IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. #30048

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

vs.

MATTHEW ALLAN CARTER,

Defendant/Appellant.

Appeal from the First Judicial Circuit

The Hon. Cheryle Gering

Presiding

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This matter was tried before a Yankton County jury on January 31, 2022, through February 3, 2022, the Honorable Cheryle Gering, First Judicial Circuit, presiding. The jury returned a verdict on February 3, 2022. A Judgment of Conviction and Judgment of Conviction and Sentence was filed on June 17, 2023. Notice of Appeal was timely filed on July 7, 2023. Appellant fired his trial counsel. New counsel was appointed on January 13, 2023. A Motion for Additional Time was filed on February 27, 2023, and was granted through April 3, 2023.

STATEMENT OF THE CASE

Appellant was charged on January 11, 2021, in an Indictment alleging Sexual Contact with a Child Under Age Sixteen. Thereafter, on April 6, 2021, a Superseding Indictment was filed charging Rape in the First Degree. Appellant was arraigned on April 8, 2021. A jury trial was held on January 31, 2022, through March 2, 2022, and Appellant was represented by Melissa Fiksdal. Judgment of Conviction and Sentence was filed on June 17, 2023. Notice of Appeal was timely filed on July 7, 2023. Thereafter, Appellant requested that the Court appoint a different attorney to represent him. Ms. Fiksdal requested additional time for Appellant to file his brief due to the change in representation and additional time was granted. New counsel was appointed on January 13, 2023, to assist Appellant in this appeal. A Motion for Additional Time was filed on February 27, 2023, and was granted through April 3, 2023.

PRELIMINARY STATEMENT

References to the Trial Transcript will be made by using "TT" followed by the page number. Appellant will be referred to as "Defendant" or "Matthew" and Appellee will be referred to as "State". Items referred to in the Appendix will be referred to as "AP#".

MOST RELEVANT CASES

The three (3) most relevant cases are:

State v Fischer, 2016 S.D. 1, 873 N.W.2d 681

State v. Bausch, 2017 S.D. 1, 889 N.W.2d 404

State v. Tooley, 816 N.W.2d 120

STANDARD OF REVIEW

The standard of review for a trial court's evidentiary rulings is the abuse of discretion. *State v. Bausch,* 2017 S.D. 1, 889 N.W.2d 404. The Court's standard of review for the denial of a motion for judgment of acquittal is *de novo*. *State v Fischer*, 2016 S.D. 1, ¶26; 873 N.W.2d 681, 692 (quoting *State v. Overbey*, 2010 S.D. 78, ¶ 12, 790 N.W.2d 35, 40).

STATEMENT OF FACTS

In December, 2020, Matthew Carter (Matthew) was on active parole in Yankton County, South Dakota, for the offense of driving under the influence. Matthew was contacted by law enforcement and interviewed at the Yankton Public Safety Center on December 31, 2020. At the conclusion of the interview, law enforcement required Matthew to submit to a mouth swab. Matthew was then held in the Yankton County Jail from that date without any charges being filed until the date of his date of his actual arrest on January 12, 2021. At that time, Matthew was charged with Sexual

Contact with a Child Under Sixteen (16) Years of Age. Thereafter, on April 4, 2021, a Superseding Indictment was filed charging Matthew with Rape in the First Degree. Matthew has been in either state or federal custody since December 31, 2020. From and after December 31, 2020, when Matthew was taken into custody and interviewed by Detective Joe Erickson until after his residence was searched by law enforcement on January 14, 2021, Matthew's residence was unlocked and unsecured. Furthermore, law enforcement was in possession of Matthew's keys, Matthew's cell phone as well as the pin number for the phone.

While situated in the Yankton County Jail, Matthew spoke to his father on a recorded telephone line. Law enforcement frequently listens in on inmate calls coming into, and going out of, the Yankton County Jail and law enforcement listened to Matthew's calls. After listening to one (1) of Matthew's outgoing calls, law enforcement searched Matthew's residence on January 14, 2021, and located a box that had two (2) hard drives in it. On January 15, 2021, law enforcement obtained a Search Warrant the day after searching Matthew's residence.

Those hard drives were inspected by DCI (Division of Criminal Investigation) and it was determined that those hard drives contained child pornography. As a result, Matthew was charged in federal court with one (1) count of possession of child pornography. (*United States of America v. Matthew Carter,* Southern Division 4:21 – cr-40073-KES). A jury trial was held in federal court and Matthew was convicted of possession of child pornography on January 26, 2022. Information relative to that conviction was published in the Yankton Daily Press & Dakotan. Thereafter, approximately one (1) week later, the Yankton County offense of First Degree Rape

was tried in front of a Yankton County jury. Despite being charged with Rape in the First Degree and not possession of child pornography; the Yankton County jury was allowed to view three (3) short videos duplicated from the hard drives which depicted child pornography.

The alleged victim, E.W., a minor child, did not testify at the Yankton County jury trial. The Trial Court allowed the jury to watch a video of the minor child washing her baby doll in her grandmother's bathroom. E.W. washed the doll's back and washed the doll's feet. At no point in the video shown to the jury, does E.W. touch the doll's private area with her wash cloth or otherwise indicate touching of the doll's private parts.

No evidence or testimony was submitted to the jury which reflected that Matthew physically touched E.W. in her private parts or that Appellant penetrated any portion of E.W.'s body in any fashion.

At the conclusion of the jury trial, the jury convicted Appellant of Rape in the First Degree. Following the preparation of a Presentence Report, on April 4, 2022, the trial court sentenced Appellant to forty-five (45) years with twenty-five (25) years suspended as well as court costs and costs of prosecution.

ISSUES

1. **Whether the Trial Court erred when it allowed the State to publish to the jury three (3) short videos of child pornography?**

2. **Whether the Trial Court erred when it refused to allow Defendant's expert the opportunity to testify as to the reliability of the NAAT testing when the packaging specifically states that testing must be repeated for accuracy?**

3. **Whether the Trial Court erred in allowing the unsworn statements of a five (5) year old girl into evidence when it refused to allow Matthew's attorney to cross-examine her before the jury?**

4. **Whether the Trial Court abused its discretion by failing to grant Matthew's Motion for Acquittal at the close of the trial when the State presented no evidence sufficient to establish the elements of rape in the first degree?**

5. **Whether Matthew's trial attorney was so ineffective in her representation of Matthew that he was denied his due process right to counsel?**

DISCUSSION

1. The Trial Court erred when it allowed the State to show the jury three (3) short videos of child pornography.

a. There was no viable evidentiary purpose for allowing the Yankton County Jury to watch three (3) short videos of child pornography.

Child pornography is an extremely taboo genre of pornography and is a form of sexual exploitation of children. Child pornography is highly repugnant to the majority of the population. However, Matthew was not charged in Yankton County with the possession of child pornography. Matthew was charged in Yankton County with the First Degree Rape of a Child under the age of thirteen (13) years of age in violation of SDCL 22-22-1(1).

Given that Matthew was not charged with possession of child pornography, allowing the State to show the jury a video of child pornography and telling the jury that it was in Matthew's possession; had no purpose other than to attempt to turn the jury against him. The publication of the videos to the jury had no probative value and only served to inflame the jury against Matthew. It is clear that the State's position

was to infer that anyone who possessed child pornography was guilty of first-degree rape of a child.

b. The Trial Court erred by allowing a DCI agent to discuss extreme forms of pornography in the presence of the jury when Matthew was not charged in state court with possession of child pornography.

The Trial Court granted the State's request to allow DCI Agent Kendra Russell to testify as to her examination of the contents of the two (2) hard drives that were located at Matthew's residence as well as his cellular telephone. Ms. Russell testified, at some length, about different kinds of pornography and her focus on the ICAC (Internet Crimes Against Children). Ms. Russell testified, at length, about different types of pornography - HCP (Hard Core Porn), SCP (Soft Core Porn), PTHC (Pre-Teen Asian Porn) and PTSC (Pre-Teen Soft Core). (TT 206; TT 207; TT 208).

Ms. Russell testified that she located, looked at and/or extracted different kinds of pornography from the hard drives as well as from Matthew's cellular telephone. Ms. Russell went on to discuss what searches had been performed on Matthew's phone and shared some of those searches with the jury both via testimony as well as via both written and video exhibits. (TE 35, 36, 39, 40 and 41).

Neither those searches nor the video clips of hardcore pornography had anything to do with the crime for which Matthew was charged. In fact, there is little, if any, probative value from Ms. Russell's testimony. Matthew was ***not*** charged with the possession of child pornography in state court.

Matthew had been convicted in federal court of possession of child pornography

shortly before the State Court jury trial. Matthew has been, or will be, sentenced in federal court for the possession of that pornography.

It is axiomatic that the real purpose for Ms. Russell's testimony which had nothing to do with an act of penetration on a child was solely used to inflame the minds of the jury against Matthew and prejudice the jury against him.

c. Allowing the jury to view child pornography in a first-degree rape case was unduly prejudicial to Matthew's case and his right to a fair trial.

Even more disturbing than the testimony as to the searches and the descriptions of the kinds of pornography on Matthew's cell phone was the Trial Court's allowing the State to show the jury three (3) short videos of child pornography that it had downloaded from the hard drives and prepared by Ms. Russell. (TE 39, 40 and 41).

There was nothing probative about any of those video clips. None of those video clips involved E.W. or Matthew. At best, the video clips were salacious and purely scandalous attempts to inflame the jury against Matthew. At worst, those video clips prejudiced the jury members against Matthew based upon what was on his cellular phone.

d. The prejudice to Matthew was so substantial as to warrant reversal.

This Court has previously held that a trial court's evidentiary rulings are presumed to be correct but are reviewed under the abuse of discretion rule. *State v. Bausch,* 2017 S.D. 1; ¶ 12, 889 N.W.2d 404, 408 (quoting *State v. Crawford,* 2007 S.D. 20, ¶ 13, quoting *State v. Spaniol,* 2017 S.D. 20, ¶ 12, 895 N.W.2d 329, 335).

This Court has gone on to hold that "to warrant reversal, not only must error be demonstrated, but it must also be shown to be prejudicial". *State v. Stone,* 2019 S.D. 18, ¶ 22, 925 N.W.2d 488, 497 (quoting *Bausch,* 2017 S.D. 1, ¶ 12, 889 N.W.2d at 408). More importantly, this Court went on to hold that "(p)rejudicial error is 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. Sheldon,* 2021 S.D. 22, ¶ 16; *See also, Casper Lodging, LLC v. Akers,* 2015 S.D. 80, ¶ 60, 871 N.W.2d 477, 496 (quoting *Harter v. Plains Ins. Co., Inc.,* 1998 S.D. 59, ¶ 32, 579 N.W.2d 625, 633).

Prejudicial error is 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. (Emphasis added). *Casper Lodging, LLC v. Akers,* 2015 S.D. 80, 871 N.W.2d 477.

Clearly, in this instance, any purported relevance of the internet word searches was substantially outweighed by the prejudice resulting from the publication of those videos and remarks. Frankly, the nature and extent of the salacious materials paraded in front of the jury could have had no other effect than to prejudice Matthew's chances at a fair trial. The prejudice arising from those three (3) videos alone warrant the reversal of the jury's verdict.

e. SDCL 22-22-1(1) requires an act of sexual penetration accomplished with any person under the age of thirteen (13) years.

SDCL 22-22-1(1) defines rape in the first degree as "an act of sexual penetration accomplished with any person if the victim is under the age of thirteen (13) years of age".

In the instant action, the alleged victim, E.W., was five (5) years old at the time of the alleged assault. The alleged assault came to the attention of E.W.'s maternal grandmother when E.W. was "washing her baby doll in the bathroom with a washcloth" on Christmas Day at the grandmother's house.

Despite taking the opportunity to video tape the child while in the care of her grandmother; E.W. did not perform any act that would indicate that Matthew had "penetrated" any part of her body.

No evidence was presented by the State to support the theory that Matthew performed ***any*** act on, to or against E.W., let alone, perpetrated an act of penetration upon E.W.

f. The State claims that the child's alleged statement that Matthew licked her girl parts is sufficient to establish penetration.

The State makes much of an alleged statement of E.W. that Matthew "licked her girl parts". However, there was no evidence submitted at trial that would establish that Matthew actually either licked her girl parts or that he penetrated any portion of E.W.'s body. This Court has previously held that there must be ***some*** degree of penetration. *State v. Tooley*, 816 N.W.2d 120.

The testimony at trial reflects that E.W. made a statement one (1) time that Matthew "licked her girl parts". However, the record also reflects that E.W. also stated that one (1) of her teachers was licking a student down there as well as one (1) or some of her classmates "licked her girl parts". TT 201, lines 9 - 14. It is inconceivable that based upon the miniscule amount of testimony that the State presented that it met the constitutional burden of "beyond a reasonable doubt".

However, it should be noted that the unrefuted testimony is that when E.W. attended a prior daycare, one (1) of the other children told E.W. that "friends lick each other on their private parts". TT 105, lines 16 – 25. In addition, E.W. made statements that a teacher at her school and other students were licking her girl parts. TT 86, lines 3 - 25; 87, lines 1 – 8.

The State's efforts to paint Matthew with the heinous brush of possessing and viewing child pornography worked. Matthew was tried and convicted in federal court of the charge of possession of child pornography. That, however, is not what Matthew was charged with in Yankton County. Matthew was clearly prejudiced by the suggestions that because he had child pornography on his cellular phone or on a hard drive; then it is axiomatic that he committed a first-degree rape of E.W. Any argument that Matthew was not prejudiced is wholly without merit and stretches this Court's credulity.

2. The Trial Court erred when it refused to allow Matthew's expert the opportunity to testify as to the reliability of the NAAT testing when the instructions and packaging specifically state that testing must be repeated to ensure accuracy.

The Trial Court denied Matthew's attorney's request to allow Dr. Elizabeth Dimitrievich to testify at trial. Dr. Dimitrievich testified at a Motions hearing held on December 20, 2021. At that time, Dr. Dimitrievich testified that in order to ensure reliability of the NAAT testing one (1) test was not enough; the test had to be repeated to ensure accuracy. AP#78, lines 2 – 7; 79, lines 15 - 18.

The Trial Court denied Matthew's request to exclude the results of the NAAT test taken from Matthew on December 31, 2020. The test given to Matthew was a test for gonorrhea that was administered by law enforcement. That test contained instructions

that specifically provide that the results of such test were not to be used in matters of determination of child sexual abuse. Appendix; Motions Hearing; p. 8; lines 9 – 16; p. 9; lines 9 – 12; p. 10, lines 5 - 9. Moreover, a positive NAAT test should prompt repeat testing. Those instructions were wholly disregarded and the sole test results were provided to the jury. TE 33. Allowing the jury to hearing any testimony regarding that singular test was clear error by the Trial Court.

It is unclear why the Trial Court refused to allow Matthew's expert to testify as to the unreliability of the gonorrhea testing that was performed on Matthew. The instruction and/or directions that come with the packaging provide that testing must be repeated to ensure accuracy. AP#78, lines 2 – 7; 79, lines 15 - 18. That second test was never performed on Matthew. Only one (1) test was performed and, as a result, there was no assurance of the accuracy of that test. For whatever reason, the Trial Court refused to allow Matthew's expert to testify as to the validity of testing to ensure the accuracy of the testing.

The State then utilized those unsubstantiated test results to infer that E.W. had contracted gonorrhea in her throat, her vagina and her rectum. When, in point fact, E.W.'s mother's throat culture had tested positive for gonorrhea. TT 171, line 15 – 21; TE 33.

Dr. Dimietrivich testified that all specimens taken from children and initially positive should be confirmed. AP#78, lines 2 – 7; 79, lines 15 - 18. Dr. Free testified that gonorrhea was able to live on wet surfaces and underneath fingernails. TT 40, 41. E.W.'s mother, Nycole Morkve, testified that she would have sex with Matthew several times per day and sometimes would not shower or even wash her hands if she

was busy. TT 97, lines 17 – 25; 98, lines 1 – 14. Further, gonorrhea can be spread by kissing. TT 26, lines 13 -14. Moreover, gonorrhea can be transferred by a child scratching themselves and sucking their fingers. TT 25, lines 13 – 15.

3. The Trial Court erred in allowing the unsworn statements of a five (5) year old girl into evidence without allowing Matthew's attorney the opportunity to cross-examine her in the presence of the jury.

a. Matthew has the constitutional right to confront his accuser.

In the instant action, the Trial Court allowed E.W.'s alleged statements in for the jury's consideration without giving Matthew's attorney the opportunity to confront and cross-examine her. The Trial Court opined, based upon the testimony of the child's counselor that having her testify with Matthew in the room might potentially cause E.W. damage.

Matthew had the absolute constitutional right to confront and cross-examine his accuser, E.W. That right is set forth in Article VI of the U.S. Constitution and South Dakota Constitution. Matthew's right to confront his accuser was taken from him by allowing other people to testify as to what E.W. had purportedly alleged on one (1) occasion. This is particularly concerning, in that, E.W. had told the interviewer, on that one (1) occasion, that it was Matthew, or a teacher from school or another student named "Jordan". Subsequent to that one (1) time statement, despite repeated efforts by adults, E.W. only stated that when E.W. was asked as to whether Matthew had ever "hurt" her; E.W. said "yes. He had yelled at her one time when she threw chicken on the floor". TT 13, lines 20-24; 14, lines 1-2.

There is a marked difference in having someone yell at a child and making

her "sad" and someone raping a child. It was imperative to Matthew's right to confront his accuser that his attorney be allowed to examine E.W. under oath. The Trial Court's failure to allow that questioning deprived Matthew of his constitutional right to confront his accuser.

4. The Trial Court abused its discretion by failing to grant Matthew's Motion for Acquittal at the close of the State's case trial when it is apparent that the State presented no evidence sufficient to establish the elements of rape in the first degree.

a. The Trial Court had the obligation to grant the oral Motion for Acquittal.

The standard of proof in a criminal trial is beyond a reasonable doubt. In the instant action, over the course of the two (2) day trial, the State failed miserably in providing evidence or testimony necessary to rise to the level of "beyond a reasonable doubt". The State did, however, provide the jury with a plethora of evidence as to Matthew's possession of child pornography. Although it is illegal to possess child pornography; the mere possession of child pornography does ***not*** make a person guilty of first degree rape.

The United States Constitution and the criminal justice system are supposed to be predicated upon the Defendant's right to be presumed to be innocent until "proven guilty" and guilt is supposed to be demonstrated beyond a reasonable doubt. Being proven guilty beyond a reasonable doubt is every American's constitutional right.

It would appear that in the case at bar, Matthew was presumed guilty of rape of a child without the necessity of the State being required to prove any of the actual elements of the crime.

If that evidence is not presented or sufficient to establish guilt ***beyond a***

reasonable doubt; then the Trial Court had the absolute obligation to grant Matthew's oral Motion for Acquittal. That did not occur in this instance.

This Court's standard of review for the denial of a motion for judgment of acquittal is *de novo*. *State v Fischer*, 2016 S.D. 1, ¶26; 873 N.W.2d 681, 692 (quoting *State v. Overbey*, 2010 S.D. 78, ¶ 12, 790 N.W.2d 35, 40).

In this instance, there was no evidence adduced at trial that would tend to establish Matthew's guilt. Even viewing the evidence most favorably to the State and taking the all inferences in favor of the State; it is clear that Matthew's Motion for Judgment of acquittal should have been granted.

b. Although circumstantial evidence can be utilized to prove an offense has been committed; there must be some evidence presented.

This Court has held that the State may prove all elements of an offense through circumstantial evidence. *State v. Fischer*, 2016 S.D. 1, 873 N.W.2d at 692 (quoting *State v. LaPlante*, 2002 S.D. 95, ¶ 30, 650 N.W.2d 305, 312).

In the instant action, the State did not produce one (1) scintilla of evidence that would serve to establish beyond a reasonable doubt that Matthew had performed an act of penetration to the person of E.W.

c. In order for there to be reasonable inferences at trial; there must be actual evidence presented.

This Court has to accept the evidence and the most favorable inferences fairly drawn therefrom in order to support the verdict. *State v. Wheeler*, 2013 S.D. 59, ¶ 7, 835 N.W.2d 871, 873. However, in this instance, there was no evidence actually presented which would rise to the level necessary to meet the necessary

elements of the crime of First Degree Rape. The State's case was built solely upon guess, speculation, supposition and conjecture.

In this instance, the State stretches the Court's credulity by claiming that the mere possession of child pornography makes Matthew a child rapist.

Each and every element of all of the elements of the crime of rape in the first degree have to be established by the State. The mere inference that it could have occurred because Matthew was, or may have been, in possession of child pornography is wholly insufficient.

It is axiomatic that the Defendant, in every criminal case, has no obligation to establish any fact or element relative to any crime charged. That is, and has always been, the express burden of the State in any criminal prosecution.

In this instance, the entire record is devoid of any testimony or evidence which would support the jury's guilty verdict. There is nothing, other than law enforcement supposition, that would support the theory that any penetration of E.W. ever occurred.

Moreover, E.W., when asked if Matthew has ever done anything to her states that Matthew had "yelled at her when she had thrown chicken on the floor". TT 68, lines 6 – 10; 67.

5. Matthew's trial attorney was so ineffective in her representation of Matthew that Matthew was deprived of his due process right to counsel.

a. Matthew's attorney failed to seek suppression of the hard drives that were obtained one (1) day prior to law enforcement seeking and obtaining a Search Warrant for his residence.

A review of the court file reflects that Matthew's trial attorney did not file a

Motion to Suppress the hard drives that were removed from Matthew's residence prior to law enforcement obtaining a Search Warrant.

Given that Matthew was being held in jail, law enforcement had the keys to the residence and law enforcement had the time and the ability to obtain a Search Warrant; there was no need for law enforcement to perform a warrantless search. Law enforcement clearly had sufficient time to secure the residence and obtain a Warrant, but, for whatever reason, they chose not to do so.

b. There were no exigent circumstances that required law enforcement to enter Matthew's residence without first obtaining a Warrant.

The Fourth Amendment of the United States Constitution and Article VI, Section 11, of the South Dakota Constitution protect an individual's right to be free from unreasonable searches and seizures. "Warrantless searches, therefore, are per se unreasonable, aside from a few, settled exceptions". *State v. Ashbrook,* 586 N.W.2d 503, 506 (S.D. 1998) (citations omitted). Those searches are searches incident to an arrest, automobile searches and exigent circumstances. None of those exceptions were applicable to the case at hand.

In determining whether a search or seizure is unreasonable is most effectively accomplished by looking at the "reasonableness in all circumstances of the particular governmental invasion of a citizen's personal security". *Id* at 506. In this case, the search of Matthew's residence while Matthew had been in law enforcement custody for fifteen (15) days and not subject to release was not appropriate.

Law enforcement should have obtained a Warrant. Matthew's trial counsel, for whatever reason, did not bother to seek to have the hard drives suppressed.

Matthew's counsel's failure to make even minimal effort to suppress those hard drives allowed the State to use unrelated information to "poison the well" and prejudice the jury.

c. Absent the effort to suppress the videos derived from the hard drives obtained from the search that occurred one (1) day prior to law enforcement obtaining a Search Warrant resulted in prejudicial materials being published to the jury.

The failure to seek the suppression of the materials obtained by law enforcement absent the necessity of a Warrant allowed the State to prepare and publish child pornography to the jury. Once those videos were published to the jury, any hope that Matthew would be convicted of the offense for which he was actually charged was dashed. The inference made by the State was that Matthew was guilty of rape because the State had found child pornography at his residence.

A review of the record does not reflect that trial counsel made even reasonable efforts to suppress evidence, investigate the allegations or require the State to prove up its case. As such, Matthew was deprived of his due process right to an effective defense. Based upon the foregoing, Matthew was denied his due process right to counsel.

CONCLUSION

In this, as in every criminal case, the State had the burden to establish beyond a reasonable doubt that Matthew had committed a crime. Neither the internet searches nor the video clips of hardcore pornography had anything to do with the crime for which Matthew was actually charged. Matthew was ***not*** charged with the possession of child pornography in state court; he was charged with rape of a child.

There is little doubt that the real purpose for Ms. Russell's testimony had nothing to do with establishing the required act of penetration on E.W. The purpose of that testimony as well as the video clips was solely used to inflame the minds of the jury against Matthew and prejudice the jury against him.

The State's inference that the mere possession of child pornography makes Matthew a child rapist is, at best, flawed logic. However, unfortunately, that plan worked.

The State was charged with proving each and every element of the crime of rape in the first degree. The mere inference that it ***could have*** occurred because Matthew possessed child pornography is wholly insufficient.

Moreover, the fact that Matthew's trial counsel did not even bother to try to keep the illegally seized hard drives out reflects the failure of his trial counsel and the deprivation of Matthew's right to due process.

This Court should reverse this matter back down to the Trial Court with instructions to the Trial Court to suppress all information obtained from the hard drives obtained from an illegal search and prohibiting the Trial Court from allowing Ms. Russell to testify as to what internet searches were found on Matthew's phone, prohibit the showing of any videos of child pornography to the jury, ordering that Matthew, via his attorney, be allowed to cross-examine the alleged victim, E.W. and allow Matthew's expert to testify as to the unreliability of one (1) single test.

Dated this 3rd day of April, 2023.

Respectfully Submitted,

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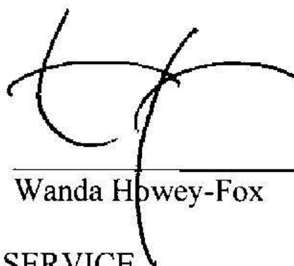
CERTIFICATE OF COMPLIANCE

I, Wanda Howey-Fox, hereby certify that Appellant's Brief, exclusive of the Certificate of Service and the Certificate of Compliance, is submitted in Times new Roman typeface, 12 font and that the word processing system used to prepare this Brief indicates that the number of words used was 5,005 and the number of characters used, excluding spaces, was 24,692.



Wanda Howey-Fox

CERTIFICATE OF SERVICE

This is to certify that the original and two (2) copies of the Appellant's Brief were served upon Shirley Jameson-Fergel and (1) copy was served upon Tyler Larsen and Paul Swedlund by depositing said copies in the United States Post Office at Yankton, South Dakota, in envelopes with first class postage prepaid, addressed to the following persons at their given address on the on this the 3rd day of April, 2023.

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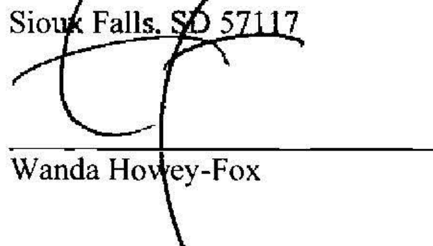

Wanda Howey-Fox

APPENDIX

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:ss
COUNTY OF YANKTON) FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

66CRI. 21 - 16

v.

INDICTMENT

MATTHEW ALLAN CARTER,
DOB: 04/28/1990
701 Burleigh Street Apt.2
Yankton, SD 57078

Defendant.

FILED
JAN 11 2021
Jody L Johnson
Yankton County Clerk of Courts
1st Judicial Circuit Court of South Dakota

THE YANKTON COUNTY GRAND JURY CHARGES:

COUNT 1.

That between December 10, 2020, through December 30, 2020, in the County of Yankton, State of South Dakota, MATTHEW ALLAN CARTER did commit the public offense of SEXUAL CONTACT WITH CHILD UNDER SIXTEEN YEARS OF AGE (SDCL § 22-22-7) in that any person, sixteen years of age or older, who knowingly engages in sexual contact with another person, other than his spouse, when such other person is under the age of sixteen years, to-wit: E.W. (Class 3 Felony)

Dated this 11th day of January, 2021, at Yankton, South Dakota.

"A True Bill"
"A TRUE BILL"

THIS INDICTMENT IS MADE WITH THE CONCURRENCE OF AT LEAST SIX GRAND JURORS.

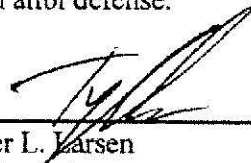
Lisa Ann Pibal
Grand Jury Foreman

WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY IN REGARD TO THIS INDICTMENT:

Detective Joseph Erickson,

STATE OF SOUTH DAKOTA	)	
:ss		NOTICE OF DEMAND FOR ALIBI DEFENSE
COUNTY OF YANKTON	)	

I, Tyler L. Larsen, Yankton County (Deputy) State's Attorney, in the above matter, hereby state that the alleged offenses(s) was committed between December 10, 2020, through December 30, 2020, in Yankton County, South Dakota. I hereby request that Defendant or their attorney serve upon me a written notice of their intention to offer a defense of alibi within ten (10) days as provided by SDCL § 23A-9-1. Failure to provide such notice of an alibi defense may result in exclusion of any testimony pertaining to an alibi defense.



Tyler L. Larsen
Yankton Co. (Deputy) State's Attorney
410 Walnut Street, Suite 100
Yankton, SD 57078
Telephone: (605) 665-4301

FILED
JAN 11 2021
Jody L Johnson
Yankton County Clerk of Courts
1st Judicial Circuit Court of South Dakota

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF YANKTON	)	FIRST JUDICIAL CIRCUIT

66 CRI 21-16

STATE OF SOUTH DAKOTA	)	SUPERCEDING INDICTMENT FOR:
Plaintiff,	)	
vs.	)	FIRST DEGREE RAPE Class C felony (SDCL 22-22-1(1))
MATTHEW ALLAN CARTER DOB: 4/28/1990	)	
Defendant.	)	

FILED
APR - 6 2021
Jody L Johnson
Yankton County Clerk of Courts
1st Judicial Circuit Court of South Dakota

THE YANKTON COUNTY GRAND JURY CHARGES:

That on or about between October 1, 2020, and December 25, 2020, in the County of Yankton, State of South Dakota, MATTHEW ALLAN CARTER did commit the public offense of FIRST DEGREE RAPE (SDCL 22-22-1(1)) in that he did accomplish an act of sexual penetration with E.W. (dob 7/10/2015), to wit: he performed cunnilingus on E.W., when E.W. was less than thirteen years of age, contrary to statute in such case made and provided against the peace and dignity of the State of South Dakota.

Dated this 6th day of April, 2021, in Yankton, South Dakota.

"A True Bill"
"A True Bill"

THIS INDICTMENT IS MADE WITH CONCURRENCE OF AT LEAST SIX GRAND JURORS.

Grand Jury Foreperson

WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY:

Detective Joseph Erickson
Nycole Morkve

FILED

STATE OF SOUTH DAKOTA) DEC 23 2021 IN CIRCUIT COURT
:ss
COUNTY OF YANKTON) Jody L Johnson Yankton County Clerk of Courts 1st Judicial Circuit Court of South Dakota FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, 66CRI 21-16

Plaintiff,

v.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AS TO OTHER ACTS EVIDENCE STATE INTENDS TO OFFER AT TRIAL

MATTHEW ALLAN CARTER,

Defendant.

The State's Motion to Admit Other Act Evidence Pursuant to SDCL 19-19-404(b) was filed on March 18, 2021 (Child Pornography). The State's Amended Motion to Admit Res Gestae Evidence, or in the Alternative, Other Acts Evidence Pursuant to SDCL 19-19-404(b) was filed on June 28, 2021 (Internet Searches and Web History). Defendant's counsel has stated objections to State's Notice of Intent to Offer Defendant's Text Messages and Other Statements Regarding Sexually Transmitted Diseases and Treatment filed on June 28, 2021.

The court has considered the above motions, all oral arguments, as well as counsels' written submissions related to these motions: Defense counsel's letter briefs filed on July 6, 2021; September 30, 2021; and October 15, 2021 and the State's briefs filed on September 30, 2021; October 1, 2021; and October 15, 2021.

1. In the Superceding Indictment, Defendant is charged with First Degree Rape in violation of SDCL 22-22-1(1) in that it is alleged that between October 1, 2020 and December 25, 2020, in Yankton County, South Dakota, Defendant Matthew Carter did accomplish an act of sexual penetration with E.W. (dob 7/10/2015), to wit: he performed cunnilingus on E.W., when E.W. was less than thirteen years of age.

2. The State seeks to admit other act evidence against Defendant Matthew Carter, including videos of three different adult males performing oral sex on three different prepubescent females.
3. The videos were found on a hard drive in Defendant Matthew Carter's residence after his arrest in this case on December 31, 2020.
4. The video excerpts the State would offer at trial are described on Exhibit 15 and contained on Exhibit 13. Both exhibits were admitted on August 30, 2021 for purposes of the motion hearing.
5. Prior to the court entering this written ruling, Attorney Kelly Marnette played Exhibit 13 for the court, with Mr. Larsen and Ms. Fiksdal present.
6. The State also seeks to introduce evidence obtained from Defendant's cell phone, namely, internet searches done on December 9, 2020 and the phone's web history from December 9 and 30, 2020. See Exhibits 11 and 12, both admitted on August 30, 2021, for purposes of the motion hearing.
7. The State has also argued that the internet searches and web history are res gestae.
8. Finally, the State seeks to introduce nine text messages made to and from Defendant Matthew Carter from May 12, 2020 through April 9, 2021 as outlined in the State's Notice and its October 1, 2021 Brief in Support of Notice of Intent to Offer Defendant's Text Message and Other Statements Regarding Sexually Transmitted Diseases[1] and Treatment filed October 1, 2021. See also Exhibits 4-10 admitted on August 30, 2021, for purposes of the motion hearing.

[1] The court takes judicial notice that "clap", the term used in the June 15, 2020 text message, is a colloquial term for gonorrhea. See Taber's Cyclopedic Medical Dictionary, Edition 19, page 413. See also Transcript of August 30, 2021 Hearing, p. 67.

9. The State asserts that these text messages and statements will be offered at trial "to contradict [Defendant's] defense that he never had [g]onorrhea or that he has never been treated for [g]onorrhea." State's Reply Brief in Support of Notice of Intent to Offer Defendant's Text Messages and Other Statements Regarding Sexually Transmitted Diseases and Treatment filed October 15, 2021.
10. The State has also acknowledged, "Should Defendant decline to challenge the [g]onorrhea test results at trial, then the messages and statements may be deemed irrelevant by the court." State's Brief in Support of Notice of Intent to Offer Defendant's Text Messages and Other Statements Regarding Sexually Transmitted Diseases and Treatment filed October 1, 2021.
11. As to Exhibit 13, the videos showing an adult male performing cunnilingus on a minor child, and internet searches and web histories listed on Exhibits 11 and 12 that include terms such as "incest" and "childhood orgasms", these materials are all probative of Defendant's motive to commit the alleged offense with which he is charged, namely, that he has a sexual interest in underage children such as E.W.[2]
12. These materials also are relevant to Defendant's intent, including refuting Defendant's voluntary statement to law enforcement that he did not perform cunnilingus on E.W., as even hearing about such an act was "horrible".
13. Mr. Carter, himself, allegedly made a statement in an April 9, 2021 recorded jail phone conversation "similar to the effect of, 'a Google search could prove intent, but it would never prove that he did it.'" Transcript of August 30, 2021 Hearing, p. 38.

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[2] In an April 9, 2021 recorded jail phone conversation, Mr. Carter allegedly made statements that he had always liked incest porn. Transcript of August 20, 2021 hearing, p. 39.

14. The videos, internet searches, and web histories are relevant pursuant to SDCL 19-19-401.[3]

15. In making its relevance determinations, the court has considered the fact that the act of cunnilingus with E.W. is alleged in the Superceding Indictment as taking place sometime between October 1, 2020 and December 25, 2020.

16. With Mr. Carter being in custody since December 31, 2020, it is understood that the videos were put on[4], the external hard drive sometime prior to December 31, 2020. Transcript of Hearing on August 30, 2021, p. 84.

17. Even though the State has not specifically shown the date that Mr. Carter viewed the videos sought to be admitted, the videos were in his possession and are relevant to show Mr. Carter's motive and intent as to E.W.

18. The dates of the internet searches sought to be admitted occurred on December 9, 2020. See Exhibit 11.

19. The dates of the phone's web history are dated December 9, 2020 and December 30, 2020. See Exhibit 12.

20. The State's written statements in support of its argument assert that the internet searches and web history "explain his conduct and his purpose in committing the act." (Motion filed June 28, 2021), and "Defendant's [sic] spent time researching what he did to E.W., including looking at the possibility that E.W. could orgasm from his act."

[3] The State has not shown to this court's satisfaction how these materials are relevant to showing plan to commit the act charged.

[4] Exhibits 13 and 15 do not include time stamps. Agent Russell testified that the time stamp on the hard drive "would best represent when the videos were put on that external hard drive." Transcript of August 30, 2021 hearing, p. 84.

(Reply Brief filed October 15, 2021).

21. With the allegations of the Superceding Indictment saying "on or about" as permitted by law[5], these internet searches and web histories are relevant to proving motive and intent.

22. Some of the web histories listed for December 30, 2020 state that a father was sentenced to serve "40 years in prison", and that children were impregnated by a father or "mom[']s boyfriend."

23. The punishment and penalty of a defendant in another state should not be introduced to the jury.[6]

24. Additionally, referencing impregnation of a child may unfairly inflame the jury, particularly when that is not a concern in this case.

25. Therefore, the court finds that unfair prejudice from the web histories dated December 30, 2020 which reference a court's sentence of another defendant or impregnation of a child substantially outweighs the probative value these histories may have.

26. Web histories dated December 30, 2020 which do not reference a court's sentence or impregnation of a child are permitted as the danger of unfair prejudice is not substantially outweighed by the probative value.

27. Furthermore, all internet searches and web histories from December 9, 2020 are permitted as their probative value is not substantially outweighed by the danger of unfair prejudice.

---

[5] See SDCL 23A-6-9.

[6] The court has granted the State's Motion in Limine to exclude references to punishment and penalties that are associated with the charges against Mr. Carter in this case.

28. None of the internet searches and web histories are res gestae evidence.

29. As to the videos of child pornography, the court finds that the videos are relevant to show Defendant's motive and intent as to alleged acts involving E.W.[7][

30. The court finds that having State witness(es) describing the video scenes to the jury (including, but not limited to, how the video excerpts are described on Exhibit 15) does not result in unfair prejudice that substantially outweighs the probative value of the evidence.

31. Even though the State has cut down lengthy videos to isolate segments with cunnilingus, the court finds that the length and number of the video excerpts would result in unfair prejudice that substantially outweighs the probative value of showing all of the video excerpts on Exhibit 13 to the jury.

32. The State may show jurors no more than 10 seconds each from Video #1 (T-132349952), Video #2 (T-140132356) and Video #3 (T-652023764), for a total of 30 seconds of video. Alternatively, the State may show jurors one still photo from each of the three videos. The State could also decide to show a combination of videos and photos, but only one video segment of up to 10 seconds <u>or</u> one photo will be allowed from each of the three videos.

33. Finally, the court addresses the text messages included in Exhibits 7-10.

34. The court finds that all of the text messages are relevant if Defendant denies having had gonorrhea prior to December 25, 2020.

---

[7] The State also asserts that the videos show Defendant's plan to perform oral sex on a child and his "lustful disposition towards the sexual activity with which he is charged." Brief, p. 3. The court is not addressing these assertions in light of the court's determination of relevance as to motive and intent.

35. The court finds that to the extent the text messages sent and received between Mr. Carter and a female friend include pictures of the adult female's genitalia, the probative value of the pictures is outweighed by the danger of unfair prejudice.
36. With removal of the adult genitalia pictures, the probative value of the remainder of the text messages, statements, and photographs are not substantially outweighed by the risk of unfair prejudice and are admissible, if Defendant denies having gonorrhea prior to December 25, 2020.
37. The State may indicate on the exhibit(s) that the pictures have been blacked out pursuant to court order.
38. All findings of fact deemed to be more properly stated to be a conclusion of law shall be so considered.

CONCLUSIONS OF LAW

1. As stated by the South Dakota Supreme Court regarding other acts evidence,

    > SDCL 19-12-5 (Federal Rule 404(b)) allows for the admission of "other acts" evidence when it is relevant for some purpose other than proving character. This Court has established a two-part test to be used in applying this rule. "First, the offered evidence must be relevant to a material issue in the case. Second, the trial court must determine 'whether the probative value of the evidence is substantially outweighed by its prejudicial effect.' " *State v. Wright*, 2009 S.D. 51, ¶ 55, 768 N.W.2d 512, 531 (quoting *State v. Owen*, 2007 S.D. 21, ¶ 14, 729 N.W.2d 356, 362-63). "The res gestae rule is a well-recognized exception to Rule 404(b)." *State v. Goodroad*, 1997 S.D. 46, ¶ 10, 563 N.W.2d 126, 130 (citing *State v. Floody*, 481 N.W.2d 242, 253 (S.D.1992))....

    State v. Stark, 2011 S.D. 46, ¶ 25, 802 N.W.2d 165, 173.

2. As further stated by the South Dakota Supreme Court "'[I]f the other act evidence is admissible for any purpose other than simply character, then it is sustainable. All that is prohibited under §404(b) is that similar act evidence not be admitted solely to

prove character.'" *State v. Taylor*, 2020 SD 48, ¶ 27, 948 N.W.2d 343, 351 (quoting *State v. Phillips*, 2018 SD 2, ¶ 14, 906 N.W. 2d 411, 415).

3. As noted by the Supreme Court in *State v. Snodgrass*, 2020 SD 66, ¶ 32, 951 N.W.2d 792, 803, "We have previously held that other act evidence that occurs after the charged offence may be relevant 'to prove a common plan or scheme.'" (quoting *State v. Thomas*, 2019 SD 1,¶ 23, 922 N.W.2d 9, 16).
4. If the court determines that the other acts evidence is relevant, the court then determine if the probative value of other acts evidence is substantially outweighed by the danger of unfair prejudice. SDCL 19-19-403.
5. In determining unfair prejudice, "[d]amage to the defendant's position is no basis for exclusion; the harm must not come from prejudice, but from 'unfair prejudice.'" *State v. Taylor*, 2020 SD 48, ¶ 33, 948 N.W.2d 342, 352 (quoted case omitted).
6. Put another way, "'Evidence is unduly prejudicial if it persuades the jury in an unfair or illegitimate manner, but not merely because it harms the other party's case.'" *State v. Snodgrass*, 2020 SD 66, ¶ 27, 951 N.W.2d 702, 802 (quoted case omitted).
7. In *Snodgrass*, the trial court found, in a child rape/child sexual contact case, that web searches and histories, and several pornographic images, "showed a 'dedicated and persistent interest in underage females' and were relevant to Snodgrass's 'pattern, common plan, or scheme, and intent' to engage in sexual activity with underage girls." 2020 SD 66, ¶ 28, 951 N.W.2d at 802.
8. In *Snodgrass*, the trial court was affirmed in its decision to admit the other acts evidence, with the Supreme Court stating, "[T]he internet searches, histories, and

pornographic images involving underaged girls,[8] along with the images Snodgrass took of E.M., were properly admitted and probative to Snodgrass's intent and plan to sexually abuse E.M." 2020 SD 66, ¶ 37, 951 N.W.2d at 804.

9. Similarly, in *State v. Thomas*, 2019 SD 1, 922 N.W.2d 9, the Supreme Court affirmed the trial court's decision to admit evidence of the defendant's internet searches in a case involving charges including fourth degree rape, sexual contact with a child, and sexual exploitation of a minor.

10. As stated by the Supreme Court, "the internet searches for incest were directly related to one of the charged events.... Furthermore, the searches related to 'teens' and 'jailbait' contradicted Thomas's assertion to law enforcement that he was interested in older women. While the searches occurred after the alleged incidents, the searches were corroborative of Thomas's plan and intent to engage in sexual conduct with minors and family members." *State v. Thomas*, 2019 SD 1, ¶ 23, 922 N.W.2d 9, 16/

11. "The res gestae exception permits the admission of evidence that is 'so blended or connected' in that it 'explains the circumstances; or tends logically to prove any element of the crime charged.'" *Wright*, 2009 S.D. 51, ¶ 55, 768 N.W.2d at 531 (quoting *Owen*, 2007 S.D. 21, ¶ 15, 729 N.W.2d at 363);
State v. Stark, 2011 S.D. 46, ¶ 25, 802 N.W.2d 165, 173.

12. The South Dakota Supreme Court has found testimony about uncharged sexual abuse allegedly perpetrated by a defendant upon the same alleged victim as in the pending

[8] The Supreme Court did note that the trial court had "failed to enter findings and conclusions addressing the probative value of the three images that did not involve prepubescent girls." However, any error as to the admission of those photographs was not prejudicial. *State v. Snodgrass*, 2020 SD 66, ¶ 36, 951 N.W.2d at 804.

charges was not res gestae evidence as the testimony was not regarding a "'matter incident to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without knowledge of which the main fact might not be properly understood.'". *State v. Fischer*, 2010 SD 44, ¶ 19, 783 N.W.2d 664, 671 (quoted case omitted).

13. All conclusions of law deemed to be more properly stated to be a finding of fact shall be so considered.

Therefore,

IT IS ORDERED that the internet searches and web histories from December 9, 2020 are permitted to be shown to the jurors pursuant to SDCL 19-19-401 and SDCL 19-19-403.

IT IS FURTHER ORDERED that the web histories from December 30, 2020 are relevant pursuant to SDCL 19-19-401, but some of these histories are excluded pursuant to SDCL 19-19-403 to the extent the December 30, 2020 web histories reference a court's sentence or impregnation of a child.

IT IS FURTHER ORDERED the videos of child pornography are relevant pursuant to SDCL 19-19-401, but the court determines that the videos will be limited pursuant to SDCL 19-19-403 as follows:

a. The State's witness(es) may describe the video scenes to the jury in words (such as, but not limited to, how the video excerpts are described on Exhibit 15).
b. The State may show jurors no more than 10 seconds each from Video #1 (T-132349952), Video #2 (T-140132356) and Video #3 (T-652023764), for a total of 30 seconds of video. Alternatively, the State may show jurors one still photo from each of the three videos. The State could also decide to show a combination of videos and

photos, but only one video segment of up to 10 seconds or one photo will be allowed from each of the three videos.

IT IS FURTHER ORDERED that the text messages (Exhibits 4-10), (not including pictures of adult genitalia), and statements made by Matthew Carter as set out in the State's Notice, are permitted pursuant to SDCL 19-19-401 and SDCL 19-19-403, if Defendant Matthew Carter denies (by argument of counsel, by testimony of witnesses or submission of evidence, or by Mr. Carter's own testimony) that he has not had gonorrhea.

IT IS FURTHER ORDERED that this order is only intended to address relevance (Rule 401) and Rule 403. All other objections to any offered evidence may be made by Defendant's counsel at trial.

Dated the 23rd day of December, 2021.

BY THE COURT:

Honorable Cheryle Gering
Circuit Court Judge

ATTEST:
Jody Johnson
Yankton County Clerk of Courts
BY

FILED

STATE OF SOUTH DAKOTA) DEC 23 2021 IN CIRCUIT COURT
:ss
COUNTY OF YANKTON) FIRST JUDICIAL CIRCUIT

Jody L Johnson
Yankton County Clerk of Courts
1st Judicial Circuit Court of South Dakota

STATE OF SOUTH DAKOTA, 66CRI 21-16

Plaintiff,

v.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS AS TO MINOR'S STATEMENTS AND TESTING OF MINOR

MATTHEW ALLAN CARTER,

Defendant.

On July 12, 2021, August 30, 2021, and December 20, 2021, the court received exhibits and heard testimony related to the following: State's Motion to Admit Child's Statements Under SDCL 19-19-806.1 filed on March 17, 2021; State's Motion in Limine Re: Victim's Alleged Statement About Sexual Abuse at School filed on August 9, 2021; and Defendant's Motion to Exclude Testing of Alleged Victim filed on October 15, 2021. Assistant South Dakota Attorney General Kelly Marnette, Yankton County Deputy State's Attorney Tyler Larsen, Defendant Matthew Carter, and Defendant's attorney Melissa Fiksdal were all personally present for the these hearings. In addition to any oral arguments, the court also considered the following written submissions related to these motions: Defense counsel's July 6, 2021; September 30, 2021; and October 15, 2021 letter briefs; and the State's briefs filed on September 30, 2021; October 1, 2021; and October 15, 2021. The court now makes the following findings of fact, conclusions of law, and orders.

FINDINGS OF FACT

1. In the Superceding Indictment, Defendant is charged with First Degree Rape in violation of SDCL 22-22-1(1) in that it is alleged that between October 1, 2020 and

December 25, 2020, in Yankton County, South Dakota, Defendant Matthew Carter did accomplish an act of sexual penetration with E.W. (dob 7/10/2015), to wit: he performed cunnilingus on E.W., when E.W. was less than thirteen years of age.

2. Defendant was arrested on this charge on December 31, 2020.
3. The State alleges that the charge in this case, as well as E.W.'s pre-trial statements, are supported by positive tests for gonorrhea by both E.W. and Defendant.
4. The State anticipates "that Defendant will claim that he has never had Gonorrhea or any treatment for Gonorrhea and that he can produce a negative test result from after he was arrested." State's Notice of Intent to Offer Defendant's Text Messages and Other Statements Regarding Sexually Transmitted Diseases and Treatment filed June 28, 2021.
5. The State seeks to admit the statements made by E.W. to her grandmother on or about December 25, 2020 and the statements made by E.W. to Child's Voice on December 30, 2020.[1]
6. The State seeks to exclude the statements made by E.W. to her mother on or about December 24, 2020, regarding alleged sexual abuse at school, namely, that E.W. said a teacher at school licked her girl parts and that two kids in her class were licking each other's girl parts.
7. Defendant Matthew Carter intends to offer E.W.'s statement to her mother on or about December 24, 2020 that Defendant Matthew Carter licked her girl parts, and E.W.'s statement that she made this statement up because she was mad at Mr.

[1] The State has withdrawn its request to admit E.W.'s statements made to her mother on or about December 24, 2020 that was part of the State's written motion. However, the defense wants these statements admitted.

Carter.

8. E.W.'s grandmother, Jennifer Morkve, testified on July 12, 2021 regarding the statements E.W. made to her on or about December 25, 2020.
9. Exhibit 3 contains a video taken by Jennifer Morkve of E.W. talking to her on or about December 25, 2020.
10. E.W.'s mother, Nycole Morkve, testified on August 30, 2021 regarding the statements E.W. made to her.
11. Bri Staton testified on July 12, 2021 regarding the statements made by E.W. at Child's Voice.
12. The State alleges that the statements made by E.W. to Jennifer Morkve and at Child's Voice should be admitted even if the State does not call E.W. as a witness as the State alleges E.W. is unavailable to testify at trial based upon testimony of E.W.'s counselor, Mikaela Campell, and E.W.'s mother.
13. Ms. Campbell testified on August 30, 2021 that she had not asked E.W. any specific questions about the alleged abuse during counseling sessions because "It's not my place as a therapist to bring up, especially for the recommendation that Child's Voice had made that caregivers are not to ask explicit questions about maltreatment, and the reason for that is that we don't want to influence any memories that [E.W.] has or give her language that isn't her own. And so, when and if [E.W.] is ready to share about her experiences, it's very important that those are in her words and not in the words of adults in her life who are asking her questions." August 30, 2021 Transcript, page 12.
14. When asked about concerns regarding E.W. testifying in court, Ms. Campbell

referenced E. W. feeling nervous and being unable to communicate or speak to a "bunch of people in an environment that she doesn't know, about things that are hard to talk about, could traumatize her and could make it harder for her emotionally." August 30, 2021 Transcript, p. 14.

15. Ms. Campbell went on to state that as to E.W. facing Mr. Carter, "I think that would be very scary for her. And I worry that she would become fearful and freeze. I worry about the impact that could have on her, emotionally, going forward." Id.
16. Ms. Campbell also agreed with Ms. Marnette that testifying in court could "set back any progress that [Ms. Campbell] ha[s] made" with E.W. Id.
17. None of the statements made by Ms. Campbell are unique to E.W.
18. The same concerns could be stated as to a majority of lay witnesses who have to testify in court, particularly those who have to testify regarding sexual assaults.
19. Furthermore, Ms. Campbell identifies no specific circumstances faced by E.W., other than E.W. was initially "very shy, very cautious", in her first meeting with Ms. Campbell.
20. Again, it is expected that a young child, when meeting a stranger, will have similar feelings.
21. E.W.'s mother, Nycole Morkve, testified that she believed that having E.W. testify in front of Mr. Carter "would be bad for her, irregardless, because at this point, me and her counselor both discussed it, and we would prefer that she forget the whole incident altogether. And we don't know if she remembers it. And then, based on what happened afterwards, she was very, very confused about what happened, what didn't happen, based on her story, based on conversations with my mother.

Because, like I said, you know, she had come home, and she said, Grandma said that I had to say these things. And if I don't, then, you know, she was under the impression Matt was going to hurt me, that Matt was going to beat her, et cetera, et cetera. So I think it would be bad for her to be talking about something, which, number one will scare her. Number two, she is very confused about, because now she doesn't know what's real and what's not...." August 30, 2021 Transcript, p. 103.

22. Ms. Morkve's desire to protect her daughter from feeling confusion or fear is understandable.
23. However, these feelings are not sufficient to establish unavailability of the child as a witness.
24. When asked "If the judge says that she is required to testify, will you bring her to testify? As her parent?", Nycole Morvke said "If I can avoid it, I will not bring her." August 30, 2021 Transcript, p. 106.
25. The court finds this statement by Ms. Morkve as to whether Ms. Morkve would defy a court order to be equivocal.
26. Thus, Ms. Morkve's statements do not make E.W. unavailable to testify.
27. The State has not yet brought E.W. before the court to determine her competence to testify, as the court understood that the State was asking the court to make the determination that E.W. was unavailable to testify.
28. E.W.'s competence to testify remains to be determined by the court.
29. The time, content, and circumstances of the Child's Voice interview provides sufficient indicia of reliability as to E.W.'s statements made in that interview.

30. Nycole Morkve has voiced distrust of Jennifer Morkve's motives and claimed that Jennifer Morkve coached E.W.

31. However, Nycole Morkve testified that E.W. first told her about the alleged abuse by Matthew Carter and that E.W. did so at a time when she had not seen her grandmother for several months.

32. While Nycole Morkve claimed that E.W. immediately recanted the statement, saying she had made it up because she was "mad" at Mr. Carter, Ms. Morkve determined it was important to exclude Mr. Carter from E.W.'s life at that time in order to protect E.W.

33. Jennifer Morvke testified that E.W.'s statements to her were unsolicited, and that she asked E.W. to repeat what E.W. had previously told her so that Ms. Morvke could film E.W.'s words and actions.

34. The recording made by Jennifer Morke shows E.W. making what appear to be unrehearsed and non-coerced actions and statements.

35. The court finds that the time, content, and circumstances of E.W.'s statements to Jennifer Morkve provide sufficient indicia of reliability to be admissible.

36. Nycole Morkve's testimony on August 30, 2021 as to how E.W. came to make comments to her regarding claimed sexual abuse is less than clear. See, e.g., August 30, 2021 Transcript, pages 92-93.

37. Nycole Morkve claims that E.W. told her that E.W. had made the statements to her regarding Matthew Carter licking her girl parts because she was mad at him for yelling at her a few days earlier for throwing food on the floor and because she wanted her mother "all to [her]self." August 30, 2021 Transcript, page 93.

38. The assignment of such well-thought out motives to a five-year old child is suspect, especially when Ms. Morvke otherwise tries to describe her daughter as confused.

39. However, Nycole Morvke also acted on the statements by following up with counseling for E.W.

40. Furthermore, Nycole Morkve has acknowledged that there were times when E.W. was left alone in Matthew Carter's care so he would have had the opportunity to do what E.W. claimed.

41. The court finds that the time, content, and circumstances of E.W.'s statements to Nycole Morkve, both alleging abuse by Matthew Carter and then allegedly retracting those allegations, provide sufficient indicia of reliability to be admissible.

42. Until the court has the opportunity to observe E.W. directly, based upon the court's review of the testimony received on July 12 and August 30, as well as the review of the Heartland Psychological Services records for E.W., the court determines at this time that E.W. is available to testify at trial.

43. Evidence of E.W. testing positive for gonorrhea, and Mr. Carter admitting that he has had gonorrhea and/or Mr. Carter testing positive for gonorrhea, provides corroborative evidence to support E.W.'s statements regarding Matthew Carter licking her vagina.

44. Having heard and considered the testimony of Dr. Free, Dr. Roth, and Dr. Dimitrievich's and the cited guidelines and articles which this court has reviewed, there is no basis for this court to exclude the gonorrhea test results of E.W.

45. The medical testing for gonorrhea conducted on E.W. are relevant and reliable.

46. The lab report disclaimers that the defense so heavily relies upon for criticism of the

gonorrhea testing done on E.W. is put on the reports simply because "no NAAT assays have been cleared [by the FDA] for use in any sample type from prepubertal boys and girls. Without other options, most laboratories resort to including disclaimers in NAAT test reports regarding the off-label use of sample types[.]" Laboratory Diagnosis of Sexually Transmitted Infections in Cases of Suspected Child Sexual Abuse, Journal of Clinical Microbiology, Volume 58, Issue 2, page 5 (February 2020).

47. This same article goes on to state:

> Given the legal implications, testing protocols with built-in redundancy, such as employing more than one specimen type and more than one test modality, can only strengthen laboratory test confidence when the off-label use of NAATs is inevitable and culture is not rapid. This standard, however, requires that a complex set of samples be collected for CSA evaluations. This can be best accomplished through the development of a CSA test bundle....

Id (emphasis added). See also, A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric, U.S. Department of Justice, page 167, fn. 227 (April, 2016)("Due to low prevalence of STDs in the prepubescent population, and lack of enough large randomized controlled trials for validation, this [NAAT] testing is not yet approved by the Food and Drug Administration for this population. However, the CDC discusses the use of NAAT for this population as indicated in protocol recommendations.").

48. Furthermore, multiple testing is recommended, but it can either be multiple tests done on one sample or multiple tests done on more than one sample.

49. As stated in the CDC recommendations,

> …Although data regarding NAAT for children are more limited and performance is test dependent, no evidence demonstrates that performance of NAAT for detection of *N. gonorrhoea*…among children differs from that among adults. Only FDA-cleared NAAT assays should be used….Specimens (either NAAT or culture, including any isolates) obtained before treatment should be preserved for further validation if needed. When a specimen is positive, the result should be confirmed either by retesting the original specimen or obtaining another. Because of the overall low prevalence of *N. gonorrhoeae*…among children, false-positive results can occur, and all specimens that are initially positive should be confirmed.

Sexually Transmitted Infections Treatment Guidelines, 2021, Morbidity and Mortality Weekly Report, Volume 70, No. 4, page 133 (July 23, 2021)(emphasis added).

50. State also asks that the courtroom be partially closed during E.W.'s testimony, if she testifies.
51. In addition to courtroom cosure, a party may request, or the court may on its own motion, allow the testimony of the child to be taken in a room other than the courtroom.
52. At this time, there is insufficient basis to either close the courtroom or to authorize the testimony of the child from another courtroom.
53. Any finding of fact deemed to be a conclusion of law shall be so considered.

CONCLUSIONS OF LAW

1. SDCL 19-19-806.1 provides as follows:

   A statement made by a child under the age of thirteen, or by a child thirteen years of age or older who is developmentally disabled as defined in § 27B-1-18, describing any act of sexual contact or rape performed with or on the child by another, or describing any act of physical abuse or neglect of the child by another, or any act of physical abuse or neglect of another child observed by the child making the statement, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings against the defendant or in any proceeding under chapters 26-7A, 26-8A, 26-8B, and 26-8C in the courts of this state if:
   (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
   (2) The child either:
   (a) Testifies at the proceedings; or
   (b) Is unavailable as a witness.

   However, if the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

   No statement may be admitted under this section unless the proponent of the statement makes known the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

2. "South Dakota law defines unavailability as including a declarant who is 'unable to be present or testify' at the trial because of a 'then-existing physical or mental illness or infirmity.' SDCL 19–16–29(4). Thus, a witness's unavailability can be premised on mental limitations, as well as physical absence." *State v. Toohey*, 2012 S.D. 51, ¶ 14, 816 N.W.2d 120, 128.

3. Based upon the evidence presented to the court to date, E.W. is available to testify at trial pursuant to SDCL 19-19-806.1.

4. Before E.W. testifies, the court will need to make a determination regarding her competence to testify. *See, e.g., State v. Spaniol*, 2017 SD. 20, 895 N.W.2d 329.

5. The State seeks to exclude statements E.W. made about alleged sexual acts at school

pursuant to SDCL 19-19-412.

6. The defense is not seeking to admit these statements to show that E.W. engaged in other sexual behavior.
7. SDCL 19-19-412 does not bar the statements made about alleged sexual acts at school.
8. Rather, the defense is seeking to admit these statements to call into question E.W.'s credibility, i.e., the argument is that E.W. lied about these statements so, therefore, she is also lying about the statements made about Mr. Carter.
9. These statements are not barred by SDCL 19-19-608. *See State v. Sieler,* 397 N.W.2d 89, 92 (S.D.1986); *State v. Chamley,* 1997 S.D. 107, ¶ 27, 568 N.W.2d 607, 616.
10. The State's Motion in Limine Re: Victim's Alleged Statement About Sexual Abuse at School is denied.
11. The court has a gatekeeping function to perform as to medical evidence such as the gonorrhea testing in this case.
12. As stated by the South Dakota Supreme Court:

> [W]hen dealing with expert opinion, the court must fulfill a gatekeeping function, ensuring that the opinion meets the prerequisites of relevance and reliability before admission. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 2799, 125 L.Ed.2d 469, 485 (1993); *State v. Hofer,* 512 N.W.2d 482, 484 (S.D.1994) (citations omitted); *Rogen v. Monson,* 2000 SD 51, ¶¶ 26 27, 609 N.W.2d 456, 462 (Konenkamp, J. concurring specially) (*Daubert* applies to medical opinions).
>
> *Daubert* and its progeny offer general guides for courts to consider in assessing reliability: testing, peer review, error rate, and general acceptance. *See Daubert,* 509 U.S. at 593–94, 113 S.Ct. at 2796–97, 125 L.Ed.2d at 482–84. These factors cannot be applied in all settings. In some instances, reliability must focus on "knowledge and experience." *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 150, 119 S.Ct. 1167, 1175, 143 L.Ed.2d 238, 251 (1999). A fundamental baseline for reliability is that experts are limited to offering opinions within their expertise. *See Brain v. Mann,* 129 Wis.2d 447, 385 N.W.2d 227, 230 (1986) (citations omitted).

Garland v. Rossknecht, 2001 S.D. 42, ¶¶ 10-11, 624 N.W.2d 700, 702–03.

13. The gonorrhea test results, as explained in the medical testimony of Dr. Free and Dr. Roth, are relevant and reliable.
14. The Defendant's Motion to Exclude Medical Testing of Alleged Victim is denied.
15. SDCL 23A-24-6 reads, "Any portion of criminal proceedings, with the exception of grand jury proceedings, at which a minor is required to testify concerning rape of a child, sexual contact with a child, child abuse involving sexual abuse, or any other sexual offense involving a child may be closed to all persons except the parties' attorneys, the victim or witness assistant, the victim's parents or guardian, and officers of the court and authorized representatives of the news media, unless the court, after proper hearing, determines that the minor's testimony should be closed to the news media or the victim's parents or guardian in the best interest of the minor."
16. Until the court has the opportunity to determine the competence of the child, and because jury trials in this community are rarely attended by any members of the public so any request for closure may be unnecessary, the court will delay any determination regarding the request for closure of the courtroom until a later time. *See also State v. Rolfe*, 2013 S.D. 2, 825 N.W.2d 901.
17. Similarly, any request for the child to testify by closed circuit television pursuant to SDCL 26-8A-30 will be determined in the future.
18. Any conclusion of law deemed to be a finding of fact shall be so considered.

Based upon the above,

IT IS ORDERED, based upon the evidence presented to the court to date, E.W. is available to testify at trial pursuant to SDCL 19-19-806.1.

IT IS FURTHER ORDERED that before E.W. testifies, the court will need to make a determination regarding her competence to testify.

IT IS FURTHER ORDERED that the State's Motion in Limine Re: Victim's Alleged Statement About Sexual Abuse at School is denied.

IT IS FURTHER ORDERED that the Defendant's Motion to Exclude Medical Testing of Alleged Victim is denied.

IT IS FURTHER ORDERED that the court will defer any determination regarding closure of the courtroom or testimony of the child by closed circuit television to a future hearing.

Dated this 23rd day of December, 2021.

BY THE COURT:

Honorable Cheryle Gering
Circuit Court Judge

ATTEST:
Jody Johnson
Yankton County Clerk of Courts
BY

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF YANKTON	)	FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff, v. MATTHEW ALLAN CARTER, Defendant.	66 CRI 21-16 **OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Matthew Allan Carter, by and through his attorney of record, Melissa Fiksdal, respectfully makes the following objections to the Supplemental Findings of Fact, and Conclusions of Law and Orders as to the Minor's Statements and Testing of the Minor.

CONCLUSION OF LAW 18

This Conclusion of Law is erroneous because if fails to state what hearsay exception the testimony of the mother and the grandmother would fall under to be admissible in accordance with the United States Supreme Court ruling in Ohio v. Clark, 576 US 237, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015).

FINDINGS OF FACT 29 and CONCLUSION OF LAW 23

This Finding of Fact and Conclusion of Law is erroneous because the proper factors were not weighed by this Court as to the time, content and circumstances of the statements so as to provide a sufficient indica of reliability as recited in State. Buchholtz, 2013 S.D. 96, 841 N.W.2d 449 (S.D. 2013). In addition, the court did not find that these factors were considered utilizing the totality of the circumstance standard.

Further, that if the statements made by E.W. are to be considered to be testimonial, they are then subject to the Confrontation Clause and as such Defense was denied an opportunity to examine E.W on January 24,2022, where the sole issue was if the child was competent to testify.

CONCLUSION OF LAW 21

This Conclusion of Law is erroneous because E.W. testified that she could not remember telling those at Child's Voice, her mother, or her grandmother about the Defendant doing anything that she did not like to her body. The "subject matter" of the case is whether the Defendant touched or licked her in a sexual manner on her private parts, not if she told someone that he did.

CONCLUSION OF LAW 20 and 22

This Conclusion of Law is erroneous because E.W.'s lack of memory is more of an indicator that she is not competent and less of an indicator that she is unavailable. The State urged this Court to declare E.W to be unavailable due to the stress and trauma that the child would endure by having to testify. It was clear that the E.W. suffered no stress or trauma while testifying on January 24, 2022. After E.W. was excused, the State argued that E.W was unavailable due to 19-19-804 (a) (3) (testifies to not remembering the subject matter) not whether she would be unduly traumatized by having to testify.

Respectfully submitted this 31st day of January, 2022.

/s/ Melissa Fiksdal
Melissa Fiksdal
Attorney for Defendant
400 N. Main Ave., Ste. 207
Sioux Falls, SD 57104
(605) 275-4529
melissa@resolute law.org

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 31st day of October, 2022, a copy of the Defendant's Objections to Findings of Fact and Conclusions of Law was served upon Kelly Marnette, Assistant Attorney General, and Tyler Larson, Yankton County State's Attorney through Odyssey E-File and Serve as well as email to the following email addresses:

Kelly.Marnette@state.sd.us
tyler@co.yankton.sd.us

/s/ Melissa Fiksdal
Melissa Fiksdal

FILED

STATE OF SOUTH DAKOTA	)	FEB - 1 2022	IN CIRCUIT COURT
	:SS		
COUNTY OF YANKTON	)	Jody L Johnson Yankton County Clerk of Courts 1st Judicial Circuit Court of South Dakota	FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

v.

MATTHEW ALLAN CARTER,

Defendant.

66CRI 21-16

SECOND SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS AS TO MINOR'S STATEMENTS AND TESTING OF MINOR

On July 12, 2021, August 30, 2021, and December 20, 2021, the court received exhibits and heard testimony related to the following: State's Motion to Admit Child's Statements Under SDCL 19-19-806.1 filed on March 17, 2021; State's Motion in Limine Re: Victim's Alleged Statement About Sexual Abuse at School filed on August 9, 2021; and Defendant's Motion to Exclude Testing of Alleged Victim filed on October 15, 2021. Assistant South Dakota Attorney General Kelly Marnette, Yankton County Deputy State's Attorney Tyler Larsen, Defendant Matthew Carter, and Defendant's attorney Melissa Fiksdal were all personally present for the these hearings. In addition to any oral arguments, the court also considered the following written submissions related to these motions: Defense counsel's July 6, 2021; September 30, 2021; and October 15, 2021 letter briefs; and the State's briefs filed on September 30, 2021; October 1, 2021; and October 15, 2021. On January 24, 2022, the court held a hearing at which E.W. testified and the court made an oral determination regarding E.W.'s competence and availability. The court also supplemented its ruling regarding E.W.'s statements pursuant to a legal argument made by the State in its October 15, 2021 brief regarding E.W.'s statements. On January 28, 2022, the court issued its written Supplemental Findings of Fact, Conclusions of Law, and

Orders as to Minor's Statements and Testing of Minor. On January 31, 2021, Defendant's attorney Melissa Fiksdal filed written Objections to the court's written Supplemental Findings of Fact and Conclusions of Law. At trial conferences on January 31, 2022 and February 1, 2022, the court also heard further from Ms. Fiksdal regarding the defense objections, and also heard the State's resistance to those objections. Matthew Carter was personally present, along with counsel for both parties, at the January 31, 2022 and February 1, 2022 trial conferences. The court now makes the following second supplemental findings of fact, conclusions of law, and orders.

FINDINGS OF FACT

1. In the Superceding Indictment, Defendant is charged with First Degree Rape in violation of SDCL 22-22-1(1) in that it is alleged that between October 1, 2020 and December 25, 2020, in Yankton County, South Dakota, Defendant Matthew Carter did accomplish an act of sexual penetration with E.W. (dob 7/10/2015), to wit: he performed cunnilingus on E.W., when E.W. was less than thirteen years of age.
2. Defendant was arrested on this charge on December 31, 2020.
3. The State alleges that the charge in this case, as well as E.W.'s pre-trial statements, are supported by positive tests for gonorrhea by both E.W. and Defendant.
4. The State anticipates "that Defendant will claim that he has never had Gonorrhea or any treatment for Gonorrhea and that he can produce a negative test result from after he was arrested." State's Notice of Intent to Offer Defendant's Text Messages and Other Statements Regarding Sexually Transmitted Diseases and Treatment filed June 28, 2021.
5. The State seeks to admit the statements made by E.W. to her grandmother on or

about December 25, 2020 and the statements made by E.W. to Child's Voice on December 30, 2020.[1]

6. The State seeks to exclude the statements made by E.W. to her mother on or about December 24, 2020, regarding alleged sexual abuse at school, namely, that E.W. said a teacher at school licked her girl parts and that two kids in her class were licking each other's girl parts.
7. Defendant Matthew Carter intends to offer E.W.'s statement to her mother on or about December 24, 2020 that Defendant Matthew Carter licked her girl parts, and E.W.'s statement that she made this statement up because she was mad at Mr. Carter.
8. E.W.'s grandmother, Jennifer Morkve, testified on July 12, 2021 regarding the statements E.W. made to her on or about December 25, 2020.
9. Jennifer Morkve testified that she had not seen E.W. for "quite a while" prior to December 25, 2020.
10. Nycole Morkve had broken up with Matthew Carter prior to bringing E.W. to see Jennifer Morkve on December 25, 2020.
11. Nycole Morkve left E.W. to stay overnight with Jennifer Morkve on December 25, 2020.
12. E.W. had received a doll for Christmas that E.W. brought to Jennifer Morkve's house on December 25, 2020.
13. Jennifer Morkve observed that E.W. "was in the bathroom constantly bathing it [the

[1] The State has withdrawn its request to admit E.W.'s statements made to her mother on or about December 24, 2020 that was part of the State's written motion. However, the defense wants these statements admitted.

doll]."

14. Jennifer Morvke also observed that as E.W. was bathing the dolly, E.W. was "using a washcloth…and she would rub it in the vaginal area quite a bit, or in that area, the private area. And it kind of struck me that that wasn't normal, from when we had played with dolls before."
15. After making these observations, Jennifer Morvke later asked E.W. "why she was doing that [with the doll]?"
16. Jennifer Morvke testified that E.W. "then proceeded to tell me that she was just cleaning the dolly, and she proceeded to tell me about what she alleged Matt had done to her."
17. When asked what words E.W. had used, Jennifer Morvke testified, "She used that Matthew touched her, and he licked her. In her private areas."
18. Jennifer Morvke then testified, "She had actually – when this incident had occurred, I was in the bathroom myself. She just barged in and – Hi, Grandma. And, started doing this, then so, after she had done that, I chose to go and get my cell phone to get my camera to videotape. And then I videotaped."
19. Exhibit 3 (filed July 12, 2021) contains a video taken by Jennifer Morkve of E.W. talking to her on or about December 25, 2020.
20. When asked, "Did you, in any way, lead [E.W.], or tell her what to say, prior to that video being started?", Jennifer Morvke responded, "No, ma'am."
21. Jennifer Morvke testified that E.W. brought up the same thing "[p]robably two or three more times" after the recording, but Jennifer "tried to veer it [the topic] off so we could talk about something that was a little bit more happy."

22. E.W.'s mother, Nycole Morkve, testified on August 30, 2021 regarding the statements E.W. made to her.
23. Nycole Morkve testified that prior to December 25, 2020, she had to take E.W. to the doctor for treatment of vaginal discharge.
24. Nycole Morkve testified that prior to December, 2020, E.W. would say "things" that Matthew Carter did.[2] According to Nycole Morkve, when she then asked E.W. "did Matt do those things, and she would go, no, but Grandma said that if I don't say this, then you are going to take me back. And Matt is going to hit you. And I don't want him to do that."
25. Nycole Morvke also testified that prior to December, 2020, E.W. had said that Matthew Carter had kicked E.W. Nycole Morvke then testified, "At one time, at the beginning, before they had even had any – they had never been together alone – she had said that he had kicked her. And I said, [E.W.], you know, did this happen? She goes, no. And I said, why would you say that? And she said, I thought it was a funny story. And I said, is it funny? And she said, no. And I said, you know, people can get in trouble if you tell stories, like, a grown up hurt you. And we don't want to get someone in trouble for something they didn't do. And so she apologized, and apologized to me. And for a while, she didn't do that again."
26. Nycole Morvke testified that, "[t]oward the end of [her] relationship with Matt", [E.W.] did make statements to Nycole "about Matt touching [E.W.] inappropriately."

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[2] The court understands that the "things" reportedly done by Matthew Carter as reported by E.W. earlier in 2020 were not sexual in nature.

27. When asked to describe those statement, Nycole Morvke testified as follows:

> Well, she came to me with three different stories. One was about her teacher. The other was about students in her class. And the last one was about Matthew. She said that there was – in all three of the stories – she said that they had licked her girl parts. And that's, basically, what she said. She just said that they, at school, she said we were in the bathroom and my teacher licked my girl parts. And then she said that there was two kids in glass, and they were licking each other's girl parts. And then she said, and Matt licked my girl parts.

28. Nycole Morkve testified that E.W. told her that "Daddy Matt licked my girl parts" while "we were watching Scooby Doo."

29. Nycole Morvke said that E.W. made these comments to her "a couple of days before" December 25, 2020, when Nycole Morkve and E.W. were alone together in their apartment.

30. Nycole Morkve said that in response to E.W.'s statements,

> Well, we went through each one of the stories. She told me each one of the stories. And then I asked her if each one of the stories happened, and she told me – for different reasons – she said she was upset because she didn't want to go to school, so she said that, well, I told you that because I don't want to go to school. And then, she said the second one about the kids. She said I was mad at him, or her, because she didn't want to be friends with me anymore. And then she said, I said that about Matt because I was upset with him, because he yelled at me. And I don't want to be around

him right now, because he yelled at me.

31. Nycole Morkve testified that E.W. also told her "I want you all to myself."

32. Nycole Morkve testified that she [Nycole] tested positive for gonorrhea in January, 2021 after having had sexual relations with Matthew Carter during their prior dating relationship in 2020.

33. Nycole Morkve testified that E.W. would call Matthew Carter, "Dad" or "Daddy."

34. Nycole Morkve testified that she told Matthew Carter about E.W.'s comments.

35. Nycole Morkve also testified that at one point she did discuss the statements with E.W. while Matthew Carter was present. As to this, Ms. Morkve testified, "At one point, we did have a little discussion, because she brought it up. And, then she apologized, and she told him she was sorry that she told a lie about him. But ---"

36. Nycole Morkve testified that she did not initially tell law enforcement about any of E.W.'s comments, but instead decided to "make sure they [Matthew Carter and E.W.] were separated" and decided to take E.W. to a counselor after the Christmas break.

37. Nycole Morkve later told law enforcement the comments that had been made by E.W. to Nycole.

38. Bri Staton testified on July 12, 2021 regarding the statements made by E.W. at Child's Voice.

39. The Child's Voice interview with E.W. is summarized in Exhibit 2 and is shown on the thumbdrive marked as Exhibit 3, both filed in this case on July 12, 2021.

40. In her Child's Voice interview on December 30, 2020, E.W. made similar statements that her "Dad Matt" had licked her private areas, as she had previously

told her mother and her grandmother.

41. Testing of E.W. revealed that she tested positive for gonorrhea, including in her vagina.

42. Bri Staton testified that she followed the normal and proper protocols in questioning E.W. at Child's Voice on December 30, 2020.

43. There is no indication that anything improper or inappropriate was done in the questioning of E.W. at Child's Voice on December 30, 2020.

44. Regardless of whether Detective Erickson was present at the time of the interview on December 30, 2020, he was the party who referred the case to Child's Voice and is listed as one of the investigating agents (along with CPS). Exhibit 2 (filed July 12, 2021).

45. The listed reason for the referral to Child's Voice was "due to concern for sexual abuse." Exhibit 2 (filed July 12, 2021).

46. At the start of the interview (shown on Exhibit 3, filed on July 12, 2021), the interviewer told E.W. that their conversation was being recorded with a camera so that the doctor and "a few other people" could review the DVD and, hopefully, E.W. would have to be asked fewer of the same questions over again.

47. The interviewer talked to E.W. about the importance of not guessing when answering questions, but to say "I don't know."

48. The interviewer talked to E.W. about not answering questions E.W. did not understand and to correct the interviewer if the interviewer did not understand something that E.W. said.

49. The interviewer also talked to E.W. about the need for E.W. to tell the truth.

50. The interviewer asked E.W. if she knew why she was present and E.W. said no.
51. The interviewer asked about "Dad Matt".
52. E.W. said that "Dad Matt" yelled at her and her mom, kicked them out of his house, and "blocked fun" with her mom.
53. When asked about going to the doctor, E.W. talked about going to the doctor because her girl parts hurt/stung.
54. The interviewer then asked what E.W. told her mother about things Matt did.
55. E.W. did not disclose any alleged sexual abuse at that point in the interview.
56. The interview then asked E.W. about touches E.W. receives from people.
57. E.W. talked about receiving "good touches" from her mother.
58. The interviewer then asked about touches E.W. does not like.
59. E.W. said that Matt held her too tight.
60. The interviewer then asked if E.W. knew what private parts were, and E.W. described them using her own terms, including describing her vagina as her "girl parts."
61. At that time, E.W. did not say anything about any adult touching any of her private parts.
62. E.W. also denied seeing any adult's private parts, or seeing any pictures of people who were not wearing clothes.

63. The interviewer then left the room, saying she intended to talk to the doctor to see if there were more questions to be asked.[3]

64. When the interviewer returned, she asked general questions about things that E.W. used to do with "Dad Matt" and with her mother.

65. The interviewer asked if someone had touched her girl parts, and while E.W. initially said "yes", she then was hesitant to identify the person.

66. The interviewer followed up with questions as to who had touched her girl parts, and E.W. first said "don't know" and "the doctor."

67. The interviewer then asked "would someone do something with their mouth", and E.W. said, "my daddy used to go and lick my girl parts" on one occasion when she was five years old.

68. The interview then asked questions regarding whether her mother was present when the incident occurred, where the incident occurred, what E.W. was wearing and what happened with her clothes, as well as how her girl parts were licked by Matthew Carter and what it felt like.

69. E.W. told the interviewer, upon questioning whether anyone had told her not to say anything, that Dad Matt also told her not to tell anyone about him licking her.

70. The interviewer then went back out to see if more questions would be asked, and the interviewer did come back and ask a few more questions of E.W.

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[3] Based upon the court's experience in other cases that have been before it, if law enforcement was present at the interview location, this is typically when law enforcement who were watching the interview would be asked if they had any additional questions or issues for the interviewer to address with the child.

71. The interviewer did not conduct the physical examination of the child, although physical examinations of E.W. were conducted by others at Child's Voice on December 30 and/or December 31, 2020, and January 25, 2021.
72. The State alleges that the statements made by E.W. to Jennifer Morkve and at Child's Voice should be admitted even if the State does not call E.W. as a witness as the State alleges E.W. is unavailable to testify at trial based upon testimony of E.W.'s counselor, Mikaela Campell, and E.W.'s mother.
73. Ms. Campbell testified on August 30, 2021 that she had not asked E.W. any specific questions about the alleged abuse during counseling sessions because "It's not my place as a therapist to bring up, especially for the recommendation that Child's Voice had made that caregivers are not to ask explicit questions about maltreatment, and the reason for that is that we don't want to influence any memories that [E.W.] has or give her language that isn't her own. And so, when and if [E.W.] is ready to share about her experiences, it's very important that those are in her words and not in the words of adults in her life who are asking her questions." August 30, 2021 Transcript, page 12.
74. When asked about concerns regarding E.W. testifying in court, Ms. Campbell referenced E. W. feeling nervous and being unable to communicate or speak to a "bunch of people in an environment that she doesn't know, about things that are hard to talk about, could traumatize her and could make it harder for her emotionally." August 30, 2021 Transcript, p. 14.
75. Ms. Campbell went on to state that as to E.W. facing Mr. Carter, "I think that would be very scary for her. And I worry that she would become fearful and freeze. I

worry about the impact that could have on her, emotionally, going forward." Id.

76. Ms. Campbell also agreed with Ms. Marnette that testifying in court could "set back any progress that [Ms. Campbell] ha[s] made" with E.W. Id.

77. None of the statements made by Ms. Campbell are unique to E.W.

78. The same concerns could be stated as to a majority of lay witnesses who have to testify in court, particularly those who have to testify regarding sexual assaults.

79. Furthermore, Ms. Campbell identifies no specific circumstances faced by E.W., other than E.W. was initially "very shy, very cautious", in her first meeting with Ms. Campbell.

80. Again, it is expected that a young child, when meeting a stranger, will have similar feelings.

81. E.W.'s mother, Nycole Morkve, testified that she believed that having E.W. testify in front of Mr. Carter "would be bad for her, irregardless, because at this point, me and her counselor both discussed it, and we would prefer that she forget the whole incident altogether. And we don't know if she remembers it. And then, based on what happened afterwards, she was very, very confused about what happened, what didn't happen, based on her story, based on conversations with my mother. Because, like I said, you know, she had come home, and she said, Grandma said that I had to say these things. And if I don't, then, you know, she was under the impression Matt was going to hurt me, that Matt was going to beat her, et cetera, et cetera. So I think it would be bad for her to be talking about something, which, number one will scare her. Number two, she is very confused about, because now she doesn't know what's real and what's not...." August 30, 2021 Transcript, p.

103.

82. Ms. Morkve's desire to protect her daughter from feeling confusion or fear is understandable.

83. However, these feelings are not sufficient to establish unavailability of the child as a witness.

84. When asked "If the judge says that she is required to testify, will you bring her to testify? As her parent?", Nycole Morvke said "If I can avoid it, I will not bring her." August 30, 2021 Transcript, p. 106.

85. The court finds this statement by Ms. Morkve as to whether Ms. Morkve would defy a court order to be equivocal.

86. Thus, Ms. Morkve's statements do not make E.W. unavailable to testify.

87. The State has not yet brought E.W. before the court to determine her competence to testify, as the court understood that the State was asking the court to make the determination that E.W. was unavailable to testify.

88. E.W.'s competence to testify remains to be determined by the court.

89. The time, content, and circumstances of the Child's Voice interview provides sufficient indicia of reliability as to E.W.'s statements made in that interview.

90. Nycole Morkve has voiced distrust of Jennifer Morkve's motives and claimed that Jennifer Morkve coached E.W.

91. However, Nycole Morkve testified that E.W. first told her about the alleged abuse by Matthew Carter and that E.W. did so at a time when she had not seen her grandmother for several months.

92. While Nycole Morkve claimed that E.W. immediately recanted the statement,

saying she had made it up because she was "mad" at Mr. Carter, Ms. Morkve determined it was important to exclude Mr. Carter from E.W.'s life at that time in order to protect E.W.

93. Jennifer Morvke testified that E.W.'s statements to her were unsolicited, and that she asked E.W. to repeat what E.W. had previously told her so that Ms. Morvke could film E.W.'s words and actions.

94. The recording made by Jennifer Morke shows E.W. making what appear to be unrehearsed and non-coerced actions and statements.

95. The court looks at numerous factors in determining the issue of the reliability of E.W.'s statements to her mother, her grandmother, and to Child's Voice.

96. The statements made by E.W. regarding Matthew Carter were made within approximately 10 days of each other, all when E.W. was 5 years old.

97. From hearing and seeing the child testify on January 24, 2022, as well as reviewing all of the materials that have been provided to the court in this case prior to trial, E.W. was and is mature for her age. For example, for E.W. to say, on January 24, 2022, that after Matthew Carter yelled at her, "It made me sad, and disappointed in myself.", is an observation that evidences that E.W. is mature beyond her calendar age.

98. The nature and duration of the alleged action by Matthew Carter with E.W. is one occasion of rape by cunnulingus in December, 2020.

99. The statements regarding the alleged actions in school are of an unknown time and unknown duration.

100. Matthew Carter had access to E.W. as he was Nycole Morke's boyfriend and had been alone with E.W. a few times.

101. E.W. was in school with a teacher and other students as she was attending kindergarten since the fall of 2020.

102. E.W.'s statements to Jennifer Morkve and to Child's Voice, as the specific words and actions of the child can be seen on video, are coherent.

103. The school incidents are somewhat less clear as they have only been repeated by mother, but they are still stated coherently to the extent repeated by Nycole Morkve.

104. E.W. is an articulate young girl who can both observe and communicate information well.

105. E.W. testified on January 24, 2020 that there were some things she did not remember.

106. Saying that her "girl parts" had been "licked" is an age-appropriate way for a 5 year old child to talk.

107. In this case, mother's claim that E.W. made a false accusation about Matthew Carter at grandmother's coaching is without merit in light of the child disclosing the alleged incident to mother first and child not seeing grandmother for months prior to making the disclosure to grandmother.

108. As to the mother's claim that E.W. made false allegations because she was mad at Matthew Carter or her classmates and/or wanted to spend more time with her mother, this claim does not rise to the level requiring the exclusion of the statements but should be considered by the jury in weighing all of E.W.'s admitted statements.

109. Based upon the totality of the circumstances, the court finds that the time, content, and circumstances of E.W.'s statements to Jennifer Morkve provide sufficient indicia of reliability to be admissible.

110. Nycole Morkve's testimony on August 30, 2021 as to how E.W. came to make comments to her regarding claimed sexual abuse is less than clear. See, e.g., August 30, 2021 Transcript, pages 92-93.

111. Nycole Morkve claims that E.W. told her that E.W. had made the statements to her regarding Matthew Carter licking her girl parts because she was mad at him for yelling at her a few days earlier for throwing food on the floor and because she wanted her mother "all to [her]self." August 30, 2021 Transcript, page 93.

112. The assignment of such well-thought out motives to a five-year old child is suspect, especially when Ms. Morvke otherwise tries to describe her daughter as confused.

113. However, Nycole Morvke also acted on the statements by following up with counseling for E.W. and by separating E.W. from Matthew Carter.

114. Furthermore, Nycole Morkve has acknowledged that there were times when E.W. was left alone in Matthew Carter's care so he would have had the opportunity to do what E.W. claimed.

115. Based upon a totality of the circumstances, the court finds that the time, content, and circumstances of E.W.'s statements to Nycole Morkve, both alleging abuse by Matthew Carter and then allegedly retracting those allegations, provide sufficient indicia of reliability to be admissible.

116. Based upon a totality of the circumstances, the court also determines the time, content, and circumstances of the statements made by E.W. to Child's Voice provides sufficient indicia of reliability pursuant to SDCL 19-19-806.1.

117. There is corroborate evidence of the act reported by E.W. to Child's Voice, including the gonorrhea tests of E.W.

118. The internet searches and child pornography videos that the court has deemed admissible as set forth in a separate order, are further corroborative evidence of the act reported by E.W. to Child's Voice.

119. Prior to the court having the the opportunity to observe E.W. directly on January 24, 2022, based upon the court's review of the testimony received on July 12 and August 30, as well as the review of the Heartland Psychological Services records for E.W., the court determined that E.W. was available to testify at trial.

120. Evidence of E.W. testing positive for gonorrhea, and Mr. Carter admitting that he has had gonorrhea and/or Mr. Carter testing positive for gonorrhea, provides corroborative evidence to support E.W.'s statements regarding Matthew Carter licking her vagina.

121. Having heard and considered the testimony of Dr. Free, Dr. Roth, and Dr. Dimitrievich's and the cited guidelines and articles which this court has reviewed, there is no basis for this court to exclude the gonorrhea test results of E.W.

122. The medical testing for gonorrhea conducted on E.W. are relevant and reliable.

123. The lab report disclaimers that the defense so heavily relies upon for criticism of the gonorrhea testing done on E.W. is put on the reports simply because "no NAAT assays have been cleared [by the FDA] for use in any sample type from prepubertal

boys and girls. Without other options, most laboratories resort to including disclaimers in NAAT test reports regarding the off-label use of sample types[.]" Laboratory Diagnosis of Sexually Transmitted Infections in Cases of Suspected Child Sexual Abuse, Journal of Clinical Microbiology, Volume 58, Issue 2, page 5 (February 2020).

124. This same article goes on to state:

> Given the legal implications, testing protocols with built-in redundancy, such as employing more than one specimen type and more than one test modality, can only strengthen laboratory test confidence when the off-label use of NAATs is inevitable and culture is not rapid. This standard, however, requires that a complex set of samples be collected for CSA evaluations. This can be best accomplished through the development of a CSA test bundle....

Id (emphasis added). See also, A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric, U.S. Department of Justice, page 167, fn. 227 (April, 2016)("Due to low prevalence of STDs in the prepubescent population, and lack of enough large randomized controlled trials for validation, this [NAAT] testing is not yet approved by the Food and Drug Administration for this population. However, the CDC discusses the use of NAAT for this population as indicated in protocol recommendations.").

125. Furthermore, multiple testing is recommended, but it can either be multiple tests done on one sample or multiple tests done on more than one sample.

126. As stated in the CDC recommendations,

...Although data regarding NAAT for children are more limited and performance is

> test dependent, no evidence demonstrates that performance of NAAT for detection of *N. gonorrhoea*...among children differs from that among adults. Only FDA-cleared NAAT assays should be used....Specimens (either NAAT or culture, including any isolates) obtained before treatment should be preserved for further validation if needed. When a specimen is positive, the result should be confirmed either by retesting the original specimen or obtaining another. Because of the overall low prevalence of *N. gonorrhoeae*...among children, false-positive results can occur, and all specimens that are initially positive should be confirmed.

Sexually Transmitted Infections Treatment Guidelines, 2021, Morbidity and Mortality Weekly Report, Volume 70, No. 4, page 133 (July 23, 2021)(emphasis added).

127. State also asks that the courtroom be partially closed during E.W.'s testimony, if she testifies.

128. In addition to courtroom closure, a party may request, or the court may on its own motion, allow the testimony of the child to be taken in a room other than the courtroom.

129. At this time, there is insufficient basis to either close the courtroom or to authorize the testimony of the child from another courtroom.

130. E.W. is currently six (6) years old.

131. E.W. testified before this court on January 24, 2022.

132. Upon seeing E.W. testify and hearing her answers to questions asked of her by Ms. Marnette and Ms. Fiksdal, which E.W. answered articulately, it was evident that E.W. has sufficient mental capacity to observe, recollect, and communicate and that she does have a sense of moral responsibility.

133. Ms. Marnette and Ms. Fiksdal both stated at the hearing on January 24, 2022, that they believed E.W. would be found competent by the court.

134. The court orally ruled on January 24, 2022 that E.W. is competent, and the court's oral ruling is incorporated by reference.

135. During E.W.'s testimony, E.W. stated that she knew who Matt [the Defendant] was and correctly identified him in the courtroom.

136. E.W. stated that she knew Matt lived in a house in Yankton, South Dakota and that she had visited Matt in his house in Yankton.

137. When then asked if she or her mother ever stayed at Matt's house, E.W. either said "I don't know" or "I don't know anymore."

138. When asked, "Do you remember something that happened with Matt that you didn't like?", E.W. said, "He yelled at me."

139. E.W. was then asked, "How did that make you feel?", to which E.W. said "Sad."

140. E.W. was then asked, "Do you remember anything else happening at Matt – with Matt that you didn't like?" E.W. responded, "Just when he yelled at me."

141. When asked if she remembered talking to someone by the castle[4], E.W. at first identified attorney Kelly Marnette as the person she spoke to there, but then later said she didn't know if it was Ms. Marnette, but that E.W. did remember talking to someone by the castle.

142. E.W. was asked, "Did you – do you remember if you talked to that person about something that Matt had done to you?" and E.W. responded "Yes."

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[4] The court takes judicial notice that Child's Voice in Sioux Falls, where E.W. was interviewed, is in or near the Sanford Children's Hospital, which is built to look like a castle.

143. E.W. was then asked, "Do you remember what you told her Matt had done?" and E.W. said "Yes."

144. When asked what E.W. told the person by the castle about what Matt had done to her, E.W. said "I told her he yelled at me. It made me sad, and disappointed in myself."

145. E.W. was then asked, "Do you remember telling her anything else that Matt had done?" and E.W. said "No."

146. E.W. was then asked "Do you remember telling her anything that Matt had done to your body?" and E.W. said "No."

147. The follow up question was, "You don't remember?" and E.W. responded, "I don't remember."

148. When asked if she remembered saying anything to her mother about something Matt had done, E.W. first said "No. Never.", then to a follow up question asking "You don't remember it?" said, "Yeah. I don't remember."

149. When the question was later repeated to E.W. about whether she ever talked about Matt with her mother, E.W. said, "I don't know. I can't remember."

150. When asked, "What about your grandma?", E.W.'s response was "Oh, my grandma. She is a nice person."

151. To a follow up question regarding whether she remembered talking to her grandmother about something that Matt had done with her body that E.W. did not like, E.W. said, "No." and then to the follow up question, "You don't' remember?" "Yeah. I don't remember. I never even talked about her with Matt. I never talked about Matt with Grandma."

152. The last question asked by the State was, "Did you ever talk about Matt with your mommy?", to which E.W. responded "I don't know. I can't remember."

153. In response to Ms. Fiksdal's question, "[I]f I understood what you said correctly, you don't seem to recall ever staying at Matt's house, is that right?", E.W. said "No."

154. In response to Ms. Fiksdal's question, "And you don't ever recall talking to Mom or Grandma Jen about Matt, is that right?", E.W. said "No."

155. Any finding of fact deemed to be a conclusion of law shall be so considered.

CONCLUSIONS OF LAW

1. SDCL 19-19-806.1 provides as follows:

A statement made by a child under the age of thirteen, or by a child thirteen years of age or older who is developmentally disabled as defined in § 27B-1-18, describing any act of sexual contact or rape performed with or on the child by another, or describing any act of physical abuse or neglect of the child by another, or any act of physical abuse or neglect of another child observed by the child making the statement, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings against the defendant or in any proceeding under chapters 26-7A, 26-8A, 26-8B, and 26-8C in the courts of this state if:
(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
(2) The child either:
(a) Testifies at the proceedings; or
(b) Is unavailable as a witness.

However, if the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

No statement may be admitted under this section unless the proponent of the statement makes known the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

2. "South Dakota law defines unavailability as including a declarant who is 'unable to be present or testify' at the trial because of a 'then-existing physical or mental illness or infirmity.' SDCL 19–16–29(4). Thus, a witness's unavailability can be premised on mental limitations, as well as physical absence." *State v. Toohey*, 2012 S.D. 51, ¶ 14, 816 N.W.2d 120, 128.
3. Based upon the evidence presented to the court to date, E.W. is available to testify at trial pursuant to SDCL 19-19-806.1.
4. Before E.W. testifies, the court will need to make a determination regarding her competence to testify. *See, e.g., State v. Spaniol*, 2017 SD. 20, 895 N.W.2d 329.
5. The State seeks to exclude statements E.W. made about alleged sexual acts at school pursuant to SDCL 19-19-412.
6. The defense is not seeking to admit these statements to show that E.W. engaged in other sexual behavior.
7. SDCL 19-19-412 does not bar the statements made about alleged sexual acts at school.
8. Rather, the defense is seeking to admit these statements to call into question E.W.'s credibility, i.e., the argument is that E.W. lied about these statements so, therefore, she is also lying about the statements made about Mr. Carter.
9. These statements are not barred by SDCL 19-19-608. *See State v. Sieler,* 397 N.W.2d 89, 92 (S.D.1986); *State v. Chamley*, 1997 S.D. 107, ¶ 27, 568 N.W.2d 607, 616.
10. The State's Motion in Limine Re: Victim's Alleged Statement About Sexual Abuse at School is denied.

11. The court has a gatekeeping function to perform as to medical evidence such as the gonorrhea testing in this case.

12. As stated by the South Dakota Supreme Court:

> [W]hen dealing with expert opinion, the court must fulfill a gatekeeping function, ensuring that the opinion meets the prerequisites of relevance and reliability before admission. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 2799, 125 L.Ed.2d 469, 485 (1993); *State v. Hofer*, 512 N.W.2d 482, 484 (S.D.1994) (citations omitted); *Rogen v. Monson*, 2000 SD 51, ¶¶ 26 27, 609 N.W.2d 456, 462 (Konenkamp, J. concurring specially) (*Daubert* applies to medical opinions).
>
> *Daubert* and its progeny offer general guides for courts to consider in assessing reliability: testing, peer review, error rate, and general acceptance. *See Daubert*, 509 U.S. at 593–94, 113 S.Ct. at 2796–97, 125 L.Ed.2d at 482–84. These factors cannot be applied in all settings. In some instances, reliability must focus on "knowledge and experience." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150, 119 S.Ct. 1167, 1175, 143 L.Ed.2d 238, 251 (1999). A fundamental baseline for reliability is that experts are limited to offering opinions within their expertise. *See Brain v. Mann*, 129 Wis.2d 447, 385 N.W.2d 227, 230 (1986) (citations omitted).
>
> *Garland v. Rossknecht*, 2001 S.D. 42, ¶¶ 10-11, 624 N.W.2d 700, 702–03.

13. The gonorrhea test results, as explained in the medical testimony of Dr. Free and Dr. Roth, are relevant and reliable.

14. The Defendant's Motion to Exclude Medical Testing of Alleged Victim is denied.

15. SDCL 23A-24-6 reads, "Any portion of criminal proceedings, with the exception of grand jury proceedings, at which a minor is required to testify concerning rape of a child, sexual contact with a child, child abuse involving sexual abuse, or any other sexual offense involving a child may be closed to all persons except the parties' attorneys, the victim or witness assistant, the victim's parents or guardian, and officers of the court and authorized representatives of the news media, unless the court, after proper hearing, determines that the minor's testimony should be closed to the news media or the victim's parents or guardian in the best interest of the minor."

16. Until the court has the opportunity to determine the competence of the child, and because jury trials in this community are rarely attended by any members of the public so any request for closure may be unnecessary, the court will delay any

determination regarding the request for closure of the courtroom until a later time. *See also State v. Rolfe*, 2013 S.D. 2, 825 N.W.2d 901.

17. Similarly, any request for the child to testify by closed circuit television pursuant to SDCL 26-8A-30 will be determined in the future.

18. E.W.'s statements as discussed in this decision that were reported by her mother and her grandmother are non-testimonial statements pursuant to *Ohio v. Clark*, 576 U.S. 237, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015), and therefore, are admissible as the court has also determined in this decision that these statements are admissible pursuant to SDCL 19-19-806.1

19. The court determines that the statements made by E.W. during the Child's Voice interview are testimonial. *See State v. Richmond*, 2019 S.D. 62, ¶¶ 29-30, 935 N.W.2d 792, 801; *Bobadilla v. Carlson*, 575 F.3d 785 (8th Cir. 2009); *Ohio v. Clark*, 576 U.S. 237, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015)(particularly concurring decision of Justices Scalia and Ginsburg); and Child's Voice Report filed in this case (referencing involvement of law enforcement)[5]. *See also State v. Bentley*, 739 N.W.2d 296 (Iowa 2007); *State v. Blue*, 2006 N.D. 134, 717 N.W.2d 558.

20. The court declines to follow the unpublished decision cited by the State in its October 15, 2021 reply brief, namely *State v. Glover*, 2018 WL 2090637 (Minn.Ct.App. 2018), or the cases in Minnesota and other jurisdictions (*e.g., State v. Arroyo*, 284

[5] The court accepts the representation made by Attorney Kelly Marnette on February 1, 2022, that Detective Erickson was not physically present for the Child's Voice interview. The lack of his physical presence is not sufficient to alter the court's determination that the statements made during the Child's Voice interview were testimonial in nature.

Conn. 597, 935 A.2d 975 (2007) which have found child abuse interviews to be nontestimonial.

21. If the court does not follow those cases finding an entire child abuse interview conducted at a center specializing in child abuse interviews to be nontestimonial, the State urges the court to follow the piecemeal approach as to statements made by E.W. at Child's Voice as set out in the majority opinion in the case of *State v. Arnold*, 126 Ohio St.3d 290, 993 N.E.2d 775 (Ohio 2010). The court declines to do so in this case.
22. There was no emergency with the child on December 30, 2020, as her mother had separated her from Matthew Carter shortly after E.W. voiced the allegations to her mother.
23. The court determines that the primary purpose of the Child's Voice interview of E.W. was to establish or prove past events relevant to establishing whether E.W. had been subject to abuse for the purpose of "memorializing evidence for law enforcement."[6] *State v. Richmond*, 2019 S.D. 62, ¶ 29, 935 N.W.2d 792, 801.
24. As noted in *State v. Richmond*, when E.W. disclosed the abuse at Child's Voice, "'an objective witness [would have] reasonably ... believe[d] that the statements would be available for use at a later trial.'" *Id.*, at ¶ 30 (citing *Crawford*).[7]

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[6] A CPS investigation may also have a reason for the interview, but this also does not convince the court that the interview should be declared nontestimonial.

[7] The court has read the majority opinion in *Ohio v. Clark*, in which it was stated, "L.P.'s age fortifies our conclusion that the statements in question were not testimonial. Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system....Thus, it is extremely unlikely that a 3-year-old child in L.P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all." *Ohio v. Clark*, 576 U.S. 237, 247-248, 135 S.Ct. 2173, 2181-2182. Indeed, concurring Justices Scalia and

25. While the Child's Voice interview also has a medical purpose, particularly in this case to assist in explaining why E.W. had a vaginal discharge and tested positive for gonorrhea, that medical purpose is a secondary purpose for the interview.
26. The court does not intend this ruling to preclude the physical examinations and/or testing of E.W. for gonorrhea at Child's Voice and/or reviewed by Child's Voice physicians.
27. E.W. is competent to testify. *See State v. Carothers*, 2006 S.D. 100, ¶ 12, 724 N.W.2d 610, 616.
28. While E.W. was repeatedly asked about what she remembered telling others about the case, she was also asked the following questions about the subject matter of this case on January 24, 2022:

    Question: "Do you remember something that happened with Matt that you didn't like?"

    Answer: "He yelled at me."

    Question: "How did that make you feel?"

    Answer: "Sad."

    Question: "Do you remember anything else happening at Matt – with Matt that you didn't like?"

    Answer: "Just when he yelled at me."

Ginsburg also stated, "L.P.'s primary purpose here was certainly not to invoke the coercive machinery of the State against Clark. His age refutes the notion that he is capable of forming such a purpose." *Id.*, at 251, 2184. These comments give the court pause, but do not change this court's decision.

29. When E.W. testified on January 24, 2022, she did not state that Matthew Carter licked her girl parts when asked if he had done anything she did not like.
30. By so testifying, E.W. testified to not remembering the subject matter of this case.
31. Therefore, E.W. is unavailable pursuant to SDCL 19-19-804(a)(3) and SDCL 19-19-806.1(2)(b).
32. However, as noted by the South Dakota Supreme Court in *State v. Toohey*, the admissibility of a child's statements under the statutes cited in this decision, does not make testimonial statements admissible without also examining the Defendant's right to confrontation.
33. Under the Sixth Amendment's Confrontation Clause, the "testimonial statements by a nontestifying witness" are not admissible "unless the witness is 'unavailable to testify, and the defendant had a prior opportunity for cross-examination.'" *Ohio v. Clark*, 576 U.S. 237, 243, 135 S.Ct. 2173, 2179 (quoting *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).
34. The opportunity to cross-examine under the Confrontation Clause "is generally satisfied when a defendant "'is given a full and fair opportunity to probe and expose [a witness's] infirmities through cross-examination[.]" *State v. Toohey*, 816 N.W.2d 120, 128, 2012 S.D. 51, ¶ 14 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 22, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985)).
35. As further stated by the South Dakota Supreme Court,

> ...The Confrontation Clause only guarantees "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v. Owens*, 484 U.S. 554, 559, 108 S.Ct. 838, 842, 98 L.Ed.2d 951 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S.Ct. 2658, 2664, 96 L.Ed.2d 631 (1987)) (additional citations omitted). Indeed, confrontation "includes no guarantee that every witness called by the

prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion." *Fensterer,* 474 U.S. at 21–22, 106 S.Ct. at 295. A child's inability to answer questions about penetration, by itself, does not render her unavailable for confrontation purposes. *State v. Bishop,* 63 Wash.App. 15, 816 P.2d 738, 743 (1991).

State v. Toohey, 816 N.W.2d 120, 128, 2012 S.D. 51, ¶ 15 (S.D.,2012)

36. In *Toohey*, the child witness was called as a witness at trial, and even though the child was not able to answer certain questions, the Supreme Court found no Confrontation Clause violation.

37. In *Toohey*, the Court went on to point out, "Several courts have taken this to mean that even a witness with no memory of the events in question is nevertheless present and available for cross-examination under *Crawford. State v. Pierre,* 277 Conn. 42, 890 A.2d 474, 499–500 (2006); *State v. Gorman,* 854 A.2d 1164, 1177 (Me.2004); *State v. Holliday,* 745 N.W.2d 556, 567–68 (Minn.2008); *Biggs,* 333 S.W.3d at 477–78; *State v. Legere,* 157 N.H. 746, 958 A.2d 969, 977–78 (2008).[footnote quoted in next paragraph.]" *State v. Toohey*, 816 N.W.2d 120, 128, 2012 S.D. 51, ¶ 16.

38. In the footnote at the end of the above-quoted language, the South Dakota Supreme Court noted "*But see* SDCL 19–16–29(3) (Rule 804(a)) ("lack of memory of the subject matter of his statement" renders witness unavailable). Yet memory loss may not render a witness "unavailable" in the constitutional sense. [*United States v.*] *Owens,* 484 U.S. [554] at 557–60, 108 S.Ct.[838] at 841–42 [, 98 L.Ed.2d 951 (1988)]." *Id.*, footnote 2.

39. In each of the cases cited in *Toohey*, the child witness was called to testify before the jury.

40. In *State v. Spaniol*, 2017 S.D. 20, 895 N.W.2d 329, the child testified before the jury and the defense then sought to have the child declared unavailable so that alleged prior inconsistent statements could be brought in. *See also State v. Carothers*, 2006 S.D. 100, 724 N.W.2d 610.

41. In order for the court admit the testimonial statements made by E.W. to Child's Voice, the Confrontation Clause requires the court to consider Confrontation Clause jurisprudence.

42. As stated in the seminal case of the United States Supreme Court,

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial."[10] Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed....
>
> *Crawford v. Washington*, 124 S.Ct. 1354, 1374, 541 U.S. 36, 68, 158 L.Ed2d 177 (2004).

43. As the court has determined that the statements made to Child's Voice are testimonial, the Child's Voice statements are inadmissible unless E.W. testifies.

44. The court has considered all of the factors set out in *State v. Buchholtz*, 2013 S.D. 96, ¶ 19, 841 N.W.2d 449, 456 in determining the reliability of all of E.W.'s reported statements.

45. Based upon Ms. Fiksdal's request at the hearing on January 24, 2022 that the jury be told about E.W.'s testimony on January 24, 2022 regarding the alleged events, counsel for the parties will talk to see if they can reach a stipulation, or the court will

rule on the defense request at a future hearing. *See State v. Spaniol*, 2017 S.D. 20, ¶ 27, 895 N.W.2d 329, 340.

46. Any conclusion of law deemed to be a finding of fact shall be so considered.

Based upon the above,

IT IS ORDERED that based upon her testimony on January 24, 2022, E.W. is not available to testify at trial pursuant to SDCL 19-19-806.1.

IT IS FURTHER ORDERED that E.W. is competent to testify.

IT IS FURTHER ORDERED that E.W.'s statements to Child's Voice would be admissible pursuant to SDCL 19-19-806.1 based upon the findings and conclusions made by the court.

IT IS FURTHER ORDERED that E.W.'s statements to Child's Voice in the interview on December 30, 2020 are not admissible under the Confrontation Clause of the Sixth Amendment unless she is called as a witness to testify.

IT IS FURTHER ORDERED that E.W.'s reported statements to her mother and grandmother are admissible as they are nontestimonial statements and they are admissible pursuant to SDCL 19-19-806.1

IT IS FURTHER ORDERED that the State's Motion in Limine Re: Victim's Alleged Statement About Sexual Abuse at School is denied.

IT IS FURTHER ORDERED that the Defendant's Motion to Exclude Medical Testing of Alleged Victim is denied.

IT IS FURTHER ORDERED that if E.W. does not testify in person, no determination need to be made by the court at this time regarding closure of the courtroom or testimony of the child by closed circuit television.

IT IS FURTHER ORDERED that the defense request that the jury be presented with E.W.'s testimony on January 24, 2022, counsel will either present a stipulation to the court or the court will resolve the issue at a future hearing.

Dated this the 1st day of February, 2022.

BY THE COURT:

Honorable Cheryle Gering
Circuit Court Judge

ATTEST:
Jody Johnson
Yankton County Clerk of Courts
BY

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) :SS
2 COUNTY OF YANKTON) FIRST JUDICIAL CIRCUIT

3 STATE OF SOUTH DAKOTA,)
)
4 Plaintiff,)
) CRI. 21-16
5 vs.)
) MOTIONS HEARING
6 MATTHEW ALLAN CARTER,)
)
7 Defendant.)

8 BEFORE THE HONORABLE CHERYLE GERING
Circuit Court Judge
9 at Yankton, South Dakota on December 20, 2021, at 2:04 p.m.

10 APPEARANCES

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25

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25

1 (WHEREUPON, the following proceedings were had, to wit:)
2 THE COURT: Let the record show that it is 2:04 p.m. on
3 Monday, December 20, 2021. This is the time and place set
4 for hearing in Yankton County Criminal File 21-16 entitled
5 the *State of South Dakota, Plaintiff, versus Matthew Allan*
6 *Carter, Defendant.* Present here in the courtroom
7 representing the State of South Dakota is Assistant South
8 Dakota Attorney General Kelly Marnette. Also present is
9 Yankton County Deputy State's Attorney Tyler Larson. Also
10 present is Matthew Carter, along with his attorney,
11 Melissa Fiksdal.
12 The Court today is hearing evidence in regard to
13 Defendant's motion to exclude medical testing of alleged
14 victim. And you are, Ms. Fiksdal, going to call
15 Dr. Elizabeth Dimitrievich in support of your motion?
16 MS. FIKSDAL: Yes, Your Honor.
17 THE COURT: And the State is going to call Dr. Roth and
18 Dr. Free in resistance?
19 MS. MARNETTE: Correct.
20 THE COURT: So all three doctors are on the line by Zoom,
21 and all parties are consenting to their appearance by Zoom
22 today, Ms. Marnette?
23 MS. MARNETTE: Yes, Your Honor.
24 THE COURT: And, Ms. Fiksdal?
25 MS. FIKSDAL: Yes, Your Honor.

1 THE COURT: So the Court is going to start with
2 Dr. Dimitrievich. Dr. Free and Dr. Roth are listening,
3 but they don't have their videos on. And then, we will do
4 the same as we go on the testimony of the doctors. So,
5 starting with Dr. Dimitrievich: Dr. Dimitrievich, if you
6 would please raise your right hand to be sworn.
7 (Dr. Dimitrievich was sworn at 2:05 p.m.)
8 Q (BY MS. FIKSDAL) Thank you. Dr. Dimitrievich, could you
9 say and spell your name for the record, please?
10 A Elizabeth Dimitrievich. E-l-i-z-a-b-e-t-h Dimitrievich.
11 D as in "Delta," i-m-i-t-r-i-e-, v as in "Victor," i-c-h.
12 Q Thank you. Can you please tell the Court what your
13 current profession is?
14 A OB/GYN physician.
15 Q And where are you currently employed?
16 A I am currently employed at OB/GYN Specialty Clinic, which
17 is a clinic here in Sioux Falls, South Dakota. I am also
18 currently, as of October, employed with OB Hospitalist's
19 Group, which is the concurrent, other position that I am
20 holding right now.
21 Q Okay. And how long have you held that position at OB/GYN
22 Specialty Clinic in Sioux Falls?
23 A I started this practice here about October 1, 2002.
24 Q Okay. And prior to that, where were you employed?
25 A I was employed with University Physicians, which was the

1 physicians's group associated with University of South
2 Dakota School of Medicine from January of '92 until
3 October 1st of 2002.
4 Q And can you please inform the Court as to your education?
5 A Well, I have a medical degree from University of London in
6 London, England. And I have had postgraduate training in
7 the form of a rotating internship for a year in
8 St. John's, Newfoundland, in Canada, prior to a four-year
9 residency program at McGill University, which is also in
10 Canada.
11 Q And aren't there other education that you have? The
12 graduate education that you have participated in?
13 A Yes. The MBA program through the University of South
14 Dakota. Actually, right now, I don't remember the date of
15 my graduation. I don't have my CV in front of me. I'm
16 sorry. It is somewhere on there.
17 Q And your CV is part of the court's record already. You
18 just rely on those dates; is that correct?
19 A Right.
20 Q All right. And I also understand -- excuse me, can you
21 tell us a little bit about where you currently hold active
22 license to practice medicine?
23 A Medical license to practice medicine in South Dakota. In
24 the state of Missouri and, as of very recently, the state
25 of Texas. That may not be on my CV. I am not sure if it

1 is. I think it made it.
2 Q Can you also inform the Court as to any awards that you
3 have been given in relation to your practice and your
4 profession?
5 A I have had multiple awards and scholarships awarded in
6 medical education; this, particularly, is pertinent: I
7 was full-time medical educator at the University of South
8 Dakota School of Medicine and the Department of OB/GYN.
9 And that was from '92 until 2002.
10 Q And from looking at your CV, it looks like you have had
11 some history and some experience in teaching; is that
12 correct?
13 A Yeah. I have had extensive experience and I was Clerkship
14 Director for ten years, through -- from '92 until 2002.
15 And since then, I have been more, let's say, less deeply
16 involved with the medical student education. Now that I
17 am working with this company outside of South Dakota, I am
18 involved in resident education again, now. That is just
19 as of October.
20 Q Okay. And in September of this past year, you were
21 retained by my office to assist in this criminal matter.
22 Is that correct?
23 A Yes, that is correct.
24 Q Okay. And specifically what did I ask you to review with
25 regard to this criminal matter?

1 A The original issue was related to the gonorrhea infection
2 issue. Transmission, general information about the
3 clinical course of gonorrhea infection, and I was given
4 lab results and a Child's Voice evaluation that was
5 performed at the end of December of last year.
6 Q Okay. And when you reviewed those records, was there a
7 statement in the records that jumped out at you? That
8 caused you concern?
9 A Well, I reviewed most of the report and the actual results
10 that were submitted by the lab, and I was concerned and
11 determined to assess these statements, as to why those
12 statements would be present on the lab report. And the
13 report -- which I don't have here -- but as I recall,
14 specifically stated that the results were not to be used
15 in matters of determination of child sexual abuse, or
16 words to that effect.
17 Q Okay. And so, is there -- can you tell us, is there a
18 difference between -- maybe this is a bad question, but
19 can you tell us -- is there a difference between the use
20 of testing, and testing that should be utilized for child
21 sex abuse cases or for legal purposes, versus just
22 clinical monitoring and care?
23 A So, the best way to answer that is to state that, as part
24 of my clinical experience and day-to-day gynecology -- and
25 this pertains to women and adolescents -- very commonly

1 adolescents -- the use of these NAAT tests are in
2 widespread clinical use and they are very -- I will say,
3 well, their use is widespread throughout clinical practice
4 for the screening and diagnostic evaluation of -- in my
5 case -- women, females, with suspected sexually
6 transmitted infections: STDs, or STIs. So, that is
7 really not the issue that I had concerns with when I read
8 this report.
9 The concerns came from the laboratory explicitly
10 stating that they did not -- the test results were not to
11 be used in the assessment or judicial process as it
12 relates to child sexual abuse. I think I am stating this
13 so you can understand what I am saying.
14 Q I think we can. So if I am understanding you correctly,
15 and as I understand reading the report correctly and the
16 information that has been given so far from your report;
17 there is a -- is there any type of requirement that
18 requires secondary, or further, testing when we are using
19 testing results in a legal setting?
20 A Well, the lab reports that we -- that I was shown, that I
21 received -- did not get into the issue of how the testing
22 should be carried out in the assessment of child abuse
23 cases. Sexual abuse cases. And so, then, I was left with
24 trying to determine where this is coming from and what is
25 going on and, therefore, what are the recommendations?

1 And so that led me -- at that point, I did not have the
2 answer or I didn't feel I had enough information -- I went
3 on to look at the Aptima test, which was the actual
4 laboratory methodology and the testing kit by the company,
5 Hologic. I talked to the lab at Avera who -- that's where
6 the initial lab results came from, Avera, and I understand
7 the lab results come from another lab used by Sanford.
8 All of those lab results indicate that the results
9 are not to be used on a child sexual abuse determination,
10 so it doesn't seem to matter which lab it is, it seems to
11 be the common language. So I went back -- I don't know if
12 this is what you want to know, but I went back through
13 some literature, going back almost 15 years to see how the
14 tests have evolved and how its use has evolved.
15 And that has led me to come to certain conclusions,
16 not based upon my personal opinion, but the opinion of
17 other experts as to what the recommendations are for;
18 let's say, overcoming or dealing with some of the concerns
19 regarding single test results, if that makes sense.
20 Q Okay. So if I am following your testimony correctly, my
21 understanding is -- is that, so far, once you started to
22 review this information you looked at the type of testing,
23 which is the NAAT testing; is that right?
24 A Correct.
25 Q Okay. And the NAAT testing is something that is pretty

1 typical in a clinical setting?
2 A Correct.
3 Q Okay. And why is that typical in a clinical setting? Is
4 it easy? Is it quick? Why is that?
5 A Well, many of these tests have completely revolutionized
6 the clinical diagnosis and screening for STDs. In this
7 case, we are talking about gonorrhea. But similarly,
8 Chlamydia -- in fact they are usually done together.
9 So, in the old days when I graduated -- which was a
10 long time ago -- the standard test was the culture of a
11 swab taken from a specific site and the samples had to be
12 sent in a cultured medium to a lab and it relied on
13 various difficulties inherent in transporting live
14 bacteria in a swab to a lab.
15 And so, with these DNA probes -- they used to be
16 called DNA probes a while back, over 25 years ago, I
17 believe -- we started to see DNA tests, which were
18 infinitely more useful, per se, in a clinical practice
19 because they did not rely on anything.
20 They are a fragile organism. Neisseria gonorrhea is
21 a very fragile organism and it can perish very easily, and
22 the culture relied on a live bacteria to get a result. So
23 cultures were a problem, although they were, and still
24 are, the gold standard.
25 In fact, many labs still do cultures because -- state

1 health labs often continue to do cultures to monitor
2 antibiotic sensitivity so that is still the ongoing
3 scientific method. But in clinical, routine practice most
4 of us would not rely on a culture. We don't even have the
5 swabs anymore. We rely on these swabs which utilize this
6 DNA technology, or in this case, the NAAT technology.
7 And so, we have gone from having the potential for a
8 false-negative result, to having very quick -- and I would
9 say in clinical practice -- very reliable results.
10 So we could have a quick turnaround; we get quick
11 results; we can treat patients quickly. And this has
12 vastly improved the screening and treatment for our
13 patients, male and female.
14 Q Okay. So, again, I am just going to ask if I have this
15 correct. In the best of all worlds, the gold standard is
16 the bacterial culture test; is that correct?
17 A I believe so.
18 Q Okay. And -- but inherent in that is the fact that we
19 have issues with it being a fragile organism and
20 transportation issues and time issues?
21 A And lab issues. Not only hospital labs that, I don't
22 believe, do any -- well, I may be wrong but, for the most
23 part, it is very difficult to find places that will
24 actually perform the culture and sensitivity. So we rely
25 mostly on public health labs for that.

1 Q Okay. So the NAAT testing or the DNA testing has come
2 along because it is quicker and it is more efficient to
3 get a result to the provider and to the patient; is that
4 correct?
5 A That's correct.
6 Q All right. But if I understood your testimony correctly,
7 the NAAT testing has some drawbacks too, such as false
8 positives?
9 A That is my understanding, based on my reading of those
10 literatures. This goes back at least 15 years that this
11 has been studied and, to my knowledge, the concern is
12 still there; it has not been resolved as far as I know. I
13 am not aware of any recent literature that states in the
14 context of sexual assault that this type of testing is
15 sufficient.
16 Q Okay. So in a clinical setting, if we have a false
17 positive, if a patient comes in and is just tested under
18 the NAAT DNA testing protocol and there is a false
19 positive, is there really any harm to the patient if that
20 patient is prescribed an antibiotic and later finds out
21 that they had a false positive?
22 A Well, so first of all because we would not in normal,
23 clinical practice send a culture, we basically would rely
24 entirely on the single rapid DNA test with a NAAT test.
25 That is exactly right, that inherent in the treatment of

1 STDs is the possibility of a false-positive test. But the
2 consequences of nontreatment or non-testing are infinitely
3 more harmful to at least females; I imagine it is the same
4 for men. Like I said, I don't treat men in my practice.
5 Then to treat -- in the event that there is a false
6 positive, however small that may be -- but clearly, an
7 untreated or poorly treated or inadequately treated
8 gonorrhea infection is much more serious than a treatment
9 for a -- an infection that wasn't present.
10 Q Okay. And so when we are talking about the recommendation
11 that -- when we are talking about these NAAT tests, and we
12 are talking about recommendations, as far as things that
13 should be done in the medical-legal setting; do they
14 require an additional test of that first NAAT test? Do
15 you know what that recommendation is?
16 A Well, the recommendations -- there is basically two
17 recommendations that I have been aware of since I have
18 looked into this, and these are articles that are from as
19 recent as 2016.
20 Basically, there is really two issues. The first
21 issue is the imperfectness of the test; the specific site
22 and the specific age groups and the prepubescent or the
23 younger child, that is, prior to puberty; which I believe
24 this particular case is one of those.
25 There were -- there has been evolving recommendations

1 on what sites are appropriate to test with these
2 particular swabs. The second issue is that if a test were
3 to be reported positive there should be a secondary test,
4 and that could mean that you obtain the secondary tests
5 and held onto it until the first test came back or that
6 you obtain the second test at that time, from the same
7 site.
8 I am not aware of anywhere that says that you can
9 test multiple sites over different days and have -- with
10 different methodologies -- and have the same result. My
11 understanding from my review is that if you test Site A
12 and you have a secondary test of Site A to confirm the
13 validity of that first test result -- because the gold
14 standard, again, is culture, but I have also read that a
15 secondary DNA test may be appropriate as long as it's
16 using a different test and a different assay.
17 Q Okay. So I want to parse these out just in the two, kind
18 of, branches that you have identified so far.
19 First, were the testing issues - as far as the
20 particular -- the particular areas that were swabbed --
21 can you delve into that a little bit more and kind of
22 explain what your research has uncovered, regarding
23 testing certain areas?
24 A Right. Now the -- I am actually going to refer here to --
25 I am a little bit disorganized at the moment -- if I can

1 answer the second -- can I actually answer the second
2 question first?
3 Q Absolutely. So, do you want to talk about the lack of the
4 second test first?
5 A Yes. I would like to talk about that again.
6 So this comes from April of 2016. And, again, these
7 are not my personal guidelines. I would have to defer to
8 other experts.
9 The document: *National Protocol for Sexual Abuse*
10 *Medical Forensic Examinations.* And the date on that is --
11 its printed by -- it is from the Department of Justice,
12 April 2016.
13 From the general guidance: NAAT can be used to
14 screen for Neisseria gonorrhea in prepubertal girls.
15 Urine, dirty catch, or vaginal swabs. Specifically makes
16 the comment that all positive specimens have to be
17 retained for additional testing, and a positive NAAT test
18 should prompt repeat testing by culture or alternate NAAT.
19 And that would mean alternate sequence. Basically, a
20 different assay.
21 Q Okay. So here we have several different specimens that
22 were collected over three different days. Do you agree
23 with that?
24 A Yes, I believe that is correct.
25 Q Okay. So we have a urine specimen that was collected on

1 December 29; is that correct?
2 A Correct.
3 Q A urine specimen that was collected at Child's Voice, and
4 that was on December 30?
5 A Right.
6 Q And then vaginal, rectal, and oral swabs that were
7 collected on December 31. Do you agree?
8 A Correct.
9 Q Okay. And so, in your review of the record did you see
10 any place where any one of these five swabs or specimens
11 were tested a second time, either using a different NAAT
12 sequence or a culture?
13 A I am not aware of that. I believe I received a report
14 from Dr. Free that confirmed that there was sequential
15 testing of different sites, but I am not aware that any
16 individual, positive swab was confirmed at that time.
17 From that same site at that time.
18 Q And, again, that is what this *National Protocol for Sexual*
19 *Abuse Forensic Examination* requires, is that the specific
20 sample be tested once, but then confirmed with a second
21 test? Is that is what I am understanding?
22 A That is correct. And that recommendation comes in other
23 documents, at other times. Which I would be happy to send
24 to you.
25 It is not just this US Department of Justice

1 document; there is CDC recommendation from 2014 and then,
2 there is another paper specifically addressing that issue,
3 a scientific journal from 2012 and, admittedly, those are
4 not 2021, but I have not seen anything since then that
5 changes that recommendation.
6 For instance, I have to state: The consensus is that
7 one test is not adequate in the context of the evaluation
8 of child sexual abuse. It is perfectly adequate in the
9 context of clinical screening and in a patient in whom
10 gonorrhea may be suspected or simply obtained for whatever
11 reason. And to be managed clinically and treated, one
12 single test would be perfectly acceptable. But that is
13 not the issue, I think, that we are talking about right
14 now.
15 Q Correct. And I want to refer to your report on the second
16 page when you talk about -- right at the second paragraph
17 up from just where we are at, so -- one, two, three, four
18 paragraphs from the end. That is kind of what that
19 paragraph speaks to, is that there is a marked difference
20 in that the specificity with the test result has to be
21 high to be useful in a legal investigation. And that is
22 why there is a need for confirmation of the results; is
23 that correct?
24 A Correct. And, again, this is not my opinion; this is the
25 opinion of experts in the field. I just want to clarify

1 that. I did not just come up with this by myself. I wish
2 I had, but this is something that has been repeated to
3 safeguard -- safeguard -- I am not sure if that is the
4 word I meant -- to maintain a very high integrity for
5 tests that are going to be potentially interpreted as
6 proof of -- if that makes sense.
7 Q Well, if this is the reality that's here in the legal
8 setting, we are looking at a loss of somebody's liberty.
9 A sentence, potentially to the penitentiary, where in a
10 clinical setting if you are wrong, the course of
11 antibiotics are given and there is basically no harm, no
12 foul. Do you agree?
13 A Yeah. The harm is relatively, I would say, minimal.
14 Unless you would imagine that there would be a, you know,
15 a reaction to an antibiotic. Perhaps that would be the
16 greatest harm but other than that there would be no harm.
17 Q Okay. And the CDC has went on to recommend that in that
18 same -- it looks like in that same paragraph when you
19 referenced the 2014 report -- the CDC report -- they asked
20 for two tests involving different techniques. For
21 example, a biochemical, enzymatic, or a serological or
22 serologic testing. Is that the same as what we are
23 talking about when we talk about a culture versus maybe a
24 different strain of the NAAT testing?
25 A Serologic is a little bit confusing because I am not aware

Lab Result			**03-05-2021 08:35 AM**
CARTER, MATTHEW ALLAN	**SDDOC# 52013**	**Gender: Male**	**DOB 04-28-1990**

Collection Date: 2021-03-05 Fri

Patient	ID	Birth Date	Sex	SSN
CARTER, MATTHEW ALLAN	52013	04-28-1990	M	574044642
1600 N. Drive SIOUX FALLS SD 57117 USA Home Phone: 605-367-5051 Ethnicity: Unknown or not specified.				

Test Name	Normal Results	Abnormal Results	Flags	Units	Reference Range	Status	Observation Date	Performing Lab	Performing MD
GC CULTURE									
GC CULTURE	See Below							MCK	
Source: THROAT									
Culture negative for Neisseria gonorrhoea									

Test Name	Normal Results	Abnormal Results	Flags	Units	Reference Range	Status	Observation Date	Performing Lab	Performing MD
CHEMISTRY MISC SENDOUT									
GCC #1265									
CHEMOUT TEST NAME	GCC							MCK	
CHEMOUT TEST RESULT	Reordered - See Com							MCK	
This test has been reordered with the appropriate procedure.									
Test reordered: GCC									

Performing ID	Name	Address	City	State	Zip	Country	County
MCK^Avera McKennon Regional Laboratory^1325 S. Cliff Ave^Sioux Falls, SD 57117^(800) 560-4846							

Message Type	Control Number	Filler Accession ID	Group Number
Results			

Order Status: F
GC CULTURE ID# MGCC
ORDER Sequence#1 Control Number: Filler Accession ID: LB201_0119C9F7C
Collection Date: 03-05-2021 08:35
Action Code: G
Lab Receipt Date: 03-05-2021 14:43
Ordering Provider: Regier, Eugene R ID: 1124241682
Requisition Number: MICRO
Observation Rpt Date: 03-07-2021 00:00
Results Status: All Final Results Available, Order Complete.

CHEMISTRY MISC SENDOUT ID# CHEMOUT
ORDER Sequence#2 Control Number: LB201_0119C9F7C Filler Accession ID: LB201_0119C9F7C
Collection Date: 03-05-2021 08:35
Lab Receipt Date: 03-05-2021 14:43
Ordering Provider: Regier, Eugene R ID: 1124241682
Observation Rpt Date: 03-07-2021 00:00
Results Status: All Final Results Available, Order Complete.

Date/Time	Sending Application/Facility	Receiving Application/Facility
03-07-2021 10:53	/SDSP	CorrecTek/SDSP

Process ID	Version	Accept Ack.	Appl. Ack.
P=Production	2.3		

Lab Result 02-11-2021 08:27 AM

CARTER, MATTHEW ALLAN **SDDOC# 52013** **Gender: Male** **DOB 04-28-1990**

Collection Date: 2021-02-11 Thu

Patient	ID	Birth Date	Sex	SSN
CARTER, MATTHEW ALLAN	52013	04-28-1990	M	574044642
1600 N. Drive SIOUX FALLS SD 57117 USA Home Phone: 605-367-5051 Ethnicity: Unknown or not specified.				

Test Name	Normal Results	Abnormal Results	Flags	Units	Reference Range	Status	Observation Date	Performing Lab	Performing MD
CHEMISTRY MISC SENDOUT									
#87081 CULTURE, NEISSERIA GONORRHOEAE									
CHEMOUT TEST NAME	NEISSERIA GON							MCK	
CHEMOUT TEST RESULT	Reordered - See Com							MCK	
This test has been reordered with the appropriate procedure.									
Test reordered: GCC									

Performing ID	Name	Address	City	State	Zip	Country	County
MCK^Avera McKennon Regional Laboratory^1325 S. Cliff Ave^Sioux Falls, SD 57117^(800) 560-4846							

Message Type	Control Number	Filler Accession ID	Group Number
Results	LB201_0116B77B7		

Order Status: F

CHEMISTRY MISC SENDOUT ID# CHEMOUT

ORDER Sequence#1 Control Number: LB201_0116B77B7 Filler Accession ID: LB201_0116B77B7

Collection Date: 02-11-2021 08:27

Lab Receipt Date: 02-12-2021 12:18

Ordering Provider: Regier, Eugene R ID: 1124241682

Observation Rpt Date: 02-12-2021 00:00

Results Status: All Final Results Available, Order Complete.

Date/Time	Sending Application/Facility	Receiving Application/Facility
02-12-2021 12:26	/SDSP	CorrecTek/SDSP

Process ID	Version	Accept Ack.	Appl. Ack.
P=Production	2.3		

Lab Result			02-11-2021 08:27 AM
CARTER, MATTHEW ALLAN	SDDOC# 52013	Gender: Male	DOB 04-28-1990

Collection Date: 2021-02-11 Thu

Patient	ID	Birth Date	Sex	SSN
CARTER, MATTHEW ALLAN	52013	04-28-1990	M	574044642
1600 N. Drive SIOUX FALLS SD 57117 USA Home Phone: 605-367-5051 Ethnicity: Unknown or not specified.				

Test Name	Normal Results	Abnormal Results	Flags	Units	Reference Range	Status	Observation Date	Performing Lab	Performing MD
GC CULTURE									
****SPECIMEN RECEIVED PAST STABILITY, INTERPRET RESULTS WITH									
CAUTION****									
GC CULTURE	See Below							MCK	
Source: THROAT									
Culture negative for Neisseria gonorrhoea									

Performing ID	Name	Address	City	State	Zip	Country	County
MCK^Avera McKennon Regional Laboratory^1325 S. Cliff Ave^Sioux Falls, SD 57117^(800) 560-4846							

Message Type	Control Number	Filler Accession ID	Group Number
Results			

Order Status: F
GC CULTURE ID# MGCC
ORDER Sequence#1 Control Number: Filler Accession ID: LB201_0116B77B7
Collection Date: 02-11-2021 08:27
Action Code: G
Lab Receipt Date: 02-12-2021 12:18
Ordering Provider: Regier, Eugene R ID: 1124241682
Requisition Number: MICRO
Observation Rpt Date: 02-14-2021 00:00
Results Status: All Final Results Available, Order Complete.

Date/Time	Sending Application/Facility	Receiving Application/Facility
02-14-2021 11:14	/SDSP	CorrecTek/SDSP

Process ID	Version	Accept Ack.	Appl. Ack.
P=Production	2.3		

STATE OF SOUTH DAKOTA)
:ss.
COUNTY OF YANKTON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, PLAINTIFF, V. MATTHEW ALAN CARTER, DEFENDANT.	66CRI21-000016 JUDGMENT OF CONVICTION AND SENTENCE

On January 11, 2021, an Indictment was filed with this Court charging the above named Defendant with Count 1, Sexual contact with child under sixteen years of age (SDCL § 22-22-7) a Class 3 Felony. The offense occurred between December 10, 2020, through December 30, 2020, in Yankton County.

On January 28, 2021, the Defendant was arraigned on said Indictment. The Defendant appeared in person at said arraignment, together with the Defendant's attorney, Mr. Daniel L. Fox and the State of South Dakota appeared by and through Mrs. Debra K. Lillie, Yankton County Deputy State's Attorney. The Court advised the Defendant of all of the Defendant's Constitutional and Statutory rights pertaining to the charge that had been filed against the Defendant, including but not limited to the right against self-incrimination, the right to confrontation, and the right to a jury trial. The Defendant plead not guilty to the charge contained in the Indictment.

On April 6, 2021, a Superceding Indictment was filed with this Court charging the above named Defendant with Count 1, Rape in the First Degree – Less than 13 (SDCL § 22-22-1(1)) a Class C Felony. The offense(s) occurred on or about between October 1, 2020, and December 25, 2020, in Yankton County.

On April 26, 2021, the Defendant was arraigned on said Superceding Indictment. The Defendant appeared in person at said arraignment, together with the Defendant's attorney, Ms. Melissa Fiksdal and the State of South Dakota appeared by and through Mr. Tyler L. Larsen, Yankton County Deputy State's Attorney and Ms. Kelly Marnette, Assistant Attorney General. The Court advised the Defendant of all of the Defendant's Constitutional and Statutory rights pertaining to the charge that had been filed against the Defendant, including but not limited to the right against self-incrimination, the right to confrontation, and the right to a jury trial. The Defendant plead not guilty to the charge contained in the Superceding Indictment.

A jury trial was held and on February 4, 2022, the Defendant was found guilty to Count 1 of the Superceding Indictment, Rape in the First Degree – Less than 13 (SDCL § 22-22-1(1)) a Class C Felony.

It is, therefore,

ORDERED, ADJUDGED AND DECREED that the Defendant is guilty Rape in the First Degree – Less than 13 (SDCL § 22-22-1(1)) a Class C Felony, contained in the Superceding Indictment.

SENTENCE

This matter came before this court for sentencing on April 4, 2022. The Defendant appeared in person at said sentencing, together with the Defendant's attorney, Ms. Melissa Fiksdal and the State of South Dakota appeared by and through Mr. Tyler L. Larsen, Yankton County Deputy State's Attorney and Ms. Kelly Marnette, Assistant Attorney General, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence: it is now therefore

ORDERED, ADJUDGED AND DECREED that Defendant shall be imprisoned in the South Dakota State Penitentiary for a term of forty-five (45) years, there to be kept, fed and clothed according to the rules and regulations governing that institution. It is further

ORDERED, ADJUDGED AND DECREED that the twenty-five (25) year sentence shall be suspended pursuant to SDCL § 23A-27-18, upon the terms and conditions of this judgment. It is further

ORDERED, ADJUDGED AND DECREED that Defendant shall pay zero ($0) in fines, $116.50 in costs, $4,590.55 in prosecution costs pursuant to SDCL § 23A-27-26, $1827.70 to Yankton County for the computer expert costs, an amount ~~to be determined to~~ of $610.00 /cwg/ Yankton County for the costs of the medical expert, Dr. Dimitrievich, and counseling fees for E.W., if any are incurred in the future or if any have been incurred in the past for which reimbursement is sought up to $20,000.00, and all payable to the Yankton County Clerk of Court's office.It is further

ORDERED, ADJUDGED AND DECREED that Defendant shall pay court-appointed attorney's fees and expenses to the Yankton County Auditor pursuant to a repayment schedule. The amount of those fees and expenses can be determined by reviewing the approved ~~voucher~~ vouchers /cwg/ in this court file and/or by contacting the Yankton County Auditor. This is also to include any appellate attorney's fees. It is further

ORDERED, ADJUDGED AND DECREED that Defendant shall receive credit for three (3) days for time served as of April 4, 2022 /cwg/. It is further

ORDERED, ADJUDGED AND DECREED that this sentence shall run concurrent to Clay County criminal file 13CRI19-156. It is further

ORDERED, ADJUDGED AND DECREED that Defendant shall abide by the rules and regulations of the Board of Pardons and Parole. Defendant shall sign all parole agreements and obey all conditions imposed by them, even if the Court has not specifically mentioned them. It is further

ORDERED, ADJUDGED AND DECREED that Defendant shall obey all federal, state, tribal and local laws and be a good law-abiding citizen in all respects. It is further

ORDERED, ADJUDGED AND DECREED that Defendant shall pay all financial obligations as ordered by the court. Defendant shall work out a payment schedule with parole, and if requested, Defendant shall execute a wage assignment form. It is further

ORDERED, ADJUDGED AND DECREED that Defendant participate in sex offender specific treatment and/or sex offender denier treatment to the maximum degree possible during any periods of incarceration and/or supervision, whether in federal and/or state facilities. Following the Defendant's return to the community, based upon input received from prison-based treatment providers, the Defendant will then participate in any recommended outpatient sex offender or sex offender denier treatment with a qualified and licensed mental health provider, who is a member of the Association for the Treatment of Sexual Abusers and/or who is otherwise properly certified, credentialed, or licensed. It is further

ORDERED, ADJUDGED AND DECREED that Defendant not have contact with children less than eighteen (18) years of age unless or until approved by his criminal justice supervisor and sexual offender treatment provider. It is further

ORDERED, ADJUDGED AND DECREED that if Defendant is participating or has participated in good faith in sexual offender treatment, has had sex offender history polygraph testing, and has developed well thought out and committed to a relapse prevention plans, that the Defendant would then, if allowed contact, continue to be directly supervised by a responsible, adult individual who understands his sexual history, whenever the Defendant is around someone less than eighteen (18) years of age. It is further

ORDERED, ADJUDGED AND DECREED that Defendant shall under no circumstance provide childcare, babysitting type services, or the provision of child hygiene to any child under the age of eighteen (18) years of age. It is further

ORDERED, ADJUDGED AND DECREED that Defendant shall abstain from the use of alcohol, street drugs, and any and all other mood-altering substances, unless prescribed by a licensed medical personnel for legitimate medical and/or mental health issues. It is further

ORDERED, ADJUDGED AND DECREED that Defendant not use, purchase, or possess any forms of sexually-explicit-content pornography or erotica, to include materials that are available through, but not limited to: books, magazines, movies, videotapes, DVD's, live entertainment, computers, cell phones, gaming systems, smart TVs, tablets, or any other device. It is further

ORDERED, ADJUDGED AND DECREED that if the Defendant does use any electronic devices capable of internet access, those must be under supervision and will be also subject to monitoring software which can be accessed and then reviewed by criminal justice personnel at a minimum, and also, if requested, by his sexual offender treatment providers. It is further

ORDERED, ADJUDGED AND DECREED that any social apps will be approved by criminal justice personnel and treatment providers. It is further

ORDERED, ADJUDGED AND DECREED that as part of the Defendant's treatment for men who have committed sexual offenses, that the Defendant take clinical polygraph examinations as recommended by his treatment providers. It is further

ORDERED, ADJUDGED AND DECREED that if deemed appropriate by the Defendant's sex offender treatment provider, that the Defendant be considered for sexual interest testing and/or penile plethysmography if it is available, and any other testing that is recommended. It is further

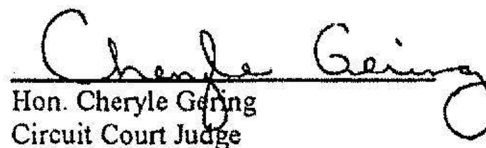
ORDERED, ADJUDGED AND DECREED that Defendant have no contact, direct or indirect, with E.W. so long as he is under the jurisdiction of the Department of Corrections. It is further

ORDERED, ADJUDGED AND DECREED that Ms. Melissa Fiksdal, is hereby appointed to represent the Defendant, as to the appeal from the conviction and judgment in this case.

THE DEFENDANT WAS ADVISED THAT THE DEFENDANT HAS A RIGHT TO APPEAL FROM THIS ORDER/JUDGMENT AND THE JURY'S DECISION, TO THE SOUTH DAKOTA SUPREME COURT, WITHIN 30 DAYS AFTER IT IS SIGNED, ATTESTED AND FILED, THAT IF THEY WAIT MORE THAN 30 DAYS IT WILL BE TOO LATE TO APPEAL, AND THAT IF THEY ARE INDIGENT, UPON THEIR APPLICATION, THIS COURT WOULD APPOINT AN ATTORNEY TO HANDLE THAT APPEAL FOR THEM.

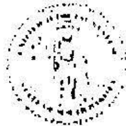
6/17/2022 4:46:39 PM

BY THE COURT:



Hon. Cheryle Gering
Circuit Court Judge

Attest:
Wells, Holly
Clerk/Deputy



IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30048

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MATTHEW CARTER,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
1st JUDICIAL CIRCUIT
YANKTON COUNTY, SOUTH DAKOTA

THE HONORABLE CHERYLE GERING
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal Filed July 7, 2022

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JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

DID THE TRIAL COURT ERR IN ADMITTING THREE CHILD PORNOGRAPHY VIDEOS IN CARTER'S TRIAL FOR FIRST-DEGREE RAPE OF A CHILD UNDER THE AGE OF 16?

State v. Snodgrass, 2022 SD 66, 951 N.W.2d 792

State v. Thomas, 2019 SD 1, 922 N.W.2d 9

The trial court denied Carter's motion to exclude the videos on the ground that they evidenced motive and intent.

DID THE TRIAL COURT ERR IN EXCLUDING TESTIMONY FROM CARTER'S EXPERT CONCERNING THE ALLEGED UNRELIABILITY OF NAAT TESTING?

Smith v. Kentucky, 2010 WL 1005907 (Ky.)

New Jersey v. C.D., 2014 WL 10212770 (N.J.)

The trial court excluded the testimony on the ground that Carter had not proven that NAAT testing is unreliable.

DID THE TRIAL COURT ERR IN ADMITTING THE CHILD VICTIM'S HEARSAY DESCRIPTIONS OF CARTER'S ABUSE?

State v. Buller, 484 N.W.2d 883 (S.D. 1992)

State v. Toohey, 2012 SD 51, 816 N.W.2d 120

Ohio v. Clark, 135 S.Ct. 2173 (2015)

The trial court found the victim's hearsay statements to her family admissible on the grounds that they were non-testimonial and fell within the tender years exception.

DOES SUFFICIENT EVIDENCE SUPPORT CARTER'S CONVICTION OF FIRST-DEGREE RAPE OF A CHILD UNDER THE AGE OF 16?

State v. Packed, 2007 SD 75, 736 N.W.2d 851

State v. Spaniol, 2017 SD 20, 895 N.W.2d 329

Steadman v. State, 2009 WL 4852156 (Ct.App.Texas)

The trial court denied Carter's motion for judgment of acquittal.

WERE CARTER'S COUNSEL INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS EVIDENCE OF CHILD PORNOGRAPHY SEIZED FROM CARTER'S HOME?

State v. Hanneman, 2012 SD 79, 823 N.W.2d 357

State v. Thomas, 2011 SD 15, 796 N.W.2d 706

State v. Kottman, 2005 SD 116, 707 N.W.2d 114

This issue was not raised in the trial court.

STATEMENT OF THE CASE AND FACTS

5-year-old E.W. contracted vaginal gonorrhea. The only way a 5-year-old girl can contract vaginal gonorrhea is through sexual contact with a carrier. Matthew Carter was that carrier.

Carter was E.W.'s mother's boyfriend for about six months before E.W. contracted gonorrhea. A couple weeks before Christmas, Carter was alone with E.W. watching a Scooby Doo movie. CARTER INTERVIEW TRANSCRIPT at 79/16-19, 80/9-13, Appellee's Appendix. A few days prior to Christmas, E.W. was experiencing a copious yellow vaginal discharge. E.W.'s mother, Nycole, took E.W. to the doctor. TRIAL 1 at 63/11, 99/20, 180/3; TRIAL 2 at 32/23. A test for a yeast infection (which does not test for STD) came back negative. TRIAL 1 at 64/19, 149/20, 153/11. The doctor prescribed a topical ointment which relieved but did not cure E.W.'s symptoms. TRIAL 1 at 99/22.

During the course of these treatments, E.W. told her mother that "Daddy Matt" had licked her "girl parts" when they were watching Scooby Doo. TRIAL 1 at 66/24, 67/5. Nycole did not want to believe that her boyfriend, a man she intended to marry, had done such a thing, but for

the days leading up to Christmas she made certain that E.W. was never alone with Carter. TRIAL 1 at 70/14-19, 73/14.

Nycole broke up with Carter on Christmas Day. TRIAL 1 at 79/24. That day, Nycole visited her mother, Jennifer. Nycole asked to leave E.W. with Jennifer overnight. Jennifer could tell Nycole was not herself, was preoccupied by events in her life and the breakup with Carter, so she agreed. TRIAL 1 at 118/25, 128/14. Nycole said nothing to Jennifer about E.W.'s statement about Carter. TRIAL 1 at 119/6.

E.W. liked to give her doll a bath. Jennifer plugged the bathroom sink and ran soapy water into it. While E.W. bathed her doll in the sink, Jennifer noticed E.W.'s preoccupation with wiping the doll in the vaginal area. TRIAL 1 at 119/13. Jennifer asked E.W. about it and E.W. told her that "Daddy Matt" washed her there and licked her there. TRIAL 1 at 119/22, 133/10, 133/15. The comment disturbed Jennifer, who has a degree in early childhood special education and works as a substitute pre-school teacher. TRIAL 1 at 114/14. Jennifer retrieved her phone so she could surreptitiously videotape E.W. while she washed her doll. EXHIBIT 1; TRIAL 1 at 135/21. On the video, Jennifer asks E.W. to show on the doll where "Daddy Matt" touches her; E.W. is seen turning the doll onto its back, lifting its dress and shyly mimicking a licking motion above the doll's vaginal area. EXHIBIT 1; TRIAL 1 at 120/4.

On the day after Christmas, Jennifer noticed blood in E.W.'s underwear. TRIAL 1 at 125/5. On the Monday after the Christmas

Holiday weekend, Jennifer contacted law enforcement to report E.W.'s statements. TRIAL 1 at 124/8, 138/5. At the time, Jennifer did not know that E.W. had also told Nycole about Carter licking her "girl parts." TRIAL 1 at 119/6, 122/13.

Nycole also noticed blood in E.W.'s underpants and took her to the emergency room. E.W. presented with "a lot of yellow discharge" and "obvious signs of an infection." TRIAL 1 at 180/3, 195/17; TRIAL 2 at 29/24. Nycole reported concern for inappropriate contact by her boyfriend, specifically that E.W. had told her that "Daddy had licked her when they watched a Scooby Doo movie." TRIAL 1 at 190/21, 195/16, 197/4; EXHIBIT 6. This time, E.W. was tested for STD and was positive for vaginal gonorrhea. TRIAL 1 at 80/9, 82/14, 100/19, 178/21, 180/14; 223/24; TRIAL 2 at 30/1, 82/9; EXHIBIT 10. Medical personnel contacted the police to make a report and set up a clinic appointment with Child's Voice for further care. TRIAL 1 at 181/11. Carter was tested and was positive for throat gonorrhea. TRIAL 1 at 156/6; TRIAL 2 at 170/2; EXHIBIT 32. Nycole also tested positive for throat gonorrhea. TRIAL 2 at 171/21. Carter was Nycole's only sexual partner since E.W.'s birth. TRIAL 1 at 82/19, 83/1, 83/10. Carter on the other hand remained sexually promiscuous during his relationship with Nycole, hooking up with at least three different women he had met on dating apps Tinder, Bumble and UberHorny. CARTER INTERVIEW TRANSCRIPT at 72-75, Appellee's Appendix.

Carter was arrested on a charge of sexual contact with a minor. He was ultimately convicted of one count of rape of a child under the age of 16 and sentenced to 45 years in the state penitentiary with 25 years suspended. Carter now appeals.

ARGUMENT

Carter raises five allegations of error. None warrant reversal of his conviction.

1. The Trial Court Properly Admitted Three Child Pornography Videos As Evidence Of Motive And Intent

In phone calls and e-mails from the jail, Carter implored his father to go to his house and remove something hidden in the drop ceiling tiles of the bathroom above the toilet. TRIAL 2 at 122/22, 123/24, 129/4-21; EXHIBIT 23; JAIL COMMUNICATIONS, Appellee's Appendix at 00022. Law enforcement agents monitoring Carter's communications beat Carter's father to the house and located a portable computer hard drive in the hiding place Carter had described. The hard drive contained three "video files depicting cunnilingus between an adult male and a juvenile child." TRIAL 2 at 202/17, 203/4, 208/16. Two of the videos had the filenames "pthc raygold preteen asian Alicia 11 YO Phillipine Fillipina child prostitute XXX hc pedo ptsc" and "5 Y full penetration." TRIAL 2 at 206/18, 209/25, 210/3. The acronyms "pthc," "yo," "y," "pedo," "ptsc" stand for "preteen hard core," "year old," "year," "pedophilia," and

"preteen soft core." TRIAL 2 at 205-208. The jury viewed 10-second clips from each video. TRIAL 2 at 204-208.

In addition to the videos, law enforcement found searches on Carter's phone for "can a little girl have an orgasm," "can a five-year-old little girl have an orgasm," "is it possible for an eight-year-old girl to be sexually abused and enjoy it," "father and daughter making real incest love," "incest porn," "real incest sex with daughter" and "my stepdad sneaks into my room at night." TRIAL 2 at 190/9-22, 191/7, 195/12; EXHIBITS 35, 36. Carter complains that the trial court improperly admitted the videos into evidence and published clips to the jury.

A trial court's determination to admit other acts evidence will be overturned only upon a showing of abuse of discretion. *State v. Medicine Eagle*, 2013 SD 60, ¶ 16, 835 N.W.2d 886, 892. "An abuse of discretion is discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Medicine Eagle,* 2013 SD 60 at ¶ 16, 835 N.W.2d at 892. Evidence of other, uncharged acts committed by a defendant are admissible under SDCL 19-19-404(b) if those other acts are not used merely to prove a person's character but are admitted for other purposes "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or lack of accident."

While propensity evidence may impugn a defendant's character, it may yet be admitted if "offered for a logically relevant purpose other than character." *State v. Wright,* 1999 SD 50, ¶23, 593 N.W.2d 792, 803;

State v. Dubois, 2008 SD 15, ¶ 20, 746 N.W.2d 197, 205. "[S]uch evidence is *only* inadmissible if offered to prove character." *Wright,* 1999 SD 50 at ¶ 13, 593 N.W.2d at 798 (emphasis in original). But if propensity evidence is offered for some relevant purpose, "the balance tips emphatically in favor of admission" unless its prejudicial effect "substantially" outweighs its probative value. *Wright,* 1999 SD 50 at ¶ 14, 593 N.W.2d at 798; *State v. Bowker*, 2008 SD 61, ¶ 41, 754 N.W.2d 56, 69. "All that is prohibited under 404(b) is that similar act evidence may not be admitted 'solely to prove character.'" *Wright,* 1999 SD 50 at ¶ 17, 593 N.W.2d at 800.

In *State v. Snodgrass,* 2022 SD 66, 951 N.W.2d 792, this court addressed the question of the admissibility of a child rape defendant's internet searches for a particular category of child pornography. Snodgrass, like Carter, was accused of raping his girlfriend's daughter. The trial court admitted web searches evidencing Snodgrass' fixation with father-stepdaughter incest and pre-pubescent sex. *Snodgrass,* 2022 SD 66 at ¶ 33, 951 N.W.2d at 803. This court affirmed admission of the evidence, finding that the searches were probative of a plan, intent and motive to sexually abuse his girlfriend's daughter and rebutted Snodgrass' denial of sexual interest in children in general and abuse of his girlfriend's daughter in particular. *Snodgrass,* 2022 SD 66 at ¶ 33, 951 N.W.2d at 803.

Also, in *State v. Thomas,* 2019 SD 1, 922 N.W.2d 9, Thomas was accused of raping his niece by marriage and one of her young friends. The searches utilized the terms "teen," "young," "way too young," "jailbait," "family orgy," "family sex," "taboo" and "incest." This court affirmed admission of the evidence, finding that the searches contradicted Thomas' assertion to law enforcement that he was only attracted to older women. *Thomas,* 2019 SD 1 at ¶¶8-12, 922 N.W.2d at 13. The searches were also directly related to Thomas' plan and intent to engage in sexual conduct with minors and family members. *Thomas,* 2019 SD 1 at ¶¶8-12, 922 N.W.2d at 13.

Snodgrass and *Thomas* are consistent with rulings in other courts confronted with the same question. In *State v. Bingman,* 194 Wash.App. 1044 (Ct.App.2 Wash. 2016), a defendant charged with raping his two daughters challenged admission of internet searches relating to incest and stepfather/stepdaughter sex. The appellate court affirmed, finding that "the internet browsing history involved a very specific category of persons – daughters having sex with their fathers. This evidence is relevant to show Bingman's lustful disposition toward his daughters." *Bingman,* 194 Wash.App. at 4. *Bingman* further ruled that the browsing history had "strong probative value" as evidence of Bingman's sexual interest in his daughters that outweighed its potential for prejudice. *Bingman,* 194 Wash.App. at 4.

In *State v. Colburn,* 419 P.3d 1196 (Mont. 2018), a defendant charged with raping his daughter and another minor challenged admission of internet searches for "dad and daughter sex," "mom and son sex," "preteen tube," "preteen pussy," and "daughter and sister sex." *Colburn,* 419 P.3d at 452. *Colburn* ruled that "[e]vidence of Colburn's pervasive and specific sexual interest in incest and sexual abuse related child pornography was relevant and probative of his identity as the perpetrator of incest against his daughter." *Colburn,* 419 P.3d at 453.

In *Commonwealth v. Vera,* 36 N.E.3d 1272 (Ct.App.Mass. 2015), a defendant charged with raping his daughter's step-sister challenged admission of internet searches related to "young raw porn," "teen TV porn," "young playground porn," "hot teen porn" and "first time home teen porn." *Vera,* 36 N.E.3d at 1275. The *Vera* court ruled the internet search evidence was relevant to refute a defense of innocent mistake or accident and to prove Vera's "passion and emotion" for underage girls. *Vera,* 36 N.E.3d at 1277, 1279. Despite its prejudicial tendencies, the *Vera* court ruled that the internet search evidence was nonetheless "highly probative of [the] defendant's intent and motive" to seek sexual gratification from young girls. *Vera,* 36 N.E.3d at 1278; *People v. Lloyd,* 2015 WL 8278462, *2 (Ct.App.Mich.)(internet searches for "teen sex videos," "daddy daughter sex stories," and "first time sex" were relevant to proving that the defendant derived sexual gratification from sexual contacts with a 13-year-old girl).

In light of these authorities, the trial court certainly did not abuse its discretion in admitting evidence of Carter's possession of child pornography videos as evidence of motive and intent. 23DEC21 FOF ¶¶ 11, 12, 13, 17, 21, 29. If Carter's porn cache was admitted *just* to portray him as a "bad" person, he might rightly complain. *State v. Ortega,* 339 P.3d 1186, 1192 (Ct.App. Idaho 2015). But, as in other child rape cases, the search evidence was relevant to material elements of the prosecution's case:

- As in *Snodgrass, Bingman, Colburn, Vera, Thomas* and *Lloyd,* the videos evidence Carter's prurient interest in performing the specific charged act on underage girls. 23DEC21 COL ¶¶ 7, 10.
- Searches on terms such as "father and daughter making real incest love," "incest porn," "real incest sex with daughter" and "my stepdad sneaks into my room at night" evidence "Daddy Matt's" interest in the stepfather/stepdaughter strain of incestuous sex. 23DEC21 COL ¶ 10.
- Because anatomical structures on the outside of the vagina do not produce orgasm, searches on terms such as "can a little girl have an orgasm," "can a five-year-old little girl have an orgasm," "is it possible for an eight-year-old girl to be sexually abused and enjoy it," evidence Carter's interest in achieving penetration as required for proof of an offense under SDCL 22-22-1(1).

- As in *Colburn* and *Vera*, the evidence was relevant to refute Carter's emphatic denials that he would tolerate any such conduct in his house (CARTER INTERVIEW at 63/11, 69/12), that he would "never do some shit like that" (CARTER INTERVIEW at 53/18, 67/19, 68/17, 72/3, 77/7, 78/3, 81/15, 82/10, 85/10, 85/12), that he "don't want nothing to do with . . . stuff" like pedophilia (CARTER INTERVIEW at 82/13, 84/13, 84/23), and that anyone who would engage in such conduct was "horrible" and "fucked up" (CARTER INTERVIEW at 65/23, 68/24). 23DEC21 FOF ¶ 12/COL ¶ 10.
- As in *Snodgrass* and *Bingman*, the video evidence's "strong probative value" outweighed its potential prejudice. And, as in *Vera* and *Lloyd*, the trial court protected against undue prejudice by instructing the jury that Carter's other acts could be used "only to show motive or intent." INSTRUCTION 16.

Here, as in *Snodgrass, Thomas, Bingman, Colburn, Vera* and *Lloyd,* the specificity of Carter's video library and search activity have sufficient points in common with the charged offense to have relevance beyond evidence of propensity or bad character. Accordingly, the trial court did not abuse its discretion by admitting evidence of Carter's pornographic and pedophilic video library and internet searches.

2. The Trial Court Properly Excluded Evidence Of NAAT Testing's Alleged Unreliability

NAAT is a test for sexually transmitted diseases including gonorrhea. The test swabs a suspected infected area, or collects urine, and examines for DNA or RNA of an infectious microbe. The NAAT test manufacturer's packaging has a disclaimer (which labs reflexively repeat in their reports) that positive results on one test should be followed up with retesting in medical-legal cases.

At trial, Carter moved *in limine* for exclusion of NAAT testing performed on E.W.'s samples as unreliable. In addition to the obvious symptoms of gonorrhea observed on examination, E.W.'s two separate urine samples and vaginal, rectal and pharyngeal (throat) swabs all tested positive. 20DEC21 MOTIONS HEARING at 17/1-8, 47/3. After a hearing at which three experts testified, the trial court denied the motion. Carter now argues that testing performed on *him* as well as E.W. should have been excluded. But since Carter only sought exclusion of the testing on E.W. at trial, the argument as to the reliability of the testing performed on him is not preserved for appeal. 15OCT21 MOTION. In any event, the trial court properly found that NAAT testing is reliable.

First, while it is true that NAAT packaging disclaims use of the product in medical-legal applications unless retested, NAAT testing (according to Carter's own expert) is in "widespread use" in clinical practice, is "very reliable," is "perfectly adequate" for clinical diagnosis of gonorrhea, and that it is "perfectly" and "totally reasonable" to diagnose

gonorrhea in a clinical setting using a single NAAT test. 20DEC21 MOTIONS HEARING at 9/3, 11/2, 12/9, 18/8. According to Carter's expert, there is "no disagreement that the tests are completely indicated in the clinical assessment of a child who is suspected [of having experienced] sexual abuse." 20DEC21 MOTIONS HEARING at 39/23-40/1. But Carter's expert expressed reticence over the use of this "perfectly reasonable," "completely indicated" and "very reliable" test in a medical-legal application because of (1) the manufacturer's disclaimer concerning the use of NAAT testing in medical-legal cases, (2) a 2014 CDC publication and (3) DOJ guidelines.

The CDC publication states only that "labs should use the NAAT to detect chlamydia and gonorrhea, except in cases of child sexual assault involving boys, and rectal and pharyngeal infection in prepubescent girls." 20DEC21 MOTIONS HEARING at 21/12-15. While E.W. did have rectal and pharyngeal testing, the CDC does not disclaim vaginal NAAT testing in prepubescent girls. The DOJ guidelines state that "NAAT can be used to screen for Neisseria gonorrhea in prepubertal girls." 20DEC21 MOTIONS HEARING at 16/14. Collection methods condoned are "urine . . . or vaginal swabs." 20DEC21 MOTIONS HEARING at 16/15. The guidelines comment that "all positive specimens have to be retained for additional testing, and a positive NAAT test should prompt repeat testing or alternate NAAT" testing using a different method. 20DEC21 MOTIONS HEARING at 16/13.

Carter's expert "interprets" these sources to mean that each collected sample must be tested twice by a different NAAT method in medical-legal cases. 20DEC21 MOTIONS HEARING at 26/19, 27/9, 27/15, 37/21, 37/8, 40/9, 40/22. E.W. submitted to five different tests: two separate urine samples using two different methodologies (Aptima for one and Roche-Cobas for another) and swab testing of three sites (oral, rectal, vaginal), all of which were positive for gonorrhea. According to Carter's expert, this extensive testing does not meet the manufacturer, CDC or DOJ guidelines. 20DEC21 MOTIONS HEARING at 40/20, 47/8. Carter's expert does not opine that any of the tests performed on E.W. are clinically unreliable, only that the manufacturer's disclaimer, and CDC and DOJ guidelines, (allegedly) call for even more testing.

The state's experts refuted Carter's expert's "interpretations" of the manufacturer's disclaimer and CDC/DOJ guidelines. The state's experts opined that the manufacturer's disclaimer stems from the fact that the FDA has not affirmatively approved NAAT testing for the prepubescent population because it has not conducted trials on this population because STDs in children are so rare that there is not a large enough available population to conduct trials. 20DEC21 MOTIONS HEARING at 49/12, 51/22. Given the FDA approval status limbo that NAAT testing

on pre-pubertal girls occupies, the disclaimer serves as an obvious liability firewall for the manufacturer. 1FEB22 SUPPLEMENTAL FOF ¶ 124.

Carter's expert's "interpretation" of the manufacturer's disclaimer and CDC/DOJ guidelines is not grounded in the reality of medicine. For one, physicians do not always know when a case has medical-legal implications. 20DEC21 MOTIONS HEARING at 48/23. Two tests on a single collected sample is neither realistic nor practical in clinical practice. 20DEC21 MOTIONS HEARING at 48/11. It would be cost prohibitive, it would deplete inventories of specimen collection tubes (of which there is a shortage), and a specimen may expire before it can be double tested. 20DEC21 MOTIONS HEARING at 48/14-17, 55/13, 55/19. There is also concern that requiring double testing of a sample from a single site would subject a child to multiple intrusions because different methods of testing use different collection devices. 20DEC21 MOTIONS HEARING at 58/24, 62/2. Here, there was difficulty obtaining a single vaginal sample because of the child's pain and level of resistance, so much so that Dr. Free considered sedating the child to obtain a vaginal swab. TRIAL 2 at 30/23. The collection of two separate urine samples which were tested using two different methods, as was done with E.W.'s urine sample, meets national testing standards. 20DEC21 MOTIONS HEARING at 47/13-48/7, 50/20, 52/21, 53/6, 54/24, 55/10, 56/2, 58/22, 61/5.

In light of the expert testimony, the trial court found that there was "no basis . . . to exclude the gonorrhea test results of E.W." 1FEB22 SUPPLEMENTAL FOF ¶ 121. The court found the NAAT testing "relevant and reliable." 1FEB22 SUPPLEMENTAL FOF ¶ 122. The court dismissed the manufacturer's disclaimer as simply a function of the fact that "no NAAT assays have been cleared [by the FDA] for use in any sample type from prepubertal boys and girls" leading "most laboratories to resort to disclaimers in NAAT test reports regarding the off-label use of NAAT testing in children." 1FEB22 SUPPLEMENTAL FOF ¶ 123. Though multiple testing is recommended, the court found that "it can be either multiple tests done on one sample or multiple tests done on more than one sample." 1FEB22 SUPPLEMENTAL FOF ¶ 125. In support of this finding, the court relied on the CDC's position that "[w]hen a specimen is positive, the result should be confirmed either by retesting the original specimen or obtaining another," which was done here for urine sampling and corroborated by three swab tests. 1FEB22 SUPPLEMENTAL FOF ¶ 126.

The trial court's decision is consistent with other courts in other cases. In *Smith v. Kentucky,* 2010 WL 1005907 (Ky.), the court affirmed the trial court's admission of NAAT testing. Though not FDA approved for use in females under the age of 12, the court found that this was a function of legal constraints in performing trials on children and the lack of a test population because children are not engaged in sexual activity.

Smith, 2010 WL 1005907 at *3, *4. *Smith* found that the lack of FDA approval did not impugn the reliability of the test in relation to the pre-pubertal female population because FDA approval is "a whole different standard" than the test for reliability in court proceedings. *Smith,* 2010 WL 1005907 at *3, *4.

Likewise, in *New Jersey v. C.D.,* 2014 WL 10212770 (N.J.), the court ruled that NAAT is medically accepted as the most reliable test to administer to children when screening for STDs. *C.D.,* 2014 WL 10212770 at *7. The *C.D.* court noted that the manufacturer's packaging reported that "for every one hundred infected people tested, ninety four would be correctly diagnosed; for every one hundred people not infected, less than three would be wrongly diagnosed." *C.D.,* 2014 WL 10212770 at *8. Consequently, "physicians uniformly accept the NAAT as a reliable test" for detecting STDs. *C.D.,* 2014 WL 10212770 at *8. In light of these authorities and the evidence at trial – not the least of which was five separate tests from three different sites using at least two different testing methods all positive for gonorrhea – the trial court did not abuse its discretion in finding NAAT testing reliable and excluding evidence of Carter's theory that each collected specimen must be tested twice to meet medical-legal standards. *State v. Lindner,* 2007 SD 60, ¶7, 736 N.W.2d 502, 505 (court abuses its discretion when it "misapplies a rule of evidence, not when it merely allows or refuses questionable evidence").

3. The Trial Court Properly Admitted The Child Victim's Hearsay Statements Describing Carter's Abuse

Carter argues that the trial court improperly admitted statements by the child describing her abuse to her mother and grandmother in violation of his confrontation rights. This court long ago affirmed the constitutionality of the tender years hearsay exception in SDCL 19-19-806.1/19-16-38. As noted in *State v. Buller,* 484 N.W.2d 883, 887 (S.D. 1992), "[t]he framers of the constitution did not intend to exclude all hearsay." *Buller* ruled that the imperatives of effective law enforcement required admission of hearsay from rape victims of tender years provided the victim is unavailable as a witness and such statements are supported by sufficient indicia of reliability and corroborating evidence. *Buller,* 484 N.W.2d at 887

These observations were echoed later in *Ohio v. Clark,* 135 S.Ct. 2173 (2015). Historically, *Clark* noted that 18th century courts "tolerated flagrant hearsay in rape prosecutions involving a child victim." *Clark,* 135 S.Ct. at 2182. Within this historical context, *Clark* found that it is "highly doubtful that statements like [a child's report of abuse to an adult] would have been understood to raise Confrontation Clause concerns" at the time of its enactment. *Clark,* 135 S.Ct. at 2182. *Clark* ruled that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause." *Clark,* 135 S.Ct. at 2182; *State v. Toohey,* 2012 SD 51, ¶¶ 12-18 n. 1, 816 N.W.2d 120, 128-129 (affirming

the admissibility of non-testimonial hearsay statements of an unavailable rape victim of tender years).

Here, E.W. was unavailable due to her inability to remember the abuse she had described to her mother and grandmother. SDCL 19-19-804(a)(3); 24JAN22 PRETRIAL CONFERENCE at 6-23; 1FEB22 SUPPLEMENTAL COL ¶ 38. The trial court found these statements to be non-testimonial. 24JAN22 PRETRIAL CONFERENCE at 4/14; 1FEB22 SUPPLEMENTAL COL ¶ 18. The statements to her mother and grandmother were uttered spontaneously before any law enforcement involvement and, tellingly, independent of each other. TRIAL 1 at 119/6, 122/13. The facts that Jennifer reported E.W. stating that Carter had licked her without knowing that E.W. had made the same statement to Nycole, and that Nycole acted on E.W.'s statements by preventing E.W. from being alone with Carter, were indicia of reliability. 1FEB22 SUPPLEMENTAL FOF ¶¶ 107, 113. The trial court found that E.W.'s description of the same abuse to a third-party interviewer at Child's Voice was a further indicium of the reliability of E.W.'s statements to her mother and grandmother. 24JAN22 PRETRIAL CONFERENCE at 22/10; 1FEB22 SUPPLEMENTAL FOF ¶ 116.

The trial court also found that E.W.'s statements were sufficiently corroborated by the facts that Carter admitted he had been alone with E.W. at the time E.W. said the abuse occurred, E.W. had gonorrhea, Carter tested positive for gonorrhea, and Carter possessed videos and

performed internet searches of acts similar to the alleged abuse. 24JAN22 PRETRIAL CONFERENCE at 22/18; 1FEB22 SUPPLEMENTAL FOF ¶¶ 100, 114, 118, 120; *People v. Culp,* 2021 Ill.App.4th 200517 (positive test for gonorrhea sufficient corroborating evidence of penetration to satisfy *corpus delicti* rule). The requirements of SDCL 19-19-804(a)(3) and -806.1 having been satisfied, admission of E.W.'s non-testimonial hearsay statements in which she described Carter's abuse to her mother and grandmother did not implicate or violate Carter's confrontation rights.

4. Carter's Conviction Is Sufficiently Supported By The Evidence

Carter alleges insufficient evidence of penetration to support a conviction under SDCL 22-22-1(1). Penetration is defined as any intrusion, however slight, of any part of the body, or of any object, into the genital opening of another person. SDCL 22-22-2. Penetration can be inferred from circumstantial evidence and need not be proved by medical evidence. *State v. Brende,* 2013 SD 56, ¶22, 855 N.W.2d 131, 140. Penetration is sufficiently evidenced in this case in two ways.

First, E.W. could only contract gonorrhea through direct contact between the moist tissue inside her vagina and fluid from the moist tissue of the carrier.[1] TRIAL 1 at 177/12, 178/1; TRIAL 2 at 19/16,

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[1] Oral-genital contact is a known mode of transmission of gonorrhea from adults to children. TRIAL 2 at 25/21. Dry tissue like fingertips, inanimate surfaces like toilet seats or carpeting, or bathwater are not known modes of transmission. TRIAL 1 at 178/1, 184/7; TRIAL 2 at 22/10, 40/21, 41/20. Science has not identified "a non-sexual explanation for gonorrhea in children;" except for gonorrhea transferred from the birth

22/9-22, 36/10-21, 42/20. Gonorrhea cannot start on the exposed outside anatomy (labia majora) of the vagina. TRIAL 2 at 20/19, 21/7, 35/11, 36/10-21, 37/21, 38/13. This means that Carter's tongue made contact with the moist tissue structures inside E.W.'s labia majora when he licked her. TRIAL 2 at 19/11-25, 20/1-20, 35/11, 36/19.

This court has found that entry into the female genitalia beyond the labia majora is sufficient to prove penetration. *State v. Packed,* 2007 SD 75, ¶32, 736 N.W.2d 851, 861; *State v. Spaniol,* 2017 SD 20, ¶¶48-50, 895 N.W.2d 329, 345-346. Other courts have found that the presence of gonorrhea in a child also is sufficient evidence to prove penetration. *Steadman v. State,* 2009 WL 4852156, *3 (Ct.App.Texas) (gonorrhea in a four-year-old child means sexual abuse); *State v. Bertrand,* 461 So.2d 1159 (Ct.App.La. 1985)(presence of gonorrhea in both the victim and the defendant sufficient to prove element of penetration); *United States v. Williams,* 34 M.J. 250 (U.S.Ct.Mil.App. 1992)(gonorrhea evidenced sexual penetration); *Commonwealth v. Nylander,* 532 N.E.2d 1223 (Ct.App.Mass. 1989)(medical evidence pointed to penetration as the cause of victim's gonorrhea).

As observed in *Garlington v. State,* 349 So.3d 782, 790 (Ct.App. Miss. 2022), it is scientifically understood that "[y]ou don't get [gonorrhea] from a toilet seat, you don't get it from a washcloth, you don't

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mother during delivery sometimes found in children under 30 days old, gonorrhea in children older than 30 days is "always the result of sexual abuse." TRIAL 2 at 47/2-6.

get it from holding somebody's hand, or walking around Target. It has to be a very intimate circumstance that the infected bodily fluid of someone has to touch and infect another person . . . . The presence of gonorrhea in anyone is definitive for an intimate contact with an infectious secretion or an infected fluid" which "means that there's no other way [a child] got it except intimate contact with an infected secretion." *Garlington,* 349 So.3d at 790.

Second, if the jury was convinced that Carter licked E.W.'s "girl parts," the jury could readily infer penetration from Carter's fixation with attempting to stimulate an orgasm in a child, as reflected in his possession of an illegal video with a filename "5 Y full penetration," illegal videos depicting oral penetration of a child by an adult, and internet searches on terms such as "can a little girl have an orgasm," "can a five-year-old little girl have an orgasm," and "is it possible for an eight-year-old girl to be sexually abused and enjoy it." *Brende,* 2013 SD 56 at ¶ 22, 855 N.W.2d at 140. Orgasm requires stimulation of structures inside the labia majora. Thus, the evidence was more than sufficient for a rational jury to find that "Daddy Matt" penetrated E.W.'s "girl parts" with his tongue in an effort to stimulate an orgasm in a child and, in so doing, infected her with gonorrhea.

5. Carter's Ineffectiveness Claim Is Not Ripe For Disposition

Carter claims his defense counsel was ineffective for failing to file a motion to suppress the videos found on the hard drive hidden in his

bathroom ceiling. IAC claims are ordinarily resolved through *habeas corpus* review because "it is only through *habeas corpus* that a sufficient record can be made to allow the appropriate review." *State v. Hanneman,* 2012 SD 79, ¶ 12, 823 N.W.2d 357, 360. An IAC claim is not ripe for review on direct appeal unless there is "a manifest usurpation of [the defendant's] constitutional rights" and "no conceivable strategic motive" behind counsel's actions. *Hanneman,* 2012 SD 79 at ¶ 18, 823 N.W.2d at 361-362; *State v. Thomas,* 2011 SD 15, ¶ 25, 796 N.W.2d 706, 714.

Carter's ineffectiveness claim requires the development of facts beyond those in the existing record, such as the circumstances of the search and his counsel's reason for not filing a motion to suppress. Counsel likely reasoned that a motion to suppress would be futile in light of the facts that Carter was on probation at the time the videos were seized from his house, law enforcement had reasonable grounds to believe Carter was in possession of contraband in violation of his probation, and Carter's probation officer authorized the search. 30AUG21 PRETRIAL CONFERENCE at 33-34; *State v. Kottman,* 2005 SD 116, 707 N.W.2d 114 (warrantless search of parolee's residence authorized by probation officer upon reasonable suspicion of parolee's involvement in a burglary); *United States v. Brown,* 346 F.3d 808 (8th Cir. 2003)(warrantless search authorized by probation officer based on reasonable suspicion of drugs in defendant's residence).

The few facts pertinent to the issue found in the trial record do not reflect a manifest usurpation of Carter's rights or suggest no strategic reason for not moving to suppress. Accordingly, Carter's allegation of ineffective assistance by trial counsel is not ripe for review on direct appeal. *State v. Craig,* 2014 SD 43, ¶¶41,42, 850 N.W.2d 828, 839 (IAC claim not ripe on direct review if counsel's actions "could have been a reasonable trial strategy").

CONCLUSION

The evidence of Carter's guilt is conclusive. He has a fetish for cunnilingus with children, E.W. described him licking her "girl parts," Carter had gonorrhea of the throat, E.W. contracted vaginal gonorrhea as a consequence of contact between Carter's tongue and the moist, inner tissues of her "girl parts." Short of a video of the offense, proof of Carter's guilt could hardly be more convincing. Carter was not convicted because of any trial court error or prejudice to his rights. Accordingly, this court can comfortably affirm Carter's conviction for raping E.W.

Dated this 11th day of May 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that 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 6,312 words.

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

Dated this 11th day of May 2023.

Paul S. Swedlund

Paul S. Swedlund
Solicitor General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Appellee's Brief was served via electronic mail on Wanda Howey-Fox at whfoxlaw@midco.net.

Dated this 11th day of May 2023.

Paul S. Swedlund

Paul S. Swedlund
Solicitor General

APPENDIX

Carter Interview Excerpts..00001

Carter Jail Communications 00022

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) :SS
2 COUNTY OF YANKTON) FIRST JUDICIAL CIRCUIT

3

STATE OF SOUTH DAKOTA,)
4) File No. 66CRI21-16
Plaintiff,)
5) VIDEOTAPED INTERVIEW
vs.) OF
6) MATTHEW ALLAN CARTER
MATTHEW ALLAN CARTER,)
7)
Defendant.)
8

9 Interview conducted by Detective Joe Erickson on
December 31, 2020, beginning at 10:57:32.
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1 her up and wiped her off, and she gave me a hug. Then
2 after that, then she ran back to her mom. But other than
3 that -- that was about the most incidental thing that I
4 can think of. (Indiscernible).
5 **Q** Yeah, but that's nothing, giving a kid a hug, right?
6 **A** Yeah, but that's -- (indiscernible) --
7 **Q** Yeah, I give hugs out all the time.
8 **A** Right.
9 **Q** That's nothing that we would be concerned with.
10 **A** Yeah. But as for sexual contact, you know, none of that,
11 you know what I mean? There's none of that going on.
12 I -- I would never do some shit like that. I think it's
13 horrible. Even, like, thinking some shit like that.
14 **Q** Yeah, and that -- you know, it's a thing that some -- I
15 mean, it's a bad thing. I know there's a lot of people
16 that are -- that are incarcerated for it. I know there's
17 stigmas around it.
18 **A** I would never do that.
19 **Q** I also know -- I mean, we do that sex offender registry,
20 and I mean, I know, too, there's so many people on that
21 sex offender registry that might not be a bad dude. Made
22 a -- made a mistake once.
23 **A** Right.
24 **Q** And --
25 **A** Also, I think there's some wrong people on there, too.

1 confirms exactly what I knew, which is she's a horrible
2 brat, I mean, you know what I mean?
3 Q Yeah. She --
4 A I mean, she'd literally say anything to be just her and
5 Mommy. You know what I mean?
6 Q Mm-hmm.
7 A That's kind of where I'm at.
8 Q Do you have any idea where she would have heard this whole
9 "licking her girl parts" stuff?
10 A Honestly, I have no idea. That -- that's not even a
11 thing, man. Not at -- not -- not at my house. I'll tell
12 you that. It's just wrong to even hear some shit like
13 that, man.
14 Q Yeah.
15 A I mean, she's, what, five or six? That's horrible.
16 Q At any point in your life, did you ever have an STD?
17 A Not that I know of.
18 Q No?
19 A No.
20 Q I mean, you'd probably still have it, if you ever had it,
21 I mean, whether it be herpes and syphilis or chlamydia or
22 gonorrhea or --
23 A Well, maybe --
24 Q What do they say? One in four people have an STD at some
25 point in their life now?

1 **Q** Yeah. I just -- I just jot down notes.
2 **A** Okay.
3 **Q** So, I mean, I'm sure you watch *Dateline* and *True Crime* or
4 whatever it is, some sort of cop shows?
5 **A** Yeah. Like *Cops*?
6 **Q** Yeah. Well, this is more like -- what I'm talking about
7 is the (indiscernible) shows, like *CSI, Law and Order*.
8 **A** Yeah.
9 **Q** Well --
10 **A** *CSI*, yeah.
11 **Q** -- a lot of times they talk about some of the child
12 predators and the sex offenders who are, like, the worst
13 of the worst, the people who we talked about, who are just
14 like the opportunistic.
15 **A** Yeah.
16 **Q** They're like, "I am willing to sexually assault any kid,
17 given the opportunity."
18 **A** Oh, my God.
19 **Q** I mean, there's some people, like, they're -- there's
20 something not right.
21 **A** (Indiscernible). They're fucked up, man. I mean --
22 **Q** Yeah, they --
23 **A** -- they need help. They need to fucking --
24 **Q** Yeah.
25 **A** They need to not be in this world.

1 aroused, and some people make the mistake of acting on the
2 wrong ones, and I -- would you agree that there's a
3 difference in the serial rapist and the person who offends
4 with one child and --
5 A No.
6 Q No? You think they're all the same?
7 A I think they're all the same. I think those people are
8 horrible, man.
9 Q Yeah, and I -- I agree that those are both inherently
10 wrong. There's also -- there's a difference in actual
11 penetration --
12 A Mm-hmm.
13 Q -- and touching, right? Like, there's the sexual fondling
14 or sexual contact with a minor.
15 A That's all the same.
16 Q That's all the same to you?
17 A That is all the same to me. That is horrible.
18 Q Okay.
19 A I could never do some shit like that.
20 Q Did you ever accidentally do it with [redacted]
21 A Never.
22 Q No?
23 A In my life. I've never done that.
24 Q Because I'm going to -- [redacted] made that accusation.
25 A Oh, my God.

1 Q [redacted] made that accusation --
2 A Oh, my God.
3 Q -- to a couple different people.
4 A I can't even believe this. This is what I'm going through
5 right now, huh?
6 Q There's -- It was given to me by the Department of Social
7 Services.
8 A Wow.
9 Q And she was forensically interviewed yesterday --
10 A Wow.
11 Q -- by a child interview specialist.
12 A Wow.
13 Q And she made that admission. Not that you penetrated her.
14 A Oh, my God. No --
15 Q She said that there was some -- some licking of the
16 vaginal area.
17 A There was no anything like that. I'm telling you right
18 now, this is a mistake. Like, I'm telling you -- I'm
19 telling you, sir, this is not -- this is not me.
20 Q Because if it -- if it was you, Matt -- and I'm not --
21 A I'm -- I'm telling you it wasn't. I swear to God on my
22 life.
23 Q Okay.
24 A That is horrible.
25 Q Yeah. I'm just telling you this is the accusation. I --

1 A I can't believe you're so -- I can't believe I'm even
2 dealing with something like this. I feel like this is,
3 like, some kind of coaching that she's doing because I
4 broke up with her on Christmas, because I said "I don't
5 want to be with you anymore. Get out." Oh, my God, I
6 can't believe she'd even say something like that about me.
7 Q Nycole didn't make the accusation.
8 A I would never do that, is what I'm saying. I didn't do
9 it.
10 Q So like I said, the accusation wasn't that you penetrated.
11 It was that there was licking of the vaginal area.
12 A There was no licking to any vaginal area.
13 Q Just -- The test that we went and did today, that was not
14 for -- it wasn't a drug screen. That was a gonorrhea
15 test.
16 A Okay.
17 Q Because [redacted] has gonorrhea.
18 A Really.
19 Q That's a sexually transmitted disease.
20 A Oh, my God.
21 Q That's how it --
22 A So that's what that shit was, then.
23 Q Yeah.
24 A Fuck.
25 Q So if something happened, Matt --

1 A No, I --

2 Q And I'm --

3 A I'm telling you --

4 Q Yeah.

5 A -- no. As far -- I'm telling you, no.

6 Q In this situation, what we tell people is -- When you were

7 a kid, did you ride the bus to school?

8 A Yeah.

9 Q How did you -- how -- how would you be guaranteed to get

10 the best seat on the bus, to have the best seat that you

11 wanted? You get on first. You're the first person to get

12 on the bus. Because I don't want anyone else to tell your

13 story.

14 A Right.

15 Q If there was something that happened --

16 A (Indiscernible).

17 Q -- accident, it was a mistake --

18 A Yeah.

19 Q -- you regret it --

20 A I don't --

21 Q -- you're sorry --

22 A Yeah, I -- I (indiscernible).

23 Q Because I think that any -- I mean, to me, when someone

24 can admit their fault --

25 A Yeah.

1 A Right. So --

2 Q I got to ask the questions no one wants to be asked.

3 A I understand. I'm going to tell you right now, that never

4 happened, and if I do have gonorrhea, it's from her, which

5 therefore means -- I haven't been sleeping around, I

6 haven't been doing shit, I haven't --

7 Q Have you slept with anyone since you and Nycole started

8 dating?

9 A Yeah, like two, but --

10 Q Who have you had sex with since you and Nycole started

11 dating?

12 A I've had sex with -- her name was Eva.

13 Q Eva what?

14 A Eva Merluzzi.

15 Q Merluzzi?

16 A Yeah.

17 Q How do you spell that?

18 A M-e-r-l-u-z-z-i.

19 Q Where does she live?

20 A Onawa, Iowa.

21 Q Onawa?

22 A Yes. And then let's see here. And then this chick named

23 Mindy, and I don't know her last name.

24 Q Where is Mindy from?

25 A She's from Sioux City.

1 Q When did you have sex with them?
2 A Boy, that was like -- I want to say three months ago,
3 maybe.
4 Q How did that happen?
5 A Same thing that I've been dealing with, man. She -- you
6 know what I mean?
7 Q Yeah.
8 A She -- she's got problems. So every time we get into an
9 argument or something because she, you know, decides she's
10 just -- she just is feeling this way right now, then I
11 ended up -- then I end up -- she's like -- I don't know
12 what to do anymore. Like, I'm over it.
13 Q So when you guys fight, you sleep with someone?
14 A No, that's not true. Just --
15 Q So I'm just -- I'm just trying to figure out --
16 A No, it was like -- no, it's just those two that I can
17 think of. I mean, maybe another one, but who knows. I
18 mean --
19 Q Who would the third one be?
20 A I don't know. But three in -- three, maybe, in, what,
21 six, nine months of our dating? You know what I mean?
22 Q Since May?
23 A Six or seven months. Right. But at the same time, you
24 got to remember, she would leave.
25 Q Yeah. So -- so anytime you were in an argument, you were

1 off.
2 A Right.
3 Q You were -- you were split apart.
4 A Exactly.
5 Q Okay.
6 A I never cheated on her.
7 Q Okay.
8 A I know that.
9 Q You keep saying there's a third, though. You said there's
10 a third person, like, three times.
11 A I don't even know her name, man. (Indiscernible).
12 Q Where was she from?
13 A She was from Nebraska.
14 Q Where at in Nebraska?
15 A I think Wayne.
16 Q Where did you guys meet up?
17 A My house.
18 Q How did you talk to her?
19 A Through -- what was it? It was --
20 Q Tinder, Bumble --
21 A No.
22 Q -- Plenty of Fish?
23 A No, it was --
24 Q Zoosk?
25 A I -- I want to say -- I don't even know how to say it.

1 I'm like -- I need my cell phone. But it's UberHorny.
2 Q UberHorny?
3 A Yeah. But, yeah, other than that, that's it.
4 Q Okay.
5 A And as far as I know, none of them had it. But, I mean,
6 then again, I guess you never know. But at the same time,
7 though, I slept with Nycole.
8 Q Okay.
9 A And only with Nycole, from -- you know, for a good stretch
10 of time. So if she had gonorrhea, I wouldn't have even
11 known about it. And she -- every time she would break up
12 or leave me or whatever, I mean, she was going out and
13 having sex with a random person, is what I'm saying.
14 Q Okay. Yeah. I'm not -- I'm not here to judge.
15 A Right.
16 Q I'm just trying to get facts, I mean, and (indiscernible)
17 this stuff is relevant.
18 A Right. It's relevant, so --
19 Q Yeah. So, yeah, as far as a five-year-old having
20 gonorrhea, that's -- that's contact with genitals.
21 A That's --
22 Q Yeah.
23 A That's crazy. Or carpet, maybe, or -- I mean, we have a
24 lot of options, is what I'm saying. Like, there are --
25 I -- I want to say that maybe if Nycole had it, she could

1 have -- it could have been in the bathtub, maybe. That's
2 a possibility too.
3 Q I'm not quite sure.
4 A I don't know. God, I hope she doesn't have, like,
5 gonorrhea. I -- I -- Nycole. Oh, my God, dude. Because
6 if she did --
7 Q So what if -- what if Nycole --
8 A -- that means now I got it. That sucks, dude.
9 Q What if Nycole --
10 A So not only did I fucking -- not only did I fucking break
11 up with her, but then she also gave me an STD, is what
12 you're saying?
13 Q I'm not saying she gave you an STD. I don't know if you
14 have it.
15 A I better not.
16 Q We'll found out, bro.
17 A I better fucking not.
18 Q Like Monday or Tuesday.
19 A I'll tell you, that's crazy, dude.
20 Q Right. I mean, I'll tell you the results right away. I
21 mean, you have the right to know that. That's a health
22 issue for you.
23 A Right.
24 Q So what if Nycole doesn't have it and you do?
25 A That would be really weird, man.

1 Q And then what if [redacted] has it?
2 A I'm saying that wouldn't be a thing, but I'm telling you
3 right now --
4 Q What -- what do you mean, "a thing"?
5 A A thing with whatever you got going on because that's your
6 missing puzzle piece. But I'm telling you right now, I
7 have never touched that fucking little girl. Not like
8 that. I -- I loved her as I loved Nycole. And that was
9 it. I'm telling you right now I'm not this guy. I am not
10 this person. I'm not.
11 Q Is there any reason that your DNA would be on her vaginal
12 area?
13 A There shouldn't be any DNA, period. There shouldn't be --
14 Q I --
15 A -- any -- I shouldn't have even -- I should not have
16 gonorrhea, either, because that would be --
17 (indiscernible). Goddamn.
18 Q I agree. I mean, it shouldn't be there.
19 A It's fucked up.
20 Q Is there any reason it would be, though?
21 A No, not at all.
22 Q No?
23 A I -- There's no DNA there. Nothing. there shouldn't be
24 anything there.
25 Q I agree. There shouldn't.

1 A There never -- as long as I live on this earth. I'm
2 telling you it's not a thing. That is not me. I didn't
3 do anything, but -- All I did was love her and her mom.
4 That's it.
5 Q Did [redacted] ever eat candy at your house?
6 A Yeah. She ate candy all the time.
7 Q What kind? What kind of candy?
8 A I don't know. Just random candy that she --
9 Q Oh.
10 A Like, she was always -- she was always grabbing that bag
11 off the kitchen table or knocking it down.
12 Q Yeah.
13 A And then she'd take off with it in her room and disappear
14 and eat all of it.
15 Q Okay.
16 A I can't even believe it.
17 Q What about the most recent time that you watched her
18 alone? Did she have any candy?
19 A No.
20 Q No?
21 A No candy.
22 Q Did her mom ever give her candy all that time?
23 A You know, she probably did when I was at work.
24 (Indiscernible).
25 Q But you -- when you were watching her?

1 A No.

2 Q She didn't eat candy while you were home with her?

3 A No. I mean, she's a five-year-old, man. What does candy

4 do to her?

5 Q (Indiscernible.)

6 A You know what I mean?

7 Q I mean, she have a Jolly Rancher or anything the last time

8 you watched her?

9 A No Jolly Rancher, no --

10 Q Gummy worms?

11 A No.

12 Q Sucker?

13 A No, no. Nothing.

14 Q No? No candy?

15 A No candy.

16 Q When did you guys watch the Scooby-Doo movie?

17 A That was -- that was a few weeks ago.

18 Q That was the most recent time you watched her alone?

19 A Yeah.

20 Q You told me earlier you (indiscernible) --

21 A Yeah, I (indiscernible). No, that's not true. Because

22 the most recent time I watched her alone was when she had

23 to go on Sunday and do that one deal. Because she got in

24 her room and I made dinner, remember?

25 Q I thought you broke up on Christmas.

1 A We did break up on Christmas. What question are you
2 asking me, and I'll answer it. Like, (indiscernible).
3 Q When did you break up?
4 A We broke up on the day before Christmas.
5 Q So Christmas Eve was a Thursday.
6 A Whatever day that was, Christmas Eve.
7 Q Okay. So Christmas Eve was on Thursday.
8 A Yeah.
9 Q What day did you watch her alone?
10 A Sunday. It was (indiscernible).
11 Q Okay. So almost two weeks ago now.
12 A Yeah.
13 Q And you watched Scooby-Doo on that time?
14 A Yes.
15 Q Okay. And the reason I'm asking is earlier you said no,
16 the most recent time, you didn't watch the movie together.
17 A That was -- Time out. I'm just -- I'm getting really
18 confused. I'm trying to answer your question honestly
19 here. Right? Honestly.
20 Q On the most recent time you watched [redacted] --
21 A Yeah.
22 Q -- you guys watched the movie.
23 A No, we did not.
24 Q No? How long --
25 A That was the time before then.

1 Q Okay. Okay. Around what time do you think that would
2 have been?
3 A I want to say it was probably about two to -- two to four,
4 I want to say. Two p.m. to four.
5 Q Was it in December?
6 A Yeah, it was in December. Yeah.
7 Q So two to four weeks ago, or from 2 p.m. to 4 p.m.?
8 A 2 p.m. to 4 p.m., because Nycole was out doing her thing.
9 Q So, hypothetically speaking, Nycole gets tested, doesn't
10 have gonorrhea, you have gonorrhea, and [redacted] has
11 gonorrhea. What do you think should happen?
12 A I mean, honestly, I mean, what -- what -- what can happen?
13 Q I'm just asking you, what do you think should happen?
14 A Well, I'm telling you right now that wasn't me. I
15 never -- I never would do something like that. It's not
16 even a thing. I'm not even worried about it. Honestly,
17 the truth will set me free. I'm not even worried about
18 it. I'm really not.
19 Q You're not worried about these allegations at all?
20 A It's crazy. I mean, it's insane, man. If somebody
21 brought something like this to you after you just broke up
22 with somebody?
23 Q Right.
24 A I just did -- I -- you know, this happens too, man. You
25 know it does.

1 Q I (indiscernible). But, look, (indiscernible).
2 A (Indiscernible).
3 Q I got to get the facts. I got to ask the hard questions.
4 A I'm just saying, though, this is nuts.
5 Q So is there any -- anything else that ever happened
6 between you and [redacted] that could -- she could have
7 maybe misconstrued or she could have taken what happened
8 and gone a different way with it?
9 A No. I've never -- No. I've never said anything like that
10 to her. Never. In my life. I would never, ever do that.
11 I am not this person. I am not. I am not that person
12 that you heard whatever from. I'm not. I -- I -- I don't
13 want nothing to do with that stuff. I just want to live
14 my life and be in peace. That's it. And I told her that
15 too. I told her I would fix her car. That was the last
16 thing I said to her.
17 Q When did you tell her that?
18 A I want to say -- I don't know -- three days ago, four days
19 ago, maybe. Three days ago. Three or four days ago.
20 Q Why would you fix her car if you broke up with her?
21 A Because I'm not heartless. I --
22 Q You're a good guy.
23 A Yeah. I'm not -- I'm not --
24 Q What's wrong with her car?
25 A She's got a PPM sensor out, like a transmission control,

1 Q Any inappropriate pictures --
2 A Absolutely not.
3 Q -- of [redacted]? Any inappropriate pictures on your
4 phone at all? Any pornography on there?
5 A Yeah. Yeah, lots of that.
6 Q Okay. You said you didn't have a big porn collection.
7 A Well, in my phone. And I don't really have a big porn
8 collection.
9 Q You just said you did.
10 A I didn't know. I didn't really consider a phone, like, a
11 porn collection.
12 Q Yeah. What kind of porn is there on there?
13 A Just regular fucking porn. Just regular shit.
14 Q Like, what is "regular"?
15 A I don't know. Like -- Oh, my God. I can't believe we're
16 even having this talk, man.
17 Q Oh, man.
18 A I just met you.
19 Q Man, I have these conversations all the time.
20 A Like, this is just crazy. I just -- All right.
21 Q (Indiscernible), yeah, it's not as weird for me, I guess,
22 because I'm just used to having it (indiscernible).
23 A I don't know. Like, straight fucking, I guess.
24 Q Okay.
25 A Yeah.

1 Q Any other stuff, you know, like, any kind of weird things
2 that you have?
3 A Not too much, no.
4 Q Not too much?
5 A No. I mean -- I don't know. I guess you (indiscernible)
6 for yourself. But I will tell you this: I'll show you
7 fucking right now if you want me to. I'm telling you,
8 though --
9 Q Yeah.
10 A I'm telling you I would never do that.
11 Q Okay.
12 A I'm telling you right now I would never do that.
13 Q Do what?
14 A What you're trying to --
15 Q What I've been asking about?
16 A Yeah. (Indiscernible). Oh, my God.
17 Q Is there a password on your phone?
18 A Yeah.
19 Q What's the password?
20 A 1137.
21 Q Okay. So we're probably going to try to end up doing --
22 we're probably going to try to do what's called a dump on
23 your phone, which is basically plug it into a computer,
24 and it basically takes a giant picture of all the
25 information on your phone.

. / .

Recorded Telephone Call
January 14, 2021

This call is from an inmate at a Correctional Facility and may be recorded or monitored.

Matthew Carter: Uh?

M.C.'s Dad: Matt, what's, what's, what's in the, what's above the toilet?

Matthew Carter: I need you. I can't talk to you about that. You're just gonna have to do that, please. I need you to stand on that, push up, and look in. Might take a flashlight or something, but there's about 4 or 5 things in there. I need you to get them. Please. Please.

M.C.'s Dad: Okay.

* * *

Matthew Carter: And like I said the most important things to me, my gold, is obviously the stuff above the, what I told you.

M.C.'s Dad: Where is, where is the, the gold? What gold?

Matthew Carter: It's what I'm saying, my gold to me, my gold, my gold, my gold Dad. My version of gold.

M.C.'s Dad: Oh, your gold, okay.

Matthew Carter: Yes.

M.C.'s Dad: Okay. I'm thinking there's something else I need to get.

Matthew Carter: No, there is a pink . . .

M.C.'s Dad: Okay.

Matthew Carter: Listen, there's a pink phone.

M.C.'s Dad: Got it.

Matthew Carter: You got it.

M.C.'s Dad: Yes. We already have it.

Matthew Carter: Okay, perfect, and then there is a black phone. Everything in that cubby, just, just, please everything in that cubby by my bed, take it.

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FEB - 4 2022
Jody L Johnson
Yankton County Clerk of Courts
1st Judicial Circuit Court of South Dakota

M.C.'s Dad: Yep.

* * *

Matthew Carter: Keep my stuff safe, please do not forget the stuff above the thing, the stuff above the thing, it's very important and I got, hey, there's one more thing Dad, okay, there's a box and it's a thermostat box and it's in a side room. Are you in there right now?

M.C.'s Dad: I'm out, uh, no I'm not.

Matthew Carter: Okay. You're leaving right now.

M.C.'s Dad: What?

Matthew Carter: Are you leaving right now?

M.C.'s Dad: What are you looking for?

Matthew Carter: Okay.

M.C.'s Dad: Matt, I am almost at the post office, okay?

Matthew Carter: Okay, you're good, you're fine. Alright, I love you. I'll talk to you later. Please . . .

M.C.'s Dad: Bye.

Matthew Carter: . . . take care of stuff, please. Okay, I love you. Bye.

TEXT MESSAGES

2021-01-18 10:51:03	**16056531387**	**MATTHEW CARTER**	**Outbound**	**Sent**	**16057878080**	**I NEED YOU TO GET THAT SHIT DAD!!! Center tile by toilet!!!! Fuck!!!! I NEED YOU TO GET THAT SHIT!!!!**
2021-01-18 10:57:16	**16056531387**	**MATTHEW CARTER**	**Outbound**	**Sent**	**16057878080**	**Wow dad...**
2021-01-18 10:58:09	16056531387	MATTHEW CARTER	Inbound	Sent	16057878080	I don't see anything. What was supposed to be there?
2021-01-18 11:05:35	**16056531387**	**MATTHEW CARTER**	**Outbound**	**Sent**	**16057878080**	**Fuck... answer**
2021-01-18 11:06:04	16056531387	MATTHEW CARTER	Inbound	Sent	16057878080	Ok

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FEB - 4 2022
Jody K Johnson
Yankton County Clerk of Courts
1st Judicial Circuit

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FEB - 4 2022
Jody L Johnson
Yankton County Clerk of Courts
1st Judicial Circuit Court of So. Dakota

Recorded Telephone Call
January 18, 2021

Matthew Carter: **Dad?**

M.C.'s Dad: What?

Matthew Carter: **Hey. Dad?**

M.C.'s Dad: What?

Matthew Carter: **Okay. I need you to, I need you to do this for me. It's very, very, very fucking imperative, Dad, Okay? If you love me in, okay. . .**

M.C.'s Dad: Matt, I'm, I'm gone, but . . .

Matthew Carter: **Oh fuck no, okay.**

M.C.'s Dad: . . . the thing is already locked up.

Matthew Carter: **Oh fuck no, no, I need you to turn around. No, I'm serious.**

M.C.'s Dad: I can't get, I can't get in the house now.

Matthew Carter: **Kick the fucker in, I don't give a fuck. I need you to go fucking take care of this. It's very important. I can't have you fucking leave. I can't have you leave without it.**

M.C.'s Dad: What, what, what is it?

Matthew Carter: **I can't, I can't have you leave without it. Go now back!**

M.C.'s Dad: Without what?

Matthew Carter: **I need . . .**

M.C.'s Dad: Without what?

Matthew Carter: **Dad, I'm not saying over the fucking phone call. I'll, I'll walk you through how to fucking get it. I need you to fucking get it.**

This call is from an inmate of the Correctional Facility and may be recorded or monitored.

Matthew Carter: **I need you to go to the fucking house Dad, now, please. I fucking told you I need it something and I need you to fucking do this. It's very important.**

M.C.'s Dad: Okay, I'm in the house. What do you need?

Matthew Carter: I don't believe you.

M.C.'s Dad: Okay I'm not in the house Matt. I can't get back in now. I've already locked everything up.

Matthew Carter: Go kick the fucking door in.

M.C.'s Dad: I am not kicking the door in because that would be, that would be illegal for me to do that now.

Matthew Carter: It wouldn't because I'm giving you per--, what, why, why, why?

M.C.'s Dad: No because it's not, it's.

Matthew Carter: Why would you not do this? Why . . .

M.C.'s Dad: Matt, I'm gonna have to hang up on you because I'm not, I'm not going to get any more stress from you.

Matthew Carter: You really don't . . .

M.C.'s Dad: I'm just not.

Matthew Carter: You really don't give a fuck about me at all, don't you? I fucking asked . . .

M.C.'s Dad: You, I don't know what you're asking me for Matt!

Matthew Carter: Dad, I need you to fucking do this. It's very fucking important.

M.C.'s Dad: Okay, once I get in then what?

Matthew Carter: Okay, then I need you to go, stand on the fucking toilet. I need you to fucking take care of this Dad. It's very important. If you don't fucking do it, if you . . .

M.C.'s Dad: Matt, you're not understanding me.

Matthew Carter: Mmm-mm.

M.C.'s Dad: You're not understanding me.

Matthew Carter: Mmm-mm.

M.C.'s Dad: There is nothing up there that I could see.

Matthew Carter: You, it, I need . . .

M.C.'s Dad: What was supposed to be up there?

Matthew Carter: **I'm not fucking saying, God damn it! I need you to fucking do this for me. If you fucking care about me in any kind of way, I need to go the fuck back to my house right now and I need you to fucking take care of this Dad. If you fucking love me in any fucking way, you're gonna fucking do this. You're gonna fucking do this.**

M.C.'s Dad: Matt! I'm, I'm not sure what you want from me because . . .

Matthew Carter: **Mmm-mm.**

M.C.'s Dad: . . . there is nothing there.

Matthew Carter: **Mmm-mm. It's, [inaudible] It's in, it's on, it's, it's, it's above the center tile. You understand what I'm saying?**

M.C.'s Dad: I understand that. All the tiles are missing. There is no tiles on the bathroom ceiling. They're gone! You're not hearing me. I don't know what I'm supposed to find.

Matthew Carter: **Were they, were they there, were they there before?**

M.C.'s Dad: No. Don't, all the tiles were there and then we went to Omaha, came back and all the tiles are gone. So there must have been a leak in the toilet or something upstairs. I don't know.

Matthew Carter: **I hate you. I fucking hate you.**

M.C.'s Dad: I don't know why you hate me 'cause I didn't do anything. I did exactly what you asked me to do.

Matthew Carter: **No you didn't. I fucking asked you.**

M.C.'s Dad: Yes I did!

Matthew Carter: **No, I asked you to get something and you fucking didn't do it for me.**

M.C.'s Dad: Oh my Gosh! I, I have no idea what you're talking about.

Matthew Carter: **Dad, I asked you to do something for me last week when you were up there that I needed.**

M.C.'s Dad: I . . .

Matthew Carter: **And you fucking failed me.**

M.C.'s Dad: No I did not because all I know is . . .

Matthew Carter: **Uh-huh.**

M.C.'s Dad: I told you I was coming through, I wanted to look at what you, all the things that we . . .

Matthew Carter: **Right and I, and I, and I told you, I told you exactly . . .**

M.C.'s Dad: . . . did before and I, I told you I was leaving a couple of days. And I did.

Matthew Carter: **And there was nothing there huh? No tiles, nothing, huh?**

M.C.'s Dad: There was nothing! Nothing! I don't know, what was supposed to be there?

Matthew Carter: **Nothing.**

M.C.'s Dad: I don't know. There is nothing there.

Matthew Carter: **Nothing. You're good. Nothing. There was nothing there. I don't know what the fuck we're talking about actually. I was just fucking with you.**

M.C.'s Dad: Okay. Okay. Alright. Bye. Whatever. Okay. Bye.

Matthew Carter: **So what you're saying is like there's, there was no ceiling on the fucking, on the bathroom at all huh?**

M.C.'s Dad: No, there was nothing.

Matthew Carter: **There is no ceiling?**

M.C.'s Dad: You could see the plumbing.

Matthew Carter: **On the ceiling, above the ceiling huh?**

M.C.'s Dad: Yep.

Matthew Carter: **But it wasn't there before like that, huh?**

M.C.'s Dad: I don't remember. I don't remember any of that. All I know is I didn't even go to the bathroom. Uh, the first time, I didn't go to that, I, I looked from the door. That's all I did to see what's in there. And then we looked to see what was in the, in the bedroom. We looked at the, what was in the, uh, kitchen. We looked to see what was in the other room and then we locked everything up and we left. So we kind of got an idea about

how many tubs we're gonna need so we got all these tubs before we got there.

Matthew Carter: Yeah.

M.C.'s Dad: So, it was, like how many tubs we were gonna need, we bought . . .

Matthew Carter: Okay, just, just. Can you do that for me? I need you to fucking, can you put that money on my fucking shit. I just, I can't even stand you right now, Dude. I fucking can't. I'm sorry. I'm just. I'm, I'm dealing with some change mentally and I just, I fucking can't stand you right now.

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Yankton County Clerk of Courts
1st Judicial Circuit Court of South Dakota

Recorded Telephone Call
April 9, 2021

Matthew Carter: **Oh but we found porn there was fucking, we found all kind of stuff on his stuff - Oh he was doing bad things on there, oh yeah we, he was googling searching this well you know at the end of the day that shows – that shows intent, yes, but – but at the end of the day it still does not – it still does not prove or say that I did this, do you see what I'm saying.**

* * *

Matthew Carter: **At the end of the day you can show intent all you want it doesn't matter, you know what I mean? Like people –**

Friend: Right.

Matthew Carter: **People Google shit all the – I mean, they're – they're – they're bringing up something like I like incest porn okay well that's nothing new. I've always like that, you know what I mean. It's always been like that**

Friend: Yeah.

Matthew Carter: **Since you, since you've known me, I've loved that.**

Friend: Yeah.

Matthew Carter: **I've always loved that, you know what I mean? Like what does that show? Oh, that shows intent. Okay cool, whatever, let it let it fly in court who cares.**

* * *

Matthew Carter: **Well he googled, well he googled dad, dad and five-year-old or something like that well and the reason I googled that, let me tell you why I googled that and you know what I did Google that and I'm not even scared, and I'm not even scared to admit it. The reason that I did was because**

I broke up with that girl on the 25th I told you that this was going to happen did I not?

Friend: Yeah.

Matthew Carter: So I was seeing, I was seeing what happened to those people.

Friend: Alright.

Matthew Carter: Yeah and it's not like oh it's not like, it wasn't like I was, it wasn't like I was googling like porn with that it was like (inaudible) it was like I think it was like dad has sex with five, but obviously Google's not going to give you porn, you know what I mean, on a Google search, duh.

Friend: No yeah.

Matthew Carter: Right why - why would that, you know what I mean, Google doesn't do that anybody knows that.

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Searched Items (22)

#	Timestamp	Source	Value	Parameters	Origin	Deleted	Account	
1	12/9/2020 10:39:08 PM(UTC-6)	Chrome **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0x6C58BF (Table: visits, keyword_search_terms; Size: 14188544 bytes)	dad daughter incest		Default			
2	12/9/2020 10:42:24 PM(UTC-6)	Chrome **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0x6C5685 (Table: visits, keyword_search_terms; Size: 14188544 bytes)	dad daughter incest		Default			
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4	12/9/2020 10:46:02 PM(UTC-6)	Chrome **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0x6C55D7 (Table: visits, keyword_search_terms; Size: 14188544 bytes)	dad daughter incest		Default			
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6	12/9/2020 10:55:32 PM(UTC-6)	Chrome **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0x6C5563 (Table: visits, keyword_search_terms; Size: 14188544 bytes)	dad daughter incest		Default			
7	12/9/2020 10:59:15 PM(UTC-6)	Chrome **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0x6C5529 (Table: visits, keyword_search_terms; Size: 14188544 bytes)	dad daughter incest		Default			
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Web History (21)

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1	Is it possible for an 8 year girl to be sexually abused and enjoy it? - Parenting Stack Exchange	https://parenting.stackexchange.com/questions/23611/is-it-possible-for-an-8-year-girl-to-be-sexually-abused-and-enjoy-it	12/9/2020 11:01:47 PM(UTC-6)			Artifact Family: Source Repository Path:	Source: Chrome Account: Source file: data/Root/data/com.android.chrome/app_chrome/Default/History : 0x6C54EF (Table: visits, urls; Size: 14188544 bytes)		
2	Female Childhood Orgasms: Findings From Adult Analysis: Studies in Gender and Sexuality: Vol 15, No 1	https://www.tandfonline.com/doi/abs/10.1080/15240657.2014.877723	12/9/2020 11:03:22 PM(UTC-6)			Artifact Family: Source Repository Path:	Source: Chrome Account: Source file: data/Root/data/com.android.chrome/app_chrome/Default/History : 0x6C5441 (Table: visits, urls; Size: 14188544 bytes)		
3	Female Childhood Orgasms: Findings From Adult Analysis: Studies in Gender and Sexuality: Vol 15, No 1	https://www.tandfonline.com/doi/abs/10.1080/15240657.2014.877723?cookieSet=1	12/9/2020 11:03:22 PM(UTC-6)			Artifact Family: Source Repository Path:	Source: Chrome Account: Source file: data/Root/data/com.android.chrome/app_chrome/Default/History : 0x6C541F (Table: visits, urls; Size: 14188544 bytes)		
4	Is it possible for an 8 year girl to be sexually abused and enjoy it? - Parenting Stack Exchange	https://parenting.stackexchange.com/questions/23611/is-it-possible-for-an-8-year-girl-to-be-sexually-abused-and-enjoy-it/23624#23624	12/9/2020 11:04:51 PM(UTC-6)			Artifact Family: Source Repository Path:	Source: Chrome Account: Source file: data/Root/data/com.android.chrome/app_chrome/Default/History : 0x6C534F (Table: visits, urls; Size: 14188544 bytes)		
5	Real incest - Extreme Porn Video - LuxureTV	https://en.luxuretv.com/searchgate.php?channels=&q=Real+incest&submit=GO%21	12/30/2020 10:24:06 PM(UTC-6)			Artifact Family: Source Repository Path:	Source: Chrome Account: Source file: data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72C99 (Table: visits, urls; Size: 14188544 bytes)		
6	Real incest - Extreme Porn Video - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/	12/30/2020 10:24:06 PM(UTC-6)			Artifact Family: Source Repository Path:	Source: Chrome Account: Source file: data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72C58 (Table: visits, urls; Size: 14188544 bytes)		

7	Father and daughter making real incest love - *Incest Porn* - LuxureTV	https://en.luxuretv.com/videos/father-and-daughter-making-real-incest-love—incest-porn-71218.html	12/30/2020 10:24:13 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72C38 (Table: visits, urls; Size: 14188544 bytes)		
8	Real incest - Extreme Porn Video - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/	12/30/2020 10:24:25 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72C18 (Table: visits, urls; Size: 14188544 bytes)		
9	Real incest - Extreme Porn Video - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/	12/30/2020 10:25:19 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72A85 (Table: visits, urls; Size: 14188544 bytes)		
10	Real incest - Extreme Porn Video - LuxureTV	https://en.luxuretv.com/searchgate.php?channels=&q=Real+incest&submit=GO%21	12/30/2020 10:25:23 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72A65 (Table: visits, urls; Size: 14188544 bytes)		
11	Real incest - Extreme Porn Video - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/	12/30/2020 10:25:23 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72A25 (Table: visits, urls; Size: 14188544 bytes)		
12	Real incest - Extreme Porn Video - Most Length - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/longest/	12/30/2020 10:25:36 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72A05 (Table: visits, urls; Size: 14188544 bytes)		
13	Real incest - Extreme Porn Video - Newest - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/newest/	12/30/2020 10:25:38 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD729C6 (Table: visits, urls; Size: 14188544 bytes)		
14	Real incest - Extreme Porn Video - Most Length - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/longest/	12/30/2020 10:25:44 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD729A6 (Table: visits, urls; Size: 14188544 bytes)		

15	Real incest - Extreme Porn Video - Newest - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/newest/	12/30/2020 10:25:58 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72986 (Table: visits, urls; Size: 14188544 bytes)		
16	Real incest - Extreme Porn Video - Newest - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/newest/	12/30/2020 10:26:18 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72946 (Table: visits, urls; Size: 14188544 bytes)		
17	Real incest - Extreme Porn Video - Newest - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/newest/	12/30/2020 10:28:57 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72906 (Table: visits, urls; Size: 14188544 bytes)		
18	Real incest - Extreme Porn Video - Newest - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/newest/	12/30/2020 10:29:38 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD728C6 (Table: visits, urls; Size: 14188544 bytes)		
19	Real incest - Extreme Porn Video - Newest - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/newest/	12/30/2020 10:30:39 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72886 (Table: visits, urls; Size: 14188544 bytes)		
20	Real incest - Extreme Porn Video - Newest - LuxureTV	https://en.luxuretv.com/searchgate/videos/real-incest/newest/	12/30/2020 10:31:36 PM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD72846 (Table: visits, urls; Size: 14188544 bytes)		
21	Real Incest Sex with daughter - My step dad sneaks into my room at night - LuxureTV	https://en.luxuretv.com/videos/real-incest-sex-with-daughter---my-step-dad-sneaks-into-my-room-at-night-73377.html	12/31/2020 6:59:46 AM(UTC-6)			**Artifact Family:** **Source Repository Path:**	**Source:** Chrome **Account:** **Source file:** data/Root/data/com.android.chrome/app_chrome/Default/History : 0xD82AD1 (Table: visits, urls; Size: 14188544 bytes)		

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. #30048

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

vs.

MATTHEW ALLAN CARTER,

Defendant/Appellant.

Appeal from the First Judicial Circuit

The Hon. Cheryle Gering
Presiding

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed July 7, 2023

Filed: 6/6/2023 10:39 AM CST Supreme Court, State of South Dakota #30048

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DISCUSSION

1. Child pornography is repugnant to the majority of the population and was used to poison the minds of the jurors against Matthew.

a. The Trial Court improperly allowed publication of three (3) child pornography videos to the jury.

1. The State used the child pornography as a basis to obtain the conviction of rape of a child under the age of sixteen.

In the instant action, Matthew was charged with rape of a child under sixteen (16) years; not possession of child pornography. At trial, the Trial Court allowed the State to talk about, elicit testimony about and publish to the jury three (3) videos containing child pornography. It is apparent from the State's lack of actual evidence that the primary purpose of the publication of the three (3) videos was to prejudice the jurors against Mathew.

2. The videos were not used to establish other acts evidence but solely to inflame the jury.

It was an abuse of discretion by the Trial Court to allow the State to offer and publish the three (3) video clips. As this Court is well aware, a trial court's determination can be overturned upon a showing of abuse of discretion. *State v. Medicine Eagle,* 2013 SD 60, ¶16, 835 N.W.2d 886, 892. In the instant action, given the State's lack of actual evidence; it chose to obtain a conviction through any means possible. Unfortunately, the Trial Court assisted the State by allowing in videos of child pornography which had nothing to do with the charges that had been filed against Matthew. None of the three (3) videos involved Matthew or E.W. The videos were blatant child pornography and had no purpose other than to foster the State's theory that Matthew's possession of child

pornography established his guilt at the jury trial.

Matthew had previously been tried and convicted of possession of that same child pornography in federal court. As such, none of the videos and none of the testimony relative to the possession, or alleged possession of child pornography or alleged search for child pornography, should have been allowed in at the State court trial for the alleged rape of a child under sixteen (16) years old. Allowing that to be presented to the jury in the State Court action was a clear abuse of discretion. Matthew was convicted, not because there was sufficient evidence to establish that he had committed the offense of rape of a child, but because there was child pornography located in his residence.

The State did not charge, or convict, Matthew of the possession of child pornography. Matthew was charged with rape. The State did not have sufficient evidence to prove that Matthew had committed ***that*** crime so the State used the public's general abhorrence for child pornography to obtain a conviction.

The State's actions fly in the face of Matthew's constitutional right to be tried for the crime that he is charged with.

3. The State's claim that the videos were properly admitted is unsubstantiated.

Although SDCL 19-19-404(b) is available to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or lack of accident"; none of those were involved in this instance.

It is apparent that none of those exceptions were involved in the instant action. The videos did not include any depictions of Matthew or E.W. Consequently, any claim of knowledge, motive, opportunity, intent, preparation, plan, absence of mistake or lack of accident were not valid. Random internet searches should not be used solely to

establish the grounds for a conviction of a serious crime. The State's use of the internet searches was to support its theory that because there were searched and/or videos; it must be true that Matthew had raped a child.

b. The State failed to provide any evidence that the hard drives belonged to Matthew.

There were two (2) hard drives "found" by former Detective Erickson when he "searched" Matthew's house a day or days prior to his obtaining a Search Warrant. As reflected by the transcripts of telephone calls from Matthew to his father from the jail; there seemed to be something that Matthew wanted his father to get from his house. However, law enforcement went to Matthew's house without the benefit of a Search Warrant and searched Matthew's residence.

Law enforcement then claimed that they discovered items in the house and that those items were evidence which was then submitted to the jury. It would seem appropriate under both our state and federal constitutions that law enforcement would have had to obtain a Search Warrant prior to searching Matthew's residence. Matthew was being held in jail without benefit of an Information or Indictment. The "search" of his residence occurred some two (2) weeks after he had been detained by law enforcement in the Yankton County Jail. There were no exigent circumstances which precluded law enforcement from obtaining a search warrant. Law enforcement searched the house two (2) days ***prior to*** obtaining a Search Warrant for the residence. Law enforcement had time to obtain two (2) Search Warrants relative to obtaining swabs from Matthew's person while he was in custody. However, law enforcement did not have time to obtain a Search Warrant relative to his residence until ***after*** it was completed.

The excerpt of the jail telephone call provided by the State is dated January 18, 2021. See, Exhibit #25; Appellee's Brief; Appendix; pp. 25 – 29. That conversation occurred three (3) days ***after*** law enforcement searched Matthew's residence without benefit of a Search Warrant.

Law enforcement had the time and opportunity to obtain a Search Warrant but chose not to do so.

Thereafter, the State used those items "found" in the "search" as the evidence upon which to substantiate its claim that Matthew was guilty of "rape". Although it is true that the hard drives were alleged to have been removed from a residence where Matthew had been residing absent a Search Warrant; no testimony or evidence was provided to establish that those hard drives were Matthew's property. No fingerprints were taken of the items. No DNA evidence was obtained. The State, with its vast resources, seem to ignore the fact that Matthew's father, Steven Carter, had been arrested, convicted and imprisoned on charges of possession of child pornography.

Upon information and belief, one of the most significant tenants in our constitution is the right to be free in our persons and our homes from unreasonable searches and seizures. In this instance, law enforcement claims they went to Matthew's residence based upon a recorded telephone call without a search warrant and "found" damning evidence which was then used against him at trial. This "coincidence" should not be allowed by this Court. If law enforcement had time to "search" a residence while the home owner was in custody; they had time to obtain a valid Search Warrant. No Search Warrant was obtained until ***after*** the alleged discovery of the "evidence". The "evidence" should have been excluded from the trial. The Trial Court's allowance of the

"evidence" should have been excluded on that basis alone.

c. The Trial Court should have allowed Matthew's expert testify and let the jury determine the "reliability" of the testing.

The State acknowledges that the NAAT packaging disclaims use of the product in the product in medical-legal applications unless retested. Appellee's Brief; p. 12. Further, the State agrees that the guidelines "recommend that "all positive specimens have to be retained for additional testing, and a positive NAAT test should be retained for additional testing or alternate NAAT testing" using a different method. Appellee's Brief, p.13.

The State then goes on to opine that "physician's do not always know that when a case has medical-legal implications. That is clearly untrue in the instant action. It was clear from the inception that the swab was going to be utilized in a legal situation. It is further interesting to note that there is a claim that additional testing would be too costly.

In this instance, the jury was the trier of fact. As such, the jury should have been allowed the opportunity to make the determination as to which expert they chose to believe. By refusing to allow Matthew's expert to testify as to the unreliability of the NAAT testing; the Trial Court took away a substantial portion of Matthew's defense.

Matthew should have been allowed the opportunity to present his expert's testimony to the jury. The jury should have been allowed to determine, based upon the testimony presented, which of the two (2) experts they chose to believe. Matthew did not get that opportunity. Matthew's defense was "hamstringed". The odds were erroneously stacked in favor of the State by the Trial Court. Consequently, Matthew did not receive a fair and impartial trial. It is one thing to be tried by a jury of your peers and be convicted. It is an entirely different scenario when you are not allowed to present your defense and

let a jury decide your guilt or innocence.

d. Failure to allow Matthew's attorney the right to cross-examine E.W. deprived Matthew of his constitutional right to confront his accuser.

In the case at bar, the Trial Court allowed in some of E.W.'s statements as to what allegedly occurred, but not others. The State was allowed to let in the child's statements that this allegedly occurred when E.W. and Matthew watched a Scooby Doo movie. However, none of the other statements made by E.W. were presented to the jury. It is uncontroverted that E.W. made statements that a teacher as well as three (3) school mates "licked her lady parts".

On the one hand, the State argues that the child's statements should be taken as truthful without the requirement or the allowance of cross-examination. Yet, on the other hand, the statements as to the existence of other potential perpetrators (teacher and school mates) were not allowed or presented. Those statements were made to E.W.'s mother and grandmother but Matthew was not allowed to ask E.W. about those statements during cross-examination.

The State claims that E.W. was "unavailable" because she was unable to "remember" the alleged abuse. Frankly, E.W. may have been "unable to remember" the alleged abuse because the alleged abuse didn't happen. E.W. made the statements that the same thing "happened" at school by a teacher and school mates. However, those statements were disregarded and law enforcement focused solely on Matthew. No evidence was ever presented that law enforcement did any investigation into the statements that E.W. made about the other persons.

e. The conviction is not supported by actual evidence.

A review of the entirety of the jury trial transcripts reflects that insufficient evidence was submitted that would establish, or tend to establish, that ***any*** penetration had occurred sufficient to support a conviction under SDCL 22-22-1(1).

The video made by the grandmother, Jennifer Morkve, did ***not*** show the minor child doing anything other than washing her doll – washing the doll's back and washing the dolly's feet. Obviously, no-one knows what E.W.'s grandmother said, or did, relative to, or with, E.W. before she started her "surreptitious" taping of E.W. on Christmas Day. The video-taping occurred the day that Matthew and Nycole Morkve "broke up" and Nycole dropped the child off with her mother. There is a viable concern as to the rationale for the taping of E.W. at that time. The statement by the State that the child made "licking motions" is wishful thinking. That assertion was necessary in order for the State to get its conviction.

e. The statute requires evidence of penetration in order to support a conviction.

The State would have this Court believe that penetration simply had to occur. However, there was no evidence submitted at trial that would support that belief. A conviction is required to be supported by actual evidence; not based upon hope, speculation or conjecture. Suspicion or probable guilt is insufficient to support a conviction. *U.S. v. Plenty Arrow*, 946 F.2d 62. In this instance, the testimony presented while cross-examination was denied, is too vague to support a conviction.

Penetration is defined as "any intrusion, however slight, of any part of the body, or of any object, into the genital opening of another person". SDCL 22-22-2. No evidence was submitted by the State that E.W. ever claimed any penetration.

The State bases its theory that penetration was "achieved" based upon the internet

searches. However, an internet "search" is insufficient to warrant a conviction under SDCL 22-22-1(1). There must be actual penetration. In this instance; there was none established.

The testing reflected that E.W.'s mother, Nycole Morkve, tested positive for gonorrhea. TT. 171; lines 19 - 21. Gonorrhea can be transmitted by kissing. TT. 26; lines 13 – 14. Nycole Morkve could have just as easily transmitted the gonorrhea to E.W. either by touch or by kissing the child.

In this instance, we have a mother, Nycole Morkve, who is not the most hygienic person and who tested positive for gonorrhea in her throat. We have a child who is later found to have gonorrhea in her throat and her vagina. It is equally as likely that Nycole Morkve, assisted E.W. with her toileting after she, herself, used the bathroom and failed to wash her hands. That would also explain the transmission of gonorrhea from Nycole to E.W. as would giving the child a kiss.

The justification for the State's use of the child pornography was not only to inflame the jury, but to also suggest that some form of penetration ***had*** to occur in order for E.W. to test positive for gonorrhea. Appellee's brief supports that position. The videos of child pornography provided by the State were necessary to inflame the jury since there was no actual evidence presented to the jury.

In its efforts to convict Matthew of rape of a child; the State pulled out all of the stops. Inasmuch as the State had no evidence to establish that Matthew was the perpetrator; the State used every trick at its disposal to obtain a conviction.

The State ignored the fact that E.W.'s mother had gonorrhea in her throat. The State ignored the fact that E.W. told Child's Voice and others that her teacher at school as

well as some of her school mates had "licked her lady parts". The State did not seek to establish whether the strain of gonorrhea that E.W. had was the same as her mother's gonorrhea. The State ignored the fact that their own expert, Dr. Free, testified that gonorrhea could be transferred a variety of ways including under the fingernails and/or via kissing. TT. 26; lines 13 – 14. As well as through inadequate hygiene coupled with a break in the skin (ie. through a rash or irritation). TT. 41 – 31, lines 23 – 3; TT. 44, lines 12 - 21.

At trial, the State provided no authority or proof to establish that Matthew had, or has, gonorrhea. The evidence presented at trial reflected that E.W.'s mother, Nycole Morkve had gonorrhea; not Matthew. TT. 171, lines 19 – 21.

CONCLUSION

The State used the same hard drives to obtain Matthew's conviction that the federal government used to obtain his conviction for possession of child pornography in federal court. (*United States of America v. Matthew Carter,* Southern Division 4:21 – cr-40073-KES). The Yankton County jury was allowed to view three (3) short videos duplicated from the hard drives which depicted child pornography. Allowing the jury to view child pornography in a first-degree rape case was unduly prejudicial to Matthew's case and obviated his right to a fair trial.

As in all criminal cases, the State was charged with proving each and every element of the crime that the Defendant is charged with. In this instance, it was rape in the first degree. The mere inference that it ***could have*** occurred because Matthew possessed child pornography is wholly insufficient to uphold the State's constitutional burden. A conviction of this magnitude cannot be sustained upon vague assertions absent

actual evidence.

This Court has held that "to warrant reversal, not only must error be demonstrated, but it must also be shown to be prejudicial". *State v. Stone,* 2019 S.D. 18, ¶ 22, 925 N.W.2d 488, 497 (quoting *Bausch,* 2017 S.D. 1, ¶ 12, 889 N.W.2d at 408). More importantly, this Court went on to hold that "(p)rejudicial error is 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. Sheldon*, 2021 S.D. 22, ¶ 16; *See also*, *Casper Lodging, LLC v. Akers,* 2015 S.D. 80, ¶ 60, 871 N.W.2d 477, 496 (quoting *Harter v. Plains Ins. Co., Inc.,* 1998 S.D. 59, ¶ 32, 579 N.W.2d 625, 633).

> Prejudicial error is 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. (Emphasis added). *Casper Lodging, LLC v. Akers,* 2015 S.D. 80, 871 N.W.2d 477.

The nature and extent of the salacious materials paraded in front of the jury could have had no other effect than to prejudice Matthew's chances at a fair trial. The prejudice arising from those three (3) videos alone warrant the reversal of the jury's verdict. To claim that those videos were anything but prejudicial is absurd.

In this instance, the entire record is devoid of any testimony or evidence which would support the jury's guilty verdict. There is nothing, other than law enforcement supposition, that would support the theory that any penetration of E.W. ever occurred.

E.W. told Child's Voice that the only thing that Matthew has ever done to her was that Matthew had "yelled at her when she had thrown chicken on the floor". TT 68, lines 6 – 10; 67.

The State had the burden to establish beyond a reasonable doubt that Matthew had committed the crime of rape of a child under the age of sixteen (16) years. It did not do so.

This Court should reverse this matter back down to the Trial Court with specific instructions to the Trial Court to suppress all information obtained from the hard drives obtained from the illegal search and prohibiting the Trial Court from allowing Ms. Russell to testify as to what internet searches were found on Matthew's phone, prohibit the showing of ***any*** videos of child pornography to the jury, ordering that Matthew, via his attorney, be allowed to cross-examine the alleged victim, E.W. and allowing Matthew's expert to testify as to the unreliability of one (1) single test.

Dated this 6th day of June, 2023.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Wanda Howey-Fox, hereby certify that Appellant's Brief, exclusive of the Certificate of Service and the Certificate of Compliance, is submitted in Times new Roman typeface, 12 font and that the word processing system used to prepare this Brief indicates that the number of words used was 3,168 and the number of characters used, excluding spaces, was 15,869.

Wanda Howey-Fox

CERTIFICATE OF SERVICE

This is to certify that the original and two (2) copies of the Appellant's Brief were served upon Shirley Jameson-Fergel and an electronic copy was served upon Tyler Larsen and Paul Swedlund via Odyssey File and Serve on this the 6th day of June, 2023.

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____
Wanda Howey-Fox

APPENDIX

TABLE OF CONTENTS

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#1	Evidence Inventory and Receipt (dated 1- 14-2021)..	1

Yankton Police Department

Yankton, South Dakota

EVIDENCE INVENTORY AND RECEIPT

Officer Erickson

Recovered From 701 Burleigh St Apt. 2

Address

Suspect Carter, Matthew

Address 701 Burleigh St. Apt 2

Victim

Address

Bin #

Page Of

Date 1/14/21

Case #

Time Search Initiated

Time Search Terminated

Exhibit No.	Description & List of Evidence	Found By	Location Property or Evidence Found/Rec'd
001	A Power Mobile Storage system	Erickson	Bathroom
002	Western Digital Harddrive	Erickson	Bathroom
003	Black DVC + memory stick	Erickson	Bedroom
004	Rose gold iPhone	Erickson	Bedroom

I acknowledge receipt of property listed on lines 1-4

Name J. Erickson Address 410 Walnut St.

Property Returned by Officer No. Date

White Copy - Investigations *Yellow Copy - With Evidence* *Pink Copy - Officer*

Boller Printing - Yankton, SD