

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, *
 *
Plaintiff and Appellee, *
 * Case #30985
v. *
 *
LESTER M. MONROE, *
 *
Defendant and Appellant. *

APPEAL FROM THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

The Honorable Jennifer Mammenga
Circuit Court Judge

APPELLANT'S BRIEF

Marty Jackley	Daniel Haggar
Office of the	Minnehaha County
Attorney General	State's Attorney
1302 E Highway 14, Suite 1	415 N Dakota Ave
Pierre, SD 57501	Sioux Falls, SD 57104

Mark Kadi & Tracy Miller
Appellant's Counsel
Office of the Public Advocate
415 N Dakota Ave
Sioux Falls, SD 57104

Notice of Appeal filed on January 31, 2025

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	*	

PRELIMINARY STATEMENT

The Arraignment transcript will be referred to as "A" followed by the page number. The trial transcripts will be referred to as "T" followed by the transcript volume number and page number. The settled record will be referred to as "SR" followed by the page number. The transcript regarding the sentencing hearing transcript will be referred to as "S" followed by the page number. Transcripts from motion hearings will be referred to as "M:Date of Hearing:page". Exhibits will be referred to as "E" followed by an exhibit letter or number. Documents in the Appendix will be referred to as "A" followed by the document number. The Appellant will be referred to as the "Appellant" or "Defendant" or "Monroe". Co-Defendant Kyle Jones will be referred to as the "Co-Defendant" or "Jones".

JURISDICTIONAL STATEMENT

The trial court entered the Appellant's judgment and sentence in Minnehaha County CR. 23-5739 on January 30, 2025. SR859; SR864. A Notice of Appeal was timely filed on January 31, 2025. SR875. This Court possesses jurisdiction of this appeal pursuant to SDCL 15-26A-3, SDCL 23A-32-2, and SDCL 23A-32-9.

LEGAL ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED DENYING THE DEFENDANT'S MOTION TO SEVER THE JOINT TRIAL WHERE THE PROSECUTION INTRODUCED CO-DEFENDANT STATEMENTS THAT INCULPATE MONROE THEREBY RESULTING IN A VIOLATION OF MONROE'S SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER AND IMPAIRED HIS RIGHT TO PRESENT A COMPLETE DEFENSE.

The trial court denied the motion to sever.

Bruton v. United States, 391 U.S. 123 (1968).

Gray v. Maryland, 523 U.S. 185 (1998).

Samia v. United States, 599 U.S. 635 (2023).

II. WHETHER THE TRIAL COURT ERRED DENYING THE DEFENDANTS' MOTION FOR MISTRIAL FOLLOWING THE PROSECUTOR'S CLOSING ARGUMENT ATTRIBUTING ONE DEFENDANT'S ADMISSIONS AGAINST INTEREST TO ANOTHER, PRIOR INSTRUCTIONS NOTWITHSTANDING.

The trial court denied the motion for mistrial.

Arizona v. Washington, 434 U.S. 497 (1978).

State v. Rose, 2024 S.D. 56, 12 N.W.3d 127.

State v. Nelson, 1998 S.D. 129, 587 N.W.2d 439.

III. WHETHER THE TRIAL COURT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE BY PRECLUDING EVIDENCE OF CONSCIOUSNESS OF INNOCENCE WHILE DEFENDING

AGAINST SPECIFIC INTENT ALLEGATIONS OF PREMEDITATED DESIGN
TO MURDER.

The trial court precluded such evidence.

State v. Santana-Lopez, 613 N.W.2d 918 (Wis.App. 2000).

State v. Hoffman, 316 N.W.2d 143 (Ws.App.1982).

State v. Banks, 2023 S.D. 39, 994 N.W.2d 230.

IV. WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR BY
VIOLATING THE RULE OF STATE V. WASHINGTON (SD 2024)
(DOUBLE JEOPARDY) FOR ENTERING A JUDGMENT AND CONVICTION
FOR BOTH COUNT II (AGGRAVATED ASSAULT) AFTER COUNT I
(ATTEMPTED MURDER 1ST).

Both Judgments and Sentences were entered.

State v. Washington, 2024 S.D. 64, 13 N.W.3d 492.

Henderson v. United States, 568 U.S. 266 (2013).

State v. Wilson, 2020 S.D. 41, 947 N.W.2d 131.

STATEMENT OF THE CASE

The Defendant, Lester Monroe, was brought before the magistrate court for his initial appearances on charges on September 19, 2023. A preliminary hearing was set for October 4, 2023, but was ultimately cancelled. The Minnehaha County Grand Jury presented a superseding indictment regarding the Defendant on February 27, 2024, under 49CRI23-5739¹. SR162. The indictment charged the Defendant with Attempted First Degree Murder of a Law Enforcement Officer; Aggravated Assault Against a

¹The Co-Defendant, Kyle Lee Jones, file is 49CRI23-5740.

Department of Corrections Employee; and Simple Assault Against a Department of Corrections Employee. SR16. The indictment noted the matter was subject to the Doubling Statute as the alleged events occurred in the penitentiary. In addition, the State filed a Part II Information. SR23. The Defendant appeared before the circuit court for arraignment on the charges on March 13, 2024. He entered not guilty pleas to the charges and allegations.

The Defendant moved to sever the Defendant and Co-Defendant arguing that a joined proceeding would violate the Defendant's Constitutional right to a fair trial. SR160. The trial court denied the motion to sever. SR662. The parties made statements about the events to others. SR689; SR693. The Defendant argued to keep the statements of the Co-defendant out of a joint trial.² SR689; SR693. Although some were excluded, many statements were permitted into the joint trial. Id.; SR728.

The Defendant had offered to take a polygraph test as to his intentions. SR659. The State objected to evidence of the polygraph offer, which the Defendant resisted.

²The Defendant renews such objections on this appeal, further outlined in this brief discussing severance of the Defendants. But for prejudice from continued joinder of the Defendants, Confrontation Clause objections and evidentiary rules discussed below would serve to protect their interests equally in their own trials.

SR659;SR469. The trial court sustained the requested exclusion. SR659.

The matter ultimately proceeded to trial on October 25, 2024. The jury was instructed to use each Defendant's statement solely against the Defendant who made them. During closing argument, the prosecutor later proceeded to attribute the Co-Defendant's statement to this Defendant despite the trial court's instruction. T4:31-32. The Defense objected and moved for a mistrial. T4:30; T4:35. The motion for mistrial was denied. T4:35.

At the close of the case, the Defendants moved for a judgment of acquittal. T3:38 et.seq. The State objected. The trial court denied the motion³.

On November 1, 2024, the jury reached a verdict. The Defendant was convicted of Attempted First Degree Murder of a Law Enforcement Officer and Aggravated Assault Against a Department of Corrections Employee. SR837.

³ The Defendant maintains that if the Defendants' trials were properly severed, evidence of Co-Defendant statements would be excluded by the Confrontation Clause of the United States Constitution and hearsay rules. Under such circumstances, a motion for judgment of acquittal should then have been properly granted. The lack of Co-Defendant statements would render the State's evidence insufficient to support a guilty verdict, particularly for charges with premeditated design elements.

The Circuit Court sentenced the Defendant on January 17, 2025. SR859; SR864. Regarding Count I, the Defendant was sentenced to the State Penitentiary for 50 years, of which 15 years were suspended on conditions. This sentence was to run consecutive to the sentence the Defendant had been serving prior to the event in question (49CRI22-3098). SR859. Regarding Count II, the Defendant was sentenced to 20 years in the penitentiary, of which were suspended on conditions. SR864. This sentence ran concurrently to the sentence for Count I. This appeal followed.

STATEMENT OF THE FACTS

On August 24, 2023, Lester Monroe was an inmate at the South Dakota State Penitentiary in Sioux Falls, South Dakota. T1:22, 32. Monroe was housed in Unit D within the Jameson Annex at the penitentiary. T1:22. Unit D has six separate sections within it, housing approximately between 100-150 men across the six sections. T1:110.

Monroe was housed in Section Four of Unit D. T1:149. Section Four contains two tiers of inmate cells, all facing the same direction with sliding steel doors that open up to a recreational area in the section where inmates can move freely outside of their cells. E21; T1:27-29. The sliding steel doors are opened and closed solely by a correctional officer who sits within a control pod that overlooks all

six sections within Unit D. T1:92. The control pod is elevated, and below it is an open area with a staff desk positioned directly under it. T1:26, 92, 96. Then, from the staff desk, there are two hallways that lead people out of the open area of Unit D - one towards the chow hall and the other towards staff offices. T1:27.

On a normal day, there would be three to four correctional officers assigned to supervise Unit D: one control pod operator, and others to assist in conducting rounds, headcounts, and general supervision. T1:23. On August 24, 2023, though, Corporal Hunter Harms was the only officer on the floor of Unit D, and Zachary Runge was operating the control pod. T1:23, 87, 93.

In addition to having staff members personally observing inmate activities, the Department of Corrections also maintains surveillance footage of Unit D. T1:129. The State played four videos at trial showing an altercation that took place on Unit D involving Corporal Hunter Harms, Lester Monroe, and Kyle Jones. E21; E22. The videos preserve by Lieutenant Wynia begin around 8:09 a.m. on August 24, 2023, showing inmates in Section Four moving in and out of cells, talking amongst each other, and moving freely within the section. E21; T1:97-98, 129-131; 145-146. While the inmates' individual cell doors are open,

they are still confined within the shared rec space of section four. E21. T1:97-98.

Monroe can be seen on video leaving his cell on the lower level and walking to the section door, peering out the window into the common area of Unit D. E21. T1:138-139. This continues for twenty minutes as he paces back and forth between his cell and section door. E21. T1:138-139. During one of his walks back to his cell, Monroe's attention turns to a person standing on the top-tier of the section. E21. That person was Kyle Jones, another inmate who is housed in Section Four. T1:141-142. Jones' cell is on the top-tier of the section. T1:141-142. Monroe walks up the stairs and the two talk for awhile outside of Jones' cell. E21; T1:142. There is no audio recording of the conversation. T1:154.

At some point during their conversation, the sliding door to the section opens. E21. It remains open for three minutes. T1: 97. Monroe then heads down the stairs and out of Section Four. E21. As he exits the section, Correctional Officer Corporal Hunter Harms is leaning up against the staff desk in the hallway. E22. T1:34. Monroe walks past Harms and proceeds down one of the hallways that lead to staff offices. E22. T1:34. But before Monroe can get there, Harms asks him what he is doing, as he did not

have permission to leave his section. T1:34. Monroe is seen stopping, pointing down the hallway where Mike's office is located, and then walking back towards his section as Harms remains seated on the staff desk. E22; T1:34; T2:70. Monroe tells Harms that he wants to go see Mike, the Native American Cultural leader whose office is just down the next hallway. T1:27, 33.

Harms directs him to return to his section but tells Monroe that if he had just asked permission he would have let him go, but since he didn't ask permission, he had to return to his section. T1:34. Harms testified that Monroe said something to the effect of, "why do you have to be a dick," lunged at him, and then started punching him in the face. T1:33. T2:70.

The altercation draws the attention of many inmates within Section Four, including Kyle Jones who is still standing on the top tier. E21; E22; T1:143; T2:95. The altercation then moves from on top of the staff desk to the floor in front of the staff desk, potentially obstructing the view of the inmates within the section. E22. T2:89. Many inmates move closer to the door to observe. E22. Jones puts his shoes on and heads down the stairs, where he watches briefly from the bottom tier

before he then jogs out of the section and into the common area. E22.

Video then shows Jones coming around the corner of the desk, observing Monroe and Harms on the ground, then joining in on the altercation by squatting down and throwing his fists in quick succession. E22. T2:70, 98. Harms curls up and places his arms around his head as both Monroe and Jones squat over him, throwing punches towards his upper torso and head. E22. After 45 seconds, other staff members arrive and break up the altercation, tazing both men. T1:62; T2:10.

Hunter Harms was subsequently treated at Avera and determined to have sustained minor injuries such as facial swelling, bruising, and a bloody nose. T2:30; T3:74. He was sent home with directions to take Tylenol for pain and swelling. T1:45, 67.

Following the incident, Monroe waived his right to remain silent and participated in two interviews with Special Agent Hockett. E67; T2:162. During those interviews, Monroe explained that he had lost a lot of family and friends lately, and he was feeling pretty depressed. E67; T2:163-64. He wanted to see Mike to see if Mike would conduct a smudging ceremony. E67. The purpose of smudging is for prayer—to purify attitudes,

consciousness, and to rid of negativity. T3:58-59. Once Harms said he would have let him go if he would have just asked permission, Monroe described himself as "seeing red" and started to assault Harms. E67. Monroe consistently denied any planning of this and maintained that it was spontaneous. E67.

Special Agent Hockett even asked him if he'd be willing to take a polygraph examination to prove he was telling the truth, and Monroe said he would and that it would even help him in court. E67. The Court excluded the polygraph offer on motion of the State. and that statement was redacted from Monroe's interview. SR659.

Jones was subsequently placed into restrictive housing for the next 29 days. T3:29-31. Inmates in restrictive housing are in isolation without access to phones, tablets, televisions, or commissary. T3:29-31. Jones could not make phone calls while housed in restrictive housing, and on September 28, 2023, he was finally able to make his first completed phone calls since the altercation. T3:18-21. Jones called his mother, Donna Jones, on a phone line that announces the calls are monitored and recorded. E69. At trial, the State was allowed to play redacted phone calls between Jones and his mother over Counsel's renewed objections. T3:21-22. In those calls, Jones'

mother criticizes Jones' actions and questions what he was thinking at the time, because he was almost eligible for parole. E69. Jones made several inculpatory statements suggesting he thought of everything before they did it, that Monroe was "under him", and that "the one that did it with me ... I tell him to do something he does it without hesitation". E69. During cross examination, the State elicited testimony from Special Agent Basche and Special Agent Hockett stating that Jones' calls were discussing the assault from August 24, 2023. T2:75; T3:35-36.

ARGUMENT

I.THE TRIAL COURT ERRED DENYING THE DEFENDANT'S MOTION TO SEVER THE JOINT TRIAL WHERE THE PROSECUTION INTRODUCED CO-DEFENDANT STATEMENTS THAT INCULPATE MONROE THEREBY RESULTING IN A VIOLATION OF MONROE'S SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER AND IMPAIRED HIS RIGHT TO PRESENT A COMPLETE DEFENSE.

SDCL 23A-11-2 permits severance of defendants charged in a joint indictment. Justice requires severance when a defendant's Constitutional right to due process and a fair trial are violated. U.S.Const.Amend. V, VI & XIV. The facts of this case demonstrate substantial prejudice is present that required severance of the parties. The constitutional limits on admitting a non-testifying co-defendant's statements are defined by a line of decisions beginning with Bruton v. U.S., 391 U.S. 123 (1968), and

continuing through Richardson v. Marsh, 481 U.S. 200 (1987), Gray v. Maryland, 523 U.S. 185 (1998), and most recently Samia v. U.S., 599 U.S. 635 (2023).

In Bruton, the Supreme Court of the United States held that the Confrontation Clause is violated when the confession of a non-testifying co-defendant that implicates the defendant is introduced at a joint trial. Bruton, 391 U.S. 124, 135-36. The Court emphasized the "practical and human limitations of the jury system," recognizing that jurors cannot realistically ignore a confession that powerfully implicates another defendant sitting at counsel table. *Id.* at 135. The Court rejected the argument that such prejudice could be cured by a limiting instruction directing the jury to consider the statement only against the declarant. *Id.* at 135.

Nearly two decades later, the Supreme Court addressed the scope of Bruton in Richardson v. Marsh, 481 U.S. 200 (1987). In a review of Bruton, the Richardson Court identified the issue on deciding whether Bruton's protections apply is "whether the jury can possibly be expected to forget [codefendant's statements implicating defendant] in assessing defendant's guilt[.]" *Id.* at 208. In Richardson, the co-defendant's confession was redacted so that it eliminated not only the defendant's

name but any reference to the defendant's existence. *Id.* The defendant became implicated only when the statement was later combined with her own testimony at trial. *Id.* at 211. The Court reasoned that because the statement was not facially incriminating and required linkage with other evidence before it could implicate the defendant, a limiting instruction was sufficient to protect the defendant's confrontation rights. *Id.* at 208.

Just a year later, the Supreme Court then clarified the limits of Richardson in Gray v. Maryland, 523 U.S. 185 (1998). In Gray, the co-defendant's confession had been redacted by replacing the defendant's name with the word "deleted." *Id.* at 188-189. Although the name itself was removed, the Court held the redaction unconstitutional, because the jury could immediately infer that the blank referred to the defendant sitting in the courtroom. *Id.* at 192-97.

The Court explained that such redactions function the same as naming the defendant because the jury can easily fill in the missing identity. *Id.* at 193-195. The Gray Court even specifically referenced that "nicknames and specific descriptions fall inside, not outside, Bruton's protections." *Id.* at 195. When that occurs, the statement

remains facially incriminating and falls within the rule announced in Bruton. Id. at 194-195.

Therefore, Gray established that the constitutional inquiry does not turn solely on whether a defendant's name appears in the statement. Instead, the question is whether the redaction leaves the defendant's identity obvious to the jury in context. If the jury can immediately determine who the statement is referring to, the redaction is constitutionally insufficient.

Most recently, the Supreme Court revisited the Bruton framework in Samia v. U.S., 599 U.S. 635 (2023). In Samia, the Court considered whether a redacted co-defendant's confession replacing the defendant's name with "other person" could be admitted at a joint trial. Id. Under those circumstances, the Court concluded that the neutral substitution did not violate the Confrontation Clause because the statement was not facially incriminating and obviously redacted like in Gray. Id. Importantly, however, the Court reaffirmed that Gray remains controlling when redactions leave the defendant's identity obvious to the jury in context. Id. at 653.

In the present case, the trial court denied Monroe's motion to sever after concluding that the redacted statements of Co-Defendant Jones were admissible under the

rule announced in Richardson v. Marsh, 481 U.S. 200 (1987).
M:10May2024:17. The trial court acknowledged that Jones' statements were inculpatory in nature, because they discussed the incident underlying the charged offense. Id.15-16. Despite the State admitting that the decision was "a close call" the court reasoned that because there was no explicit reference to Monroe, it did not violate Bruton. Id. at 9, 17. Based on that reasoning, the court concluded the statements created only inferential incrimination and believed any risk of prejudice could be cured through a limiting instruction directing jurors to consider the statements solely against Jones. Id.16. The court therefore determined the statements fell within the rule of Richardson rather than Bruton. Id.17.

Even under the framework articulated in Bruton, Richardson, Gray, and Samia, the redactions used in this case were constitutionally inadequate because Jones' statements repeatedly described planned conduct with another participant whose identity was obvious in context.

Unlike Richardson, Gray, and Samia, this case involved a two-defendant prosecution that was captured on surveillance video. The State's theory was that Monroe and Jones jointly assaulted Harms and planned the attack. T4:17. Surveillance footage admitted at trial depicted

Monroe engaged in a physical altercation with Harms while Jones later descended from the upper tier and joined the encounter. E21; E22. T2:88-98.

The State's theory of coordinated intent was then reinforced through Jones' recorded prison calls. Over Monroe's renewed objections, the court permitted the State to introduce redacted recordings of calls Jones made to his mother more than thirty days after the incident, following a period in which he had been placed in restrictive housing, isolated without his phone privileges. T3:28-30.

During those calls, Jones repeatedly referenced acting with another participant: "I was thinking of everything before we did it"; "I'm the one that, I, I told him"; "everything I told him to do he does, he did it without no hesitation"; "the one that did it with me"; "my brother." Despite arguing in its brief opposing severance that Jones' statements "could have been talking about a completely noncriminal activity", the State elicited testimony from Special Agent Jon Basche and Lieutenant Dykstra that those exact calls introduced at trial were discussing the assault from August 24, 2023. T2:75; T3:35-36.

Moreover, these statements were not redacted to remove all existence of another person like in Richardson, nor did

the statements merely reference an abstract "other person" like in Gray. They described joint action, direction, and coordination between two individuals: "my brother" that is in the same section as him; "the one that did it with me", "everything I told him to do he does, and he did it without hesitation". E69. Because the State alleged that only Monroe and Jones participated in the assault, the identity of the unnamed participant in those statements was readily apparent.

This is precisely the type of contextual identification the Supreme Court addressed in Gray, where the Court held that redactions are constitutionally insufficient when the inferences "involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." 523 U.S. 185, 196. Jones' calls leave no question as to who he was referencing and therefore went beyond the permissible inferential connection as permitted under Richardson. Because Jones did not testify, Monroe had no opportunity to cross-examine him regarding those statements. The trial court's reliance on Richardson was therefore misplaced, because the calls were not redacted to

remove all existence of Monroe. Therefore, the denial of severance allowed the jury to consider statements that effectively implicated Monroe without the procedural safeguards required by the Sixth Amendment and denied him a right to a fair trial.

Even if this Court were to conclude that admission of Jones' statements did not constitute a categorical Confrontation Clause violation under Gray, reversal is still warranted, because the joint trial substantially prejudiced Monroe and impaired his ability to present a complete defense. Severance is required when a joint trial "compromise[s] a specific trial right of one of the defendants" or prevents the jury from making a reliable determination of guilt or innocence. Zafiro v. United States, 506 U.S. 534, 539 (1993).

That is precisely what occurred here. Monroe waived his Miranda rights and participated in two interviews with Agent Hockett shortly after the incident. E67; T2:156-157. During those interviews, Monroe consistently maintained that the altercation occurred spontaneously. E67; T2:162-163. When asked about Jones' thoughts or intentions, Monroe stated that he could not speak for Jones and that investigators should ask Jones directly. E67; T2:162-163.

Jones did not testify, and instead, the jury heard Jones' version of events through recorded statements made weeks after the incident during phone calls with his mother. E69; T3:19-21. Those calls occurred after Jones had spent approximately thirty days in restrictive housing with limited privileges. T3:29-31. During the calls, Jones described thinking about the incident beforehand and directing another participant's actions. E69. The State relied on those statements to argue planning and coordinated intent. T4:17. In closing arguments the State played Jones' calls again and immediately after playing them argued that his admissions were "consistent with the videos that you saw" of both actors and then argued that Jones' calls "show[] that this was premeditation." Id.

Additionally, Monroe was effectively prevented from meaningfully challenging the credibility or meaning of those statements. Jones' references to "standing on my business" and "standing up for my people" are consistent with a reactive obligation to assist "his brother"--not necessarily with prior planning. But Monroe could not meaningfully advance that interpretation. Without Jones testifying, Monroe could not challenge the credibility of whether Jones was exaggerating authority; whether he was reframing impulsive conduct as controlled leadership;

whether his statements were influenced by placement in isolation following the altercation; or whether his language reflected bravado rather than facts.

The structure of the joint trial placed Monroe in a constitutionally untenable position: either ignore inculpatory statements or risk strengthening them. Attempting to challenge Jones' credibility would have required repeating and emphasizing the very statements the State used to inculcate him; the very statements Monroe sought to prevent admission.

As such, this dilemma impaired Monroe's ability to present a complete defense. The Constitution guarantees a defendant "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986); Chambers v. Mississippi, 410 U.S. 284, 294 (1973). The trial court's denial of severance prevented Monroe from presenting a complete defense.

II. THE TRIAL COURT ERRED DENYING THE DEFENDANTS' MOTION FOR MISTRIAL FOLLOWING THE PROSECUTORS CLOSING ARGUMENT ATTRIBUTING ONE DEFENDANT'S ADMISSIONS AGAINST INTEREST TO ANOTHER, PRIOR INSTRUCTIONS NOTWITHSTANDING.

During closing argument, the prosecutor attributed the statements of Co-Defendant Jones to the alleged actions of Defendant Monroe, and vica versa. This occurred despite instructions to the contrary following denial of the motion

to sever. T4:13-15; T4:31-32. The defense requested a side bar to object to the statement. T4:30. The trial court found that such an argument was in fact made by the prosecutor. T4:31-32. However, the court did not provide a limiting instruction to the jury. It delegated any limiting instruction role to the State who promised to clear things up in rebuttal. T4:32 ("I do find this could be cleared up by rebuttal by the State. I would encourage them to clear that up in rebuttal").

The act of presenting instructions to the jury is a judicial power, and obligation not subject to delegation to the State, a party to the case. SDCL 23A-25-2 provides "to receive as law that which is laid down as such by the court." Judges may not delegate judicial functions to non-judicial officers per the Constitution. State v. Blakney, 2014 S.D. 46, ¶ 13, 851 N.W.2d 195, 199. See also, State v. Heinrich, 449 N.W.2d 25, 27 (S.D. 1989); Gray v. Gienapp, 2007 S.D. 12, ¶ 17, 727 N.W.2d 808, 812 ("no branch may delegate to another branch its essential constitutionally assigned functions,")⁴. While courts presume juries follow a court's instructions, it does not

⁴In addition to mistrial grounds, plain error is necessarily implicated. See Henderson v. United States, 568 U.S. 266, 278 (2013).

similarly presume that juries follow a prosecutor's instructions, effectively rendering jury trials to be without purpose.

The Defendants moved for a mistrial. T4:30; T4:35.⁵ The trial court denied the mistrial motion, thus committing reversible error of a constitutional dimension. The Court noted the improper argument was made by the prosecutor in good faith.

This Court usually reviews issues concerning denials of motions for mistrial under an abuse of discretion standard. State v. Buchhold, 2007 SD 15, ¶17, 727 N.W.2d 816, 821. "An actual showing of prejudice must exist" to overturn a trial court's decision to deny a motion for mistrial. State v. Bousum, 2003 SD 58, ¶ 31, 663 N.W.2d 257, 265-66. Prejudice occurs when "in all probability, it produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." State v. Mollman, 2003 SD 150, ¶ 23, 674 N.W.2d 22, 29.

The present matter, however, is an unusual case. As with other jury instructions presented by a court - not a prosecutor - failure to give a proper effective reliable instruction to the jury may rise to constitutional

⁵ Monroe's counsel noted "this is exactly the sort of danger that we sought to prevent with the motion to sever." T4:35.

dimensions. See Zemina v. Solem, 438 F. Supp. 455, 469 (D.S.D. 1977), aff'd, 573 F.2d 1027 (8th Cir. 1978); see also Cool v. United States, 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972). Although the severance motion was denied, Constitutional concerns per Bruton still remained. The trial court sought to address those concerns by imposing instructions regarding restricting the use of each Defendant's statements.

Use of multiple defendant statements correctly encompasses the notion that the instructions regarding them would be followed by both trial counsel and the jury. This did not occur in this case. As such, all these preventive measures lay wasted.

In this case, "the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." See Cupp v. Naughten, 414 U.S. 141, 147-48 (1973). The infection of the Defendant's case with the other's statements prejudiced these Defendants, violating Monroe's right to a fair trial. These constitutional concerns demonstrate de novo review should be applied.

An effort to instruct the jury to disregard a statement is a standard device used by trial courts, not a prosecutor, when an improper argument is made. Arizona v. Washington, 434 U.S. 497, 512-13 (1978). The Supreme Court of the United States still noted that such a technique "however, will not necessarily remove the risk of bias that may be created by improper argument." *Id.* It noted that when an unfair advantage would result from the improper argument, "the trial judge must have the power to declare a mistrial in appropriate cases:". *Id.* Mistrial motions should be granted "whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity" for doing so. Renico v. Lett, 559 U.S. 766, 773-74 (2010). A "mistrial is appropriate when there is a 'high degree' of necessity." *Id.*

This Court addressed similar concerns justifying appropriate mistrial motions in State v. Rose, 2024 S.D. 56, ¶ 23, 12 N.W.3d 127, 134.. In Rose, the trial court ordered the parties to refrain from discussing a prior trial proceeding. At no fault of the defense attorney, a witness revealed the prior trial in a narrative and non-responsive answer to a question. The State moved for a mistrial which was ultimately approved by this Court.

Despite the presumption that the jury would follow instructions, this Court still noted the reference to the prior case was "concerning". State v. Rose, 2024 S.D. 56, ¶ 32, 12 N.W.3d 127, 136. In addition, this Court relied on two other trial events not objected to at trial. These events effectively presented a cumulative effect to show a manifest necessity existed to justify a mistrial. State v. Rose, 2024 S.D. 56, ¶ 37, 12 N.W.3d 127, 137-38. Trial counsel's good faith when asking the question was not determinative to justify denying the mistrial motion. *Id.* As such, a court's finding that the party acted in good faith is not determinative in mistrial motion determinations, as was in the Appellant's present case. T4:31-32.

In contrast to Rose, these Defendants presented numerous motions for relief and objections. They objected to joinder of the Defendants outright with clarity. The state still presented transcripts of the Defendants' statements as admissions, over the Defendants' objections. SR689; SR693. A record of their objections is established. As in Rose, a record as made by the Defendants to present a sufficient supply of legal and factual arguments made demonstrating a manifest necessity.

A jury is normally presumed to follow instructions. State v. Rose, 2024 S.D. 56, ¶ 32, 12 N.W.3d 127, 136. However, this is not a normal case. This presumption is not absolute and can be rebutted where the transgression is still "concerning." Id. Here, a law trained prosecutor who found the charging instructions confusing violated the instructions herself. T4:8. That is "concerning". The presumption that jurors will always follow instructions is thereby rebutted.

In this particular case, the instructions were not followed. As such, they should not have been expected to be followed at trial when denying the motion for the mistrial. The fact they were not followed by the prosecutor is not in dispute. T4:31-32. The jury's inability to follow any curative instruction not offered by the trial court, but just the prosecutor, should be presumed instead.

The error denying the motion for mistrial arising from the prosecutor's comments struck at Monroe's primary defense. Monroe's defense entailed that just a simple assault occurred to the victim. The Defendant only sought to commit a Simple Assault. T4:53-54. He did not assault the victim with a premeditated design, so as to possess a specific intent to murder Harms. The statements of the Co-

Defendant, however, served to wrongfully attributed to Monroe's alleged premeditated design in addition to Jones' own, which otherwise should not be attributed to Monroe especially absent his ability to confront the Co-Defendant.

After all, the law trained prosecutor admitted to the jury the instructions regarding the homicide and assault charges were "confusing". T4:8. With full knowledge of the instructions discussed prior to their presentation to the jury, the law trained prosecutor nevertheless attributed the statements of one defendant toward the other during closing argument. Such comments could not be cross-examined at trial in violation of the Defendant's Confrontation Clause rights. See Bruton supra. Such comments were wrongfully probative of the premeditated design charges against this Defendant demonstrating prejudice. Accordingly, a manifest necessity for a mistrial existed. Prejudice is thus shown beyond any reasonable doubt requiring reversal. See Chapman v. California, 386 U.S. 18, 24 (1967). While evidence of a crime may be present, overwhelming evidence of the premeditated design element required for conviction is not.

The prosecutor's argument focused prejudice towards concluding the specific intent crime charged could be legitimately found within the evidence of this joined

trial. In light of denial of the mistrial, following denial of the motion for severance, it could not. On direct appeal, this Court may consider the cumulative effect of these errors. See also State v. Rose, 2024 S.D. 56, ¶ 37, 12 N.W.3d 127, 137; State v. Nelson, 1998 S.D. 129, ¶20, 587 N.W.2d 439, 446; Gordon v. United States, 344 U.S. 414, 420-23 (1953) ("We believe, moreover, that the combination of these two errors was sufficiently prejudicial to require reversal."); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973) ("a consequence of the combination"). The trial court erred denying the motion for mistrial under these unique circumstances of this case. This Court should reverse and remand this matter for a new trial, with appropriate instructions.⁶

III. THE TRIAL COURT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE BY PRECLUDING EVIDENCE OF CONSCIOUSNESS OF INNOCENCE WHILE DEFENDING AGAINST SPECIFIC INTENT ALLEGATIONS OF PREMEDITATED DESIGN TO MURDER.

⁶ The Co-Defendant has since declined to appeal his judgment and sentence. See 49CRI235740; Nauman v. Nauman, 336 N.W.2d 662, 664 (S.D. 1983) ("judicial notice may be taken of public or official records."). Regarding appropriate instructions, many issues discussed in this brief will not return.

Investigators interviewed the Defendant following the incident. M:6/28/24:32. During the interview, they discussed whether he would take a polygraph test regarding his thoughts and actions. M:6/28/24:32-33. The Defendant agreed to take the evaluation. M:6/28/24:32-33; SR462. The State sought to offer portions of the Defendant's interview against him at trial. Nevertheless, it thought to prohibit evidence of the Defendant's willingness to take a polygraph via a motion in limine arguing that it was inadmissible. SR462.

The Defendant objected to the requested prohibition arguing that willingness to take the test was probative of his consciousness of innocence when defending allegations of a premeditated specific intent crime. M:6/28/24:XX; SR 469). See State v. Santana-Lopez, 613 N.W.2d 918, 921 (Wis.App. 2000); State v. Hoffman, 316 N.W.2d 143 (Ws.App.1982). The trial court precluded evidence about the Defendant's willingness to take the test. SR659.

The trial court committed error in that ruling. The error went beyond mere abuse of the trial court's discretion regarding rules of evidence. "If the error goes to the heart of a defendant's theory of defense it can infringe upon defendant's rights to due process and jury trial." Miller v. State, 338 N.W.2d 673, 676-77 (S.D.

1983); citing Zemina v. Solem, 438 F.Supp. 455 (D.S.D.1977); *aff'd* 573 F.2d 1027 (8th Cir.1978). It committed Constitutional error by preventing the Defendant from presenting a complete defense to which he is entitled by Due Process. State v. Huber, 2010 S.D. 63, ¶37, 789 N.W.2d 283, 294; Crane v. Kentucky, 476 U.S. 683, 687 (1986); U.S.Const.Amend. V and XIV. If further erred by preventing him from challenging the strength of the investigation and the State's charging decision. Kyles v. Whitley, 514 U.S. 419, 446 (1995); citing Bowen v. Maynard, 799 F.2d 593 (10th Cir. 1986).

In that constitutional errors are present, this Court should apply de novo review to this issue and conclude the trial court erred, warranting a new trial. See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001). This Court has ruled that polygraph results are inadmissible at trial. State v. Bertram, 2018 S.D. 4, ¶ 14, 906 N.W.2d 418, 423-24. The rule was extended to affirm a trial court's exclusion of polygraph results at sentencing decisions. State v. Banks, 2023 S.D. 39, ¶ 32, 994 N.W.2d 230, 239. In both cases, this Court noted it would not "foreclose the possibility of reconsidering this per se rule in the future if presented with an appropriate case." State v. Banks, 2023 S.D. 39, ¶ 31, 994 N.W.2d 230,

239. However, these cases are distinguishable in that a polygraph test result was not sought to be admitted. It was his willingness to take one that is highly probative. Where a Defendant was willing to participate in a test, considerations of consciousness of innocence evidence relevant to a specific intent crime should constitute such a case.

The trial court relied on persuasive authority for its decision. It cited United States v. Dinga, 609 F.3d 904 (7th Cir. 2010). Dinga is distinguishable. It involved review of a conviction for a 'false statement to a federal law enforcement officer.' United States v. Dinga, 609 F.3d 904, 907 (7th Cir. 2010). The elements called for a statement knowingly and willingly made. *Id.* In South Dakota, such terms have often led this Court to conclude that a general intent crime is present for certain offenses regarding assaults and bodily harm. See State v. Barrientos, 444 N.W.2d 374, 376 (S.D. 1989).

Consciousness of guilt evidence is admitted at trials quite readily in South Dakota. See State v. Nelson, 2022 S.D. 12, ¶ 46, 970 N.W.2d 814, 829. Due Process requires that consciousness of innocence be allowed to balance out negative inferences arising from considerations of fundamental fairness. See Daily v. City of Sioux Falls,

2011 S.D. 48, ¶ 29, 802 N.W.2d 905, 917 ("the applicable rules of evidence must be applied in a fair and even-handed manner"); citing Withrow v. Larkin, 421 U.S. 35, 46 (1975).

Relevant evidence is admissible. SDCL 19-19-401. To be admissible, "evidence need only to alter the probabilities of a proposition; it need not sway the balance to any particular degree." Supreme Pork, Inc. v. Master Blaster, Inc., 2009 S.D. 20, ¶ 46, 764 N.W.2d 474, 488. Evidence of innocence would alter the probability of the State's proposition especially for evaluation of a specific intent crime to some degree. See State v. Tuopeh, 2025 S.D. 16, ¶ 30, 19 N.W.3d 37, 50, reh'g denied (Apr. 29, 2025). The absence of such available evidence prejudiced the Defendant regarding the jury's determination of that central issue.

This case potentially involves the most serious homicide crime under South Dakota law. Murder 1st contains a specific intent element of premeditated design. State v. Bolden, 2024 S.D. 22, ¶ 22, 6 N.W.3d 238, 243. Unlike a general intent crime, the probative value of any consciousness of innocence evidence has an inherently higher value and weight in a case involving a specific intent crime. The trial court did not take this greater need for probative weight into account when balancing

against the allegations of substantially unfair prejudice. It erred relying on Dinga. As such, a misapplication of law occurred here demonstrating prejudice. See State v. Packed, 2007 S.D. 75, ¶ 24, 736 N.W.2d 851, 859.

The cases cited by the Defendant before the trial presented a better fit for the situation. SR469. The trial court erred by disregarding them. Wisconsin law viewed a defendant's willingness to take a lie detector test to be probative of consciousness of guilt, or lack thereof (i.e. consciousness of innocence). See State v. Hoffman, 316 N.W.2d 143 (Ws.App.1982); State v. Santana-Lopez, 613 N.W.2d 918 (Wis.App. 2000). In State v. Santana-Lopez, the Wisconsin Court of Appeals held the willingness of a defendant to take a polygraph is "relevant to the state of mind of the person making the offer--so long as the person making the offer believes that the test or analysis is possible, accurate, and admissible." State v. Santana-Lopez, 613 N.W.2d at 921.

In the instant case, Monroe waived his *Miranda* rights and choose to be interrogated by Special Agent Hockett on two separate occasions on the same day the incident occurred. After being questioned about what he and Jones discussed prior to the incident, Monroe said "I can't remember ... But it wasn't, it had nothing to do with Harms.

Ya know what I mean?" Agent Hockett then said "Are you willing to take a polygraph about that?" to which Monroe responded "yeah ... it would help me in court too." SR462 Exhibit A. As in Santana-Lopez, Monroe demonstrated he believed it would be "possible, accurate, and admissible." *Id.*

This discussion occurred before charges were indicted, and before counsel was ever appointed for the defendant to offer strategic thoughts. See State v. Pfaff, 2004 WI App 31, ¶ 29, 269 Wis. 2d 786, 802, 676 N.W.2d 562, 569 (counsel originated polygraph idea). It demonstrated aspects of a bargained for exchange between the interviewer and the Defendant. Even polygraph results (not at issue here) arising from an agreement can be admissible under such circumstances. State v. Banks, 2023 S.D. 39, ¶ 26, 994 N.W.2d 230, 237; citing State v. Stevenson, 2002 S.D. 120, ¶ 2, 652 N.W.2d 735, 737 (plea agreement involving supervision via polygraph use admitted at sentencing).

Monroe's defense entailed that an assault occurred. The Defendant only sought to commit a Simple Assault. He did not assault the victim with a premeditated design so as to possess as specific intent to murder him. The polygraph offer would rebut the State's argument regarding Count I to illustrate a different or lesser intent. The lack of its

presence in evidence prejudiced the Defendant from establishing that argument. The failure to admit such evidence violated not only the rules of evidence but the Defendant's right to present a complete defenses per Crane supra.

IV. THE TRIAL COURT COMMITTED PLAIN ERROR FOR VIOLATING THE RULE OF STATE V. WASHINGTON (SD 2024) (DOUBLE JEOPARDY) FOR ENTERING A JUDGMENT AND CONVICTION FOR COUNT II DESPITE THE PRESENCE OF COUNT I.

The Circuit Court sentenced the Defendant on January 17, 2025. SR859; SR864. With regards to Count II, the Court also entered a Judgment and Sentence for the jury's verdict. Count II involved Aggravated Assault against the same victim as whom was the subject of the same factual occurrence pertaining to Count I (Attempted Murder). On October 23, 2024, this Court ruled that "where a guilty verdict has been rendered on multiple counts for a single statutory offense resulting from the same act, a sentencing court should include express language stating that no judgment of conviction is being entered on a particular count." State v. Washington, 2024 S.D. 64, ¶ 71, 13 N.W.3d 492, 513.

"Every citizen is presumed to know the law,". Georgia v. Public.Resource.Org, Inc., 590 U.S. 255, 265, 140 S. Ct. 1498, 1507, 206 L. Ed. 2d 732 (2020). The trial court did

not take steps to comply with the Washington rule as judgments of conviction for Count II were still entered. As such, the trial court committed plain error in violation of the Defendant's Due Process and Double Jeopardy rights. State v. Wilson, 2020 S.D. 41, ¶ 17, 947 N.W.2d 131, 136; see also Henderson v. United States, 568 U.S. 266, 278 (2013). This matter should also be reversed and remanded to vacate or strike the conviction, judgment and sentence regarding Count II.

CONCLUSION

The trial court erred in a number of respects as outlined in the brief. All errors effected the result of this case, beyond any reasonable doubt. All these errors individually and cumulatively prejudiced the Defendant. See Nelson, 1998 S.D. at ¶20, 587 N.W.2d at 447; Gordon v. U.S., 344 U.S. at 420-23. This Court should remand this matter to the trial court to enter a judgment of acquittal, or new trial on all remaining charges, with appropriate instructions.

CERTIFICATE OF COMPLIANCE

This brief meets applicable page and word (7618) limitations required by this Court.

Dated this 6th day of March, 2026.



TRACY MILLER
c/o Public Advocate Office
415 N Dakota Ave
Sioux Falls, SD 57104
(605) 367-7392
tmiller@minnehahacounty.gov
Attorney for Appellant



MARK KADI
c/o Public Advocate Office
415 N Dakota Ave
Sioux Falls, SD 57104
(605) 367-7392
mkadi@minnehahacounty.gov
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of March, 2026, a true and correct copy of the foregoing Appellant's Brief was served electronically on:

Marty Jackley
Attorney General
1302 E Hwy 14, Suite 1
Pierre, SD 57501
ATGservice@state.sd.us

Daniel Hagggar
M.C. States Attorney
415 N Dakota Ave
Sioux Falls, SD 57104
ujsservice@minnehahacounty.gov



MARK KADI
Attorney for Appellant

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30985

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

LESTER M. MONROE,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JENNIFER MAMMENG
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Mark Kadi & Tracy Miller
Office of the Public Advocate
415 N Dakota Ave
Sioux Falls, SD 57101
Telephone: (605) 367-7392
Email: mkadi@minnehahacounty.gov
Email: tmiller@minnehahacounty.gov

ATTORNEYS FOR DEFENDANT
AND APPELLANT

Renee Stellagher
Assistant Attorney General
1302 East Highway 1889, Suite 1
Pierre, SD 57501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30985

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

LESTER M. MONROE,

Defendant and Appellant.

PRELIMINARY STATEMENT

Monroe appeals arguing the circuit court erred by denying his motion to sever his case from his codefendant, denying his motion for a mistrial for the prosecutor's statement during closing statements, excluding evidence of his willingness to take a polygraph, and entering judgments for Attempted First-Degree Murder of a Law Enforcement Officer and Aggravated Assault Against a Department of Corrections Employee.

This Court should affirm the circuit court's decision on these issues because the codefendant's statements were not facially incriminating as to Monroe, the prosecutor's statement did not warrant a mistrial, evidence regarding Monroe's polygraph was not proper for the jury to consider, and no double jeopardy violation occurred.

References to the Settled Record, 49CRI23-5739, are denoted “SR.” References to the Appellant’s Brief are denoted “AB.” References to exhibits from the trial will be cited to as “EX.” The proper page number(s) follows these references.

JURISDICTIONAL STATEMENT

This is an appeal of a Judgment and Sentence entered on January 30, 2025. SR:859-67. Monroe timely filed and served a Notice of Appeal on January 31, 2025. SR:875; SDCL 23A-32-15. Accordingly, this Court has jurisdiction to hear this appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE CIRCUIT COURT PROPERLY DENIED MONROE’S MOTION TO SEVER HIS CASE FROM HIS CODEFENDANT?

The State filed a Notice of Intent to offer prison phone call conversations between Monroe’s codefendant and the codefendant’s mother. Monroe objected, stating it violated *Bruton*, so his trial should be severed from his codefendant. The circuit court overruled the objection, concluding the statements did not incriminate Monroe on their face and only become incriminating when linked with other evidence.

- *State v. Zakaria*, 2007 S.D. 27, 730 N.W.2d 140
- *State v. Fool Bull*, 2009 S.D. 36, 766 N.W.2d 159
- SDCL 24-15-1.1

II.

WHETHER THE CIRCUIT COURT PROPERLY DENIED MONROE'S MOTION FOR A MISTRIAL?

Monroe moved for a mistrial, asserting the State misstated the evidence during its closing argument by attributing to Monroe statements that were made by his codefendant. The circuit court concluded that the State's inadvertent statement did not rise to the level of prejudice necessary to warrant a mistrial.

- *State v. Kvasnicka*, 2013 S.D. 25, 829 N.W.2d 123
- *State v. Ortiz-Martinez*, 2023 S.D. 46, 995 N.W.2d 239

III.

WHETHER THE CIRCUIT COURT PROPERLY EXCLUDED EVIDENCE MONROE WAS WILLING TO TAKE A POLYGRAPH?

The circuit court denied any reference to Monroe's willingness to take a polygraph.

- *State v. Dornbusch*, 384 N.W.2d 682 (S.D. 1986)
- *State v. Winter*, 668 N.W.2d 222 (Minn. App. 2003)

IV.

WHETHER THE CIRCUIT COURT PROPERLY ENTERED JUDGMENTS FOR ATTEMPTED FIRST-DEGREE MURDER OF A LAW ENFORCEMENT OFFICER AND AGGRAVATED ASSAULT AGAINST A DEPARTMENT OF CORRECTIONS EMPLOYEE?

This issue is being raised for the first time on appeal so the circuit court did not rule on this issue.

- *State v. Johnson*, 2007 S.D. 86, 739 N.W.2d 1
- *State v. Lafferty*, 2006 S.D. 50, 716 N.W.2d 782

STATEMENT OF THE CASE

Monroe was charged by a Superseding Indictment with Attempted First-Degree Murder of a Law Enforcement Officer and Aggravated Assault Against a Department of Corrections Employee. SR:162-64.

In preparation for trial, the State entered a Notice of Intent to offer four prison phone calls between Kyle Lee Jones, Monroe's codefendant, and Jones' mother as evidence of Jones and Monroe's motive in attacking Correctional Officer Corporal Hunter Harms. SR:235-40. In response, Monroe moved to sever his case from Jones, arguing any out-of-court statements made by Jones would violate Monroe's right to confrontation. SR:160 (citing *Bruton v. United States*, 391 U.S. 123 (1968)). The circuit court denied Monroe's request, finding Jones' statements not facially incriminating as to Monroe. SR:375, 662-67.

Prior to trial, the State moved to exclude any reference to Monroe's willingness to take a polygraph, arguing it would mislead the jury by prompting speculation as to why no test occurred because the State could not explain that polygraph results are inadmissible. SR:462-63; 577-78. Monroe objected, asserting the offer was relevant to show consciousness of innocence regarding premeditation. SR:469-71, 578-80. The circuit court, citing *State v. Dornbusch*, 384 N.W.2d 682 (S.D. 1986) and noting no South Dakota case law permitted evidence of a defendant's willingness to take a polygraph, barred the evidence. SR:580, 659.

A five-day jury trial ensued. SR:1483-2363. After the State's closing argument, Monroe moved for a mistrial, arguing the State "submitted to the jury that Mr. Monroe's statements should be used against Mr. Jones." SR:2298. The circuit court held it could "recall one occasion during state's closing statement where they referred to statements that would have been made by [] Monroe, and the prosecutor mistakenly said [] Jones." SR:2298. The circuit court determined the misstatement was not "done with the intent to mislead or to ask the jurors to hold statement by either defendant against the others." SR:2298.

The circuit court noted the jurors were instructed multiple times that they could not use any of the statements of either defendant against the other defendant; the prosecutor during its closing argument instructed the jurors as to the same; and the jurors were instructed that closing statements are not evidence. SR:2298. The circuit court did not find the prosecutor's "inadvertent mistake [rose] to the level of granting a mistrial or [was] so overly prejudicial that a mistrial [was] the only remedy available to this court." SR:2298.

The jury convicted Monroe of both counts. SR:837. The circuit court sentenced Monroe to fifty years imprisonment, with fifteen years suspended, for Attempted First-Degree Murder of a Law Enforcement Officer and twenty years imprisonment, with twenty years suspended, for Aggravated Assault Against a Department of Corrections Employee.

SR:859-67. These sentences were ordered to run concurrently to each other and consecutively to Monroe's prior sentence. SR:859.

STATEMENT OF THE FACTS

On August 24, 2023, Monroe was incarcerated at the South Dakota State Penitentiary for Simple Assault on Department of Corrections Employee. SR:24, 1770, 1776. Monroe was housed in Section Four of Unit D within the Jameson Annex. SR:1770. Corporal Harms was the only officer on the floor of Unit D as the prison was short staffed. SR:1767.

At around 8:09 a.m., inmates in Section Four were allowed to move freely within the Section. SR:1823, 1841-42, 1889-90; EX:21. Monroe left his cell, walked to the Section door, and looked out into Unit D's common area. EX:21; SR:1883. For approximately twenty minutes, Monroe paced between his cell and the Section door. EX:21.

Monroe's attention turned to Jones, who was standing on the top-tier of the Section. SR:1884-85; EX:21. Monroe walked up the stairs and the two talked for a couple minutes. SR:1879-80, 2015; EX:21. Based on their body language, it appeared they wanted to keep their conversation private. SR:1909, 2015.¹

During their conversation, the Section's sliding door opened. SR:1835; EX:21. While the door was open, Monroe walked down the

¹ No audio recording of the conversation exists. SR:1909.

stairs and out of the Section. EX:21. Monroe walked past Corporal Harms, who was leaning against the staff desk in the hallway. SR:1777.

Corporal Harms asked Monroe what he was doing, as he did not have permission to leave his Section. SR:1777. Monroe told Corporal Harms he wanted to see Mike, the Native American Cultural leader. SR:1777-78, 1805. Corporal Harms told Monroe he did not have permission to leave his Section. SR:1777-78. Monroe replied, "Why are you always such a dick to me?" SR:1777, 1780.

Before Corporal Harms could respond, Monroe struck him on the right side of his face. SR:1778, 1780. Then, Monroe pushed Corporal Harms onto the desk and began punching him in the head. SR:1777-78, 2011. As Monroe continued to hit Corporal Harms in the head, Monroe stated, "You think you're so tough? You're not so fucking tough now." SR:1780. Monroe pulled Corporal Harms off the desk and slammed him onto the floor. EX:21, 22. Monroe got on top of Corporal Harms and continued punching him in the head repeatedly. SR:1780; EX:21, 22.

Corporal Harms heard a "war cry[,]" which was "kind of just like a yell, but" it "echo[ed] from another section." SR:1781. Then, Jones quickly went down the stairs and exited the Section. SR:1929; EX:21, 22. Jones joined Monroe in the assault and began punching Corporal Harms in the head repeatedly. EX:21, 22. Corporal Harms felt himself blacking out and believed he was going to die. SR:1781, 1784.

Corrections Officer Zachary Runge was working in the delta pod, which is the control center for the floor. SR:1831. Officer Runge saw Corporal Harms being hit in the face, so he called a code red, which is an emergency response. SR:1832. Lieutenant Arop and officers from other Sections responded to the code red. SR:1952. Lieutenant Arop commanded Monroe and Jones to freeze or they would be tased. SR:1952. Monroe moved, so Lieutenant Arop deployed his Taser, causing Monroe to fall to the ground. SR:1785, 1952.

Corporal Harms was taken to the hospital and examined for his injuries. EX:4-14. Corporal Harms had facial bruising and was released from the hospital the same day. SR:1977, 1986. The entire assault lasted 45 seconds. SR:1806. During the assault, Monroe struck Corporal Harms in the head at least twenty times, and Jones struck him in the head at least fifty times. SR:2012-13, 2039.

After the assault, Monroe consented to being interviewed by Mike Hockett, supervisory special agent with the South Dakota Division of Criminal Investigation. EX:67, 68; SR:2096. Monroe stated the assault was “spontaneous” as he “just wanted to talk to Mike.” EX:67A pg. 3. Monroe remarked, “something triggered in” him when Corporal Harms told him to return to his unit, and he “just got angry real fast and . . . just punched him.” EX:67A pg. 3; EX:68A pg. 19. Monroe explained he “blanked out” and “everything just went red real fast . . . it just went explosive.” EX:67A pg. 12.

Monroe confessed he “got so pissed . . . so fast” and the next thing he knew he was “scrappin’ it out. [He] had him on the desk and [he] was punchin’ him in the face.” EX:67, 68. Monroe then “threw him off the desk.” EX:68A pg. 6.

Agent Hockett asked Monroe if he was trying to hurt Corporal Harms and Monroe responded “how can I . . . bounce his head off the concrete when he was curled up? I don’t know man. I was too pissed.” EX:68; 68A pg. 8. Again, Agent Hockett asked Monroe if he was trying to hurt Corporal Harms and Monroe answered, “that’s one of the reasons why people punch each other, right?” EX:68; 68A pg. 8.

When Monroe was asked what would have happened to Corporal Harms had guards not stopped the assault, Monroe stated, “’cuz I don’t know if I would have stopped. I don’t know if I should have stopped. I don’t know . . . if I was gonna stop.” EX:68; 68A pg. 11. Monroe stated hitting Corporal Harms gave him “almost like a good feeling. Like [he] was relieving stress or somethin’.” EX:68; 68A pg. 9.

ARGUMENTS

I.

THE CIRCUIT COURT PROPERLY DENIED MONROE’S MOTION TO SEVER HIS CASE FROM HIS CODEFENDANT.

Monroe asserts multiple errors in the circuit court’s refusal to sever his and Jones’ trials, arguing the circuit court violated *Bruton*, SDCL 23A-11-2, and his Sixth Amendment right of confrontation. AB:12-21. But the circuit court thoroughly analyzed *Bruton* and its

decision aligns with it and other case law, Monroe fails to meet the necessary showing to prove a statutory violation, and Jones' statements were nontestimonial and did not contribute to the verdict.

A. Monroe's right to confrontation was not violated by the introduction of Jones' prison phone calls because Jones' statements were not facially incriminating against Monroe.

Monroe argues a joint trial, where the audio recordings of Jones' phone calls with his mother were played, violated his right of confrontation and impaired his right to present a complete defense.

AB:12-21. The circuit court, consistent with Supreme Court precedent, concluded Jones' statements were not incriminating on their face as to Monroe and only become incriminating when linked with other evidence. SR:375, 665-67. Because Monroe is alleging his Sixth Amendment right to confront witnesses was violated, his claim is reviewed de novo. *State v. Zakaria*, 2007 S.D. 27, ¶¶ 8-9, 730 N.W.2d 140, 143 ("Alleged violations of constitutional rights are reviewed de novo.")

Prior to trial, the State filed a Notice of Intent to offer four prison phone calls between Jones and his mother as evidence of the codefendants' motive in assaulting Corporal Harms. SR:235-40. In response, Monroe moved to sever his case from Jones. SR:260-65. The circuit court evaluated Monroe's motion and found "the issue here hinges on whether or not the statements of Defendant Jones that are being offered by the state violate the United States Supreme Court's holding in *Bruton*." SR:665. The circuit court held:

[T]he statements are inculpatory in nature and that they do, in a roundabout way, discuss the fact that there was some type of incident that took place regarding Defendant Jones and another individual. At no place in Statements 1, 2, and/or 3 is that other individual named. That other individual is referred to as “he” or as “my brother.” At no point is Defendant Monroe explicitly referred to in any of the statements that Mr. Jones made to his mother, Donna Jones, on the phone. The Court relies on the holding in *State v. Fool Bull*, where the South Dakota Supreme Court analyzed a circuit court’s decision to not sever a trial, and the South Dakota Supreme Court upheld that decision noting that none of the statements offered specifically identified the codefendant who wished the trials to be severed. 2009 S.D. 36, [¶] 30, 766 N.W.2d 159. The South Dakota Supreme Court ultimately ruled that those nonspecific statements fell within the *Richardson* rule and not under *Bruton*.

While the statements are inculpatory as to Defendant Jones, the Court does not find that they are facially incriminating as to Defendant Monroe. There is no explicit reference at any point to the defendant. The holding in *Richardson* essentially states that where there is not an explicit reference to a defendant, that offering a codefendant’s statements against that defendant in the same trial is not violative of *Bruton*.

SR:666. The circuit court correctly denied Monroe’s motion to sever because the statements at issue did not incriminate Monroe on their face but only became so when linked with other evidence.

On appeal, Monroe asserts “the redactions used in this case were constitutionally inadequate because Jones’ statements repeatedly described planned conduct with another participant whose identity was obvious in context.” AB:16 (citing *Bruton*, 391 U.S. at 123). Monroe then argues “Jones’ calls leave no question as to who he was referencing and therefore went beyond the permissible inferential connection as

permitted under *Richardson*.” AB:18. Monroe claims his situation “is precisely the type of contextual identification the Supreme Court addressed in *Gray*.” AB:18 (citing *Gray v. Maryland*, 523 U.S. 185 (1998)).²

A defendant is deprived of his “Sixth Amendment right of confrontation when the *facially incriminating* confession of a nontestifying codefendant is introduced at their joint trial[.]” *State v. Stanley*, 2017 S.D. 32, ¶ 27, 896 N.W.2d 669, 679 (quoting *Richardson v. Marsh*, 481 U.S. 200, 207 (1987)) (emphasis in original). In *Bruton*, the codefendant’s confession “expressly implicat[ed]” Bruton as his accomplice. *Id.* ¶ 28 (citing *Bruton*, 391 U.S. at 124). However, *Bruton* does not apply when statements of codefendants are not inculpatory. In *Richardson*, the Supreme Court clarified “there is an important distinction between this case and *Bruton*[,]” as the confession in this case was not “incriminating on its face, and became so only when linked with evidence introduced later at trial[.]” *Richardson* at 208. This Court has also recognized this distinction. See *State v. Johnson*, 509 N.W.2d 681, 686 (S.D. 1993) (concluding no error in refusal to sever, because the statements were not inculpatory); compare *Iron Shell v. Leapley*, 503 N.W.2d 868, 870 (S.D. 1993) (concluding that under *Bruton*, the admission of inculpatory statements violates the Sixth Amendment).

² The State concurs with Monroe’s thorough summary of the applicable caselaw. AB:12-15.

In *Gray*, the codefendant's confession was redacted by replacing the defendant's name with the word "deleted." *Gray*, 523 U.S. at 188-189. The Supreme Court held "despite redaction [the statements] obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Id.* at 194.

Here, Jones' statements do not directly name Monroe and instead include statements like "my brother"; "He's in the same section as me"; and "Everything I told him to do he does, he did it without no hesitation." SR:663-64. The statements could refer to any of the inmates in Jones' Section. Monroe argues the reference to him is "obvious in context," but his assertion only supports the court's finding that this is a *Richardson* and not a *Bruton* issue. Jones' statements only implicate Monroe when linked with additional evidence; accordingly, the circuit court properly found this case falls within the framework of *Richardson* and does not constitute a *Bruton* violation. Monroe's right to confrontation was not violated, and the circuit court did not err when it denied Monroe's motion to sever.

B. The circuit court did not abuse its discretion in refusing to sever under SDCL 23A-11-2.

Monroe argues he was entitled to severance under SDCL 23A-11-2, which affords a circuit court the ability to order separate trials if it

appears that a defendant would be prejudiced by a joint trial. AB:19. Monroe argues the joint trial deprived him of his fundamental constitutional right to a fair opportunity to present a defense because he was effectively prevented from meaningfully challenging the credibility or meaning of Jones' prison phone call conversations. AB:20-21.

When defendants have been properly joined for trial, a court should grant a severance “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Zakaria*, 2007 S.D. 27, ¶ 13, 730 N.W.2d at 143 (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)). This Court has held “[t]o cause the type of prejudice that prevents co-defendants from obtaining a fair trial, the defenses must be more than merely antagonistic. They must conflict to the point of being irreconcilable and mutually exclusive so that acceptance of one defendant's defense will preclude the acquittal of the other defendant.” *Id.* (quoting *State v. Jenner*, 434 N.W.2d 76, 80 (S.D. 1988)). Even “one defendant’s desire to exculpate himself by inculcating a co-defendant does not necessarily render the defenses irreconcilable and mutually exclusive.” *Id.* (quoting *State v. Shape*, 517 N.W.2d 650, 656 (S.D. 1994)).

The court’s severance ruling, “will be reversed on appeal only if the defendant demonstrates an abuse of discretion.” *Zakaria*, 2007 S.D. 27,

¶ 13, 730 N.W.2d at 143 (quoting *Jenner*, 434 N.W.2d at 80); *State v. Birdshead*, 2015 S.D. 77, ¶ 26, 871 N.W.2d 62, 73.

“The defendant establishes an abuse of discretion by showing *substantial* prejudice which constitutes a denial of a fair trial.” *Id.* (emphasis in original) (citations omitted). “A certain amount of prejudice to a defendant is regarded as acceptable given the judicial economies that result from joinder.” *Id.* (citation omitted). But prejudice to the defendant is not the only consideration a court must make. “‘The [trial] court must consider . . . possible prejudice to the government because of two time-consuming, expensive, and duplicitous trials.’” *Id.* (citation omitted).

Jones and Monroe’s defenses were not irreconcilable. Monroe’s defense was simple: Monroe was having a bad day and did not know how to process his emotions, so he lashed out at Corporal Harms. SR:2303. Jones’ defense was that when he noticed Monroe was in a fight, he came to “his brother’s aid.” SR:2321. In the phone call to his mother, Jones’ references to “standing on my business” and “standing up for my people” could be construed as consistent with a reactive obligation to assist “his brother” without premeditation.

The jury heard Monroe’s defense that the assault was not premeditated. The jury nonetheless returned guilty verdicts on both counts. The State presented substantial evidence from which a rational jury could find that Jones and Monroe’s assault on Corporal Harms was

premeditated, disguised as a chance attack after a minor rule infraction. That evidence presented at trial, namely the surveillance videos of the assault, coupled with Monroe's statements made during his interviews, was sufficient to sustain Monroe's conviction. EX:21, 22, 67, 68.

Monroe has not shown there was a serious risk that the joint trial compromised his rights, nor that the jury was unable to make a reliable judgment about his guilt or innocence. He has not shown that Jones attempted to exculpate himself by inculcating Monroe. He has not shown his and Jones' defense were wholly incompatible. And he has not shown that the acceptance of Jones' defense precluded a potential acquittal of Monroe. Under these circumstances, the circuit court properly refused to sever Monroe and Jones' trial under SDCL 23A-11-2.

C. Because Jones' recorded phone calls were not testimonial, Monroe's confrontation rights were not violated.

Monroe argues that even if severance was not required under the Rules of Criminal Procedure or *Bruton*, the admission of Jones' statement without opportunity to cross-examine violated Monroe's Sixth Amendment right of confrontation. AB:28. Issues involving this constitutional right are reviewed de novo. *State v. Carothers*, 2005 S.D. 16, ¶ 7, 692 N.W.2d 544, 546.

"The Sixth Amendment to the United States Constitution provides that a criminal defendant has the right to be 'confronted with the witnesses against him.'" *State v. Clifford*, 2026 S.D. 16, ¶ 26, -- N.W.3d -- (quoting *State v. Dickerson*, 2022 S.D. 23, ¶ 27, 973 N.W.2d 249, 258).

“The Supreme Court has made clear that the Confrontation Clause ‘applies only to testimonial hearsay,’ a two-word phrase that requires exclusion if the statements are (1) hearsay and (2) testimonial.” *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 823 (2006); *Smith v. Arizona*, 602 U.S. 779, 784 (2024)).

“Hearsay means a statement that: (1) [t]he declarant does not make while testifying at the current trial or hearing; and (2) [a] party offers in evidence to prove the truth of the matter asserted in the statement.” SDCL 19-19-801. Jones’ statements were made out of court and presented to the jury to prove intent, motive, preparation, and common plan or scheme. SR:236.

To determine whether a statement is testimonial, “the question is whether, in light of all the circumstances, viewed objectively, the ‘primary purpose’ of the conversation was to ‘creat[e] an out-of-court substitute for trial testimony.’” *State v. Carter*, 2023 S.D. 67, ¶ 63, 1 N.W.3d 674, 694-95 (quoting *Ohio v. Clark*, 576 U.S. 237, 245 (2015)). “Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.” *Id.* ¶ 63, 1 N.W.3d at 695 (quoting *Clark*, 576 U.S. at 245).

Jones’ statements to his mother via the prison phone system were made of his own volition. Jones was confiding in his mother; therefore, the primary purpose of the conversation was not to create an out-of-

court substitute for trial testimony. So, Jones' statements were not testimonial.

This Court held “[i]t is now well accepted that admission of a co-defendant’s statement without opportunity to cross-examine is subject to harmless error analysis.” *Zakaria*, 2007 S.D. 27, ¶ 18, 730 N.W.2d at 145. The harmless error rule governs, and a challenged conviction is affirmed, “provided the court is able to declare a belief beyond a reasonable doubt that the error was harmless and did not contribute to the verdict obtained.” *Id.* ¶ 19, 730 N.W.2d at 146.

Monroe has not shown that, absent Jones’ statements, the jury would have returned a different verdict, as the entire assault was captured on surveillance video. EX:21, 22. Prior to the assault, Monroe approached Jones and the two talked for a couple of minutes; their body language indicated they wanted to keep their conversation private. SR:1879-80, 1909, 2015; EX:21. After Monroe slammed Corporal Harms onto the floor and continued to punch Corporal Harms in the head repeatedly. EX:21, 22. Corporal Harms testified that he heard a “war cry[,]” which he described was “kind of just like a yell, but” it “echo[ed] from another section.” SR:1781. In response to the war cry, Jones came to Monroe’s aid. EX:21, 22. In total, Monroe struck Corporal Harms in the head at least twenty times, and Jones struck him in the head at least fifty times. SR:2012-13, 2039.

After the assault, Monroe consented to being interviewed. EX:67, 68. When Monroe was asked if he was trying to hurt Corporal Harms, Monroe responded “that’s one of the reasons why people punch each other, right?” EX:68. Monroe also said the assault was spontaneous, he hated himself for not being able to control himself and his emotions, and he had no idea of why Jones joined the assault. EX:67, 68. When asked what would have happened to Corporal Harms, had guards not stopped the assault, Monroe stated, “I don’t know if I would have stopped, I don’t know if I should have stopped, I don’t know if I was gonna stop.” EX:68. Monroe also stated that hitting Corporal Harms gave him a good feeling and was a stress reliever. EX:68. Further, both the State and Defense expert testified that head injuries can be life threatening. SR:1983, 1986, 2208, 2210. The Defense expert testified that because Corporal Harms suffered from facial bruising, there must have been significant force inflicted. SR:2190, 2216.

The evidence presented established that Monroe attempted to cause serious bodily injury to Corporal Harms under circumstances manifesting extreme indifference to the value of human life and had a premeditated design to effect his death. It was clear Monroe was not going to stop assaulting Corporal Harms, and the only reason he stopped is because law enforcement intervened. The surveillance videos of the assault, coupled with Monroe’s confessions during his interviews, were

sufficient to sustain Monroe's conviction regardless of Jones' statements.
EX:21, 22, 67, 68.

II.

THE CIRCUIT COURT PROPERLY DENIED MONROE'S MOTION FOR A MISTRIAL.

Monroe sought a mistrial based on a single misstatement in the State's closing argument, claiming the prosecutor attributed statements to him made by his codefendant. But a mistrial is an extraordinary remedy, and this Court will disturb a circuit court's denial for a mistrial only upon a showing of an abuse of discretion resulting in clear prejudice. Here, the circuit court correctly concluded that the prosecutor's isolated and inadvertent misstatement did not approach the level of prejudice necessary to warrant a mistrial.

This Court will affirm a circuit court's denial of a mistrial unless it finds an "abuse of discretion resulting in clear prejudice." *State v. Kvasnicka*, 2013 S.D. 25, ¶ 17, 829 N.W.2d 123, 127 (citation omitted). "Abuse of discretion is defined as 'a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which on full consideration, is arbitrary or unreasonable.'" *Id.* (quoting *State v. Lemler*, 2009 S.D. 86, ¶ 40, 774 N.W.2d 272, 286).

" 'A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone,' but, if the prosecutor's conduct affects the fairness of the trial when viewed in context of the

entire proceeding, reversal can be warranted.” *State v. Horse*, 2024 S.D. 4, ¶ 24, 2 N.W.3d 383, 392 (quoting *State v. Hankins*, 2022 S.D. 67, ¶ 33, 982 N.W.2d 21, 33). “For purposes of determining whether there are grounds for a mistrial there must be error ‘which, in all probability, produced some effect upon the jury’s verdict and is harmful to the substantial rights of the party assigning it.’” *State v. Ortiz-Martinez*, 2023 S.D. 46, ¶ 26, 995 N.W.2d 239, 244 (quoting *State v. Red Cloud*, 2022 S.D. 17, ¶ 39, 972 N.W.2d 517, 530). The “ ‘all probability’ phrase should be understood as ‘a reasonable probability that, but for [the error], the result of the proceeding would have been different.’” *State v. Richard*, 2023 S.D. 71, ¶ 26, 1 N.W.3d 654, 662 (quoting *State v. Carter*, 2023 S.D. 67, ¶ 26, 1 N.W.3d 674, 686).

After the State’s closing argument, Monroe moved for a mistrial, arguing the State “submitted to the jury that Mr. Monroe’s statements should be used against Mr. Jones.” SR:2298. The State responded:

[T]hat was an inadvertent statement. I don’t recall that and told them every time I used the statements that they could only be used against the person making the statement. I said that from the beginning of the argument, to follow the court’s instruction. They have an instruction on that. I can clear that up in rebuttal. They can clear it up in their closing arguments if that statement was made. It was inadvertent and was inconsistent with everything that had been told to them.

SR:2298. The circuit court held:

I can recall one occasion during state’s closing statement where they referred to statements that would have been made by Lester Monroe, and it appeared to the court that

they mistakenly said Kyle Jones. I do not find that was intentional or done in bad faith. I do not find that it was done with the intent to mislead or to ask the jurors to hold statement by either defendant against the others. The jurors have been instructed both during the trial and at the close of the trial that they cannot use any of the statements of either defendant against the other defendant.

I also note that Ms. Quasney at multiple times during her closing argument instructed the jurors as to the same. I find the jurors have also been instructed by the court that closing statements, opening statements, comments by counsel, and questions by counsel are not evidence. I do not find that Ms. Quasney's inadvertent mistake rises to the level of granting a mistrial or is so overly prejudicial that a mistrial is the only remedy available to this court.

I do find this could be cleared up by rebuttal by the state. I would encourage them to clear that up in rebuttal, and for those reasons the defense's motion for a mistrial is denied at this time.

SR:2298-99. Monroe did not object to the circuit court's ruling.

SR:2299. During Monroe's closing statement, the jury was instructed:

Specifically, I'd like to draw your attention to jury instruction number 26 where you are advised that the phone calls that the state has submitted against Kyle Jones cannot and must not be considered when coming to your conclusion about Lester Monroe's guilt or innocence. You cannot and you must not take that into consideration when you are rendering a verdict for Lester Monroe.

SR:2319. During its rebuttal, the State reminded the jury:

I want to stop and just say again, a reminder that Lester Monroe's interviews can only be used against Lester Monroe, that the prison calls can only be used against Kyle Jones. Ms. Beck noted that I inadvertently switched the names at one point. That was unintentional, should not use that against the other. I think it was in Lester Monroe's interview talking about when they were going to stop. That is only against Lester Monroe, not against Kyle Jones.

SR:2346.

On appeal, even with the benefit of transcripts, Monroe does not point to the exact moment when the State made the alleged error. It appears the misstatement happened when the State was discussing Monroe's interview and said, "despite Lester Monroe's interview that he claims this was a mutual fight." SR:2283. At most, any alleged misstatement by the State that referenced Jones while discussing Monroe's interview would have affected Jones, not Monroe.

That said, a single, inadvertent misattribution during closing cannot, as a matter of law, meet the high bar for a mistrial; this Court's precedent demonstrates this to be true.

In *Horse*, the defendant argued the prosecutor's statement should have been grounds for a mistrial because the impermissible comment amounted to prosecutorial misconduct that improperly bolstered the witness's credibility. *Horse*, 2024 S.D. 4, ¶ 23, 2 N.W.3d at 391. This Court held "[t]he prosecutor's remark, while improper, was not so reprehensible that it 'infected the trial with unfairness' so as to require reversal[]" because it "was a very short statement" and "the circuit court took appropriate curative action by striking the comment from the record and by reiterating the preliminary instruction given to the jury that comments and objections made by the attorneys are not evidence that should be considered." *Id.* ¶ 25, 2 N.W.3d at 392.

Additionally, in *Lee*, this Court held the prosecutor's improper expression of his opinion during closing argument did not reach the level

of reversible error because the trial court's admonition to jury that prosecutor's opinion was not evidence served to curtail any improper inference the jury may have taken from the closing arguments. *State v. Lee*, 599 N.W.2d 630 (S.D. 1999). In *Martin*, when a prosecutor misstated the law, this Court held that the trial court properly instructed the jury and concluded there was no indication that the trial court's measures were insufficient to cure any misunderstanding engendered by the prosecutor's isolated statements. *State v. Martin*, 2004 S.D. 82, 683 N.W.2d 399.

Here, the State's alleged mistake compromised less than one sentence of a more than 800-page trial. This alleged error was harmless in the context of the trial as a whole. *See Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993) (holding the prosecution's "references to [Brecht's] post-*Miranda* silence" were harmless because those references "compris[ed] less than two pages of the 900-page trial transcript."); *Neels v. Fluke*, 109 F.4th 1021, 1033 (8th Cir. 2024) (rejecting ineffective assistance claim, because counsel did not object to the prosecution's opening statement for lack of prejudice because the improper comments were limited to "just three pages of the six-volume jury trial transcript that totaled more than 700 pages."); *United States v. Rodriguez*, 581 F.3d 775, 804 (8th Cir. 2009) (finding when a challenged statement comes during a single phase of trial, it has only a small effect on a trial that is] filled with overwhelming evidence of the defendant's guilt[.]").

On appeal, Monroe argues the circuit court delegated its judicial power of instructing the jury to the State, so this issue should be reviewed de novo. AB:22. That claim is unsupported by the record. The circuit court did not find that the State’s statement rose to the level of granting a mistrial or was so overly prejudicial that a mistrial was the appropriate remedy. SR:2299. The circuit court noted the jurors were repeatedly instructed they could not use either defendant’s statements against the other defendant. SR:818-20, 2299. Lastly, the circuit court commented that any confusion could be cleared up in the State’s rebuttal.

Context shows the State was not offering a curative instruction, usurping the circuit court’s authority, but rather removing any confusion caused by the misstatement. The circuit court properly found a mistrial was not warranted for an inadvertent statement. Because the circuit court did not delegate its judicial power, de novo review does not apply and, as stated previously, this Court affirms a circuit court’s denial of a mistrial unless it finds an abuse of discretion resulting in clear prejudice.

To support his mistrial argument Monroe relied on *Rose*. AB:25 (citing *State v. Rose*, 2024 S.D. 56, ¶ 23, 12 N.W.3d 127, 134). In *Rose*, the trial court found the State met its heavy burden of proving “manifest necessity” for granting a mistrial because of the many errors that occurred at trial. *Id.* ¶ 30, 12 N.W.3d at 136. On appeal, *Rose* claimed the magistrate court abused its discretion in granting the State’s motion

for a mistrial, and, as a result, double jeopardy was violated when he was tried for the same offense. *Id.* ¶ 24, 12 N.W.3d at 134. This Court held it could not “say the court ‘clearly abused’ its considerable discretion in determining that there was a manifest necessity warranting a mistrial.” *Id.* ¶ 42, 12 N.W.3d at 139. Not only does *Rose* involve a state-requested mistrial, which carries a significantly higher burden than a defendant-requested mistrial to protect against double jeopardy violations, that case only supports that a mistrial was not warranted in this case.

Here, the State inadvertently misspoke during its closing statement. The circuit court found a mistrial was not warranted and it was appropriate for the State to clear any confusion of its misstatement during its rebuttal. Monroe failed to assert how any alleged error had any effect on the jury’s verdict or was harmful to his substantial rights. As discussed above, ample evidence existed to support Monroe’s conviction.

Finally, the jury was correctly and repeatedly instructed about how it could use Monroe’s and Jones’ statements. In fact, three instructions expressly forbade any cross-use of the statements. SR:818-20. It was also instructed that closing statements were not evidence. SR:760. We must presume the jury followed these instructions. *State v. Shelton*, 2021 S.D. 22, ¶ 30, 958 N.W.2d 721, 731.

Ultimately, a prosecutor’s isolated and inadvertent misstatement in closing argument does not warrant the extraordinary remedy of a

mistrial. Guided by this Court's precedent, which requires both a fundamentally unreasonable judicial decision and a reasonable probability of harm to the defendant's substantial rights, Monroe cannot satisfy this demanding standard. The circuit court reasonably found mistrial was not warranted, and Monroe cannot meet the high bar required to disturb that ruling. Under this Court's precedent, the denial of a mistrial must be affirmed.

III.

THE CIRCUIT COURT PROPERLY EXCLUDED EVIDENCE OF MONROE'S WILLINGNESS TO TAKE A POLYGRAPH.

Monroe argues the circuit court erred by excluding evidence of his willingness to take a polygraph test. This Court reviews evidentiary rulings for an abuse of discretion and will disturb such decisions only when a clear error is shown and that error is prejudicial. *State v. Loeschke*, 2022 S.D. 56, ¶ 17, 980 N.W.2d 266, 272; *State v. Mitchell*, 2021 S.D. 46, ¶ 27, 963 N.W.2d 326, 332. Guided by this deferential standard, the question is not whether another court might have ruled differently, but whether the circuit court acted within the broad range of permissible choices when it determined that Monroe's offer to take a polygraph should be excluded. Here, the record shows that the court undertook a detailed review of the governing authorities, including this Court's longstanding precedent barring polygraph-related evidence and persuasive caselaw from other jurisdictions, before determining that Monroe's offer was inadmissible.

After the assault occurred, Monroe waived his *Miranda* rights and was interviewed by Agent Hockett. EX:68, 69. Monroe was asked what he and Jones discussed before the assault, and Monroe responded “I can’t remember . . . But it wasn’t, it had nothing to do with Harms. Ya know what I mean?” Agent Hockett then said, “[a]re you willing to take a polygraph about that?” and Monroe responded “yeah, it would help me in court too.” SR:464.

The State sought to prohibit evidence of Monroe’s willingness to take a polygraph. SR:462-63. The State argued:

If the willingness to take a polygraph were to be left in, the jury would be left to wonder why the defendant did not take one or why the State did not offer one. The State cannot comment on the fact that defendant Monroe was appointed counsel shortly after the interview. The State further cannot comment on the fact that polygraph results are not admissible regardless of their results. The Circuit Court in *State v. Hernandez*, 11CRI19-2[5]0, a South Dakota Charles Mix Circuit Court case, recently precluded the willingness of a defendant to take a polygraph, citing inter alia, *State v. Winter*[.]

SR:462, 577-78. Monroe objected, arguing that his willingness to take the polygraph was probative of his consciousness of innocence when defending allegations of premeditation. SR:469-71, 578-80.

The circuit court, relying on *Dornbusch*, precluded evidence about Monroe’s willingness to take the polygraph. SR:659. In *Dornbusch*, this Court remarked a “defendant’s unwillingness to submit to a polygraph is something that should not be admitted in court.” SR:580, 659 (citing

Dornbusch, 384 N.W.2d at 685-86 (S.D. 1986)). The circuit court commented there has “never [been] a case in our state go up on appeal where the opposite . . . scenario has been posited, which is when a defendant offers to take a polygraph.” SR:581. So the circuit court considered a recent circuit court’s ruling in *State v. Hernandez*, 11CRI19-250, where the trial court precluded the defendant’s offer to take a polygraph at trial. SR:581. The circuit court relied on the authorities cited to in *Hernandez*. SR:581 (citing *State v. Winter*, 668 N.W.2d 222 (Minn. App. 2003); *State v. Schaeffer*, 457 N.W.2d 194, 197 (Minn. 1990); 29 Am. Jur. 2d Evidence § 542; 75A Am. Jur. 2d Trial § 524; and 95 A.L.R.2d 819, Propriety and Prejudicial Effect of Comment or Evidence as to Accused’s Willingness to Take Lie Detector Test). SR:660. The circuit court also “reviewed the Wisconsin authority cited by defense, providing certain circumstances where the offer to take a polygraph is admissible in Wisconsin. However, absent clear authority in South Dakota, this Court finds the analysis apposite to *Dornbusch*, *supra*.” SR:581, 661.

Further, the circuit court, finding no Eighth Circuit Court of Appeals cases on point, relied on *Dinga* as persuasive authority, which held evidence that a defendant offered to take a polygraph test was not admissible at trial. SR:581 (citing *United States v. Dinga*, 609 F.3d 904, 908-9 (7th Cir. 2010)).

The circuit court noted:

[S]ome of the reasons cited by that court as to why they won't let the offer of taking the polygraph come in is that it may leave a juror with an erroneous belief that an offer necessarily means that the defendant is innocent and that the offer to take the test is only marginally probative on credibility. The court there said that absent an agreement that polygraph results, whether or not they are favorable, would be admissible in court, the defendant has little at stake in expressing their willingness to submit to a polygraph. Especially where no test was ever taken, there's no way of knowing what the defendant knew about the subsequent admissibility of the test results. The defendant may have believed that test would be taken, the results would be admissible, or they may have known they would never submit to a test or they may have believed that any results would be inadmissible in court. The great potential of confusing the issues and misleading the jury substantially outweighed any probative value of the offer as to the defendant's credibility. And when the district court declined to allow the defendant to offer evidence of his offer to take a polygraph, the Seventh Circuit found that was not an abuse of discretion by the trial court.

SR:582-83. The circuit court granted the State's motion to redact any mention of the polygraph, stating:

[A]bsent clear directive [and] because of the South Dakota Supreme Court's prior ruling in *Dornbusch* regarding a defendant's unwillingness to submit to a polygraph not being proper to put before a jury, I similarly find the defendant's willingness to submit to a polygraph is also not something that should go in front of a jury. I think that it skates on the line of impermissible vouching. I also find the Seventh Circuit *Dinga* holding to be persuasive. That any probative value is marginal here. And I do find that it would lead to great jury confusion issues.

SR:582-83; 661.

Monroe argues the circuit court erred in relying on *Dinga* and instead, the circuit court should have relied on *Santana-Lopez* in which, the Wisconsin Court of Appeals held the willingness of a defendant to

take a polygraph is “relevant to the state of mind of the person making the offer—so long as the person making the offer believes that the test or analysis is possible, accurate, and admissible.” AB:34 (citing *State v. Santana-Lopez*, 613 N.W.2d 918, 921 (Wis.App. 2000)).

The circuit court considered *Santana-Lopez* but found its “analysis apposite to *Dornbusch*, *supra*.” SR:581, 661. The circuit court held that even if *Santana-Lopez* applied, “[t]he great potential of confusing the issues and misleading the jury substantially outweighed any probative value of the offer as to the defendant’s credibility.” SR:582. The circuit court held Monroe’s “willingness to submit to a polygraph is also not something that should go in front of a jury” and “skate[d] on the line of impermissible vouching.” SR:582-83; 661.

This Court’s precedent supports the circuit court’s decision. In *Banks*, this Court held “[g]iven the reliability concerns surrounding polygraph evidence, this Court has established a per se rule prohibiting the admission of polygraph evidence in criminal and civil cases.” *State v. Banks*, 2023 S.D. 39, ¶ 25, 994 N.W.2d 230, 238 (citing *State v. Bertram*, 2018 S.D. 4, ¶ 14, 906 N.W.2d 418, 423-24). This Court “explained the basis for this per se rule, citing three rules of evidence, as follows:

The rationale advanced for not admitting evidence of polygraph results, in civil or criminal cases, is that such evidence is irrelevant because of dubious scientific value [(Rule 402)], it has no ‘general scientific acceptance as a reliable and accurate means of ascertaining truth or deception,’ it is not reliable [(Rule 702)], it has no probative value, and it is likely to be given significant, if not conclusive

weight by the jury, so that ‘the jurors’ traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is thereby preempted’ [(Rule 403)].”

Id. (quoting *Bertram*, 2018 S.D. 4, ¶ 14, 906 N.W.2d at 423-24).

As *Banks* makes clear, the per se rule excluding polygraph results is grounded in fundamental questions of scientific reliability, lack of general acceptance, and the substantial risk that such evidence would unduly influence a factfinder. Monroe has not identified any development—scientific, legal, or otherwise—that would undermine the rationale reaffirmed in *Banks*. Monroe has not demonstrated that any circumstance relevant to this Court’s longstanding reliability concerns regarding polygraph evidence has changed. Nor has he convincingly shown that the mere willingness to take a polygraph is reliable evidence of one’s innocence. Accordingly, nothing in Monroe’s argument provides a basis for departing from this Court’s established rule.

In conclusion, the circuit court carefully conducted a review of the applicable caselaw and thoroughly explained its reasoning for excluding evidence of Monroe’s willingness to take a polygraph. Given the absence of South Dakota precedent permitting such evidence, the persuasive authority cautioning against its admission, and the substantial risk of juror confusion, the exclusion of his willingness to take a polygraph test was well within the permissible range of evidentiary decisions.

IV.

THE CIRCUIT COURT PROPERLY ENTERED JUDGMENTS FOR ATTEMPTED FIRST-DEGREE MURDER OF A LAW ENFORCEMENT OFFICER AND AGGRAVATED ASSAULT AGAINST A DEPARTMENT OF CORRECTIONS EMPLOYEE.

Monroe claims his right against double jeopardy was violated when he was convicted and sentenced for Attempted First-Degree Murder of a Law Enforcement Officer and Aggravated Assault Against a Department of Corrections Employee. AB:36-37. Under the analysis set forth in *Blockburger* and this Court's precedent in *Johnson* Monroe's double jeopardy claim fails.

This Court reviews "double jeopardy claims under the de novo standard of review." *State v. Johnson*, 2007 S.D. 86, ¶ 12, 739 N.W.2d 1, 6. "Established double jeopardy jurisprudence confirms that the Legislature may impose multiple punishments for the same conduct without violating the Double Jeopardy Clause if it clearly expresses its intent to do so." *Id.* ¶ 13, 739 N.W.2d at 6 (quoting *State v. Weaver*, 2002 S.D. 76, ¶ 8, 648 N.W.2d 355, 358). "The true intent of the legislature is ascertained primarily from the language of the statute." *State v. Lafferty*, 2006 S.D. 50, ¶ 6, 716 N.W.2d 782, 784.

Aggravated Assault Against a Department of Corrections Employee is "as provided in § 22-18-1.1" and must be committed against a Department of Corrections employee, while officer or employee was engaged in the performance of their duties. SDCL 22-18-1.05. The specific Aggravated Assault subsection that Monroe was charged under

requires the defendant to “[a]ttempt[] to cause serious bodily injury to another, or causes such injury, under circumstances manifesting extreme indifference to the value of human life.” SDCL 22-18-1.1(1).

Attempted First-Degree Murder of a Law Enforcement Officer is an Attempted First-Degree Murder, as defined by § 22-16-4 and must be “committed against a law enforcement officer while the officer was engaged in the performance of the officer’s duties[.]” SDCL 22-4-3. First-Degree Murder requires the crime to be committed “without authority of law and with a premeditated design to effect the death of the person killed or of any other human being[.]” SDCL 22-16-4.

These statutes do not expressly preclude or authorize cumulative punishments; thus, the legislative intent is uncertain. When legislative intent to impose multiple punishments is uncertain, this Court employs the *Blockburger* analysis. *State v. Dillon*, 2001 S.D. 97, ¶ 18, 632 N.W.2d 37, 45 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Under *Blockburger*, “the test to be applied to determine whether there are two separate offenses or only one is whether each provision requires proof of an additional fact which the other does not.” *Johnson*, 2007 S.D. 86, ¶ 16, 739 N.W.2d at 7 (citing *Lafferty*, 2006 S.D. 50, ¶ 11, 716 N.W.2d at 786). “Whether conduct constitutes more than one offense is to be bound by examining only the statutory elements comprising the offenses without regard to how the offenses were charged, how the jury

was instructed, or how the underlying proof for the necessary elements was established.” *Id.* (citation omitted).

In *Johnson*, the defendant claimed his right against double jeopardy was violated when he was convicted and sentenced for Attempted First-Degree Murder and Aggravated Assault. *Id.* ¶ 1, 739 N.W.2d at 5. This Court held while there is no explicit language that authorizes or prohibits punishment for Attempted Murder and Aggravated Assault arising from a single transaction, under the analysis set forth in *Blockburger*, Johnson’s double jeopardy claim failed. *Id.* ¶ 19, 739 N.W.2d at 7. This Court held:

Although in some cases the required act toward committing the murder may result in serious bodily injury, it is not a statutory element of attempted murder. One can envision situations in which one could be convicted of attempted murder without any injury to the intended victim, for example shooting at someone and missing. Consequently, we must conclude that each offense requires proof of a fact which the other does not. In other words, aggravated assault requires proof of the statutory element of “serious bodily injury” while attempted murder does not. One is not subsumed into the other as a lesser included offense.

Id. ¶ 17, 739 N.W.2d at 7. This Court remarked that other jurisdictions have similarly held that a defendant’s convictions for both Attempted Murder and Aggravated Assault did not violate double jeopardy protections. *Id.* ¶ 18, 739 N.W.2d at 7 (citing *State v. Armendariz*, 140 N.M. 182, 141 P.3d 526, 533-34 (2006) (“although the two statutes may be violated together, they are not necessarily violated together. There are

countless situations where aggravated battery is committed with only an intent to injure, not an intent to kill.”).

The sole difference between *Johnson* and this case is that Monroe’s offense involved a correctional officer. Even with this caveat, the analysis from *Johnson* applies. Attempted First-Degree Murder of a Law Enforcement Officer and Aggravated Assault Against a Department of Corrections Employee require proof of a fact which the other does not. Aggravated assault requires an “[a]ttempt[] to cause serious bodily injury to another, or causes such injury, under circumstances manifesting extreme indifference to the value of human life.” SDCL 22-18-1.1(1). Whereas First-Degree Murder requires “a premeditated design to effect the death of the person killed[.]” SDCL 22-16-4. While there is no explicit statutory language that either authorizes or prohibits criminal punishment for both Attempted Murder and Aggravated Assault arising from a single transaction, under the analysis set forth in *Blockburger*, and this Court’s precedent in *Johnson*, Monroe’s double jeopardy claim fails.

Monroe also argues “[t]he trial court did not take steps to comply with the *Washington* rule[.]” AB:36-37 (citing *State v. Washington*, 2024 S.D. 64, 13 N.W.3d 492). In *Washington*, this Court held “where a guilty verdict has been rendered on multiple counts for a single statutory offense resulting from the same act, a sentencing court should include express language stating that no judgment of conviction is being entered

on a particular count.” *Washington*, 2024 S.D. 64, ¶ 71, 13 N.W.3d at 513. Monroe did not have two convictions for the *same* offense; so, the recommendation from *Washington* does not apply.

CONCLUSION

The circuit court carefully applied the correct legal standards at every stage, exercised sound discretion in its evidentiary rulings, and properly rejected Monroe’s attempts to avoid the consequences of his actions. None of Monroe’s claims establish constitutional error, let alone prejudice capable of undermining the overwhelming evidence of his guilt. The State presented clear, corroborated proof of Monroe’s conduct, and the court’s decisions were firmly grounded in controlling precedent. Monroe’s arguments ask this Court to disregard those principles and to second-guess routine trial rulings that were both reasonable and legally unassailable. Because the law, the facts, and the interests of justice all support the circuit court’s judgment, the State respectfully requests that this Court affirm Monroe’s convictions and sentence in their entirety.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ Renee Stellagher

Renee Stellagher
Assistant Attorney General
1302 E. SD Highway 1889, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 8,568 words.

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

Dated this 23rd day of April, 2026.

/s/ Renee Stellagher

Renee Stellagher

Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of April, 2026, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Lester M. Monroe* was served via electronic mail on Mark Kadi at mkadi@minnehahacounty.gov and Tracy Miller at tmiller@minnehahacounty.gov.

/s/ Renee Stellagher

Renee Stellagher

Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, *
 *
Plaintiff and Appellee, *
 * Case #30985
v. *
 *
 *
LESTER M. MONROE, *
 *
 *
Defendant and Appellant. *
 *

APPEAL FROM THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

The Honorable Jennifer Mammenga
Circuit Court Judge

APPELLANT'S REPLY BRIEF

Marty Jackley	Daniel Haggar
Office of the	Minnehaha County
Attorney General	State's Attorney
1302 E Highway 14, Suite 1	415 N Dakota Ave
Pierre, SD 57501	Sioux Falls, SD 57104

Mark Kadi
Appellant's Counsel
Office of the Public Advocate
415 N Dakota Ave
Sioux Falls, SD 57104

Notice of Appeal filed on January 31, 2025

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,	*	
	*	
Plaintiff and Appellee,	*	Case #30985
	*	
v.	*	REPLY BRIEF
	*	
LESTER M. MONROE,	*	
	*	
Defendant and Appellant.	*	

PRELIMINARY STATEMENT

The Appellant renews factual statements and legal arguments originally presented in the Appellant's brief. Reference to the trial court's record remains the same. The Appellant and Appellee briefs will be referred to as "AT" and "AE", respectively.

ARGUMENT

The Appellee asserts the Richardson case controls the constitutional severance issues present here. Despite that case's ruling, the Gray case followed it sequentially. Gray in turn was followed by Samia. Samia did not abrogate either Bruton or Gray. They still co-exist.

Samia demonstrated that Gray still controls "when redactions leave the defendant's identity obvious to the jury in context". AT:15 citing Samia v. U.S., 599 U.S. 635, 653 (2023). The Appellee maintains the Robertson rule obviates Bruton where "the statements at issue did not

incriminate Monroe on their face but only became so when linked with other evidence". AE:11. Unlike the defenses of the Defendants, these concepts can be reconciled.

Richardson tests whether codefendant statements were linked with other evidence. AE:11. In this case, they were linked with other blatantly apparent information, but not evidence. This other information made the identities of the Defendants obvious to the jury in the context of this case.

Attorney statements are not evidence. See Tunender v. Minnaert, 1997 S.D. 62, ¶ 23, 563 N.W.2d 849, 854 ("arguments 'are not evidence.'"); Neels v. Fluke, 109 F.4th 1021, 1032 (8th Cir. 2024). However, attorney statements at the inception of the case drowned the jury in obvious references to the allegations regarding the Defendants' alleged actions. The State read the indictment to the jury with the Defendants listed in the conjunctive: "Monroe and Jones". T1:6-7. No other potential suspect inmates were mentioned. No other "brothers" are mentioned. The indictment was not offered or admitted into evidence. Their alleged identities, henceforth, became obvious to the jury, without being linked to other evidence.

The State then proceeded with an opening statement. T1:8. Opening statements are regarded as important under

the law. An opening statement can have "a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." Strickland v. Washington, 466 U.S. 668, 695-96 (1984).

While important, the structural content of opening statements is limited. "The opening statement is a statement of what counsel expects the evidence to show, and *it is not evidence in and of itself.*" State v. Brewer, 266 N.W.2d 560, 562 (S.D. 1978) (emphasis added). The opening statement contained numerous statements concerning the indicted codefendants "Monroe and Jones" allegedly acting in concert with each other. T1:8-12. Monroe's name appears 15 times over only 4 transcript pages; Jones appears 9 times. The "pervasive effects" of number of references is obvious. Compare Neels v. Fluke, 109 F.4th 1021, 1033 (8th Cir. 2024) (opening statement "spanned just three pages of the six-volume jury trial transcript that totaled more than 700 pages.)). The reading of the indictment, combined with the opening statement, presented obvious identification of Monroe not linked to any "evidence" later submitted.

The Gray rule applied rather than the rule of Richardson. The trial court erred denying the Defendants' motion to sever, denying them a Fair Trial.

Overwhelming evidence of guilt, in terms of the attempted murder charge (specific intent) compared to an assault charge (general intent) is not present. This case demonstrates harmful error occurred beyond any reasonable doubt. See Chapman v. California, 386 U.S. 18, 25 (1967). As such, an Order from this Court reversing the matter and remanding it for a new trial is appropriate.¹

The Appellee claims that the defenses of Monroe and Jones were not incompatible. Monroe's defense conceded an assault occurred but not to the extreme as specifically intending to murder Harms. T4:53-53; AT:27-28. The facts

¹ The Appellee's disdain for the Appellant's allegations of prejudice from the joined trial perhaps arises from a fundamental misconception of the true choice which the jury faced at the close of evidence. The jury possessed a choice between guilty or not guilty on each count. SR837. However, the Appellee indicates comparison upon which jury was charged to undertake was to "make a reliable judgment about his guilt or innocence." AE:16.

The verdict form provided to the jury did not reflect that choice. Due Process would forbid it. A defendant never has to prove innocence. Mullaney v. Wilbur, 421 U.S. 684, 704, 95 S. Ct. 1881, 1892, 44 L. Ed. 2d 508 (1975); See also State v. McNally, 922 A.2d 479, 482 (Me. 2007).

Similarly, it would be unreasonable to expect the state to submit evidence of innocence in their effort to prove guilt. The jury could not make a comparison of guilt or innocence as no showing would ever be presented by the State as to the latter, where a defendant possesses no burden to present any evidence at all. See SDCL 15-14-1. As such, the Appellee urges an unreasonable application of Due Process law presented by the United States Supreme Court, to arrive at their proffered conclusions. See also 28 USC 2254; Mullaney supra.

acknowledged in the Appellee's own brief demonstrate the distinction. "Monroe struck Corporal Harms in the head at least twenty times, and Jones struck him in the head at least fifty times". AE:18. The lesser number of blows attributed to Monroe versus Jones made Monroe's defense more credible than Jones' defense attempting to overcome a higher number of blows. The defenses differed not only by what a defendant hypothetically "desires" but by objective facts. See AE:14. Acceptance of Jones' defense of coming to "his brother's aid", "standing on [Jones'] business" suggests a joint enterprise more indicative of a planned event. See AE:15. Prejudice is shown through admission of Jones's statements proclaiming their alleged "business" with no ability to confront it. In addition, Monroe's statements attributed to Jones², prejudiced this Appellant as the allegations presented against both defendants doing business together specifically to kill Harms. AE:23.

The Defendants requested a mistrial due to the prosecutor's closing argument statements. The court then denied the motion and instructed the prosecutor to address

²The trial court found the mistake occurred, which the Appellee does not challenge. AE:21-23; State v. O'Connor, 344 N.W.2d 684, 685 n.2 (S.D. 1984); SDCL 15-26A-22.

her mistake in her closing rebuttal arguments. The prosecutor would instruct rather than by the court.

The Appellee asserts that Monroe did not object to the court's ruling regarding the mistrial and the prosecutor's instruction. AE:22. This is not correct. The sequence of statements demonstrate the trial court's prosecutorial cures were presented before the mistrial motion was finally ruled on: "I would encourage them to clear that up in rebuttal, and for those reasons the defense's motion for mistrial is denied." AE:22. As such, the mistrial motion encompassed other topics related to it such as potential cures to describe why the motion was denied.

State v. Rose, demonstrates further authority to show prosecutor's instruction issue as being preserved for review. The State in Rose presented one primary argument to justify the mistrial. This Court noted the presence of other issues compounding its need, even though not objected to at trial. State v. Rose, 2024 S.D. 56, ¶ 37, 12 N.W.3d 127, 137-38. As in Rose, associated matters in Monroe's case help explain the need for the mistrial. If the State receives the benefits of the Rose analysis, Due Process requires that approach apply to Defendants as well. See

Daily v. Sioux Falls, 2011 S.D. 48, ¶ 29, 802 N.W.2d 905, 917; citing Withrow v. Larkin, 421 U.S. 35, 46 (1975).³

The Appellee claims Jones's statements were not testimonial. AE:17. The calls were allegedly made of Jones's "own volition" while he was allegedly confiding in his mother. AE:17. A review of Jones's statements demonstrate that "proclaiming" would be a better word choice than "confiding". Still, the Appellee's characterization of the conversation as being private defies caselaw regarding privacy and inmate phone calls.

In State v. Owens, 2002 S.D. 42, 643 N.W.2d 735, the arrested defendant while inside the jail attempted to exclude evidence from a phone call to his mother. In denying relief, this Court noted "a prisoner's constitutional rights are subject to restrictions." State v. Owens, 2002 S.D. 42, ¶ 71, 643 N.W.2d 735, 754; citing State v. McKercher, 332 N.W.2d 286, 287 (S.D.1983). Such "restrictions allow jail officials to monitor and record conversations between detainees and their visitors for security reasons and to use the conversation as evidence against the detainee without violating the Fourth

³ In addition to prosecutorial jury instructions as mistrial grounds, the Appellant noted the applicability of the plain error doctrine. AT:22 n.4.

Amendment." State v. Owens, 2002 S.D. 42, ¶ 71, 643 N.W.2d 735, 754. Inmates have no expectation of privacy. As such, Jones had no expectation of privacy.

Jones was incarcerated at the penitentiary through prior legal process. He was undoubtedly advised of his rights of silence via prior process that placed him there. In addition, the Owens rule had been established law since 2002; McKercher since 1983. Everyone "is presumed to know the law", particularly inmates who have been incarcerated by the law. See Georgia v. Public.Resource.Org, Inc., 590 U.S. 255, 265, 140 S. Ct. 1498, 1507, 206 L. Ed. 2d 732 (2020); Johnson v. Graff, 68 S.D. 562, 566, 5 N.W.2d 33, 35 (1942). Jones was presumptively on notice of the Owens ruling, as are all of us. He knew that conversations arising at the penitentiary with his mother outside on a pending case could be used prosecutorially in his later trial - and it was. It was testimonial.

The primary purpose of the statements were not for non-testimonial purposes such as an "ongoing emergency". Ohio v. Clark, 576 U.S. 237, 244 (2015). The recorded statements of both Defendants occurred after the assault had stopped. Harms's whereabouts and condition were clearly known. The statements addressed the Defendant's actions toward Harms after the attack - not before.

The State addressed the issue regarding admission of the polygraph offer (not result) as an evidentiary ruling and not as a Constitutional Due Process complete defense issue. As such, it waived its argument regarding a complete defense or the lack thereof.

The line between where control via the rules of evidence end and constitutional protections begin was addressed in U.S. v. Scheffer, 523 U.S. 303, 304 (1998). Where statutes conflict with a constitutional provision such as the Due Process Clause allowing a defendant a complete defense, the challenged statute cannot "abridge an accused's right to present a defense so long as they are not 'arbitrary' or disproportionate to the purposes they are designed to serve." *Id.* at 308. Rules excluding evidence are "unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Id.* citing Washington v. Texas, 388 U.S. 14, 22-23 (1967) (state rule excluding convicted co-defendant testimony at trial unconstitutional).

Ironically, Scheffer involved a case where a defendant sought to admit a polygraph result in a military trial that exonerated him. Admission of the test result was to occur via expert testimony, rather than the defendant's own

statements⁴. Id. at 304. Such test evidence was specifically precluded by statute. Id. at 306-07. The court noted, inter alia, the scientific community did not regard tests as scientifically accurate and most jurisdictions excluded polygraph results. Id. at 310-12.

In South Dakota, polygraph test results (not offers) are excluded via opinions of this Court (not a statute) which still left the future open to other opportunities for admission (even for tests). State v. Banks, 2023 S.D. 39, ¶ 31, 994 N.W.2d 230, 239; State v. Stevenson, 2002 S.D. 120, ¶ 2, 652 N.W.2d 735, 737 (plea agreement involving supervision via polygraph test results admitted at sentencing). Unlike polygraph test result evidence, a long history shows consciousness of guilt evidence is readily admitted in South Dakota and elsewhere. State v. Strain, 262 N.W. 237, 240 (1935) (erroneously excluded testimony "was material for him to show that he was not nervous, excited, or scared when visited by the said sheriff at his home on the day following said robbery, as tending to show that the appellant was innocent and had a clean conscience"). Evidence of consciousness of guilt admitted in trials include many topics: "escape from custody ...

⁴ Consciousness of innocence evidence was not specifically offered in Scheffer.

false alibi ... flight ... suppression of evidence ... and failure to respond to accusatory statements when not in police custody". State v. Neville, 312 N.W.2d 723, 728 (S.D. 1981) (reversed on other grounds) (Wollman dissent).

Here, the exclusion was arbitrary via constant references to polygraph test result cases rather than those pertaining to consciousness of innocence or the lack thereof. Juries capably process consciousness of guilt or innocence evidence on their own, as shown throughout history. Consciousness is particularly relevant in a specific intent crime. The polygraph offer presents evidence of what idea is present in a defendant's consciousness prior to or during a criminal act, not a questionable scientific test result presented via third party expert statements long after the criminal act. The jury's function as the only true polygraph remains preserved. As such, the trial court's exclusion of the polygraph offer constituted constitutional error per Crane.

The Appellee disputes that the trial court's judgment and sentence imposing judgments for two counts violated Double Jeopardy. It asserts that the lower court did apply the rule of State v. Washington correctly. AE:36-37. It indicates: "In Washington, this Court held 'where a guilty verdict has been rendered on multiple counts for a single

statutory offense resulting from the same act. A sentencing court should include express language stating that no judgment of conviction is being entered on a particular count'". AE:36-37 (citing State v. Washington, 2024 S.D. at ¶71, 13 N.W.3d at 513. It then concludes "Monroe did not have two convictions for the same offense, so the recommendation from Washington does not apply." (emphasis original) AE:37.

The Appellee attempts to bedazzle this Court with a clever repetitive interplay of the term "offense" in lieu of even acknowledging the existence of the "resulting from the same act" clause.⁵ They are different concepts arising from the same acts. Harms's status as a law enforcement officer and a Department of Corrections employee occupied the same place at the same time. He maintained the status of both when the Defendant attacked via the same act. Monroe did have two convictions "resulting from the same act" so the rule from Washington must apply.

Per Washington, "a court violates double jeopardy when it imposes multiple convictions for a single statutory

⁵One court described gaslighting as "the process of making somebody believe untrue things in order to control them, especially that they have imagined or been wrong about what has really happened". Lewis v. Essex Cnty., No. 8:24-CV-00100, 2024 WL 4712530, at *6 (NDNY June 18, 2024).

offense arising out of the same act." State v. Washington, 2024 S.D. 64, ¶ 67, 13 N.W.3d 492, 512. This Court based this rule in part from two cases of the United States Supreme Court: Rutledge v. United States, 517 U.S. 292, 296 (1996); Ball v. United States, 470 U.S. 856 (1985); see State v. Washington, 2024 S.D. 64, ¶ 65, 13 N.W.3d 492, 511. The Appellee, however, ignored Ball and Rutledge in their brief. By wrongfully suggesting offenses and acts are synonymous, the State invites this Court to make an unreasonable application of Constitutional law expressed in reported United States Supreme Court cases. See 28 U.S.C.A. § 2254 ("resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.").⁶ This Court should ignore the State's argument. The victim was both a law enforcement officer and a department employee when attacked. It was the same act. SR16. The issue presented by Monroe's defense was whether it was an attempt to murder Harms with

⁶ Appellee's counsel respects the ingenuity of the State's technique. If appellants cite U.S. Supreme Court cases, while the State cites cases of any other court upon which this Court adopts in its opinions, it becomes immune from Sec. 2254 reversals as its opinion was not unreasonably applying a *U.S. Supreme Court opinion*. See Carey v. Musladin, 549 U.S. 70, 77 (2006).

a premeditated plan, or it was an assault - a crime of less complexity and subsequent consequences.

CONCLUSION

The trial court denied the Defendants' motion to sever in error, thus denying the Defendants' Constitutional right to a Fair Trial and Due Process. His rights were further violated when the prosecutor disregarded Bruton instructions by mixing up the Defendants' statements during closing argument. With this case's unique facts, the presumption that jurors follow instructions is rebutted when an experienced prosecutor cannot follow them. The error worsened when the trial court told the prosecutor to instruct the jury, rather than by the court herself.

The trial court violated Defendant's Due Process rights to a complete defense by precluding evidence of his willingness to take a polygraph test as showing consciousness of innocence in a specific intent case. No polygraph test result was an issue. The exclusion prejudiced the Defendant. It would aide the jury's determination whether the Appellant attempted murder or an assault.

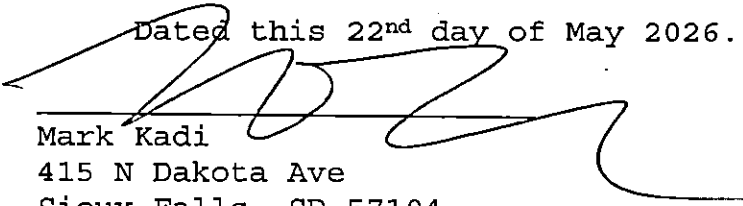
The trial court violated Constitutional Double Jeopardy rights by entering judgments and sentences for two counts arising from the same occurrence, and not merely the

same offense causing reversible plain error. All these errors presented in this appeal individually and cumulatively require reversal and remand to the circuit court for a new trial with appropriate instructions. See State v. Nelson, 1998 S.D. 124, ¶20, 587 N.W.2d 439, 447; Gordon v. U.S., 344 U.S. 414, 420-23 (1953).

CERTIFICATE OF COMPLIANCE

This Reply Brief meets applicable page (15) and word limitations (2594) required by this Court.

Dated this 22nd day of May 2026.



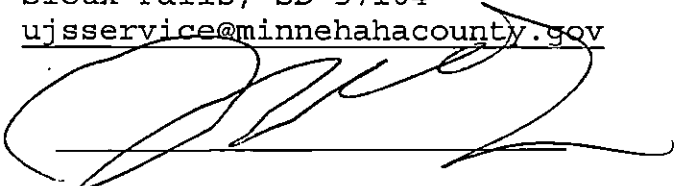
Mark Kadi
415 N Dakota Ave
Sioux Falls, SD 57104
(605) 367-7392
mkadi@minnehahacounty.gov
Attorney for Appellant

CERTIFICATE OF SERVICE

On May 22, 2026, a true and correct copy of the Appellant's Reply Brief was served by electronic File & Serve on:

Marty Jackley
Attorney General
1302 E Hwy 14, Suite 1
Pierre, SD 57501
ATGservice@state.sd.us

Daniel Hagggar
M.C. States Attorney
415 N Dakota Ave
Sioux Falls, SD 57104
ujsservice@minnehahacounty.gov



Attorney for Appellant.