am ashamed and embarrassed for myself and my family as well as the people that I have entrusted to me.

(ST 27:9-14).

Given that Brian and Ryan, 1) reached the age of 32 with only one traffic offense apiece to constitute the entirety of their criminal history, 2) that they immediately cooperated with law enforcement through interviews as well as, 3) provided computer equipment to the investigation, 4) immediately enrolled in counseling to address the issues which brought them before the court and, finally, 5) made restitution of approximately $100,000.00 to make amends for their actions, they believe that the four maximum and consecutive sentences for Unlawful Use of Computer System, made consecutive the four years they each

received for Grand Theft constitutes a grossly disproportionate sentence which violates their Eighth Amendment protection.

Intra-jurisdictional Analysis

It appears from a Sentencing History Report that only one other individual has been convicted and sentenced in South Dakota under the "Unlawful Use of Computer System SDCL 43-43B-1(2) since 2002. That person was convicted of one count in Meade County in 2012 and received a suspended imposition of sentence with terms and conditions that included thirty (30) days in jail with zero days suspended and credit for zero days served. This person also received a $396.00 fine and costs as well as other routine conditions including work release. (APP. A)

While the sample size is extremely small, it is clear that the sentences which Brian and Ryan received could not be more divergent than the sentence handed down in Meade County in 2012 with that individual receiving work release while spending thirty days in county jail and the Krauses receiving four consecutive maximum sentences each. At face value these sentences appear to be grossly disproportionate to each other.

Effect Upon Society of This Type of Offense

The sentencing judge in this matter was very clearly concerned about the effects of this type of offense and its effects upon society. At sentencing he said,

> I need to punish you two for what you did for those invasions of privacy, but also you need to be the tool of the message to be sent, not only here in Milbank, not only in Grant County, not only to graduates of Lake Area, but hopefully broader, that when we get you creepers, we punish you. And that's what you are. You are Internet creepers. You are no different. You creeped between the

> two of you, but you invaded privacy. And that's what probably gets me the most upset.

(ST 29:17-25).

It is well settled that one of the factors the sentencing court considers when fashioning an appropriate sentence is to consider deterrence for the public – this is at least partly because of the effect upon society of the type of offense. However, given the gross disparity between the Meade County sentence and what Brian and Ryan received, it seems that a strong message could still be sent to the public without maximum consecutive sentences being imposed upon them. With respect to the effect upon society for the specific offenses which Brian and Ryan committed, they acknowledge here, as they did at sentencing, that they caused hurt and pain to the victims. (ST 26:13-17 & 26:19-25). But with respect to the Unlawful Use of Computer System counts, they did no further harm than emotional harm. The victims were not impacted financially – no money was taken from them nor were they threatened with disclosure of the information nor did the Krauses share it with anyone beyond themselves. So, while emotional damage was likely inflicted through an invasion of privacy, the harm stopped there and in that respect the effect upon society was mitigated to a significant degree.

ISSUE II

Whether the sentencing court erred when it cited, a) punishment for the defendants and b) deterrence to the public as aggravating factors for deviating from a presumptive probation sentence for counts 2 through 5 at the sentencing hearing instead of whether or not the defendants posed a significant risk to the public

The four sentences from which Brian and Ryan appeal are for convictions from a Class 6 felony level[1]. In 2013, the South Dakota Legislature enacted Senate Bill 70 (the Public Safety Improvement Act) a portion of which is reflected in SDCL 22-6-11. See S.D. Sess. Laws Ch. 101, §53. SDCL 22-6-11 states:

> The sentencing court shall sentence an offender convicted of a Class 5 or Class 6 felony, except those convicted under §§ 22-11A-2.1, 22-18-1, 22-18-1.05, 22-18-26, 22-19A-1, 22-19A-2, 22-19A-3, 22-19A-7, 22-19A-16, 22-22A-2, 22-22A-4, 22-24A-3, 22-22-24.3, 22-24-1.2, 22-24B-2, 22-24B-12, 22-24B-12.1, 22-24B-23, 22-42-7, subdivision 24-2-14(1), 32-34-5, and any person ineligible for probation under §23A-27-12, to a term of probation. The sentencing court may impose a sentence other than probation if the court finds aggravating circumstances exist that *pose a significant risk to the public* and require a departure from presumptive probation under this section. If a departure is made, the judge shall state on the record at the time of sentencing the aggravating circumstances and *the same shall be stated in the dispositional order*. Neither this section nor its application may be the basis for establishing a constitutionally protected liberty, property, or due process interest.

SDCL 22-6-11. (Emphasis added).

A plain reading suggests that the sentencing court may deviate from a probationary sentence if the defendant poses "…a significant risk to the public." Id. The sentencing court in this case, at the time of sentencing, did make a finding of aggravating circumstances but his objective seemed to focus on punishment for the Krauses as well as deterrence to the public. See generally ST 28:13 through 31:8. But specifically, the court found:

> …number one, I need to punish. I need to punish you two for what you did for those invasions of privacy, but also you need to be the

[1] Unlawful Use of Computer System SDCL 43-43B-1(2) classifies the offense as a Class 6 felony.

> tool of the message to be sent, not only here in Milbank, not only in Grant County, not only to graduates of Lake Area, but hopefully broader, that when we get you creepers, we punish you. And that's what you are. You are Internet creepers. You are no different. You creeped between the two of you, but you invaded privacy. And that's what probably gets me the most upset.

ST 29:17-25.

These remarks clearly focused on the punishment component of sentencing. The sentencing court also placed emphasis on sending a message to other would be offenders when it said:

> But, you still need to be the message senders, and so I have toyed with different sentencing formats. And I am not going to give you jail time or suspended jail time. You will be going to the penitentiary, because what you did in the Counts 2 through 5 deserve penitentiary time.

ST 30:5-9.

The sentencing court appeared to make a clear finding that neither Brian nor Ryan posed a threat to the public and that they had learned their lessons when it stated: "*I don't think rehabilitation is necessary. I think you have learned your lessons*, but that doesn't get us to the conclusion." ST 28:15-17. (Emphasis added). Therefore, based upon the sentencing court's remarks, it appears the sentences for counts 2 through 5 were made to be penitentiary sentences instead of probationary sentences out of the court's desire to punish and to deter others and not because Brian or Ryan posed a significant risk to the public. Brian and Ryan argue that SDCL 22-6-11 was erroneously deviated from with improper aggravating circumstances cited at the time of sentencing.

In addition to receiving maximum consecutive sentences for presumptive probation convictions, for reasons other than posing a significant risk to the

public, the sentencing court imposed a harsher sentence than the prosecutor requested under the terms of the plea bargain agreement. The prosecutor did argue aggravating factors to the court. See ST 7:15 and ST 10:22. While the net result of the sentence actually imposed upon Brian and Ryan is a 12 year sentence, the prosecutor asked for 10 years (10 years on the grand theft conviction with Counts 2 through 5 to run concurrently with Count 1. (ST 17:3-8). (APP. B)

The sentencing court is, of course, not bound by recommendations of either party, however, given that the role of a prosecutor is to be a minister of justice with a duty to "see that justice is done on behalf of both the victim and defendant," it seems that a strong argument exists that the victim and society would have been well served had Counts 2 through 5 been run concurrent to the Grant Theft sentence as the plea bargain agreement contemplated. Berger v. United States, 295 US 78, 88, 55 SCt 629, 79 LEd 1314 (1935).

ISSUE III

Whether it is error for the aggravating factors to be absent from the judgment of conviction for counts 2 through 5 when the sentencing court ordered penitentiary sentences instead of probation.

Brian and Ryan argue that SDCL 22-6-11 and State v. Hernandez were not followed because the judgments of conviction do not also provide the aggravating circumstances which the sentencing court found to justify its departure from the presumptive probation required by the statute. (SR. 21-27). SDCL 22-6-11 and State v. Hernandez, 845 NW2d 21, (SD 2014). Both statute and case law seem to indicate the necessity of including the proper aggravating factors or circumstances in the dispositional order. That was not done in this case.

CONCLUSION

Brian and Ryan are only appealing the sentences for the Unlawful Use of Computer System convictions (counts 2 through 5 inclusive). Given their almost spotless history and almost total lack of any past conduct as well as the disparity between their sentences and the Meade County sentence, they believe their consecutive, maximum sentences are grossly disproportionate and therefore are cruel and unusual sentences as prohibited by the Eighth Amendment of the United States Constitution.

Alternatively, Brian and Ryan believe that the Class 6 sentences were not in line with the dictates of SDCL 22-6-11 because the sentencing court found essentially that they were not a risk to the public which is the trigger for finding aggravating factors and deviating from a non-penitentiary sentence. This seems particularly so when the prosecutor recommended counts 2 through 5 be run concurrently with count 1 (which they do not appeal). Additionally, the aggravating factors were not included in the judgment of conviction. For these reasons Brian and Ryan respectfully ask this Court to determine that their sentences were cruel and unusual and that they be resentenced on counts 2 through 5.

The appellants respectfully request oral arguments in this matter.

Respectfully submitted this 18th day of February, 2016.

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APPENDIX

South Dakota Unified Judicial System

Sentencing History Report

Report Period 07/01/2002 - 12/02/2015

Offenses Selected: USE/ACCESS COMPUTER WITH CONFIDENTIAL DATA W/O CONSENT OF OWNER

County	Case Number	
Grant	**25CRI15-000063**	Filed: 07/14/2015
		Judgment on Plea of Guilty of SDCL 22-30A-17 (GRAND THEFT - MORE THAN $5,000 AND LESS THAN $100,000.01)
		Sentenced 09/15/2015 | Fine: $750.00 | Susp. Fine: $0.00 | Total Fine: $750.00 | Cost: $104.00
		Incarcerated to Penitentiary for 4 Year(s) 0 Day(s)with 0 Day(s) suspended. Credit for 0 Day(s) served.
		Probation: Restitution: $0.00
		Judgment on Plea of Guilty of SDCL 43-43B-1 (2) (USE/ACCESS COMPUTER WITH CONFIDENTIAL DATA W/O CONSENT OF OWNER)
		Sentenced 09/15/2015 | Fine: $750.00 | Susp. Fine: $0.00 | Total Fine: $750.00 | Cost: $104.00
		Incarcerated to Penitentiary for 2 Year(s) 0 Day(s)with 0 Day(s) suspended. Credit for 0 Day(s) served.
		Probation: Restitution: $0.00
		Judgment on Plea of Guilty of SDCL 43-43B-1 (2) (USE/ACCESS COMPUTER WITH CONFIDENTIAL DATA W/O CONSENT OF OWNER)
		Sentenced 09/15/2015 | Fine: $750.00 | Susp. Fine: $0.00 | Total Fine: $750.00 | Cost: $104.00
		Incarcerated to Penitentiary for 2 Year(s) 0 Day(s)with 0 Day(s) suspended. Credit for 0 Day(s) served.
		Probation: Restitution: $0.00
		Judgment on Plea of Guilty of SDCL 43-43B-1 (2) (USE/ACCESS COMPUTER WITH CONFIDENTIAL DATA W/O CONSENT OF OWNER)
		Sentenced 09/15/2015 | Fine: $750.00 | Susp. Fine: $0.00 | Total Fine: $750.00 | Cost: $104.00
		Incarcerated to Penitentiary for 2 Year(s) 0 Day(s)with 0 Day(s) suspended. Credit for 0 Day(s) served.
		Probation: Restitution: $0.00
		Judgment on Plea of Guilty of SDCL 43-43B-1 (2) (USE/ACCESS COMPUTER WITH CONFIDENTIAL DATA W/O CONSENT OF OWNER)
		Sentenced 09/15/2015 | Fine: $750.00 | Susp. Fine: $0.00 | Total Fine: $750.00 | Cost: $104.00
		Incarcerated to Penitentiary for 2 Year(s) 0 Day(s)with 0 Day(s) suspended. Credit for 0 Day(s) served.
		Probation: Restitution: $0.00
		Conditions
		09/15/2015 | 1 | PAY FINES AND COSTS AS ORDERED
	25CRI15-000064	Filed: 07/14/2015

Grant		**Judgment on Plea of Guilty of SDCL 22-30A-17 (GRAND THEFT - MORE THAN $5,000 AND LESS THAN $100,000.01)** Sentenced 09/15/2015 Fine: $750.00 Susp. Fine: $0.00 Total Fine: $750.00 Cost: $104.00 Incarcerated to Penitentiary for 4 Year(s) 0 Day(s)with 0 Day(s) suspended. Credit for 0 Day(s) served. Probation: Restitution: $0.00 **Judgment on Plea of Guilty of SDCL 43-43B-1 (2) (USE/ACCESS COMPUTER WITH CONFIDENTIAL DATA W/O CONSENT OF OWNER)** Sentenced 09/15/2015 Fine: $750.00 Susp. Fine: $0.00 Total Fine: $750.00 Cost: $104.00 Incarcerated to Penitentiary for 2 Year(s) 0 Day(s)with 0 Day(s) suspended. Credit for 0 Day(s) served. Probation: Restitution: $0.00 **Judgment on Plea of Guilty of SDCL 43-43B-1 (2) (USE/ACCESS COMPUTER WITH CONFIDENTIAL DATA W/O CONSENT OF OWNER)** Sentenced 09/15/2015 Fine: $750.00 Susp. Fine: $0.00 Total Fine: $750.00 Cost: $104.00 Incarcerated to Penitentiary for 2 Year(s) 0 Day(s)with 0 Day(s) suspended. Credit for 0 Day(s) served. Probation: Restitution: $0.00 **Judgment on Plea of Guilty of SDCL 43-43B-1 (2) (USE/ACCESS COMPUTER WITH CONFIDENTIAL DATA W/O CONSENT OF OWNER)** Sentenced 09/15/2015 Fine: $750.00 Susp. Fine: $0.00 Total Fine: $750.00 Cost: $104.00 Incarcerated to Penitentiary for 2 Year(s) 0 Day(s)with 0 Day(s) suspended. Credit for 0 Day(s) served. Probation: Restitution: $0.00 **Judgment on Plea of Guilty of SDCL 43-43B-1 (2) (USE/ACCESS COMPUTER WITH CONFIDENTIAL DATA W/O CONSENT OF OWNER)** Sentenced 09/15/2015 Fine: $750.00 Susp. Fine: $0.00 Total Fine: $750.00 Cost: $104.00 Incarcerated to Penitentiary for 2 Year(s) 0 Day(s)with 0 Day(s) suspended. Credit for 0 Day(s) served. Probation: Restitution: $0.00 **Conditions** 09/15/2015 1 PAY FINES AND COSTS AS ORDERED
Meade	**46C12000033A0**	Filed: 01/23/2012

Meade		**Suspended Imposition of Sentence of SDCL 43-43B-1 (2) (USE/ACCESS COMPUTER WITH CONFIDENTIAL DATA W/O CONSENT OF OWNER)**

Sentenced 04/30/2012	Fine: $396.00	Susp. Fine: $0.00	Total Fine: $396.00	Cost: $104.00

Incarcerated to Jail for 30 Day(s)with 0 Day(s) suspended. Credit for 0 Day(s) served.

Probation: Restitution: $0.00

Case Conditions

1	DEFENDANT TO OBEY ALL RULES REGULATIONS AND ASSOCIATION LIMITS SE T FORTH BY HIS COURT SERVICE OFFICER Condition Expiration Date: 04/30/2014 [COND-TIME] = 2 [COND-TIME-UNIT] = Y
2	DEFENDANT SHALL OBEY ALL FEDERAL TRIBAL STATE LAWS AND LOCAL ORDI NANCES Condition Expiration Date: 04/30/2014 [COND-TIME] = 2 [COND-TIME-UNIT] = Y
3	DEFENDANT SHALL NOT INGEST OR OTHERWISE TAKE INTO THE BODY ANY SU BSTANCE (EXCEPT FOR ALCOHOL) ANY SUBSTANCES FOR PURPOSES OF BECOM ING INTOXICATED UNLESS SUCH SUBSTANCE IS PRESCRIBED TO HIM BY A L ICENSED HEALTH CARE PROVIDER Condition Expiration Date: 04/30/2014 [COND-TIME] = 2 [COND-TIME-UNIT] = Y
4	DEFENDANT SHALL SEND A WRITTEN APOLOGY TO JH & KS WHEN HE MEANS I T Condition Expiration Date: 04/30/2014 [COND-TIME] = 2 [COND-TIME-UNIT] = Y
5	THE COURT DOES NOT OBJECT TO WORK RELEASE DURING DEFENDANTS 30 DA Y SENTENCE Condition Expiration Date: 04/30/2014 [COND-TIME] = 2 [COND-TIME-UNIT] = Y

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
) SS		
COUNTY OF GRANT)		THIRD JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,	*	25CRI 15-000064
Plaintiff,	*	
V.	*	PLEA AGREEMENT
RYAN ALAN KRAUSE,	*	
Defendant.	*	

****

In Grant County, South Dakota, the undersigned Defendant Ryan Alan Krause, is being charged by Complaint with one count GRAND THEFT, violation of SDCL 22-30A-1 and 22-30A-17, class 4 felony; and four counts UNLAWFUL USE OF COMPUTER SYSTEM, violation of SDCL 43-43B-1(2), class 6 felony.

The undersigned Defendant has been advised of his statutory and constitutional rights and understands them, and has been advised of the maximum penalties which may be imposed upon a conviction of each of the above mentioned offenses in each matter. The undersigned Defendant also understands that if he enters a plea of guilty to any or all of the above mentioned offenses, some of his statutory and constitutional rights will be waived.

The parties and the Defendant, through his counsel of record, Chad C. Nelson, Nelson Law Office, P.C., Milbank, South Dakota and Mark Reedstrom as State's Attorney of Grant County, have entered into certain plea negotiations concerning the appropriate disposition of this matter;

The State and the Defendant have agreed upon the following:

1. The Defendant, Ryan Alan Krause, shall enter a plea of guilty to Count 1 of the Information – GRAND THEFT, violation of SDCL 22-30A-1 and 22-30A-17, class 4 felony.

2. The Defendant, Ryan Alan Krause, shall enter a plea of guilty to Count 2 of the Information – UNLAWFUL USE OF COMPUTER SYSTEM, violation of SDCL 43-43B-1(2), class 6 felony.

3. The Defendant, Ryan Alan Krause, shall enter a plea of guilty to Count 3 of the Information – UNLAWFUL USE OF COMPUTER SYSTEM, violation of SDCL 43-43B-1(2), class 6 felony

4. The Defendant, Ryan Alan Krause, shall enter a plea of guilty to Count 4 of the Information – UNLAWFUL USE OF COMPUTER SYSTEM, violation of SDCL 43-43B-1(2), class 6 felony

5. The Defendant, Ryan Alan Krause, shall enter a plea of guilty to Count 5 of the Information – UNLAWFUL USE OF COMPUTER SYSTEM, violation of SDCL 43-43B-1(2), class 6 felony

6. The Defendant, Ryan Alan Krause, shall make full restitution in one lump sum cash payment of $80,000.00, joint and severely, as well as the transfer of a clean title to the pontoon owned by Ryan and his brother, Brian, which is currently in Valley Queen Cheese possession. In addition, $3,000.00 of the aforementioned cash payment will be allocated to Big Stone Therapies to settle their restitution claim.

As consideration for the upfront restitution settlement and entry of the Defendant's aforementioned Plea of Guilty to Count 1,2,3,4 and 5, the State of South Dakota, through the States Attorneys offices in Grant County, agrees to not charge the Krause brothers (Brian and Ryan) with additional crimes related to this investigation of the Defendant's conduct with his employer.

In addition, the State will agree to recommend that the sentences on counts 2, 3, 4 and 5 run concurrently with the sentence on Count 1.

The undersigned parties acknowledge that there exists no agreement as to sentencing recommendations which may be made by any party to the court in Grant County. The Defendant expressly states that he understands that the Court may impose any penalty allowed by law, in the Court's sole discretion including ordering that sentences may be consecutive instead of concurrent.

Dated this 10th day of July, 2015.

Ryan Alan Krause

Mark A. Reedstrom
Grant County States Attorney

Chad C. Nelson
Attorney for Defendant

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
) SS		
COUNTY OF GRANT)		THIRD JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,	*	25CRI 15-000063
Plaintiff,	*	
V.	*	PLEA AGREEMENT
BRIAN MICHAEL KRAUSE,	*	
Defendant.	*	

****

In Grant County, South Dakota, the undersigned Defendant Brian Michael Krause, is being charged by Complaint with one count GRAND THEFT, violation of SDCL 22-30A-1 and 22-30A-17, class 4 felony; and four counts UNLAWFUL USE OF COMPUTER SYSTEM, violation of SDCL 43-43B-1(2), class 6 felony.

The undersigned Defendant has been advised of his statutory and constitutional rights and understands them, and has been advised of the maximum penalties which may be imposed upon a conviction of each of the above mentioned offenses in each matter. The undersigned Defendant also understands that if he enters a plea of guilty to any or all of the above mentioned offenses, some of his statutory and constitutional rights will be waived.

The parties and the Defendant, through his counsel of record, Chad C. Nelson, Nelson Law Office, P.C., Milbank, South Dakota and Mark Reedstrom as State's Attorney of Grant County, have entered into certain plea negotiations concerning the appropriate disposition of this matter;

The State and the Defendant have agreed upon the following:

1. The Defendant, Brian Michael Krause, shall enter a plea of guilty to Count 1 of the Information – GRAND THEFT, violation of SDCL 22-30A-1 icw 22-30A-17, class 4 felony.

2. The Defendant, Brian Michael Krause, shall enter a plea of guilty to Count 2 of the Information – UNLAWFUL USE OF COMPUTER SYSTEM, violation of SDCL 43-43B-1(2), class 6 felony.

3. The Defendant, Brian Michael Krause, shall enter a plea of guilty to Count 3 of the Information – UNLAWFUL USE OF COMPUTER SYSTEM, violation of SDCL 43-43B-1(2), class 6 felony

4. The Defendant, Brian Michael Krause, shall enter a plea of guilty to Count 4 of the Information – UNLAWFUL USE OF COMPUTER SYSTEM, violation of SDCL 43-43B-1(2), class 6 felony

5. The Defendant, Brian Michael Krause, shall enter a plea of guilty to Count 5 of the Information – UNLAWFUL USE OF COMPUTER SYSTEM, violation of SDCL 43-43B-1(2), class 6 felony

6. The Defendant, Brian Michael Krause, shall make full restitution in one lump sum cash payment of $80,000.00, joint and severely, as well as the transfer of a clean title to the pontoon owned by Brian and his brother, Ryan, which is currently in Valley Queen Cheese possession. In addition, $3,000.00 of the aforementioned cash payment will be allocated to Big Stone Therapies to settle their restitution claim.

As consideration for the upfront restitution settlement and entry of the Defendant's aforementioned Plea of Guilty to Count 1,2,3,4 and 5, the State of South Dakota, through the States Attorneys offices in Grant County, agrees to not charge the Krause brothers (Brian and Ryan) with additional crimes related to this investigation of the Defendant's conduct with his employer.

In addition, the State will agree to recommend that the sentences on counts 2,3,4 and 5 run concurrently with the sentence on Count 1.

The undersigned parties acknowledge that there exists no agreement as to sentencing recommendations which may be made by any party to the court in Grant County. The Defendant expressly states that he understands that the Court may impose any penalty allowed by law, in the Court's sole discretion including ordering that sentences may be consecutive instead of concurrent.

Dated this 10th day of July, 2015.

Brian Michael Krause

Mark A. Reedstrom
Grant County States Attorney

Chad C. Nelson
Attorney for Defendant

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF GRANT) THIRD JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA, *
Plaintiff, File No.: 25CRI15-000064
*
vs. JUDGMENT OF CONVICTION
*
RYAN ALAN KRAUSE,
Defendant. *

****

AN INFORMATION was filed with this Court before the Honorable Vincent Foley on the 20th day of July, 2015, charging the defendant with the crime of COUNT 1 – GRAND THEFT, SDCL 22-30A-1 AND SDCL 22-30A-17 which offense was committed on the 1st day of July, 2013 and the 17th day of February, 2015. The defendant was arraigned on the Information on the 20th day of July, 2015. The defendant, the defendant's attorney, Chad Nelson, and Mark A. Reedstrom, Grant County State's Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled guilty to the charge contained in the Information.

IT IS THEREFORE, the judgment of this Court that the defendant is guilty of the offense of COUNT 1 – GRAND THEFT, SDCL 22-30A-1 AND SDCL 22-30A-17.

SENTENCE

On the 15th day of September, 2015, after Court and counsel reviewed the presentence investigation report, 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 HEREBY ORDERED, that the defendant forthwith be imprisoned in the South Dakota State penitentiary, situated in the City of Sioux Falls, State of South Dakota, at hard labor for a term of four (4) years, there to be kept, fed and clothed according to the rules and discipline governing said institution. The defendant shall be deemed to have commenced serving said sentence at noon on the day on which he actually enters said State Penitentiary.

IT IS FURTHER ORDERED that the defendant forthwith pays a fine in the sum of Seven Hundred Fifty Dollars ($750.00), together with court costs in the sum of One Hundred Four Dollars ($104.00).

IT IS FURTHER ORDERED, that the Court expressly reserves control and jurisdiction over the defendant for the period in which he is required to remain a law abiding citizen and that this Court may revoke the suspension any time and reinstate the

sentence and/or the fine without diminishment or credit for any of the time that the sentence was suspended.

IT IS FURTHER ORDERED, that the Court reserves the right to amend any and all of the terms of this Order at any time.

BY THE COURT:

Judge of Circuit Court

FILED

SEP 15 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF GRANT) THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

File No.: 25CRI15-000064

vs.

AMENDED
JUDGMENT OF CONVICTION

RYAN ALAN KRAUSE,
Defendant.

AN INFORMATION was filed with this Court before the Honorable Vincent Foley on the 27th day of July, 2015, charging the defendant with the crime of COUNT 2 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2) which offense was committed on the 27th day of December, 2013. The defendant was arraigned on the Information on the 20th day of July, 2015. The defendant, the defendant's attorney, Chad Nelson, and Mark A. Reedstrom, Grant County State's Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled guilty to the charge contained in the Information.

IT IS THEREFORE, the judgment of this Court that the defendant is guilty of the offense of COUNT 2 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2).

SENTENCE

On the 15th day of September, 2015, after Court and counsel reviewed the presentence investigation report, 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 HEREBY ORDERED, that the defendant forthwith be imprisoned in the South Dakota State penitentiary, situated in the City of Sioux Falls, State of South Dakota, at hard labor for a term of two (2) years, and that said sentence is to run consecutive to the Judgment of Conviction for Count 1 entered this same date; there to be kept, fed and clothed according to the rules and discipline governing said institution. The defendant shall be deemed to have commenced serving said sentence at noon on the day on which he actually enters said State Penitentiary.

IT IS FURTHER ORDERED that the defendant forthwith pays a fine in the sum of Seven Hundred Fifty Dollars ($750.00), together with court costs in the sum of One Hundred Four Dollars ($104.00).

IT IS FURTHER ORDERED, that the Court expressly reserves control and

jurisdiction over the defendant for the period in which he is required to remain a law abiding citizen and that this Court may revoke the suspension any time and reinstate the sentence and/or the fine without diminishment or credit for any of the time that the sentence was suspended.

IT IS FURTHER ORDERED, that the Court reserves the right to amend any and all of the terms of this Order at any time.

BY THE COURT:

Signed: 10/7/2015 2:33:36 PM

Judge of Circuit Court

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
)SS		
COUNTY OF GRANT)		THIRD JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA, Plaintiff,	*	File No.: 25CRI15-000064
vs.	*	AMENDED JUDGMENT OF CONVICTION
RYAN ALAN KRAUSE, Defendant.	*	

****

AN INFORMATION was filed with this Court before the Honorable Vincent Foley on the 20th day of July, 2015, charging the defendant with the crime of COUNT 3 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2) which offense was committed on the 27th day of December, 2013. The defendant was arraigned on the Information on the 20th day of July, 2015. The defendant, the defendant's attorney, Chad Nelson, and Mark A. Reedstrom, Grant County State's Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled guilty to the charge contained in the Information.

IT IS THEREFORE, the judgment of this Court that the defendant is guilty of the offense of COUNT 3 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2).

SENTENCE

On the 15th day of September, 2015, after Court and counsel reviewed the presentence investigation report, 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 HEREBY ORDERED, that the defendant forthwith be imprisoned in the South Dakota State penitentiary, situated in the City of Sioux Falls, State of South Dakota, at hard labor for a term of two (2) years, and that said sentence is to run consecutive to the Judgments of Conviction for Count 1, and Count 2 entered this same date; there to be kept, fed and clothed according to the rules and discipline governing said institution. The defendant shall be deemed to have commenced serving said sentence at noon on the day on which he actually enters said State Penitentiary.

IT IS FURTHER ORDERED that the defendant forthwith pays a fine in the sum of Seven Hundred Fifty Dollars ($750.00), together with court costs in the sum of One Hundred Four Dollars ($104.00).

IT IS FURTHER ORDERED, that the Court expressly reserves control and

jurisdiction over the defendant for the period in which he is required to remain a law abiding citizen and that this Court may revoke the suspension any time and reinstate the sentence and/or the fine without diminishment or credit for any of the time that the sentence was suspended.

IT IS FURTHER ORDERED, that the Court reserves the right to amend any and all of the terms of this Order at any time.

BY THE COURT:

Signed: 10/6/2015 10:28:03 AM

Judge of Circuit Court

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF GRANT) THIRD JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

RYAN ALAN KRAUSE,
Defendant.

File No.: 25CRI15-000064

AMENDED
JUDGMENT OF CONVICTION

****

AN INFORMATION was filed with this Court before the Honorable Vincent Foley on the 20th day of July, 2015, charging the defendant with the crime of COUNT 4 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2) which offense was committed on the 27th day of December, 2013. The defendant was arraigned on the Information on the 20th day of July, 2015. The defendant, the defendant's attorney, Chad Nelson, and Mark A. Reedstrom, Grant County State's Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled guilty to the charge contained in the Information.

IT IS THEREFORE, the judgment of this Court that the defendant is guilty of the offense of COUNT 4 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2).

SENTENCE

On the 15th day of September, 2015, after Court and counsel reviewed the presentence investigation report, 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 HEREBY ORDERED, that the defendant forthwith be imprisoned in the South Dakota State penitentiary, situated in the City of Sioux Falls, State of South Dakota, at hard labor for a term of two (2) years, and that said sentence is to run consecutive to the Judgments of Conviction for Count 1, Count 2, and Count 3 entered this same date; there to be kept, fed and clothed according to the rules and discipline governing said institution. The defendant shall be deemed to have commenced serving said sentence at noon on the day on which he actually enters said State Penitentiary.

IT IS FURTHER ORDERED that the defendant forthwith pays a fine in the sum of Seven Hundred Fifty Dollars ($750.00), together with court costs in the sum of One Hundred Four Dollars ($104.00).

IT IS FURTHER ORDERED, that the Court expressly reserves control and

jurisdiction over the defendant for the period in which he is required to remain a law abiding citizen and that this Court may revoke the suspension any time and reinstate the sentence and/or the fine without diminishment or credit for any of the time that the sentence was suspended.

IT IS FURTHER ORDERED, that the Court reserves the right to amend any and all of the terms of this Order at any time.

BY THE COURT:

Signed: 10/6/2015 10:27:23 AM

Judge of Circuit Court

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

RYAN ALAN KRAUSE,
Defendant.

File No.: 25CRI15-000064

AMENDED
JUDGMENT OF CONVICTION

****

AN INFORMATION was filed with this Court before the Honorable Vincent Foley on the 20th day of July, 2015, charging the defendant with the crime of COUNT 5 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2) which offense was committed on the 27th day of December, 2013. The defendant was arraigned on the Information on the 20th day of July, 2015. The defendant, the defendant's attorney, Chad Nelson, and Mark A. Reedstrom, Grant County State's Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled guilty to the charge contained in the Information.

IT IS THEREFORE, the judgment of this Court that the defendant is guilty of the offense of COUNT 5 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2).

SENTENCE

On the 15th day of September, 2015, after Court and counsel reviewed the presentence investigation report, 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 HEREBY ORDERED, that the defendant forthwith be imprisoned in the South Dakota State penitentiary, situated in the City of Sioux Falls, State of South Dakota, at hard labor for a term of two (2) years, and that said sentence is to run consecutive to the Judgments of Conviction for Count 1, Count 2, Count 3, and Count 4 entered this same date; there to be kept, fed and clothed according to the rules and discipline governing said institution. The defendant shall be deemed to have commenced serving said sentence at noon on the day on which he actually enters said State Penitentiary.

IT IS FURTHER ORDERED that the defendant forthwith pays a fine in the sum of Seven Hundred Fifty Dollars ($750.00), together with court costs in the sum of One Hundred Four Dollars ($104.00).

IT IS FURTHER ORDERED, that the Court expressly reserves control and jurisdiction over the defendant for the period in which he is required to remain a law abiding citizen and that this Court may revoke the suspension any time and reinstate the sentence and/or the fine without diminishment or credit for any of the time that the sentence was suspended.

IT IS FURTHER ORDERED, that the Court reserves the right to amend any and all of the terms of this Order at any time.

BY THE COURT:

Signed: 10/6/2015 10:29:08 AM

Judge of Circuit Court

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF GRANT) THIRD JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA, *
Plaintiff, File No.: 25CRI15-000063
*
vs. JUDGMENT OF CONVICTION
*
BRIAN MICHAEL KRAUSE,
Defendant. *

****

AN INFORMATION was filed with this Court before the Honorable Vincent Foley on the 20th day of July, 2015, charging the defendant with the crime of COUNT 1 – GRAND THEFT, SDCL 22-30A-1 AND SDCL 22-30A-17 which offense was committed on the 1st day of July, 2013 and the 17th day of February, 2015. The defendant was arraigned on the Information on the 20th day of July, 2015. The defendant, the defendant's attorney, Chad Nelson, and Mark A. Reedstrom, Grant County State's Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled guilty to the charge contained in the Information.

IT IS THEREFORE, the judgment of this Court that the defendant is guilty of the offense of COUNT 1 – GRAND THEFT, SDCL 22-30A-1 AND SDCL 22-30A-17.

SENTENCE

On the 15th day of September, 2015, after Court and counsel reviewed the presentence investigation report, 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 HEREBY ORDERED, that the defendant forthwith be imprisoned in the South Dakota State penitentiary, situated in the City of Sioux Falls, State of South Dakota, at hard labor for a term of four (4) years, there to be kept, fed and clothed according to the rules and discipline governing said institution. The defendant shall be deemed to have commenced serving said sentence at noon on the day on which he actually enters said State Penitentiary.

IT IS FURTHER ORDERED that the defendant forthwith pays a fine in the sum of Seven Hundred Fifty Dollars ($750.00), together with court costs in the sum of One Hundred Four Dollars ($104.00).

IT IS FURTHER ORDERED, that the Court expressly reserves control and jurisdiction over the defendant for the period in which he is required to remain a law abiding citizen and that this Court may revoke the suspension any time and reinstate the

sentence and/or the fine without diminishment or credit for any of the time that the sentence was suspended.

IT IS FURTHER ORDERED, that the Court reserves the right to amend any and all of the terms of this Order at any time.

BY THE COURT:

Judge of Circuit Court

FILED

SEP 15 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By

STATE OF SOUTH DAKOTA
Third Judicial Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:

SEP 15 2015

Julie Anderson
Grant County Clerk of Courts

By:

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF GRANT) THIRD JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

BRIAN MICHAEL KRAUSE,
Defendant.

File No.: 25CRI15-000063

AMENDED
JUDGMENT OF CONVICTION

****

AN INFORMATION was filed with this Court before the Honorable Vincent Foley on the 20th day of July, 2015, charging the defendant with the crime of COUNT 2 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2) which offense was committed on the 27th day of December, 2013. The defendant was arraigned on the Information on the 20th day of July, 2015. The defendant, the defendant's attorney, Chad Nelson, and Mark A. Reedstrom, Grant County State's Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled guilty to the charge contained in the Information.

IT IS THEREFORE, the judgment of this Court that the defendant is guilty of the offense of COUNT 2 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2).

SENTENCE

On the 15th day of September, 2015, after Court and counsel reviewed the presentence investigation report, 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 HEREBY ORDERED, that the defendant forthwith be imprisoned in the South Dakota State penitentiary, situated in the City of Sioux Falls, State of South Dakota, at hard labor for a term of two (2) years, and that said sentence is to run consecutive to the Judgments of Conviction for Count 1 entered this same date; there to be kept, fed and clothed according to the rules and discipline governing said institution. The defendant shall be deemed to have commenced serving said sentence at noon on the day on which he actually enters said State Penitentiary.

IT IS FURTHER ORDERED that the defendant forthwith pays a fine in the sum of Seven Hundred Fifty Dollars ($750.00), together with court costs in the sum of One Hundred Four Dollars ($104.00).

IT IS FURTHER ORDERED, that the Court expressly reserves control and

jurisdiction over the defendant for the period in which he is required to remain a law abiding citizen and that this Court may revoke the suspension any time and reinstate the sentence and/or the fine without diminishment or credit for any of the time that the sentence was suspended.

IT IS FURTHER ORDERED, that the Court reserves the right to amend any and all of the terms of this Order at any time.

BY THE COURT:

Signed: 10/7/2015 2:52:57 PM

Judge of Circuit Court

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF GRANT) THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff,	*	File No.: 25CRI15-000063
vs.	*	AMENDED JUDGMENT OF CONVICTION
BRIAN MICHAEL KRAUSE, Defendant.	*	

AN INFORMATION was filed with this Court before the Honorable Vincent Foley on the 27th day of July, 2015, charging the defendant with the crime of COUNT 3 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2) which offense was committed on the 27th day of December, 2013. The defendant was arraigned on the Information on the 20th day of July, 2015. The defendant, the defendant's attorney, Chad Nelson, and Mark A. Reedstrom, Grant County State's Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled guilty to the charge contained in the Information.

IT IS THEREFORE, the judgment of this Court that the defendant is guilty of the offense of COUNT 3 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2).

SENTENCE

On the 15th day of September, 2015, after Court and counsel reviewed the presentence investigation report, 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 HEREBY ORDERED, that the defendant forthwith be imprisoned in the South Dakota State penitentiary, situated in the City of Sioux Falls, State of South Dakota, at hard labor for a term of two (2) years, and that said sentence is to run consecutive to the Judgments of Conviction for Count 1 and Count 2 entered this same date; there to be kept, fed and clothed according to the rules and discipline governing said institution. The defendant shall be deemed to have commenced serving said sentence at noon on the day on which he actually enters said State Penitentiary.

IT IS FURTHER ORDERED that the defendant forthwith pays a fine in the sum of Seven Hundred Fifty Dollars ($750.00), together with court costs in the sum of One Hundred Four Dollars ($104.00).

IT IS FURTHER ORDERED, that the Court expressly reserves control and

jurisdiction over the defendant for the period in which he is required to remain a law abiding citizen and that this Court may revoke the suspension any time and reinstate the sentence and/or the fine without diminishment or credit for any of the time that the sentence was suspended.

IT IS FURTHER ORDERED, that the Court reserves the right to amend any and all of the terms of this Order at any time.

BY THE COURT:

Signed: 10/6/2015 10:26:34 AM

Judge of Circuit Court

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF GRANT) THIRD JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

BRIAN MICHAEL KRAUSE,
Defendant.

File No.: 25CRI15-000063

AMENDED
JUDGMENT OF CONVICTION

****

AN INFORMATION was filed with this Court before the Honorable Vincent Foley on the 27th day of July, 2015, charging the defendant with the crime of COUNT 4 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2) which offense was committed on the 27th day of December, 2013. The defendant was arraigned on the Information on the 20th day of July, 2015. The defendant, the defendant's attorney, Chad Nelson, and Mark A. Reedstrom, Grant County State's Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled guilty to the charge contained in the Information.

IT IS THEREFORE, the judgment of this Court that the defendant is guilty of the offense of COUNT 4 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2).

SENTENCE

On the 15th day of September, 2015, after Court and counsel reviewed the presentence investigation report, 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 HEREBY ORDERED, that the defendant forthwith be imprisoned in the South Dakota State penitentiary, situated in the City of Sioux Falls, State of South Dakota, at hard labor for a term of two (2) years, and that said sentence is to run consecutive to the Judgments of Conviction for Count 1, Count 2 and Count 3 entered this same date; there to be kept, fed and clothed according to the rules and discipline governing said institution. The defendant shall be deemed to have commenced serving said sentence at noon on the day on which he actually enters said State Penitentiary.

IT IS FURTHER ORDERED that the defendant forthwith pays a fine in the sum of Seven Hundred Fifty Dollars ($750.00), together with court costs in the sum of One Hundred Four Dollars ($104.00).

IT IS FURTHER ORDERED, that the Court expressly reserves control and

jurisdiction over the defendant for the period in which he is required to remain a law abiding citizen and that this Court may revoke the suspension any time and reinstate the sentence and/or the fine without diminishment or credit for any of the time that the sentence was suspended.

IT IS FURTHER ORDERED, that the Court reserves the right to amend any and all of the terms of this Order at any time.

BY THE COURT:

Signed: 10/6/2015 10:28:50 AM

Judge of Circuit Court

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF GRANT) THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff,	*	File No.: 25CRI15-000063
vs.	*	AMENDED JUDGMENT OF CONVICTION
BRIAN MICHAEL KRAUSE, Defendant.	*	

AN INFORMATION was filed with this Court before the Honorable Vincent Foley on the 27th day of July, 2015, charging the defendant with the crime of COUNT 5 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2) which offense was committed on the 27th day of December, 2013. The defendant was arraigned on the Information on the 20th day of July, 2015. The defendant, the defendant's attorney, Chad Nelson, and Mark A. Reedstrom, Grant County State's Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled guilty to the charge contained in the Information.

IT IS THEREFORE, the judgment of this Court that the defendant is guilty of the offense of COUNT 5 – UNLAWFUL USE OF COMPUTER SYSTEM, SDCL 43-43B-1(2).

SENTENCE

On the 15th day of September, 2015, after Court and counsel reviewed the presentence investigation report, 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 HEREBY ORDERED, that the defendant forthwith be imprisoned in the South Dakota State penitentiary, situated in the City of Sioux Falls, State of South Dakota, at hard labor for a term of two (2) years, and that said sentence is to run consecutive to the Judgments of Conviction for Count 1, Count 2, Count 3, and Count 4 entered this same date; there to be kept, fed and clothed according to the rules and discipline governing said institution. The defendant shall be deemed to have commenced serving said sentence at noon on the day on which he actually enters said State Penitentiary.

IT IS FURTHER ORDERED that the defendant forthwith pays a fine in the sum of Seven Hundred Fifty Dollars ($750.00), together with court costs in the sum of One Hundred Four Dollars ($104.00).

IT IS FURTHER ORDERED, that the Court expressly reserves control and jurisdiction over the defendant for the period in which he is required to remain a law abiding citizen and that this Court may revoke the suspension any time and reinstate the sentence and/or the fine without diminishment or credit for any of the time that the sentence was suspended.

IT IS FURTHER ORDERED, that the Court reserves the right to amend any and all of the terms of this Order at any time.

BY THE COURT:

Signed: 10/8/2015 10:29:03 AM

Judge of Circuit Court

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Nos. 27628 & 27629

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

RYAN ALAN KRAUSE,

Defendant and Appellant.

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

BRIAN MICHAEL KRAUSE,

Defendant and Appellant.

APPEALS FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
GRANT COUNTY, SOUTH DAKOTA

THE HONORABLE VINCENT A. FOLEY
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Notices of Appeal filed October 27, 2015

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Nos. 27628 & 27629

STATE OF SOUTH DAKOTA,
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v.
RYAN ALAN KRAUSE
Defendant and Appellant.

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
v.
BRIAN MICHAEL KRAUSE
Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendants, Ryan Alan Krause and Brian Michael Krause, will be referred to collectively as "the Krause Brothers," or individually by first name. Plaintiff and Appellee, State of South Dakota, will be referred to as "State." References to following will be designated as follows:

Grant County Settled Record #15-64 (Ryan) SR1

Grant County Settled Record #15-63 (Brian).....SR2

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All designations will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

The Krause Brothers appeal from final Judgments of Conviction entered on September 15, 2015, and Amended Judgments of Conviction entered on October 6, 2015, and October 7, 2015, by the Honorable Vincent A. Foley, Circuit Court Judge for the Third Judicial Circuit. SR1 19-20, 99-106; SR2 19-20, 97-104. The Krause Brothers timely filed Notices of Appeal on October 27, 2015. SR1 107; SR2 105. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TWO-YEAR PRISON SENTENCE FOR UNAUTHORIZED USE OF COMPUTER WAS GROSSLY DISPROPORTIONATE OR CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT?

The trial court sentenced the Krause Brothers to four two-year prison terms for unlawful use of computer system.

State v. Chipps, 2016 S.D. 8, 874 N.W.2d 475

State v. Rice, 2016 S.D. 18, 877 N.W.2d 75

State v. McCahren, 2016 S.D. 34, -- N.W.2d --

II

WHETHER THE CIRCUIT COURT'S DEVIATION FROM A PRESUMPTIVE PROBATION AND SENTENCE WAS ERR.

This Court has held that probation is not an available option for defendants who have simultaneously been sentenced to the penitentiary, therefore this issue is moot.

State v. Orr, 2015 S.D. 89, 871 N.W.2d 834

III

WHETHER THE FAILURE TO STATE THE AGGRAVATING CIRCUMSTANCES IN THE DISPOSITIONAL ORDER REQUIRES A RE-SENTENCING HEARING?

As the Krause Brothers were not eligible for a probationary sentence, this issue is moot. Regardless, this Court has held that the appropriate remedy for failing to state the aggravating circumstances in the dispositional order is a remand to amend the order.

State v. Orr, 2015 S.D. 89, 871 N.W.2d 834

State v. Whitfield, 2015 S.D. 17, 862 N.W.2d. 133

STATEMENT OF THE CASE AND FACTS

In January 2014, the security division of the Xerox Company, which monitors Internet activities for the sale of Xerox consumables (e.g. toner cartridges) which remain Xerox property pursuant to agreements with their clients, discovered some toner cartridges in Valley Queen Cheese's[1] custody were posted for auction on eBay. SH 8-9, SR1 74-75, SR2 72-73. Xerox security purchased the toners from the seller, whose email address was Brian.Krause1@html.com.

[1] Valley Queen Cheese Factory is located in Milbank, South Dakota.

SH 9, SR1 75, SR2 73. Similar purchases were made in April of 2014. SH 9, SR1 75, SR2 73. Thereafter Xerox exchanged emails with the seller, who offered to sell them additional property worth 5,800 dollars for 600 dollars. SH 9, SR1 75, SR2 73. After this exchange, Xerox turned their information over to the Milbank Police Department. SH 9, SR1 75, SR2 73.

After the report was filed with law enforcement, an internal investigation commenced at Valley Queen Cheese, Brian's employer, resulting in the discovery that approximately 180,000 dollars-worth of property had been stolen, including toner, toner cartridges, computers, computer monitors, printers, phones, electronic equipment, and other miscellaneous items of inventory. SH 10, SR1 76, SR2 74; *See also* SR1 7-12, SR2 7-12. The law enforcement and Valley Queen Cheese investigations led to the Krause Brothers and also revealed some electronics were also taken from Ryan's employer, Big Stone Therapies. SR1 34 (sealed).

On July 14, 2015, separate complaints were filed charging each of the Krause Brothers with one count of grand theft in violation of SDCL 22-30A-1 and four counts of unlawful use of computer system in violation of SDCL 43-43B-1(2). SR1 1-4, SR2 1-4.[2] The grand theft

[2] Informations regarding the same charges were filed on July 20, 2015. SR1 6-12; SR2 6-12.

charge was related to the property stolen from Valley Queen Cheese and Big Stone Therapies. SR1 6, SR2 6.

The four counts of unlawful use of computer system were described as "an example, just one or more examples of this computer hacking and spying that was going on, where the [Krause Brothers] were invading the personal and confidential files of Valley Queen Cheese and their staff and different employees." SH 13, SR1 79, SR2 77. On December 27, 2013, the Krause Brothers accessed Valley Queen Cheese's accounting department's secured and restricted database and copied the 2013 payroll statement, which included 32 Valley Queen Cheese employees' employee ID numbers, salary, benefits, leave, bonus payments, mailing addresses, bank routing numbers, and bank account numbers. SH 13-14, SR1 79-80, SR2 77-78; SR1 7-12, SR2 7-12. A copy of this file was sent from Brian to Ryan and the Krause Brothers reviewed and discussed the information. SH 13-14, SR1 79-80, SR2 77-78; SR1 7-12, SR2 7-12.

On July 1, 2014, Brian accessed Valley Queen Cheese's Chief Financial Officer's (CFO) email account and copied an email containing a local businessman's development loan application, which included information about the businessman's taxpayer ID number, social security number, underwriting documents, personal financial statement, and business financial statement. SH 14, SR1 80, SR2 78; SR1 7-12, SR2 7-12. Brian again sent a copy of this information to

Ryan and the Krause Brothers reviewed and discussed the information. SH 14, SR1 80, SR2 78; SR1 7-12, SR2 7-12.

On July 23, 2013, Brian accessed Valley Queen Cheese's CFO's personal file folder and copied a file containing his personal financial statement, this file also included information about the Chief Executive Officer (CEO) and the CEO's wife's personal financial information including cash assets, retirement assets, investments, and debts. SH 15, SR1 81, SR2 79; SR1 7-12, SR2 7-12. Brian then sent a copy of the file to Ryan and the Krause Brothers reviewed and discussed the information. SH 15, SR1 81, SR2 79; SR1 7-12, SR2 7-12.

On May 31, 2013, and February 12, 2014, Brian accessed Valley Queen Cheese's CFO's and IT Administrator's email accounts and used their confidential passwords and login information to access, view, and review their on-line bank account records at www.wellsfargo.com. SH 15, SR1 81, SR2 79; SR1 7-12, SR2 7-12. Brian then shared this confidential information with Ryan. SH 15, SR1 81, SR2 79; SR1 7-12, SR2 7-12. The Krause Brothers accessed these accounts and reviewed the personal financial information contained therein on multiple occasions. SH 15, SR1 81, SR2 79.

On July 10, 2015, the Krause Brothers entered into separate identical Plea Agreements with the State. SR1 126-27, SR2 124-25. Each Krause Brother agreed to enter a plea of guilty to each of the five

charges. SR1 126-27, SR2 124-25. The Krause Brothers also agreed to make restitution to both Valley Queen Cheese and Big Stone Therapies totaling 80,000 dollars and title to a jointly-owned pontoon boat. SR1 126-27, SR2 124-25. In exchange for the guilty pleas and the restitution payments, the State agreed not to charge the Krause Brothers with additional crimes. SR1 126-27, SR2 124-25. The State also agreed to recommend that the sentences on the unlawful use of computer system convictions run concurrent to the grand theft conviction. SR1 126-27, SR2 124-25. When the Krause Brothers signed the plea agreements they also signed an acknowledgement stating that they understood "that the Court may impose any penalty allowed by law, in the Court's sole discretion including ordering that sentences may be consecutive instead of concurrent." SR1 127, SR2 125.

On July 20, 2015, the Krause Brothers entered guilty pleas to the charges. *See* SR1 19, SR2 19. The Krause Brothers were sentenced on September 15, 2015. SH 1, SR1 67, SR2 65. When presenting the State's sentencing argument, the prosecution argued the Krause Brothers were not one-time offenders, but rather that they were "serial offenders, and that their first offenses occurred several years ago and then occurred again, and again, and again. Each time they took property from their employers was a separate act, a separate decision, a separate act of dishonesty [.] Each time they accessed

other people's computer files and their emails, and their confidential information was a separate act, a separate decision that they made, a separate offense." SH 7-8, SR1 73-74, SR2 71-72. The prosecution highlighted that given the Krause Brothers skill, training, and positions in the companies IT departments, they had been entrusted with and had access to "very sensitive information and access to Valley Queen's very proprietary systems." SH 11, SR1 77, SR2 75. The "economic injury [was] beyond the ordinary in this case." SH 12, SR1 78, SR2 76. Also of note to the prosecution was that the employees of Valley Queen Cheese were not bothered so much by the actual theft of company property, rather it was "this cyber spying and this invasion of their privacy and security[.] … They expressed lingering feelings of vulnerability[.]" SH 16, SR1 82, SR2 80.

The Court Services Officer (CSO) noted in the pre-sentence investigation that the charges against the Krause Brothers went well beyond a few thousand dollars and that the charges hit a nerve within the community; that the victims felt it was a personal attack on them and their confidential information. SR1 29, SR2 29 (sealed). The CSO did not find the Krause Brothers statement that they were unaware what they were doing was wrong credible, rather he had the impression that the Krause Brothers enjoyed it. SR1 29, SR2 29 (sealed).

The trial court made the following statements prior to sentencing the Krause Brothers: "I don't think rehabilitation is necessary"; "I think you have learned your lessons"; "there needs to be that retribution regardless of how sorry you are and regardless of what steps you have taken, because the message needs to be sent"; "technology doesn't intimidate me personally…[b]ut what you have done scares the living daylights out of me." SH 28-29, SR1 94-95, SR2 92-93. The trial court further noted "I need to punish you two for what you did for those invasions of privacy, but also you need to be the tool of the message to be sent, not only here in Milbank, not only in Grant County, not only graduates of Lake Area, but hopefully broader, that when we get you creepers, we punish you. And that's what you are. You are Internet creepers. You are no different. You creeped between the two of you, but you invaded privacy. And that's what probably gets me the most upset." SH 29, SR1 95, SR2 93.

The trial court noted toying with several different sentencing formats, finally stating "I am not going to give you jail time or suspended jail time. You will be going to the penitentiary, because what you did in the Counts 2 through 5 deserves penitentiary time." SH 30, SR1 96, SR2 94. The trial court then sentenced the Krause Brothers to four years in the South Dakota State Penitentiary for count one (grand theft) and two years in the penitentiary for each of the four counts of unlawful use of computer system, all to be served

consecutively, plus fines and costs. SH 30, SR1 96, SR2 94; *See also* SR1 19-20, SR2 19-20; SR1 99-106, SR2 97-104.

The trial court issued Judgments of Conviction on the grand theft charge and unlawful use of computer system charges on September 15, 2015. SR1 19-28, SR2 19-28. However, the judgments regarding the convictions for unlawful use of computer system were amended and Amended Judgments of Conviction were issued on October 6, 2015, and October 7, 2015. SR1 99-106, SR2 97-104.

ARGUMENTS

I

THE TWO-YEAR PRISON SENTENCE FOR UNAUTHORIZED USE OF A COMPUTER WAS NOT GROSSLY DISPROPORTIONATE OR CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT.

The Krause Brothers argue that the sentences they received on each of the four counts of unlawful use of computer systems (the statutory maximum of two years in prison) constitute a grossly disproportionate sentence and therefore violate the Eighth Amendment. KB 9-10. The Krause Brothers make it clear that they are not asserting that their four-year prison sentence for grand theft is unlawful; rather only assert that the four simultaneous two-year

sentences ordered to serve consecutively[3] to the grand theft conviction were grossly disproportionate.

> When this Court is presented with the question of:
>
> > whether a challenged sentence is cruel and unusual in violation of the Eighth Amendment, we conduct a de novo review. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.,* 532 U.S. 424, 435, 121 S.Ct. 1678, 1685, 149 L.Ed.2d 674 (2001) (requiring appellate courts to apply de novo standard in reviewing the proportionality of a fine under the Eighth Amendment); *State v. Ball,* 2004 S.D. 9, ¶ 20, 675 N.W.2d 192, 199 ("[W]hether a constitutional violation has occurred is subject to de novo review." (quoting *Stallings v. Delo,* 117 F.3d 378, 380 (8th Cir.1997))).

State v. Chipps, 2016 S.D. 8, ¶ 31, 874 N.W.2d 475, 486.

Therefore, this Court's review is de novo when determining whether the Krause Brothers' sentences for unlawful use of computer system are grossly disproportionate to their offenses. *Id.* This Court recently revised its analysis regarding assertions of disproportionality, noting that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Chipps*, 2016 S.D. 8, ¶ 33, 874 N.W.2d at 487 (quoting *Harmelin v. Michigan,* 501 U.S. 957, 1001, 111 S.Ct. 2680, 2705 (Kennedy, J.,

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[3] SDCL 22-6-6.1 provides that a sentencing court has discretion in determining whether simultaneous sentences will be served concurrently or consecutively. The Krause Brothers have not raised the issue that the trial court abused its discretion when ordering their sentences be served consecutively.

concurring in part and concurring in the judgment)). After further review this Court concluded that

> our review of a sentence challenged under the Eighth Amendment is relatively straightforward. "First, we look to the gravity of the offense and the harshness of the penalty." "This comparison rarely 'leads to an inference of gross disproportionality' and typically marks the end of our review [.]" If the penalty imposed appears to be grossly disproportionate to the gravity of the offense, then we will compare the sentence to those "imposed on other criminals in the same jurisdiction' as well as those 'imposed for commission of the same crime in other jurisdictions."

Chipps, 2016 S.D. 8, ¶ 38, 874 N.W.2d at 488-89 (citations omitted).

Gravity of the Offense

"[T]he gravity of the offense refers to the offense's relative position on the spectrum of all criminality." *Chipps*, 2016 S.D. 8, ¶ 35, 874 N.W.2d at 487. "[T]he circumstances of the crime of conviction affect the gravity of the offense." *Chipps*, 2016 S.D. 8, ¶ 36, 874 N.W.2d at 488. Here, the Krause Brothers accessed and shared multiple individuals' highly confidential information, which included salaries, bank account numbers, emails, and even viewing or monitoring banking activities. This activity occurred multiple times over an approximate two-year period of time. These are very invasive and serious offenses with potential grave consequences to the victims. It was these offenses that kept the victims on edge and left them feeling vulnerable, not the theft of property. The main risk of this

access to a company's and individual's personal and confidential information arises not from the simple act of hacking into the information, but rather from dissemination and discussion of the information and placing the victims in an extremely vulnerable position. The repeated nature of this invasion over an almost two-year period, reveals it was not a "one and done" type of crime but a continuous invasion of privacy.

While the circumstances of this crime do not equate murder, it is a grave offense given the highly sensitive, personal, and vulnerable information that was accessed. The gravity of the crime is reflected by the trial court's admission that what the Krause Brothers did "scares the living daylights out of me." SH 29, SR1 95, SR2 93.

The graveness of this offense is similar in nature to the identity theft addressed in *Chipps*, where this Court noted "the harm contemplated by SDCL 22–40–8 is the appropriation of the very identity of another person—a more profound and personal violation of the victim than the mere theft of property." *Chipps*, 2016 S.D. 8, ¶ 43, 874 N.W.2d at 490. While the defendant in *Chipps* took and used the victim's credit cards, here the Krause Brothers had account numbers and accessed multiple individuals' bank accounts.

Harshness of the Sentence

The Krause Brothers received two years for each of the four counts of unlawful use of computer system. While the Krause

Brothers note that they received the maximum sentence provided by law, this Court has recognized that the fact that a "sentence was the maximum permitted by statute for [the] particular offense was not relevant to an Eighth Amendment analysis." *State v. Rice*, 2016 S.D. 18, ¶ 19, 877 N.W.2d 75, 82. Rather, in *State v. McCahren*, this Court noted that this fact would be relevant in assessing whether the sentencing court abused its discretion.[4] 2016 SD 34, ¶ 37.

Further this Court explained "[t]he harshness of the penalty … refers to the penalty's relative position on the spectrum of *all permitted punishments*." *Rice*, 2016 S.D. 18, ¶ 19, 877 N.W.2d at 82 (quoting *Chipps*, 2016 S.D. 8, ¶ 37, 874 N.W.2d at 487). Here, the Krause Brothers received a sentence of two years for each conviction, of all the permissible punishments; it is a stretch to consider a two-year sentence harsh.

In *Chipps* this Court had "no difficulty" finding that 5 years for four counts of identity theft was not grossly disproportionate. *Chipps,* 2016 S.D. 8, at ¶ 45. In that same spirit, neither can eight years for four counts of unlawful use of computer system be found grossly

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[4] The Krause Brothers have not separately argued that the trial court's sentences were an abuse of discretion. Therefore this issue is not before the Court for consideration. Given the framework of the Krause Brothers' argument and the *Chipps* decision, the State does not address the factors discussed by the Krause Brothers which more properly belong within the analysis of whether the trial court abused its sentencing discretion rather than within the context of their Eighth Amendment challenge.

disproportionate. As the two-year sentences cannot be found to be grossly disproportionate, given the gravity of the offenses committed, this Court's review ends. *Id.*

II

THE CIRCUIT COURT'S DEVIATION FROM A PRESUMPTIVE PROBATION AND SENTENCE WAS NOT ERR.

The Krause Brothers argue that the circuit court erred by sentencing them to the South Dakota State Penitentiary rather than giving them probation by relying on factors that were not contemplated by SDCL 22-6-11. KB 11-14. The Krause Brothers contend that the aggravating circumstances cited by the trial court – punishment for the Krause Brothers and deterrence to the public – were insufficient for the trial court to impose a penitentiary sentence because these were not indications that the Krause Brothers posed "a significant risk to the public." KB 12. The Krause Brothers were convicted of one count of grand theft—a Class 4 felony, and four counts of unlawful use of computer system—a Class 6 felony. *See* SDCL 22-30-17 and 43-43B-3(2). Under SDCL 22-6-11, the Krause Brothers' presumed sentence for each count of unlawful use of computer system would be

probation.[5] While presumptive probation would have been a sentencing option for the Krause Brothers had they only been convicted for the unlawful use of computer system, it is not an option here, where they were also convicted of grand theft, a conviction not subject to SDCL 22-6-11 and a conviction for which the Krause Brothers were simultaneously sentenced to four years in the penitentiary.

This Court provided in *State v. Orr* that "[t]he sentencing court cannot grant probation where a defendant receives penitentiary time" on another simultaneous conviction. 2015 S.D. 89, ¶ 12, 871 N.W.2d 834, 838.

> South Dakota's presumptive-probation statute makes no mention of a scenario where a defendant is concurrently or consecutively sentenced to the penitentiary for other crimes not requiring presumptive probation. SDCL 22-6-11 must be reconciled with Article II of the South Dakota Constitution. Therefore, it must yield to the constitutionally established jurisdictional boundaries. The judicial branch cannot give itself authority over offenders that are in the state penitentiary by sentencing a person to simultaneous probation and penitentiary sentences.

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[5] SDCL 22-6-11 provides in part:

> The sentencing court shall sentence an offender convicted of a Class 5 or Class 6 felony . . . to a term of probation. The sentencing court may impose a sentence other than probation if the court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation under this section. If a departure is made, the judge shall state on the record at the time of sentencing the aggravating circumstances and the same shall be stated in the dispositional order.

> "Once an offender is within the jurisdiction of the executive branch of government, the judicial branch—the circuit court—loses jurisdiction and control." *State v. Oban,* 372 N.W.2d 125, 129 (S.D.1985) (construing previous version of SDCL chapter 24–15). Thus, probation is not available for those defendants that are incarcerated in the penitentiary or on parole.

Orr, 2015 S.D. 89, ¶ 10, 871 N.W.2d at 837-38.

As the Krause Brothers limit their appellate issues to the convictions for unlawful use of computer system and not questioning the prison sentence for their grand theft conviction, they cannot now argue the trial court was required to simultaneously impose a probationary sentence. Given this Court's *Orr* decision and analysis and the Krause Brothers' presumptively valid grand theft sentence, this issue is moot.

III

STATE V. WHITFIELD MAKES CLEAR THAT IF THE CIRCUIT COURT FAILED TO SET FORTH THE AGGRAVATING CIRCUMSTANCES IN THE DISPOSITIONAL ORDER, THE APPROPRIATE REMEDY IS A REMAND TO AMEND THE ORDER.

The Krause Brothers next submit that the circuit court failed to state the aggravating circumstances in its dispositional order in violation of SDCL 22-6-11. *See State v. Whitfield,* 2015 S.D. 17, ¶ 20, 862 N.W.2d 133, 140 (holding that under SDCL 22-6-11 the sentencing court must state the aggravating circumstances in the dispositional order). The Krause Brothers failed to acknowledge this Court's decision and analysis in *Orr*, which, as argued above, resolves

this issue as well as the preceding issue. *Orr*, 2015 S.D. 89, 871 N.W.2d 834. As the Krause Brothers were not eligible for probation given their prison sentence for grand theft, the dispositional order was not required to meet the requirements of SDCL 22-6-11. Regardless, the Amended Judgments of Conviction did reference the trial court's sentence for grand theft, which should meet the requirements of SDCL 22-6-11.

Further, this Court also recently held in *Whitfield* that if the circuit court fails to state the aggravating circumstances in the dispositional order the error does not warrant a new trial, but merely warrants a remand to amend the dispositional order:

> [T]he court recognized that SDCL 22–6–11 applies to Whitfield, identified the aggravating circumstances that pose a significant risk to the public, and stated those circumstances on the record at sentencing. The court did not, however, include those circumstances in the dispositional order and, therefore, clearly erred. This error, however, does not warrant either a new trial or resentencing. Rather, the matter is remanded to the sentencing court to amend the dispositional order to include the aggravating circumstances considered on the record at the time of the sentencing hearing.

Whitfield, 2015 S.D. 17, ¶ 20, 862 N.W.2d at 140.

The Krause Brothers cannot show how they were prejudiced given the circumstances of their convictions, especially considering that they were not entitled to a probation sentence given the simultaneous prison sentence they received for grand theft. Thus, if this Court finds that the trial court's dispositional orders were

required to and did not comply with SDCL 22-6-11, this Court should adhere to its decision in *Whitfield* and simply remand to amend the dispositional order.

CONCLUSION

The Krause Brothers' two-year sentences for unlawful use of computer system were grossly disproportionate and given their simultaneous prison sentence for grand theft were not eligible for a probation sentence. Accordingly, the State respectfully requests that this Court affirm the convictions and sentences. Should this Court determine that dispositional orders were required to and did not comply with SDCL 22-6-11, this Court should simply remand to amend the dispositional orders.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

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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 3,806 words.

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

Dated this 6th day of May, 2016.

/s/ *Kirsten E. Jasper*
Kirsten E. Jasper
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of May, 2016, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Ryan Alan Krause* and *State of South Dakota v. Brian Michael Krause* was served via electronic mail upon Chad C. Nelson, attorney for Appellants, at chadcnelson@gmail.com.

/s/ *Kirsten E. Jasper*
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VIA EMAIL & FIRST CLASS MAIL

June 7, 2016

Shirley A. Jameson-Fergel
Supreme Court Clerk
500 East Capitol
Pierre SD 57501

Re: **State of South Dakota vs. Ryan Alan Krause – Appeal No. 27628 and State of South Dakota vs. Brian Michael Krause – Appeal No. 27629**

Dear Ms. Jameson-Fergel:

This letter is to inform you that I do not feel that a Reply to the Appellee's Brief is necessary.

Thank you.

Sincerely,

NELSON LAW OFFICE, P.C.

Chad C. Nelson

kmw
Enclosures