IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29070

STATE OF SOUTH DAKOTA
Plaintiff and Appellee,
vs.
Joshua Vortherms
Defendant and Appellant.

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Robin J. Houwman
Presiding Circuit Court Judge

APPELLANT'S BRIEF

ATTORNEY FOR APPELLANT
Nichole A. Carper
Burd & Carper Law Office
4900 East 57th Street
Suite A
Sioux Falls, SD 57108
(605) 332-4351

ATTORNEY FOR APPELLEE
Jason Ravnsburg – Attorney General
Brigid Hoffman – Deputy Attorney General
1302 E Hwy 14
Suite 1
Pierre, SD 5501-8501
(605) 773 3215

Crystal Johnson
Minnehaha County State's Attorney
415 North Dakota Avenue
Sioux Falls, South Dakota 57104
(605) 367-4226

Table of Contents

Table of Authorities

Constitutional Provisions:

Cases:

South Dakota Supreme Court:

United States Supreme Court:

Preliminary Statement

This brief refers to transcripts of the suppression hearing as "ST" followed by page and line citations. References to the trial transcript are referred to as "TT" followed by page and line citations. All references to the settled record will be cited as "SR" followed by a page number. All references to the dash camera that recorded law enforcement's encounter with Appellant at the scene are referred to as "Dash Cam" followed by the time stamp on the video.

Jurisdictional Statement

The Appellant Josh Vortherms was indicted on November 16, 2017 on two counts of Vehicular Homicide (SDCL 32-23-1), one count of Vehicular Battery (SDCL 32-23-1), and two counts of Driving under the Influence of Alcohol (SDCL 32-23-1). After a jury trial, Mr. Vortherms was convicted of 1 Count of Vehicular Battery, 2 Counts of Vehicular Homicide, and 1 Count of Driving under the Influence of Alcohol. On June 25, 2019, the Judgment and Sentence, signed by the Honorable Circuit Court Judge Robin Houwman, was filed in the 2nd Circuit Court. (SR 588-589). Mr. Vortherms filed Notice of Appeal with this Honorable Court on July 19, 2019. (SR 580).

Statement of Legal Issues

I. Whether the Circuit Court Abused its Discretion in Denying Mr. Vortherm's Motion to Suppress.

The Trial Court held that the warrantless blood draw was excepted from the warrant requirement based on the exigent circumstances exception to the warrant requirement.

Relevant Case Law:
Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552, 1558, 185 L.E.d2d 696 (2013)
State v. Fierro, 2014 S.D. 62, 853 N.W.2d 235.
State v. Fischer, 2016 S.D. 2, 875 N.W.2d 40.

II. Whether Mr. Vortherms received ineffective assistance of counsel cognizable on direct appeal.

Relevant Case Law:
State v. Thomas, 2011 S.D. 15, 796 N.W.2d 706.

Statement of Facts

On July 1, 2017, an off-duty law enforcement officer, Christopher Schoepf, was traveling westbound on I-90 near the Brandon exit. (TT 161:22-162:6). Approximately ½ mile before the exit, the interstate was under construction, with traffic diverted into two lanes. (TT 305: 15-306:5). As the officer came under the overpass for the exit, he noticed a great deal of dust in the air and saw a man without a shirt attempting to flag down traffic. (TT 162:9). The man was later identified as Joshua Vortherms, the Appellant. Mr. Vortherms had been in an accident with a black Subaru. He had left or been thrown from his vehicle and gone to the Subaru to find that a child was trapped in the back seat. (TT 172:1-13) Vortherms told the child he couldn't get to her through the barbed wire and he was going to get help. *Id.* By the time the officer got back to where he'd seen Mr. Vortherms, Mr. Vortherms had given up trying to flag down traffic and headed toward a Holiday Inn located about ¼ mile from the crash scene. (TT 179:19-180:9.). The driver and front seat passenger of the Subaru died as a result of injuries from the accident. A child, who had been sleeping in the backseat of the Subaru, suffered a fractured leg in the accident. (TT 284:7-14).

Trooper Angel Duran-Garcia was assigned as the lead reconstruction expert. (TT 301). He took photographs, utilized the latest technology to document the scene and directed evidence collection at the scene. (TT 308). He also interrogated Mr. Vortherms (TT 303) and contacted a witness who had indicated that she had seen a Subaru swerving

on I-90 that night at about the time of the accident. (TT322-323). Trooper Duran-Garcia later determined that this witness testimony would be irrelevant, and thus she was not called to testify at trial.

In the course of his initial investigation into the accident, Trooper Duran-Garcia failed to discern the damage and markings on the vehicles or the skid marks (TT 325) that indicated that the two vehicles had come into contact prior to veering off the road. He did not correct this failure until after he had reviewed the reconstruction report created by the defense's expert witness. The defense did not request a *Daubert* hearing or in any way challenge the legal sufficiency of the Trooper's testimony.

Trooper Wosje was assigned to retrieve data from the airbag control module (sometimes referred to as a "black box") in Mr. Vortherms' vehicle. (TT 288). The crash data report (CDR) he produced at trial indicated that prior to the accident, Mr. Vortherms' vehicle was traveling at greater than 90 miles per hour. (SR 98). Trial counsel did not inquire into the reliability of either the Trooper's methods for retrieving this data nor the reliability of the report or the efficacy of the ACM in Mr. Vortherms' nearly 20-year-old vehicle. The Trooper was unable to retrieve similar data from the Subaru. (TT 288:8-10). The only evidence of either party's speed leading up to the accident was the CDR. This report was given to the jury with nominal foundation and no objection.

The law enforcement response to the accident scene was significant. Local deputies, Division of Criminal Investigation Agents, and Highway Patrol officers responded. Three of those officers reported directly to the Holiday Inn and encountered a confused and injured Mr. Vortherms in the lobby. The facts related to their encounter with Mr. Vortherms will be developed in Mr. Vortherms' argument below regarding

suppression. None of the three officers at the scene initially attempted to apply for a search warrant to retrieve a blood sample from Mr. Vortherms. Instead, citing exigent circumstances, Trooper Bumann ordered a warrantless blood draw. The results of the warrantless blood draw indicated a .159 BAC. (TT 216:3). A later blood draw, obtained pursuant to a warrant, indicated a BAC of .093. (TT 219:5).

The State's theory of the case was that Mr. Vortherms was negligent for being intoxicated and driving over 90 miles per hour at the time of the accident, thus he was therefore guilty of vehicular battery, vehicular homicide, and driving under the influence of alcohol. (TT 131:8-17). The primary evidence used in support of this theory was the accident reconstruction of Trooper Duran-Garcia, the CDR report introduced by Trooper Wosje, and the results of the warrantless blood draw.

Appellant's Argument

The Warrantless Blood Draw Violated Mr. Vortherms' Fourth Amendment Protection Against Unreasonable Search and Seizure and its Results Ought to have been Suppressed

The United States Supreme Court and this Court have long recognized the sanctity of the human body against unreasonable invasion by the state. In *Schmerber v. California*, 384 U.S. 757, 758, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the United States Supreme Court opined that since search warrants are ordinarily required for searches of a citizen's home, "absent an emergency, no less could be required where intrusions into the human body are concerned." This was so "even when the search was conducted following a lawful arrest." *Missouri v. McNeely,* 569 U.S. 141, 148 133 S.Ct. 1552, 1558. 185 L.E.d2d 696 (2013) (quoting *Schmerber* at 770, 86 S.C. 1826). In *Missouri v. McNeely*, the United States Supreme Court reiterated that "the importance of requiring

authorization by a 'neutral and detached magistrate' before allowing a law enforcement officer to 'invade another's body in search of evidence of guilt is indisputable and great.'" *Id.* (quoting *Schmerber,* at 770, 86 S.C. 1826) (additional citation omitted)). In the instant case, the State argued, and the Circuit Court agreed, that the exigencies of the situation allowed for an exception to the warrant requirement. Mr. Vortherms contends that the question in this case is closer than the State and Court concluded, and proper application of the Supreme Court's precedent ought to have led to suppression of the blood evidence seized without warrant or consent nearly an hour after officers concluded that they were investigating Mr. Vortherms for driving under the influence of alcohol.

The Fourth Amendment to the United States Constitution and Art. VI, §11 of the South Dakota State Constitution protect South Dakotans from unreasonable searches and seizures. Generally speaking, a search or seizure requires a warrant by a neutral magistrate based on probable cause. *State v. Fierro,* 2014 S.D. 62, ¶15, 853 N.W.2d 235, 240. Warrantless searches are *per se* unreasonable with a few delineated exceptions. *Id.* When considering the reasonableness of a particular search, this Court balances "the public's interest in preventing crime with the individual's right to be free from arbitrary and unwarranted governmental intrusions into personal privacy." *Id.* at ¶16 (additional citation omitted).

This Court reviews the Circuit Court decision on a motion to suppress under the *de novo* standard of review. *State v. Fischer,* 2016 S.D. 2, ¶10, 875 N.W.2d 40, 44. Findings of fact will be reviewed for clear error and no deference is given to the Circuit Court's conclusions of law. *Id.* It is the State's burden to show that the warrantless search fell within an identified exception to the warrant requirement. *Id.*

The exigent circumstances exception to the warrant requirement allows for a warrantless search when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *McNeely*, 569 U.S. at 148-149 133 S.Ct. at 1558. In *McNeely*, the Supreme Court highlighted the type of circumstances that might justify application of the exception: providing emergency assistance to the occupant of a home, hot pursuit of a fleeing felon, entering a home to put out a fire, or imminent destruction of evidence. *Id.* (internal citations omitted). In short, the Court indicated that warrantless searches will be deemed reasonable under the exception when "there is a compelling need for official action and no time to secure a warrant." *Id.* (quoting *Michigan v. Tyler,* 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)). The determination of whether such exigency exists depends on the Court's analysis of the totality of the circumstances. *Id.* Several material facts exist in Mr. Vortherms' case that ought to have given both the State and the Circuit Court pause in the application of this exception.

In the Second Judicial Circuit, obtaining a search warrant is a straightforward process in which law enforcement officers are aided significantly by modern telecommunication capabilities. According to the state's witness at the hearing on Mr. Vortherms' motion to suppress, the officer simply phones the magistrate on call, and after being sworn in by the magistrate, recites the facts the officer believes might support a warrant. (ST 5:8-20). If the magistrate finds the facts are sufficient to amount to probable cause, she will give the officer permission to initial a duplicate original warrant and sign the judge's name. At that point, the officer has a warrant in hand and may proceed with the search. *Id*. This process is routinely used in standard DWI arrest cases. The Trooper

called to testify by the State argued at the suppression hearing that he could not predict how long it would take to get a warrant. (ST 5:19-21). He speculated about possible reasons why it might take longer to get in touch with a judge, pointed out that he once had to call "nine judges" before one answered the telephone. (ST 5:23- 6:6). But in the case at hand, once he decided to try to get a warrant, the whole process from start to finish took just over 15 minutes, though the Trooper's testimony on this issue was somewhat murkier than on other issues. (ST 21:6-16). The material facts indicate that the Trooper was well aware he was investigating a fatal DUI accident and he had more than sufficient resources and time to secure a warrant.

Trooper Bumann answered a dispatch to the scene of the accident at 2:18 a.m. (ST 6:12-14). By the State's evidence, *before* he arrived at the scene, the Trooper knew the following: that there had been a rollover crash; that there was "a white male with black shorts and no shirt or shoes attempting to flag down traffic" at the location of the accident; and that this person was "now at the Holiday Inn," which was ¼ mile away from the location of the accident. (TT 179:19-180:9.). Trooper Bumann went straight to the Holiday Inn because "I knew that there was already law enforcement personnel at the location of the crash and in my mind I thought that it was more than just coincidence that there was an individual running around on the interstate with no shirt and shorts on." (TT 180:4-9). Trooper Bumann arrived at the Holiday Inn at approximately 2:30 a.m. (Dash Cam 2:30:28). The Trooper made contact with Mr. Vortherms within 12 seconds. (Dash Cam 2:30:40). Just over one minute after arriving at the Holiday Inn, at least one additional officer arrived at the scene. (Dash Cam 2:31:44). Within seconds of arriving at the scene, the Trooper knew the following: Mr. Vortherms had a significant head injury

(ST 7:22-23); he "had blood all over the front of his body" (ST 7:20) and that "there was a large gash on the side of his head." (ST 7:22-23); Mr. Vortherms had been at the site of the accident very near the time of the accident (TT 179:19-180:9); Mr. Vortherms was missing clothing (ST 7:19-20); that Mr. Vortherms was in the white pickup truck involved in the accident at the time of the accident (ST 9:3-9); that Mr. Vortherms smelled of alcohol (ST 8:21-22); and that Mr. Vortherms had "had a few" to drink. (ST 9:10-13). The Trooper also knew that an ambulance was *en route*.

Trooper Bumann was on the scene for four minutes (Dash Cam 2:34:17) when he began to suspect that Mr. Vortherms was the driver of the white pickup truck. This is clear as the Trooper first shone his light closely at the left side of Mr. Vortherms face, asked the other Trooper about a camera and began searching for his own camera. The Trooper can be heard advising another officer that Mr. Vortherms told him he was the passenger "but he's got a bunch of glass on the left side" (Dash Cam 2:34:51). Trooper Bumann went on to explain to the other officer that Mr. Vortherms didn't remember his birthday or who else was in the car. At 2:35:48, the Trooper begins documenting the injuries to Mr. Vortherms' head. As he does so, he requests that Josh remove the shirt he was using to apply pressure to the wound in order to get a better picture. By 2:36:45, a third officer has appeared on the dash camera. The warrantless blood draw did not take place until 3:17 am, nearly an hour after Trooper Bumann had all of these facts in hand.

By 2:37:50, the officers have transitioned into interrogation mode. As Trooper Bumann takes photos of Mr. Vortherms' injuries, Trooper Murray tells Mr. Vortherms "you need to start remembering things. This situation is serious." He asked, "who was all in the pickup?" Mr. Vortherms responded, "I don't know." Trooper Murray, with two

additional officers standing right next to him responded, “you know how many people were in the pickup you were traveling in.” This conversation took place 50 minutes before Trooper Bumann ordered the warrantless blood draw. The third officer, identified by Trooper Bumann at the suppression hearing, was Minnehaha County Sheriff’s Deputy Tanner Cornay. (ST 18:17-23). Deputy Cornay’s role at the scene is difficult to discern. For most of the recording, he is merely standing by.

At 2:39:00, the dash camera records audio of a conversation that takes place off camera between the two troopers and a third unidentified law enforcement officer. The third officer asked whether they needed to bring their crash team out. One of the Troopers responded it did not matter to him as he was on overtime. There was some conversation about one of the Troopers going to map the scene and the conversation ended with the third officer stating, “we’ll help however we can, *we have plenty of guys*.” At this point, the Troopers were also informed that the helicopter was not being brought to scene. This conversation ended at 2:39:58 when Mr. Vortherms lost consciousness. At 2:40:40, emergency medical responders appeared on the scene. The three officers spend approximately 4 minutes observing the emergency medical workers. One Trooper either made or received a phone call at approximately 2:44. The EMTs removed Mr. Vortherms from view of the camera at 2:45:35.

Despite the fact that Mr. Vortherms had lost consciousness and was largely incoherent, the Trooper attempted to “get a PBT off of him” when “he was in the back of the ambulance.” (ST 10:8-11). At a minimum, approximately 30 minutes before he ordered the warrantless blood draw, the Trooper believed Mr. Vortherms was involved in the accident and he believed that there was a PBT result of .097.

All told, at least three law enforcement officers were on the scene with Vortherms, knew they were investigating a very serious motor vehicle accident and suspected that the person with whom they were dealing was one of the drivers and was under the influence. They were advised by a fourth officer that he had "plenty of guys" if they needed assistance. They knew all of this before the ambulance arrived. Any one of them could have requested a warrant. Certainly they were all concerned about collecting evidence of potential intoxication. Yet none of them made the phone call to the magistrate.

The ambulance left with Mr. Vortherms at 2:52 am. (ST 11:7-8). At this point, three officers, two of whom had attempted to get a PBT from Mr. Vortherms, had been with him at the scene for over 20 minutes. A reasoning officer must have understood that he had a DUI investigation on his hands and that the man with the gash on his head was going to require medical treatment. Rather than requesting a warrant to draw his suspect's blood, or asking another officer at the scene to do so, Trooper Bumann followed Mr. Vortherms to the hospital to "make contact with him and try and talk to him more" (ST 11:19-22). This, despite the fact that the Trooper also knew that Mr. Vortherms had lost consciousness earlier in the investigation. Upon hearing the nurses state that Mr. Vortherms would likely need surgery, the Trooper requested a warrantless blood draw. No attempt had been made to reach a neutral magistrate.

The heart of his justification for not attempting to get a warrant prior to the blood draw was the Trooper's fear that Mr. Vortherms would quickly be in surgery, might be receiving a blood transfusion, and would presumably be given medications during

surgery, which might "taint the sample." (ST 12:15- 13:11). The Trooper also expressed concern about the alcohol in Mr. Vortherms' blood stream dissipating over time.

If this Court accepts the State's interpretation of what constitutes "totality of the circumstances," then evaluation of the reasonableness of the officer's actions would be narrowed to only those circumstances surrounding Trooper Bumann's actions after he arrived at the hospital and ignore all of the investigation, the resources available to the officers, and passage of time that occurred prior to Trooper Bumann walking into the emergency room and overhearing the nurses' conversation.

In *McNeely,* the Supreme Court unequivocally held that the natural metabolization of alcohol in the blood stream is not a *per se* exigency permitting an exception to the warrant requirement. *McNeely,* 569 U.S. at 145, 133 S.Ct. at 1557. The Court reiterated that a "compelled physical intrusion beneath [a person's] skin and into his veins to obtain a sample of his blood" was an "invasion of bodily integrity which implicates an individual's 'most personal and deep-rooted expectations of privacy'." *McNeely,* 569 U.S. at 148, 133 S.Ct at 1558 (quoting *Winston v. Lee,* 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985)). While the Court acknowledged that the evanescent nature of alcohol means that "a significant delay in testing will negatively affect the probative value of the [blood test] results" it nevertheless concluded:

> [W]here police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.

McNeely, 569 U.S. at 152, 33 S.C.t at 1561. BAC evidence dissipates naturally and in a gradual, predictable manner and there is bound to be some delay between the time of arrest or accident regardless of whether officers are required to obtain a warrant. *Id.*

Relevant to this case, the Court justified not imposing a *per se* exigency exception based on dissipation alone by pointing out:

> Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

McNeely, 569 U.S. at 154, 33 S.Ct. 1561. The Court specifically acknowledged the advances since *Schmerber,* including the more expeditious processing of warrant applications, noting "technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably." *Id.* at 155.

The State justified the failure to obtain a warrant based in part on the fact that this was a serious death investigation that required significant resources, rendering it nearly impossible for the Trooper to get a warrant. But this Court's opinion in *State v Fischer,* 2016 S.D. 12, 875 N.W.2d 40, illuminates a type of resource and time constraint that simply did not exist in the case at hand. In *Fischer,* the defendant was convicted of vehicular homicide and driving under the influence. He argued that the warrantless extraction of his blood at the hospital violated the Fourth Amendment. In *Fischer,* the accident left a significant debris field that included body parts from two victims. *Fischer,* 2016 SD 13 at ¶ 2. After the suspect was taken away by ambulance, the Sheriff, noting the risk of precipitation and size of the scene, instructed the deputies to identify witnesses and begin taking pictures of the scene. *Id.* at ¶ 4. The Sheriff was so concerned about the threat of

rain that he recruited EMTs and firefighters to assist in securing the scene. *Id.* No officers except those at the scene were available to assist in the investigation. *Id.* The suspect was being prepared for transport by helicopter from Wagner to Sioux Falls and the Sheriff ordering the blood draw did not believe it would be possible to obtain a warrant before the suspect left his jurisdiction. *Id.* The Deputy sent to get the blood draw arrived at the hospital at the same time as the helicopter. *Id.* at ¶5. Among the totality of the circumstances relied upon by the circuit court in finding that blood draw constitutional were the Sheriff's responsibilities for helping those injured, preserving evidence from rain, preserving evidence by photographing it, finding all evidence, including body parts, finding witnesses, interviewing witnesses or giving them statement forms, performing crowd control, taping off the scene, getting the blood sample from the suspect and coordinating with the highway patrol. *Id.* at ¶9. There, Sheriff Thaler simply had no resources available to obtain a warrant for the blood draw before the suspect was removed from the hospital. *Id.* at ¶18. This Court noted that the officer had to drive six miles from the scene to prepare the warrant and that the warrant preparation took 30-60 minutes. After having prepared the warrant, the officer would have to call the magistrate and receive approval and then drive another 15 miles to get to the hospital. *Id.* at ¶19.

This case is materially distinguishable. Here, three law enforcement officers were tasked with investigating Mr. Vortherms and his involvement with the accident. None of them were simultaneously responsible for any other aspect of the scene. Trooper Bumann testified that obtaining the warrant in this case required no driving on his part and from start to finish took 17 minutes. 40 minutes before he ordered the warrantless blood draw, Trooper Bumann was notified that another agency had "plenty of guys" available to assist

with the investigation. Deputy Cornay stood mute and basically immobile for most of the time that officers were engaged with Mr. Vortherms.

Mr. Vortherms respectfully requests that this Court review the objective evidence of the officers' choices during their investigation of Mr. Vortherms. No doubt, the investigation was serious and wide ranging and the officers were under pressure to preserve evidence, but it appears equally apparent that the officers had the resources to engage the neutral oversight of a magistrate before ordering the blood draw.

The Cumulative Effect of Counsel's Errors Amounted to Ineffective Assistance of Counsel Cognizable on Direct Appeal

In order to prevail on a claim of ineffective assistance of counsel, Mr. Vortherms must show that his counsel provided representation that "fell below an objective standard of reasonableness" and that he was prejudiced thereby. *State v. Thomas,* 2011 S.D. 15 ¶21, 796 N.W.2d 706, 713. This Court will presume that counsel's performance fell within "the wide range of professional assistance." *Id.* The Court looks at counsel's performance from counsel's perspective at the time of the alleged error. *Id.* Typically, ineffective assistance of counsel claims should be advanced in collateral appeals because a habeas proceeding will allow the court to hear from counsel. *State v. Arabie,* 2003 S.D. 57, ¶ 20, 663 N.W.2d 250, 263. This Court will review an ineffective assistance of counsel claim where trial counsel was "so ineffective and counsel's representation so casual as to represent a manifest usurpation of [the defendant's] constitutional rights." *Thomas,* 2011 S.D. 15 at ¶23. The Court's analysis ought to consider not merely outcome determinations but also focus on "whether the result of the proceeding was fundamentally unfair or unreliable." *Lien v. Class,* 1998 S.D. 7, ¶16, 574 N.W.2d 601, 608 (additional citations omitted).

The State's theory of the case against Mr. Vortherms hinged on the argument that Mr. Vortherms was intoxicated and drove negligently by speeding while he passed the alleged victim's vehicle. (TT 131:8-17). The State's case relied heavily on its accident reconstructionist's conclusions and a crash data retrieval report indicating that Mr. Vortherms' speed exceeded 90 miles per hour in the seconds before the accident. This was necessary because no eyewitnesses to the accident or to the driving of either vehicle testified at trial. There were vital, obvious problems with this testimony. Counsel was ineffective for failure to question the admissibility of the reconstructionist's testimony and the crash data retrieval report.

Counsel Failed to Inquire into the Admissibility of The Reconstructionist's Testimony

SDCL 19-19-702 provides: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) The testimony is based on sufficient facts or data;
> (c) The testimony is the product of reliable principles and methods; and
> (d) The expert has reliably applied the principles and methods to the facts of the case.

South Dakota relies on the *Daubert* standard in assessing the admissibility of an expert's opinion. *State v Yuel,* 2013 S.D. 84 ¶8 840 N.W.2d 680, 683-684. This standard requires the trial court to act as a gatekeeper in assuring that the expert's testimony rests on "a reliable foundation and is relevant to the task at hand." *Id.*

This Court has previously found a state accident reconstructionist qualified to testify as an expert. *See e.g. State v Kvasnicka,* 2013 S.D. 25 ¶28, 829 N.W.2d 123, 130.

Mr. Vortherms does not argue that an accident reconstructionist could not be qualified as an expert *per se*. Mr. Vortherms instead asserts that the officer's methods and application of those methods were called into serious question prior to trial and required testing in a *Daubert* hearing prior to admission at trial. Failure to do so permitted flawed testimony from an expert law enforcement officer to prop up the State's argument about the cause of the accident. Overcoming the aura of expertise and reliability would have been nearly impossible and the testimony ought to have been limited or excluded altogether. This, coupled with counsel's failure to test other pertinent facets of the State's case, rendered counsel ineffective and Mr. Vortherms' trial fundamentally unfair.

Prior to trial, it became clear to defense counsel, through his retained accident reconstructionist, that the State's expert, Trooper Angel Duran-Garcia, had fundamentally misinterpreted the evidence. Trooper Duran-Garcia testified at trial that his conclusions rested on an investigation that required careful documentation of the scene and subject vehicles. (TT 307:24-309:7). Yet his initial investigation failed to discern the crucial facts that:

1- the cars came into contact with one another prior to veering off the road (TT 311)

2- that there were shadow marks that he subsequently concluded were an indication that Mr. Vortherms had lost control of his vehicle. (TT 318: 3-18; 325:8-10)

3- He had misapprehended the paths of the vehicles. (TT 311)

At trial, the State conceded that its expert witness was required to return to his investigation and amend his report. The State's lead expert and primary witness

essentially rewrote his report to conform his theory of the accident to objective evidence he failed to account for in his initial investigation. (TT 311). This called the reliability of the expert's methodology and application of that methodology into serious question.

Rather than challenge the admissibility of this flawed expert testimony, counsel chose to address it at trial. Counsel's failure to put the witness' testimony through the crucible of a *Daubert* hearing was prejudicial ineffective assistance of counsel. The State was permitted to provide the jury with expert testimony that did not meet prongs (c) or (d) of SDCL 19-19-702. Mr. Vortherms is not asking this Court to "second guess the tactical decisions" of defense counsel nor to "substitute [its] own theoretical judgment for that of counsel." *Lien v Class,* 1998 S.D. 7 at ¶21, 574 N.W.2d at 609. Instead, Mr. Vortherms asserts that there was no viable tactical justification for failing, prior to trial, to question the legal reliability of the State's primary evidence.

Underlying the rules of evidence and case law surrounding the admission of expert testimony is the concern that the jury needs to have trustworthy and relevant information to assist them in the determination of facts. Scientific or other complex evidence has long been recognized as having "an aura of reliability and trustworthiness." *State v. Werner*, 482 N.W.2d 286, 291, 292 (S.D. 1992). This aura of trustworthiness is enhanced by the fact that a law enforcement officer is offering the evidence. It is thus quite important in a case which is based almost entirely on scientific evidence that the methods utilized by the expert and his application of those methods are reliable. This is particularly true when, as in this case, there were no eyewitnesses to the accident and the state's case about the events leading up to and through the accident rested wholly on the

expert testimony of police officers. Because the state's theory rested so heavily on this expert testimony, it was incumbent upon counsel to ensure its validity.

Counsel Failed to Challenge or Inquire into the Admissibility or Reliability of Trooper Wosje's "Black Box" Testimony or the Crash Data Retrieval Report.

During the testimony of Trooper Wosje, the State introduced exhibit #56, labeled "crash data retrieval." (SR 98). Trooper Wosje's involvement with the case was limited to retrieving this data. (TT 297:25-298: 2). This report was the only evidence introduced by the State to prove Mr. Vortherms' speed leading up to the accident. There were no eyewitnesses, and the accident reconstructionist did not testify to any calculations he used to determine speed of either vehicle. The report was introduced with nominal foundation and no objection. Trooper Wosje testified that he was a Highway Patrol Trooper who was an accident reconstructionist for the state. (TT 286:8-10). He testified that he had taken several classes and that he was familiar with "air bag control modules ("ACM")." (TT:286:18-20). He did not testify to his knowledge, or lack thereof, about the differences between different manufacturers' detection and recording systems. The Trooper did not testify to any specifics about the model of vehicle and type of system installed in Mr. Vortherms' vehicle. He testified that he was trained to "collect the information from the ACM" (TT 287:6-8) but offered no testimony as to training in *interpreting* the data retrieved from the systems. The Trooper testified that the ACM was designed to begin recording information when there is "a change in momentum of the car, and depending on various models of the car, that's what sets the air bags off and that's when it starts recording." (TT 287: 14-18). There was no testimony or evidence offered to indicate that the airbags were deployed in Mr. Vortherms' vehicle. There was no testimony regarding the reliability of ACM or the crash data retrieval report. Defense

counsel did not ask a single question about the report and no pretrial motions were filed with regard to the report or the State's argument regarding speed of the vehicle. The report was treated as proving an incontrovertible fact about Mr. Vortherms' speed. Mr. Vortherms acknowledges that other courts have found information retrieved from ACM devices to be admissible (See, e.g. 40 ALR 6th 595**,** *Admissibility of Evidence Taken from Vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "Black Boxes"*). Mr. Vortherms was unable to find any authority from this jurisdiction regarding the admissibility of black box data or the standards the Court would utilize in determining admissibility. The state's cursory foundation and defense counsel's failure to object or inquire left the jury with a document that may or may not have been reliable but that was nevertheless determinative in the case. The State's attorney relied heavily on this report and treated it as a fact established throughout trial.

Under *Daubert*, the State, as the proponent of this evidence, needed to establish that there has been "adequate empirical proof of the validity" of the method Trooper Duran-Garcia and Trooper Wosje used to establish the speed of the vehicle. *State v. Guthrie*, 2001 S.D. 61 ¶34, 627 N.W.2d 401, 413 (citing Edward J. Imwinkelried, Evidentiary Foundations 287 (4th ed 1998). In order to assess the reliability of the evidence, the Circuit Court ought to have been asked to consider the nonexclusive guidelines for assessing the reliability of the expert's methodology:

(1) whether the method is testable or falsifiable;

(2) whether the method was subjected to peer review;

(3) the known or potential error rate;

(4) whether standards exist to control procedures for the method;

(5) whether the method is generally accepted;

(6) the relationship of the technique to methods that have been established as reliable;

(7) the qualifications of the expert; and

(8) the non-judicial uses to which the method has been put.

Id. (citing *Daubert v. Merrell Dow Pharm,* 509 U.S. 579, 593-95, 113 S.Ct. 2786, 2796-98, 125 L.Ed.2d 469, 483-484.) The list of factors alone highlights the woeful inadequacy of the foundation offered to support admission and use of the report. Instead, the information came into evidence without objection or inquiry.[1]

This Court has noted that pertinent evidence based on scientifically valid principles will satisfy the reliability demand of *Daubert*. *State v. Lemler,* 2009 SD 86, ¶23, 774 N.W.2d 272, 270. The burden of showing that the testimony is reliable rested with the State. *Id.* The Court will focus solely on the principles and methodology relied upon rather than the conclusions drawn by the expert. *Wells v. Howe Heating & Plumbing, Inc.,* 2004 SD 37, ¶ 16, 677 N.W.2d 586, 592. Here, there was nothing about

[1] Mr. Vortherms acknowledges the report may have been admissible over a hearsay objection pursuant to SDCL 19-19-703, which provides that the expert may base his opinion on inadmissible data or facts as long as those facts or data are reasonably relied upon by experts in the field. However, those inadmissible facts or data may only be admitted by the proponent "if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." SDCL 19-19-703. Trooper Wosje was clearly called for the primary purpose of introducing the ACM report. Although the State asked the Trooper to opine about the effect of speed and inebriation upon perception and reaction times, the Trooper had no involvement with the defendant or the investigation outside of downloading this report and the State elicited the perception and reaction testimony from multiple other sources, including Trooper Bumann (T 178:22-179:7), Trooper Duran-Garcia, and the defense expert, Bryan Mohr. Finally, although Trooper Duran-Garcia indicated that he had the ACM report as part of his investigation (TT:309:8-12) his testimony did not utilize the report for purposes of helping the jury understand his conclusions, rather he simply used it for its truth. (TT 309:14-24).

the information relied upon or the methods utilized by the expert for the trial court to inquire into.

Mr. Vortherms called his own expert reconstructionist to testify and he concedes that generally, when opposing experts give contradictory opinions on the reliability or validity of a conclusion, the issue of reliability is a question for the jury. *See State v. Hofer*, 512 N.W.2d 482, 484 (S.D.1994). As this Court noted in *State v. Guthrie*, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Guthrie* , 2001 S.D. 61, 627 N.W.2d 401 (citing *Daubert*, 509 U.S. at 596, 113 S.Ct. at 2798, 125 L.Ed.2d at 484). But in this case, counsel chose not to cross examine eight of the state's fourteen witnesses. Counsel did not question the conclusions drawn or the report relied upon to support the state's theory about Mr. Vortherms' speed. Counsel also chose not to call a witness who had apparently seen a Subaru swerving on the road that evening around the same time as the accident, despite this Court's previous finding of ineffective assistance "when counsel failed to inquire of known witnesses[.]" *Dillon v. Weber*, 2007 SD 81 ¶13, 737 N.W.2d 420, 426 (additional citations omitted). Finally, counsel did nothing to challenge the reliability of the State's expert evidence prior to trial.

Mr. Vortherms was Prejudiced by Trial Counsel's Ineffective Assistance

To establish prejudice, Mr. Vortherms must show a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Thomas*, 2011 S.D. 15 at ¶28. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* Mr. Vortherms' recognizes that

it is the jury's function "to resolve conflicts in evidence, weigh credibility, and sort out the truth." *State v. Pellegrino,* 1998 SD 39, ¶21, 577 N.W. 2d 590, 599. Yet the jury's ability to perform its function is highly dependent on fully engaged advocates to ensure that the most reliable evidence is presented and that which will persuade the jury by illegitimate means is kept out of the jury's deliberations. The State's case had three pillars: its accident reconstructionist's opinion, the speed of the vehicle, and evidence of intoxication. In the State's case in chief, its primary witness testified that his function was to map the paths of the vehicles and try to figure out the speed of the vehicles. (TT 310:9-10). Yet he testified that in his initial investigation, right after the accident, he got the paths of the vehicles wrong. (TT 311:14-15). At trial, the State's expert was permitted to testify that he knew that the pickup driven by Mr. Vortherms lost control based on shadow marks. Yet he did not see those shadow marks until a year after his initial investigation and thus never identified or discussed them in his initial investigation and report. (TT 318:4-10; 325:8-10). The only evidence about speed came into trial without ever having been tested for reliability. Had the CDR report been rendered inadmissible, the State would not have proven that Mr. Vortherms' negligently operated his vehicle and the elements of vehicular battery and vehicular homicide would not have been met. Finally, although failure to call a witness alone will not establish prejudice, in this case, there is evidence that such testimony could well have changed the jury's decision. During deliberations, the jury inquired into the definition of "intervening cause." (SR 122). This phrase was central to the defense's argument and was found in jury instruction #21, which provided that legal cause:

> Is a cause which, in the natural and continuous sequence, or chain of events, unbroken by any intervening cause, aids in producing the death, and without

> which it would not have occurred. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the death. (SR 113).

Despite having chosen to argue that the alleged victim's swerving into the passing lane was an intervening cause, counsel's failure to call a known witness who apparently had evidence that she had seen a Subaru swerving that evening was prejudicial. To establish prejudice for failure to call the witness, Mr. Vortherms would need to show that the witness not only would have testified but that her testimony would likely have changed the outcome of the trial *Fast Horse v. Weber,* 1999 S.D. 97, ¶ 18, 598 N.W.2d 539, 544. On the record available, Mr. Vortherms cannot establish this prejudice. However, this failure of counsel, combined with the failure to challenge the admissibility of the State's evidence on speed and its reconstructionist's testimony does rise to a level prejudice warranting a finding that his trial was fundamentally unfair.

Conclusion

Mr. Vortherms respectfully requests that the Court reverse the trial court's decision on suppression and that the Court find that counsel's performance constituted a manifest injustice warranting a new trial in which the State's scientific and technical evidence are measured against the standards set forth in *Daubert* and the state rules of evidence.

Respectfully submitted this 4th day of March, 2020.

/s/ Nichole A. Carper
Nichole Carper
Burd & Carper Law Office
4900 East 57th Street, Suite A
Sioux Falls, SD 57108
Telephone: (605) 332-4351
Email: nichole@burdandcarper.com
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided in SDCL 15-26A-66(b) using Times New Roman typeface in 12 point type. Appellant's Brief contains 7,065 words.
2. I certify that the word and character count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, certificate of counsel or any addendum materials.

Dated this 4th day of March, 2020.

/s/ Nichole A. Carper

Nichole Carper
Burd & Carper Law Office
4900 East 57th Street, Suite A
Sioux Falls, SD 57108
Telephone: (605) 332-4351
Fax: (605) 334-6844
Email: nichole@burdandcarper.com
Attorney for Appellant

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on the 4th day of March, 2020, a true and correct copy of the foregoing Appellant's Brief was served upon the following person, by emailing the same to the following email address:

Ms. Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
State Capitol Building
500 East Capitol Ave.
Pierre, South Dakota 57501-5070
Email: SCClerkBriefs@ujs.state.sd.us

Jason Ravnsburg - Attorney General
Brigid C. Hoffman – Deputy Attorney General
1302 E Hwy 14
Suite 1
Pierre, SD 5501-8501
Email: atgservice@state.sd.us

Crystal Johnson
Minnehaha County State's Attorney
415 North Dakota Avenue
Sioux Falls, SD 57104
Email: ujsservice@minnehahacounty.org

Dated this 4th day of March, 2020.

/s/ Nichole A. Carper

Nichole Carper
Burd & Carper Law Office
4900 East 57th Street, Suite A
Sioux Falls, SD 57108
Telephone: (605) 332-4351
Fax: (605) 334-6844
Email: nichole@burdandcarper.com
Attorney for Appellant

APPENDIX

APPENDIX TABLE OF CONTENTS

IccacsnD
IccJaiD
Pen

STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF MINNEHAHA)		SECOND JUDICIAL CIRCUIT
		HPD 201703269
STATE OF SOUTH DAKOTA, Plaintiff,	+	49CRI17008474
vs.	+	JUDGMENT & SENTENCE
JOSHUA DAVID VORTHERMS, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on November 16, 2017, charging the defendant with the crimes of Count 1 Vehicular Homicide on or about July 1, 2017, Count 2 Vehicular Homicide on or about July 1, 2017, Count 3 Vehicular Battery on or about July 1, 2017, Count 4 DWI-Under the Influence on or about July 1, 2017, Count 5 DWI-0.08% Or More Alcohol By Weight In The Blood on or about July 1, 2017, Count 6 Reckless Driving on or about July 1, 2017, Count 7 Speeding on Interstate on or about July 1, 2017. The defendant was arraigned upon the Indictment on November 20, 2017, Neil Fossum appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment. The case was regularly brought on for trial, Gail Eiesland and Randy Sample, Deputy State's Attorneys appeared for the prosecution and, Neil Fossum and Derek Friese, appeared as counsel for the defendant. Count 6 Reckless Driving and Count 7 Speeding on Interstate of the Indictment were dismissed prior to evidence at trial being presented. A Jury was impaneled and sworn on April 1, 2019 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on April 4, 2019 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, JOSHUA DAVID VORTHERMS, guilty as charged as to Count 1 Vehicular Homicide (SDCL 32-23-1 and 22-16-41), guilty as charged as to Count 2 Vehicular Homocide (SDCL 32-23-1 and 22-16-41), guilty as charged as to Count 3 Vehicular Battery (SDCL 32-23-1 and 22-18-36), guilty as charged as to Count 4 DWI-Under the Influence (SDCL 32-23-1(2)) and guilty as charged as to Count 5 DWI-0.08% Or More Alcohol By Weight In The Blood (SDCL 32-23-1(1))." The Sentence was continued to June 11, 2019, after completion of a presentence report.

Thereupon on June 11, 2019, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

AS TO COUNT 1 VEHICULAR HOMICIDE : JOSHUA DAVID VORTHERMS shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for fifteen (15) years credit 89 days served. The defendant shall pay $104.00 court costs and $317,249.20 restitution to be collected by the Board of Pardons and Paroles. It is ordered that the defendant's driving privileges are to be revoked immediately and for 10 years upon release from custody.

AS TO COUNT 2 VEHICULAR HOMICIDE : JOSHUA DAVID VORTHERMS shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for fifteen (15) years, with five (5) years suspended, consecutive to Count 1. The defendant shall pay $104.00 court costs to be collected by the Board of Pardons and Paroles. The defendant shall comply with all terms and conditions of parole and commit no violations of any laws for 5 years. It is ordered that the defendant's driving privileges are to be revoked immediately and for 10 years upon release from custody.

AS TO COUNT 3 VEHICULAR BATTERY : JOSHUA DAVID VORTHERMS shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years, with the sentence suspended consecutive to Counts 1 & 2. The defendant shall commit no violations of parole and no violations of any laws for 10 years. The defendant shall pay $104.00 court costs to be collected by the Board of Pardons and Paroles. It is ordered that the defendant's driving privileges are to be revoked immediately and for 3 years upon release from custody.

It is ordered that the defendant shall provide a DNA sample upon intake into the South Dakota State Penitentiary or the Minnehaha County Jail, pursuant to SDCL 23 – 5A – 5, provided the defendant has not previously done so at the time of arrest and booking for this matter.

AS TO COUNT 4 DWI-UNDER THE INFLUENCE : The Court pronounced no sentence as to Count 4.

AS TO COUNT 5 DWI-0.08% OR MORE ALCOHOL BY WEIGHT IN THE BLOOD : JOSHUA DAVID VORTHERMS shall serve 364 days in the Minnehaha County Jail, located in Sioux Falls, South Dakota with the sentence suspended concurrent with Count 1. The defendant shall pay $84.00 court costs and $50.00 DUI surcharge fee to be collected by the Board of Pardons and Paroles. The defendant shall comply with all terms and conditions of parole and commit no violations of the law for 364 days. It is ordered that the defendant's driving privileges are to be revoked immediately and for 30 days upon release from custody.

The defendant was remanded into custody for transport to the South Dakota State Penitentiary, there to be kept, fed and clothed according to the rules and discipline governing the South Dakota State Penitentiary.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 24th day of June, 2019.

FILED
JUN 25 2019
Minnehaha County, S.D.
Clerk Circuit Court

BY THE COURT:

JUDGE ROBIN J. HOUWMAN
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk
By: _____ Deputy

UNIFIED JUDICIAL SYSTEM STATE OF SOUTH DAKOTA

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29070

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSHUA DAVID VORTHERMS,

Defendant and Appellant.

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

THE HONORABLE ROBIN J. HOUWMAN
Circuit Court Judge

APPELLEE'S BRIEF

JASON R. RAVNSBORG
ATTORNEY GENERAL

Brigid C. Hoffman
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Nichole A. Carper
Burd & Carper Law Office
4900 E. 57th Street, Suite A
Sioux Falls, SD 57108
Telephone: (605) 332-4351
E-mail: nichole@burdandcarper.com

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed July 19, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29070

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSHUA DAVID VORTHERMS,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff and Appellee, State of South Dakota, is referred to as "State." Defendant and Appellant, Joshua David Vortherms, is referred to as "Vortherms." References to documents are designated as follows:

Minnehaha County Criminal File No. 17-8474..... SR

Appellant's Brief..... AB

Motion Hearing Transcript..... MT

Jury Trial Transcript Vol. 1..... JT1

Jury Trial Transcript Vol. 2..... JT2

All document designations are followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

This is an appeal of a Judgment and Sentence filed on June 25, 2019, by the Honorable Robin J. Houwman, Circuit Court Judge, Second Judicial Circuit, Minnehaha County. SR 588. On July 19, 2019, Vortherms filed a Notice of Appeal. SR 590. This Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE CIRCUIT COURT ERRED BY DENYING VORTHERMS'S MOTION TO DISMISS?

The circuit court denied Vortherms's motion to suppress the results of a warrantless blood draw because exigent circumstances created an exception to the warrant requirement.

Missouri v. McNeely, 569 U.S. 141 (2013)

State v. Fischer, 2016 S.D. 12, 875 N.W.2d 40

II

WHETHER VORTHERMS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL COGNIZABLE ON DIRECT APPEAL?

The circuit court did not address this issue.

State v. Golliher-Weyer, 2016 S.D. 10, 875 N.W.2d 28

State v. Phillips, 2018 S.D. 2, 906 N.W.2d 411

State v. Hannemann, 2012 S.D. 79, 823 N.W.2d 357

STATEMENT OF THE CASE

On November 16, 2017, a Minnehaha County Grand Jury indicted Vortherms for Counts 1 and 2: Vehicular Homicide, a Class 3 felony in violation of SDCL 22-16-41; Count 3: Vehicular Battery, a Class 4 felony in violation of SDCL 22-18-36; Count 4: Driving While Intoxicated, a Class 1 misdemeanor in violation of SDCL 32-23-1(2); Count 5: Driving While Intoxicated, a Class 1 misdemeanor in violation of SDCL 32-23-1(1); Count 6: Reckless Driving, a Class 1 misdemeanor in violation of SDCL 32-24-1; and Count 7: Speeding on the Interstate, a Class 2 misdemeanor in violation of SDCL 32-25-4. SR 14.

On February 14, 2019, Vortherms filed a Motion to Suppress the results of a blood test obtained without a warrant. SR 35. On March 11, 2019, a hearing was held, and the court denied the motion, finding that exigent circumstances allowed for an exception to the requirement for a warrant. MT 38.

A jury trial was held April 1-4, 2019. SR 558. The State dismissed Counts 6 and 7 on the first day of trial. JT1 3. Vortherms moved for a Judgment of Acquittal as to all remaining counts at the conclusion of the State's case-in-chief. JT2 330. The court denied the motion. JT2 330-32. The jury returned a verdict of guilty as to Counts 1-5. SR 126.

A sentencing hearing was held June 11, 2019, and on June 25, 2019, the court filed its Judgment and Sentence. SR 588. As to

Count 1, the court sentenced Vortherms to fifteen years in the South Dakota State Penitentiary with credit for 89 days served, ordered him to pay court costs and $317,249.20 in restitution, and revoked his driving privileges for ten years following his release from custody. *Id.* As to Count 2, Vortherms was sentenced to fifteen years in the penitentiary with five years suspended to run consecutive to Count 1, as well as court costs and revoked driving privileges for ten years following his release from custody. *Id.* As to Count 3, Vortherms was sentenced to ten years suspended to run consecutive to Counts 1 and 2, as well as court costs and revoked driving privileges for three years following his release from custody. *Id.* The court did not pronounce a sentence as to Count 4. *Id.* As to Count 5, Vortherms was sentenced to 364 days in the Minnehaha County Jail suspended to run concurrent with Count 1, as well as court costs, a DUI surcharge fee, and revoked driving privileges for thirty days following his release from custody. *Id.* He filed a Notice of Appeal on July 19, 2019. SR 590.

STATEMENT OF THE FACTS

On Saturday, July 1, 2017, at about 2:15 a.m., Christopher Schoepf, an off-duty detective with the Sioux Falls Police Department, was driving west on I-90 with his girlfriend and his children. JT2 159-61. He was travelling from Luverne, Minnesota, back home to Sioux Falls after attending a movie at the drive-in theater in Luverne.

JT2 161. Past the Brandon exit and a construction zone,[1] Schoepf noted skid marks heading into a north ditch and a cloud of dust in the air. JT2 161-62. He then saw a shirtless man standing on the shoulder, waving at traffic. JT2 162. Schoepf told his girlfriend to call 911. *Id.*

After finding a location to turn around and park, Schoepf returned to where he had seen the man, but could not locate him. JT2 162-63. He then heard a young girl's voice yelling for help and he went down a steep hill into the ditch, following her voice. JT2 163. He noted a white vehicle present at the scene. *Id.* He also saw a fully dressed man—not the shirtless one he had previously seen—lying on the ground. *Id.*

Schoepf located the vehicle the girl was in—a Subaru—resting on its passenger side with the hood facing the interstate. JT2 163, 165. The girl, S.F., asked where her father and his girlfriend were, but Schoepf saw that there was no one else in the vehicle. JT2 164. S.F. said that her leg had been hurt. *Id.* After law enforcement officers and first responders arrived on the scene, Schoepf assisted them in removing S.F. from the Subaru through the broken back-hatch window and she was taken to the hospital. JT2 165-66. The body of a woman was found as S.F. was removed from the Subaru. JT2 165.

[1] In the construction zone both eastbound lanes of travel were closed, resulting in two lanes of divided travel in the westbound lanes of I-90. JT2 305. The crash site was about half a mile past the closed lanes of travel. JT2 306.

S.F., who was eleven years old at the time of the accident, had also been to the movies at the drive-in theater in Luverne with her father, Shannon Fischer, and his girlfriend, Anna Mason. JT2 169-70. Anna was driving that night. JT2 170. S.F. fell asleep after the first movie and did not wake up until the Subaru was rolling. JT2 171. She then remembered darkness and realizing she was alone in the vehicle. *Id.* Prior to Schoepf's arrival, S.F. saw a shirtless man exit a white pickup nearby and walk out of the ditch. JT2 172. She called to him for help. JT2 171. He replied he could not help her because of barbed wire in the ditch. JT2 172.

The shirtless man—later identified as Vortherms—made his way a quarter of a mile from the crash site to the Holiday Inn Express located near the Brandon exit after attempting to waive down traffic. JT2 179-80, 184. Trooper Patrick Bumann arrived at the Holiday Inn Express at about 2:31 a.m. and observed Vortherms in the main lobby with "no shirt on, black shorts and one shoe[.]" JT2 180. Vortherms, who was bloody, held a cloth to an injury on his head. *Id.* Trooper Bumann smelled alcohol emanating from Vortherms and proceeded to ask him questions about the crash. JT2 181.

Vortherms reported that he had been in a white pickup and he had been cruising "with a buddy" but could not recall his friend's name. *Id.* He claimed to have been in the passenger's seat but could not recall if it was the front or rear passenger seat. JT2 182. He said that he had

had a few alcoholic drinks. JT2 181-82. He further stated that he had woken up and heard a girl screaming and so he left the scene. JT2 182. He had difficulty staying conscious during his encounter with Trooper Bumann. JT2 195.

Trooper Bumann decided not to perform field sobriety tests on Vortherms due to his injuries. JT2 189. Vortherms was placed in an ambulance and left the scene at 2:52 a.m., arriving at Avera McKennan Hospital at about 3:06 a.m. *Id.* Trooper Bumann followed the ambulance and, arriving at the hospital, heard that Vortherms would soon be going into surgery. JT2 190. Determining there was a need to preserve evidence pursuant to a possible DUI investigation, Trooper Bumann asked a phlebotomist to withdraw a sample of Vortherms's blood at 3:17 a.m. *Id.* Another blood sample was withdrawn from Vortherms following his surgery pursuant to a search warrant at 6:44 a.m. JT2 192. Testing indicated that Vortherm's blood alcohol content was 0.159 percent by weight at 3:17 a.m. and 0.093 percent by weight at 6:44 a.m. JT2 213, 218; SR 88, 90.

Subsequent investigation indicated that Vortherms was indeed the driver of the white pickup due to the large number of personal items and documents belonging to Vortherms found in the pickup, including his other shoe. JT2 231, 233, 240, 249, 250. DNA testing also indicated that spots of blood throughout the pickup originated from Vortherms. JT2 278-79; SR 92.

Trooper Matthew Wosje testified that he had sixteen years of experience with the Highway Patrol and specialized training in accident reconstruction and how to gather data from air bag control modules (ACMs). JT2 286. He testified at trial that the ACM collected from the pickup indicated that Vortherms had been travelling 93 miles per hour five seconds before the crash, with the gas pedal pushed all the way down. JT2 289; SR 98. Four seconds before the crash he was travelling 95 miles per hour with the gas pedal still pushed all the way down; three seconds before the crash he was travelling 96 miles per hour and started to release the gas pedal; at two seconds he was travelling 94 miles per hour and released the gas pedal, and one second before the crash he was going 85 miles per hour. JT2 289-90; SR 98. Through Trooper Wosje's testimony, the State introduced a report generated from the data retrieved from Vortherms's pickup. JT2 288; SR 98. Anna's Subaru did not have an ACM that provided information indicating her speed at the time of the accident. JT2 288. The speed limit where the accident occurred was 80 miles per hour. JT2 307.

Trooper Angel Duran-Garcia, who testified that he had nine years of experience in law enforcement, specialized training and certification in accident reconstruction, and experience investigating forty-nine prior crashes, generated an initial accident reconstruction report. JT2 300-01. His initial report indicated that the vehicles had not made contact

during the accident. JT2 311.[2] However, after reviewing the report of the defense expert, Trooper Duran-Garcia realized he had incorrectly identified the paths of the vehicles. JT2 311, 379. Upon further examination of the photographs of the skid marks and other evidence collected, Trooper Duran-Garcia concluded that the vehicles had made contact after Vortherms lost control of his pickup as he was passing the Subaru and veered into the Subaru's lane (the driving lane), contacting the front end of the Subaru and causing it to lose control, resulting in the crash. JT2 316-19, 375.

Trooper Duran-Garcia was able to determine where the contact occurred based on the photographs of the skid marks and each vehicle's final resting place. JT2 316-19. Shadow marks left by the pickup on the road surface indicated that it lost control as it veered into the Subaru's lane, while the Subaru had not left any marks until the pickup entered the driving lane and made contact, causing the Subaru to change direction. JT2 316-18, 374. Evidence further indicated that the Subaru's front tire had contacted the pickup and rubbed off, leaving a black mark on the front passenger side of the pickup. JT2 314-16. Vortherms's speed and intoxication were contributing factors in the crash. JT2 322.

---

[2] Although he did not initially conclude that the vehicles had made contact, he determined that Vortherms had lost control of his pickup while passing the Subaru, causing Anna to take evasive action, resulting in both cars crashing in the ditch. SR 5.

As a result of the accident, Shannon Fischer and Anna Mason died due to multiple blunt force trauma injuries. JT2 153, 158; SR 72, 78. Toxicology reports indicated that neither Shannon nor Anna had been drinking that night. JT2 153, 158; SR 77, 83. S.F. suffered a comminuted displaced femur fracture to her right leg. JT2 284. She underwent surgery and physical therapy, although she continued to experience trouble walking. JT2 174, 284.

ARGUMENTS

I

THE CIRCUIT COURT PROPERLY DENIED VORTHERMS'S MOTION TO SUPPRESS.

A. Standard of Review and Introduction

This Court reviews a circuit court's "denial of a motion to suppress involving an alleged violation of a constitutionally protected right under the de novo standard of review. The court's findings of fact are reviewed under the clearly erroneous standard, but we give no deference to the court's conclusions of law." *State v. Fischer*, 2016 S.D. 12, ¶ 10, 875 N.W.2d 40, 44.

The Fourth Amendment's prohibition against unreasonable searches and seizures generally requires a warrant based on probable cause issued by a neutral judicial officer before the search of an individual. *Id.* ¶ 13. If no warrant is obtained, the search is per se unreasonable, and it is the State's burden to prove an exception. *Id.*

The presence of exigent circumstances is one such exception. *Id.* The exigent circumstances exception applies "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Missouri v. McNeely,* 569 U.S. 141, 148-49 (2013). In other words, an emergency exists when an officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant . . . threatened the destruction of evidence." *Schmerber v. California*, 384 U.S. 757, 770 (1966) (internal quotation marks omitted).[3]

The question of whether exigent circumstances existed is analyzed under the totality of the circumstances, with each case based "on its own facts and circumstances." *McNeely,* 569 U.S. at 150. While, under *McNeely*, there is no per se rule that the dissipation of alcohol in an individual's bloodstream creates an exigent circumstance, that fact is still worthy of consideration. *Id.* at 165.

B. Exigent Circumstances Justified the First Blood Draw

Vortherms argues that the circuit court should have suppressed evidence of the first blood draw because there were enough resources and time available for officers to obtain a warrant. AB 11, 14. The

[3] Additionally, in the context of blood draws, intrusion into the human body must be supported by probable cause, and the blood draw must be conducted in a reasonable manner. *Schmerber*, 384 U.S. at 768. There is no dispute this blood draw was supported by probable cause and conducted reasonably.

totality of the circumstances extending from Trooper Bumann's dispatch up to the time of the first blood draw, however, support the circuit court's conclusion that exigent circumstances were present justifying the first blood draw.

1. Motions Hearing Testimony[4]

A review of Trooper Bumann's testimony at the motions hearing is warranted in order to establish the totality of the circumstances present during the early morning of Saturday, July 1, 2017. Trooper Bumann testified that he had experience with obtaining telephonic warrants, as he had previously obtained them for blood samples about thirty times. MT 5. He testified that it could be difficult to predict how long it would take to obtain a warrant because multiple judges might need to be called before one answered, particularly early in the morning or on a weekend, as was the case here. MT 5-6. Furthermore, facts in support of probable cause may take time to obtain. MT 6.

Trooper Bumann was dispatched at 2:18 a.m. on July 1. *Id.* He knew a few facts before arriving on the scene: there was a rollover crash, there was a white male wearing black shorts and no shoes trying to flag down traffic, and the male had made his way to the Holiday Inn in Brandon. MT 6-7. When he arrived at the scene at about 2:31 a.m.,

[4] The motions hearing testimony and the dash cam footage partly relied upon by Vortherms in his Appellant's Brief will be addressed separately for reasons discussed below.

Trooper Bumann was first told of multiple fatalities, as well as one person possibly missing from the scene. MT 7.

At the Holiday Inn, Trooper Bumann observed an injured Vortherms holding a cloth to an injury on his head. *Id.* In order to conclusively identify Vortherms, Trooper Bumann had to request dispatch to contact Minnesota. MT 8. As he asked Vortherms questions about the crash, Trooper Bumann could smell the odor of alcohol on Vortherms, and Vortherms told Trooper Bumann that he had had a few drinks that night. MT 8-9. Vortherms stated that he had not been driving, had been sitting in a passenger seat, and had been "cruising" with a "buddy," but he could not answer further questions about his "buddy." MT 9.

Vortherms had difficulty remaining conscious and an ambulance came to transport Vortherms to the hospital. MT 10. There was a brief effort to obtain a PBT from Vortherms in the back of the ambulance. MT 10. The ambulance left the scene at 2:52 a.m., only twenty-one minutes after Trooper Bumann arrived and began his investigation. MT 11, 22. The ambulance arrived at Avera McKennan Hospital at 3:06 a.m., fourteen minutes later. MT 11.

Trooper Bumann intended to continue his investigation at the hospital by attempting to interview Vortherms. *Id.* However, shortly after arriving at the hospital, Trooper Bumann understood that his investigation would be delayed by Vortherms going into surgery. *Id.* It

was then that Trooper Bumann understood that he needed to obtain a blood draw in order to preserve evidence. MT 11-12.

Trooper Bumann testified that, based on his prior experience with Avera, once a suspect is in surgery you have to wait until after surgery to get a blood sample and there is no way of telling how long surgery will take, if there will be a blood transfusion, or if medications will be used that could potentially taint a sample. MT 12-13. Trooper Bumann knew that medical staff will not delay a surgery to wait for a warrant to conduct a blood draw because their goal is the preservation of life. MT 13. He also knew that alcohol in the blood dissipates with time. *Id.* In his experience, he was also aware that it could take between fifteen minutes to an hour to wait for a phlebotomist at Avera to conduct the blood draw. MT 23. Ultimately, the first blood draw was conducted at 3:17 a.m., while Trooper Bumann had only first encountered Vortherms at 2:31 a.m. MT 13.

Based on this testimony, the circuit court concluded that exigent circumstances existed. MT 38. In support of its conclusion, the court cited the length of time it could possibly take to obtain a warrant for a blood sample as compared to Vortherms's imminent surgery. *Id.* The court found that there was no evidence of other officers available to obtain the warrant, in part because other officers that were present at the scene were preoccupied with finding a possibly missing person involved in a deadly vehicle accident. MT 39-40.

2. Trooper Bumann's Testimony and Relevant Case Law Support the Circuit Court's Conclusion

Analysis cannot be solely focused on the short period of time—approximately twenty-one minutes—Trooper Bumann was at the Holiday Inn before Vortherms was taken away by ambulance. The events of these first moments must be considered in the totality of circumstances, and they should be placed in the context of the emergency that was taking place and the limited ability of officers to predict what would follow.

Trooper Bumann arrived approximately fifteen minutes after Schoepf had first come across the accident scene. Trooper Bumann, as well as the other officers at the Holiday Inn, were just beginning to figure out the situation by attempting to gather information from Vortherms. Furthermore, officers at the Holiday Inn were dealing with potential medical emergencies. An injured Vortherms was slipping in and out of consciousness. Furthermore, Vortherms suggested that another unknown person might have been involved in the crash, a fact that no one was able to conclusively substantiate or repudiate on the spot. Officers attempted to gather further evidence supporting probable cause in the form of a PBT immediately before the ambulance left the scene. Yet, Vortherms asserts that an officer should have cut investigation short to obtain a warrant, despite these immediate concerns.

The preoccupation of law enforcement with other investigative tasks was discussed by this Court in *Fischer*, 2016 S.D. 12, ¶ 17, 875 N.W.2d at 46. This Court observed that the "nature of the fatal injuries received by the victims resulted in an extensive debris field that required immediate attention to ensure that all evidence was located, documented, and secured in the event of potentially imminent rain." *Id.* Evidence needed to be covered with tarps, witnesses identified, and traffic and crowd control performed. *Id.* Due to these tasks, "law enforcement reasonably believed that other tasks they were performing took priority over taking time to get a warrant." *Id.*

It is true that the details of the accident scene in *Fischer* were horrific, but that does not minimize the fact that here there were known fatalities, known severe injuries, and a potential missing victim. Other courts have also held that an officer's preoccupation with other aspects of an emergency response taking time away from applying for a warrant does not necessarily disturb a finding of exigent circumstances. *See People v. Ackerman*, 346 P.3d 61, 66-67, 68 (Colo. 2015) (reversing a lower court's suppression of a blood draw because the officers did not know at the beginning of an investigation that the defendant would become unavailable during surgery and further noting that "legitimate logistical challenges must be considered in evaluating exigency under the totality of the circumstances."); *State v. Granger*, 761 S.E.2d 923, 928 (N.C. Ct. App. 2014) (affirming a finding of exigent circumstances

partly because the officer "did not have the opportunity to investigate the matter adequately until he arrived at the hospital because of Defendant's injuries and need for medical care."); *State v. Sauter*, 908 N.W.2d 697, 702 (N.D. 2018) ("Deliberation away from the demands and pressing needs of the scene may lead one to conclude there were moments in which the officer could . . . have applied for a warrant. But, we believe the opportunity and necessity to do so should be determined by the circumstances of the moment[.]")

It was objectively reasonable for all officers at the Holiday Inn to continue to focus attention on the emergency and be available to respond to new information as it became available, rather than taking an unknown amount of time away from their duties to obtain a warrant, especially considering that this was still in the earliest stages of the response. Officers had not even been on the scene a full hour before Vortherms was transported to the hospital. Specifically, Trooper Bumann, acting as an objectively reasonable officer, sought to continue obtaining evidence and information from Vortherms that could assist in the investigation for as long as he could.

Even considering the facts with the benefit of hindsight, based on Trooper Bumann's testimony about his experience with obtaining warrants at night and on the weekends, there is no clear evidence that a warrant could have been obtained before Vortherms went into surgery, even if another officer had attempted to do so. Vortherms was

removed from the scene only twenty-one minutes after Trooper Bumann's initial contact with him. Furthermore, Trooper Bumann became aware that Vortherms would be going into surgery just after his arrival at the hospital at 3:06 a.m., only about thirty-five minutes after his initial contact with him. If any other officer had begun the warrant process at the Holiday Inn, they very likely would have needed to leave the scene, drive to Avera, and attempt to serve the warrant before Vortherms went into surgery—an effort that may not have been successful. MT 24. Alternatively, if an officer from another law enforcement agency such as the Sioux Falls Police Department was called to obtain a warrant, Trooper Bumann would have needed to discuss the facts supporting probable cause with that officer. *Id.*

Certainly, Trooper Bumann, nor any other officer present at the scene, had reason to know what circumstances would present themselves once Vortherms reached the hospital. It was not until then that Trooper Bumann knew he could not continue the investigation as planned. Rather, he was suddenly facing a "now or never situation" due to Vortherms's need for surgery. *See McNeely*, 569 U.S. at 153. At that point, it was objectively reasonable for Trooper Bumann, based on his experience with the amount of time it could take to obtain a warrant and knowledge that medical personnel would not delay Vortherms's medical treatment, to obtain a blood draw in order to preserve evidence tied to a deadly crash.

Additional relevant case law further supports a finding of exigent circumstances based on Trooper Bumann's testimony. While the *McNeely* Court could not provide a detailed analysis of whether exigent circumstances existed in the case before it because it had been argued on the basis of whether drunk-driving investigations create per se exigencies, the Court did remark on several circumstances supporting the lower court's finding that no exigency existed. *Id.* at 163, 165. The arresting officer in that case believed that no warrant was necessary, although he was "'sure' a prosecuting attorney was on call and even though he had no reason to believe that a magistrate judge would have been unavailable." *Id.* at 163. Additionally, the officer testified that he had never had difficulty in the past obtaining warrants prior to taking blood samples. *Id.*

The circumstances here are markedly different. Trooper Bumann testified that, based on his prior experience with obtaining warrants for blood draws early in the morning and on weekends, he did not know how long it would take him to contact a judge. He cited one instance in which he had to call nine judges before one answered. MT 6.

The *McNeely* Court also noted:

> While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation. For that reason, exigent circumstances justifying a warrantless blood sample

> may arise in the regular course of law enforcement due to delays from the warrant application process.

McNeely, at 156.

This Court has also recognized similar circumstances justifying a blood draw. In *Fischer*, there was a similar concern that the defendant would undergo medical procedures that could compromise the results of blood alcohol testing. 2016 S.D. 12, ¶ 18, 875 N.W.2d at 47. Additionally, in *Fischer*, law enforcement knew that the defendant would be unavailable for some time. *Id.*

The same concerns existed here. The longer Trooper Bumann waited to obtain a warrant and did not acquire a sample until after Vortherms was out of surgery and had potentially received medications or a blood transfusion, the accuracy of the sample would be questionable. The need to preserve evidence in a case involving a deadly crash in which alcohol was potentially a factor justified exigent circumstances considering this potential delay.

Furthermore, while certain technological improvements may increase the ease with which a warrant may be obtained, the *McNeely* Court remarked "improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest." *Id.* at 155. Although warrants are now easier to obtain through improved technology, such as the telephonic system Trooper Bumann was trained in, there is

never a guarantee a judge is available when necessary, especially if the warrant is needed late at night or early in the morning on a weekend.

Thus, the circuit court did not err by denying Vortherms's motion to suppress because Trooper Bumann was presented with exigent circumstances making it objectively reasonable for him to obtain blood sample from Vortherms without a warrant.

3. Dash Cam Footage

Vortherms's argument relies partly upon Trooper Bumann's dash cam footage of his encounter with Vortherms at the Holiday Inn. This footage was introduced at trial as State's Exhibit 3 and was filed as a physical exhibit on April 4, 2019. JT2 185; SR 602. This footage was not marked as an exhibit at the motions hearing, nor is there an indication that the circuit court relied upon the dash cam footage. *See* MT 2-3 (no exhibits marked at the hearing; court states that it reviewed briefs filed by the parties, the file and relevant case law prior to the hearing). The court relied upon the testimony of Trooper Bumann. Since the dash cam was not introduced at the hearing, any reliance upon the dash cam is waived on appeal. *State v. Bowker*, 2008 S.D. 61, ¶ 35 n.4, 754 N.W.2d 56, 67 n.4.

Even if the dash cam evidence is considered, what it demonstrates only reinforces a finding of exigent circumstances. The dash cam shows that Trooper Bumann arrived on scene and asked Vortherms to come out of the Holiday Inn lobby to stand in front of his

patrol vehicle at approximately 2:31 a.m., when sirens can still be heard in the distance. State's Exhibit 3. Soon after, Vortherms asserted he was not driving, had a few drinks that night, and had been cruising with a buddy but could not remember his buddy's name. *Id.* Furthermore, upon first contact Vortherms gave Trooper Bumann his true name and said he had a Minnesota license, but he could not spell his last name beyond the first letter or remember his birthday. *Id.* Whatever Trooper Bumann's suspicions may have been regarding Vortherms's role in the crash, Vortherms was possibly demonstrating serious memory problems, the result of his head injury, making it difficult to verify any information Vortherms gave him. Due to the emergency, objectively reasonable officers at the scene had to seriously consider Vortherms's assertion that another unknown person may have been involved in the crash.

It is true there were three officers on the scene within the first few minutes of the dash cam footage. *Id.* Each were preoccupied, however, throughout the short period of time documented in the video. The preservation of evidence is one aspect of concern, as Trooper Bumann asked Vortherms various questions about the crash. *Id.* He also photographed Vortherms's injuries starting at about 2:35 a.m. *Id.*

Their concern with figuring out Vortherms's role in the crash or if another victim was unaccounted was also made apparent by Trooper Bumann's questions regarding whether Vortherms was driving, who

else was in the car with him, and which passenger seat he had been sitting in. *Id.* This concern continues to be evident when at 2:38 a.m. the other trooper at the scene told Vortherms to get serious and try to remember who else was in his pickup. *Id.*

Finally, their preoccupation with Vortherms's condition is apparent as well. The other trooper sets out a first aid kit on the hood of Trooper Bumann's vehicle at 2:33 a.m. *Id.* By about 2:38 a.m., Vortherms begins to be less responsive to the other trooper's questions about where he had been that night and what his name was. *Id.* At about 2:40 a.m.—a mere nine minutes after Trooper Bumann encountered Vortherms—the third officer, who had been attentively monitoring Vortherms while the troopers moved to the side to discuss a crash team response[5], called the troopers over as Vortherms lost consciousness. *Id.* The officers were then immediately preoccupied with administering first aid and keeping Vortherms alert as an EMT came into view of the dash cam a few seconds later. *Id.* Their efforts were then focused on getting Vortherms onto a stretcher and into the ambulance until the video ends at about 2:45 a.m. *Id.* As alluded to in the motions hearing, attempts were made to gather further evidence in the form of a PBT before the ambulance left the scene at 2:52 a.m.

[5] It is in the context of this brief exchange regarding what was an appropriate response to the emergency that one of the troopers mentioned that he had "plenty of guys."

Even considering the dash cam footage, it is apparent that considering the context of the emergency response, there was no reasonable opportunity for officers to cease their attempts at questioning Vortherms and gather evidence, there was no reasonable opportunity to delay planning a response, and there was no reasonable opportunity to cease monitoring Vortherms's serious condition in order to apply for a search warrant at the scene of the Holiday Inn when no one was aware of what would transpire at the hospital.

II

VORTHERMS DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL COGNIZABLE ON DIRECT APPEAL.

A. Standard of Review and Introduction

Absent exceptional circumstances, this Court will generally not consider ineffective assistance of counsel claims on direct appeal. *State v. Golliher-Weyer*, 2016 S.D. 10, ¶ 8, 875 N.W.2d 28, 31. This is because ineffective assistance claims are better addressed in habeas corpus proceedings, which allow counsel to explain their actions or strategies. *State v. Hauge*, 2019 S.D. 45, ¶ 18, 932 N.W.2d 165, 171.

In bringing this claim, a defendant must demonstrate that trial counsel was ineffective, and the defendant was prejudiced as a result. *Golliher-Weyer*, 2016 S.D. 10, ¶ 8, 875 N.W.2d at 31. Counsel is ineffective when "counsel's representation fell below an objective standard of reasonableness." *Id.* Prejudice is demonstrated by "a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

On direct appeal, this Court only addresses these claims "when trial counsel was so ineffective and counsel's representation so casual as to represent a manifest usurpation of the defendant's constitutional rights." *Id.* (internal quotation marks omitted). "In other words, it must be obvious on the record that the defendant has been deprived of his constitutional rights to counsel and a fair trial." *State v. Phillips*, 2018 S.D. 2, ¶ 22, 906 N.W.2d 411, 417 (internal quotation marks omitted).

B. Trial Counsel's Strategic Decisions Did Not Result in a Cognizable Claim of Ineffective Assistance of Counsel on Direct Appeal

Vortherms argues that trial counsel was so ineffective in several respects that such errors are reviewable on direct appeal. First, Vortherms claims that his trial counsel was ineffective for failing to challenge the admissibility of Trooper Duran-Garcia's testimony regarding his accident reconstruction report. AB 15. Specifically, Vortherms asserts that Trooper Duran-Garcia's "methods and application of those methods" should have been tested before trial in a *Daubert* hearing. AB 16. Second, Vortherms contends that trial counsel was ineffective for failing to object or inquire into Trooper Wosje's methodology regarding the report retrieved from the ACM device in his pickup. AB 19. Third, Vortherms argues that a potential

witness's testimony could have changed the jury's decision if she had testified. AB 22. Vortherms argues that these decisions, when combined, resulted in Vortherms receiving an unfair trail. AB 23.

I. Trooper Duran-Garcia and Accident Reconstruction

Regarding Vortherms's claim of error regarding the testimony of Trooper Duran-Garcia, this Court has noted that trial counsel often has strategic reasons for how they deal with experts. One such reason may be a belief that an expert is properly qualified, and that cross-examination will best call into question the expert's methodology. *See Phillips*, 2018 S.D. 2, ¶ 24, 906 N.W.2d at 417–18.

Here, Vortherms's trial counsel did, in fact, engage in cross-examination of Trooper Duran-Garcia regarding why he re-wrote his report. JT2 325-28, 377-81. But not only did Vortherms's trial counsel cross-examine Trooper Duran-Garcia to challenge his credibility, counsel called a competing expert witness to provide contradictory evidence for the jury to consider. JT2 334. Vortherms's counsel made reasonable tactical decisions about the best course of action for challenging Trooper Duran-Garcia's testimony, which this Court does not second-guess nor "substitute [its] own theoretical judgment for that of defense counsel." *State v. Beynon*, 484 N.W.2d 898, 907 (S.D. 1992).

The results of a hypothetical objection or *Daubert* hearing are purely speculative. Courts have "considerable leeway" in deciding whether to allow expert testimony and the application of *Daubert*

factors[6] are flexible and cannot be applied with rigidity. *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 25, 737 N.W.2d 397, 406. Indeed, this Court has stated under SDCL 19-19-702, all that is needed to be established is that the offered expert testimony rests upon a reliable foundation and is relevant. *Id.* Other deficiencies in an expert's opinion or qualifications can be tested through the adversary process at trial; there does not need to be a showing that the expert's opinion is correct. *Id.,* ¶ 24; *see also State v. Fischer*, 2011 S.D. 74, ¶ 42, 805 N.W.2d 571, 480 (stating that a circuit court's ruling on the admission of expert testimony will not be disturbed "unless there is no evidence that the witness had the qualifications of an expert or the trial court has proceeded upon erroneous standards"). When the opinions of opposing expert opinions are introduced, as was the case here, reliability or validity of their opinions is a question for the jury. *State v. Wills*, 2018 S.D. 21, ¶ 26, 908 N.W.2d 757, 765.

Trooper Duran-Garcia testified to his experience and special certification in accident reconstruction, how he based his opinion on the

---

[6] "A trial court can consider the following nonexclusive guidelines for assessing an expert's methodology: (1) whether the method is testable or falsifiable; (2) whether the method was subjected to peer review; (3) the known or potential error rate; (4) whether standards exist to control procedures for the method; (5) whether the method is generally accepted; (6) the relationship of the technique to methods that have been established as reliable; (7) the qualifications of the expert; and (8) the non-judicial uses to which the method has been put." *State v. Guthrie*, 2001 S.D. 61, ¶ 35, 627 N.W.2d 401, 416. *See also State v. Huber*, 2010 S.D. 63, ¶ 26, 789 N.W.2d 283, 291 ("[T]his Court has never required a circuit court to address the eight factors in every case[.]")

evidence gathered from the scene, and he provided a reasoned explanation for his mistake in his first report. JT2 299-302, 307-11. Thus, considering this Court's guidance on the flexible standards surrounding the admissibility of expert testimony, on this record there is no indication that Trooper Duran-Garcia should not have been allowed to testify. Vortherms's trial counsel challenged his testimony through the adversarial process by cross-examination and introduction of another expert opinion. There is no demonstration of a probable different result, nor obvious mistake in the record generating a "manifest usurpation" of Vortherm's constitutional rights regarding trial counsel's approach to this expert's testimony.

A. Trooper Wosje and the Crash Data Report

Next, as to Vortherms's argument regarding Trooper Wosje's methodology, Vortherms himself concedes that other courts have established the admissibility of evidence retrieved from ACM devices and there is no authority from this Court on these devices. AB 19.[7] Trooper Wosje demonstrated his credentials and experience with ACM devices

[7] Utilizing various rationales, courts look favorably upon admitting evidence from crash data reports and/or testimony concerning the conclusions generated by these reports: *See e.g., State v. Clary*, 2016 WL 4525041 (Ariz. Ct. App. Aug. 30, 2016); *Matos v. State*, 899 So. 2d 403 (Fla. Ct. App. 2005); *Bachman v. Gen. Motors Corp.*, 776 N.E.2d 262 (Ill. Ct. App. 2002); *State v. Claerhout*, 453 P.3d 855 (Kan. 2019); *Easter v. State*, 115 A.3d 239 (Md. Ct. App. 2015); *Commonwealth v. Zimmermann*, 873 N.E.2d 1215 (Mass. Ct. App. 2007); *State v. Shabazz*, 946 A.2d 626 (N.J. Super. Ct. 2005); *People v. Christmann*, 776 N.Y.S.2d 437 (N.Y. Justice Ct. 2004); *Commonwealth v. Safka*, 95 A.3d 304 (Pa. Super. Ct. 2014), *aff'd,* 141 A.3d 1239 (Pa. 2016).

and accident reconstruction. JT2 286-88. As such, Vortherms's trial counsel may have believed that there was no basis to object or inquire into his testimony about the results from the ACM device either in a *Daubert* hearing or at trial. Nor is there evidence supporting a conclusion that the court should not have admitted the report generated from the ACM data or Trooper Wosje's testimony.

Vortherms's trial counsel did challenge Trooper Wosje's testimony in aspects he likely felt he had a basis to challenge. Trial counsel chose to voir dire Trooper Wosje on his ability to judge reaction times, and the court found that he was properly qualified as an expert in accident reconstruction. JT2 291, 293. Vortherms's counsel further chose to cross-examine Trooper Wosje on the matters he likely saw fit to properly challenge: no data was collected from the Subaru, Trooper Wosje had never interacted with Vortherms to gauge his impairment, and his investigation was limited solely to extracting data from the ACM. JT2 295-98. Cross-examination of Trooper Wosje on these topics may have been the best available strategy. Vortherms has not demonstrated trial counsel made a mistake regarding this evidence and testimony.

B. Potential Testimony of Megan Dower

At trial, Trooper Duran-Garcia testified that he interviewed Dower during his investigation because she stated she saw a Subaru swerving on the road that night. JT2 322-23. He became familiar with Dower through a Facebook post by a third-party. JT2 322. Trooper Duran-

Garcia determined that she had not been a witness, did not see license plates of vehicles involved, nor could she say who was driving that night because it was too dark. JT2 323. She also did not contact the Highway Patrol. *Id.*

It is ineffective assistance to fail to "inquire of known witnesses." *Dillon v. Weber*, 2007 S.D. 81, ¶ 13, 737 N.W.2d 420, 426. It is not ineffective assistance, however, to not call a witness if the potential witness could not have changed the outcome of the trial. *Denoyer v. Weber*, 2005 S.D. 43, ¶ 29, 694 N.W.2d 848, 857.

There is no showing Vortherms's trial counsel failed to investigate Dower. The court indicated at trial that Dower was going to testify as part of the defense's case. JT2 332, 369; *see also* SR 42, 43. She ultimately did not testify, however. Critically, there is no showing of prejudice because Dower's testimony may have been unhelpful to the defense based on problems with her credibility as alluded to by Trooper Duran-Garcia. There is no evidence on this record that Dower's testimony could have changed the result of the trial. *See State v. Hannemann*, 2012 S.D. 79, ¶ 15, 823 N.W.2d 357, 361.

C. Vortherms Did Not Receive Ineffective Assistance of Counsel

Vortherms suggests that trial counsel's combined decisions resulted in an unfair trial. AB 23. Vortherms has not succeeded in asserting any errors resulting in unfair prejudice; on this record Vortherms received a fair trial. *State v. Beck*, 2010 S.D. 52, ¶ 24, 785

N.W.2d 288, 296.[8] Vortherms's trial counsel did not engage in representation "so casual" as to constitute a reviewable claim on direct appeal, but rather challenged the State's evidence with what was likely perceived to be the best available means. Although Vortherms did not succeed, "[f]ailed trial strategy is not equivalent to ineffective assistance." *New v. Weber*, 1999 S.D. 125, ¶ 10, 600 N.W.2d 568, 574.

In any event, this claim is more properly addressed in a habeas hearing so that trial counsel may have the opportunity to defend their tactical decisions. *Hauge*, 2019 S.D. 45, ¶ 18, 932 N.W.2d at 171.

CONCLUSION

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

Respectfully submitted,

JASON R. RAVNSBORG
ATTORNEY GENERAL

/s/
Brigid C. Hoffman
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

[8] Vortherms makes passing reference to the fact that trial counsel did not cross-examine several of the State's witnesses. AB 21. This also could have been a strategic decision based on the desire not to "detract from the material issues" or adversely impact the credibility of the defense. *See Phillips*, 2018 S.D. 2, ¶ 24, 906 N.W.2d at 417–18.

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 7,206 words.

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

Dated this 14th day of April 2020.

/s/
Brigid C. Hoffman
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this April 14, 2020, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Joshua David Vortherms* was served via electronic mail upon Nichole A. Carper at nichole@burdandcarper.com.

/s/
Brigid C. Hoffman
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29070

STATE OF SOUTH DAKOTA
Plaintiff and Appellee,
vs.
Joshua Vortherms
Defendant and Appellant.

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Robin J. Houwman
Presiding Circuit Court Judge

APPELLANT'S REPLY BRIEF

ATTORNEY FOR APPELLANT
Nichole A. Carper
Burd & Carper Law Office
4900 East 57th Street
Suite A
Sioux Falls, SD 57108
(605) 332-4351

ATTORNEY FOR APPELLEE
Jason Ravnsburg – Attorney General
Brigid Hoffman – Deputy Attorney General
1302 E Hwy 14
Suite 1
Pierre, SD 5501-8501
(605) 773 3215

Table of Contents

Table of Authorities

Cases:

South Dakota Supreme Court:

8th Circuit Court of Appeals

State Supreme Courts

United States Supreme Court:

Statutes

Preliminary Statement

This brief refers to transcripts of the suppression hearing as "ST" followed by page and line citations.

Jurisdictional Statement

The Appellant Josh Vortherms was indicted on November 16, 2017 on two counts of Vehicular Homicide (SDCL 32-23-1), one count of Vehicular Battery (SDCL 32-23-1), and two counts of Driving under the Influence of Alcohol (SDCL 32-23-1). After a jury trial, Mr. Vortherms was convicted of 1 Count of Vehicular Battery, 2 Counts of Vehicular Homicide, and 1 Count of Driving under the Influence of Alcohol. On June 25, 2019, the Judgment and Sentence, signed by the Honorable Circuit Court Judge Robin Houwman, was filed in the 2nd Circuit Court. (SR 588-589). Mr. Vortherms filed Notice of Appeal with this Honorable Court on July 19, 2019. (SR 580).

Statement of Legal Issues

I. Whether the Circuit Court Abused its Discretion in Denying Mr. Vortherm's Motion to Suppress.

The Trial Court held that the warrantless blood draw was excepted from the warrant requirement based on the exigent circumstances exception to the warrant requirement.

Relevant Case Law:
Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552, 185 L.E.d2d 696 (2013)
State v. Fierro, 2014 S.D. 62, 853 N.W.2d 235.
State v. Fischer, 2016 S.D. 2, 875 N.W.2d 40.

II. Whether Mr. Vortherms received ineffective assistance of counsel cognizable on direct appeal.

Relevant Case Law:
State v. Thomas, 2011 S.D. 15, 796 N.W.2d 706

Statement of Facts

Mr. Vortherms relies on his statement of facts in his initial brief.

Response to State's Argument

This reply brief focuses only upon those arguments by the State that were not addressed in Mr. Vortherms' initial brief. Mr. Vortherms hereby incorporates his statement of facts and legal arguments into this response and does not waive any arguments asserted in his initial brief.

The Warrantless Blood Draw Violated Mr. Vortherms' Fourth Amendment Protection Against Unreasonable Search and Seizure and its Results Ought to have been Suppressed

Review of the Dash Camera Video

The State argues that the Court may not consider the dash camera evidence entered at trial in determining whether the officer faced exigent circumstances that obviated the need to seek a warrant. In making this argument, the State relies on a footnote in *State v Bowker*, 2008 SD 61, ¶35 754 N.W.2d 56 n.4. There, the majority was refuting a dissenting justice's reliance on a body camera recording. This Court noted:

> "while the dissent bases its argument chiefly on this tape, *throughout the trial and appellate proceedings, it played no part* in the issue of whether Bowker was free to leave or whether she was restrained at the time she made the statements that she sought to suppress. Since Bowker failed to introduce the tape at the hearing on the motion to suppress statements, or have it incorporated into those proceedings, those proceedings, any consideration of the content of the tape is waived on appeal."

(emphasis supplied). The Court went on to note "As an appellate court, we are confined to the record *and issues presented to us for judicial review*." *Id.* Mr. Vortherms' case presents a different circumstance in that the video is in the record for this Court to review and Mr. Vortherms has raised the issue on appeal for this Court's consideration.

Furthermore, to ignore evidence in the record would overlook this Court's decision in *State v Hett,* 2013 S.D. 47 ¶ 18, 834 N.W.2d 317, 323-24, in which the Court, in considering a suppression issue, reviewed a video recording introduced at trial by the State but not introduced at a suppression hearing. There, the Court was determining whether reasonable suspicion existed to support a stop based on a totality of the circumstances. The Court held:

> "This review is not limited to evidence considered at the suppression hearing, but may extend to evidence produced at trial. *See United States v. Hicks,* 978 F.2d 722, 724 (D.C.Cir.1992) (noting that "reviewing courts routinely consider trial evidence in affirming pre-trial suppression rulings."); *United States v. Brewer,* 624 F.3d 900, 905 (8th Cir.2010) (noting that " '[i]n reviewing the denial of a motion to suppress, [the court] must examine the entire record, not merely the evidence adduced at the suppression hearing.' ") (quoting *United States v. Anderson,* 339 F.3d 720, 723 (8th Cir.2003)."

In determining whether the trial court has committed clear error in its findings of fact, this Court has consistently reiterated that:

> "This court's function …is to determine whether the decision of the lower court lacks the support of substantial evidence, evolves from an erroneous view of the applicable law or whether, *considering the entire record,* we are left with a definite and firm conviction that a mistake has been made. *State v. Corder,* 460 N.W.2d 733 (S.D.1990). In making this determination, we review the evidence in a light most favorable to the trial court's decision." *Id.*(emphasis supplied).

See e.g. State v. Durke, 1999 SD 39 ¶11, 593 N.W.2d 407, 408 (quoting *State v. Baysinger,* 470 N.W.2d 840, 843 (S.D.1991)). Although the Court's review will be through a lens favorable to the Circuit Court's findings (*State v Lockstedt,* 2005 S.D. 47 ¶14, 695 N.W.2d 718, 722), this Court is not precluded from taking all of the evidence in the record into account in determining whether the trial court erred its finding, under the totality of the circumstances, that exigent circumstances existed.

But even assuming that this Court chooses not to consider the facts that are objectively ascertainable by review of the officer's dash camera, the facts testified to at the time of the suppression hearing by Trooper Bumann were insufficient to establish that exigent circumstances existed. According to Trooper Bumann's testimony at the suppression hearing:

- "Nearly an hour passed between the time he arrived on the scene and the warrantless blood draw. (ST 17: 5-11);
- There were other officers already at the scene when the Trooper arrived. (ST 17:1-2; 19:1-4);
- Those other officers were also investigating Mr. Vortherms' participation in the accident and intoxication at the scene. (ST 19:12-15);
- The three officers investigating Mr. Vortherms were not responding to the crash site or the victims, but rather ¼ mile away. There were other officers and emergency personnel responding to the crash site. (ST 20);
- Within seconds of arriving at the scene, the Trooper knew: Mr. Vortherms had a significant head injury (ST 7:22-23); he "had blood all over the front of his body" (ST 7:20) and that "there was a large gash on the side of his head." (ST 7:22-23); Mr. Vortherms was missing clothing (ST 7:19-20); that Mr. Vortherms was in the white pickup truck involved in the accident at the time of the accident (ST 9:3-9); that Mr. Vortherms smelled of alcohol (ST 8:21-22); and that Mr. Vortherms had "had a few" to drink. (ST 9:10-13). The Trooper also knew that an ambulance was *en route*.
- The Trooper attempted to "get a PBT off of him" when "he was in the back of the ambulance." (ST 10:8-11).
- Approximately 30 minutes before he ordered the warrantless blood draw, the Trooper believed Mr. Vortherms was involved in the accident and he believed that there was a PBT result of .097.
- At the time he requested the warrantless blood draw, he had not begun the process for requesting a warrant. (ST 17:13-15);
- Once he decided to request a warrant, it took 15-20 minutes to obtain it. (ST 21:19-21);
- According to Trooper Bumann, to obtain a warrant in Minnehaha County the officer phones the magistrate on call, is sworn in, and recites the facts supporting a warrant. (ST 5:8-20). If the magistrate finds probable cause, she will give the officer permission to initial a duplicate original warrant and sign the judge's name. At that point, the officer may proceed with the search. *Id*.

- Trooper Bumann obtained a warrant over the phone, in his squad car, without driving anywhere. (ST 17:16-18:3).

> "[C]ompelled physical intrusion beneath [a person's] skin and into his veins to obtain a sample of his blood" is an "invasion of bodily integrity which implicates an individual's 'most personal and deep-rooted expectations of privacy'." *McNeely*, 569 U.S. at 148, 133 S.Ct at 1558 (quoting *Winston v. Lee*, 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985)). "[W]here police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *McNeely*, 569 U.S. at 152, 33 S.C.t at 1561.

There is no doubt that officers were faced with a serious and complex investigation in this case. But the state ignores crucial facts in its argument in favor of exigent circumstances:

1- Three officers were investigating Mr. Vortherms' identity, his driving, and his intoxication.

2- Those officers were not responsible for searching for victims, or securing the scene on the interstate, or any other element of the response.

3- Any one of those officers could have called the magistrate to get a warrant.

The State's Factual Arguments

The State argues that the Circuit Court's denial of the suppression motion was appropriate based on the fact that the officers were unable to predict future circumstances in light of the ongoing emergency. Yet the officers at the scene could predict that Mr. Vortherms was going to need medical care, and the Trooper was aware that the hospital would not forestall medical care to await a warrant. Equally apparent was the fact that the officers were going to need to collect evidence of blood alcohol content. These were all

things that were predictable to Trooper Bumann and all could have been addressed by initiating the warrant process before the hospital advised him that Mr. Vortherms was going to need treatment.

The State also argues that Mr. Vortherms preferred that the officers "cut the investigation short" in order to obtain a warrant. But the Trooper had already decided he was investigating a potential DUI related to a fatal crash long before he ordered the warrantless blood draw.

Although the State argues that the three officers on the scene were preoccupied by multiple issues aside from their investigation of Mr. Vortherms, that assertion is not supported by a review of the entire record, which clearly indicates that the three officers were on the scene with Mr. Vortherms throughout the entirety of Trooper Bumann's on-scene investigation and at least one of the officers was involved, along with Trooper Bumann, in the investigation of Mr. Vorthern's intoxication.

The State relies on 4 cases in support of its argument in favor of the circuit court's finding of exigent circumstances.

With regard to *State v Fischer*, 2016 S.D. 12, 875 N.W.2d 40, Mr. Vortherms refers the Court to the argument in his initial brief distinguishing that case. (Appellant's Brief, 10-11).

In *State v Granger*, 761 SE2d 923 (N.C.App 2014), the investigating officer testified that he had concerns about dissipation of alcohol because it had been over an hour since the accident. *Id.* at 928. He did not have the opportunity to investigate intoxication at the scene because of the defendant's injuries and subsequent transport to the hospital. *Id.* Importantly, he testified that he was investigating the case by himself. *Id.*

He would have had to call another officer to the hospital to sit with the suspect while he traveled 40 minutes round trip to obtain the warrant. *Id*. Here, Trooper Bumann had investigated the DUI. He had a positive PBT test, he had noted the odor of alcohol on Mr. Vortherms, and he had observed behavior that might have indicated intoxication. Further, Trooper Bumann had no need to travel to obtain a warrant, and had the assistance of at least two other officers in his DUI investigation.

People v Ackerman, 346 P3d 61, 68 (Colo 2015) is likewise distinguishable. There, the driver of an ATV in a potentially fatal accident was removed from the scene before officers could investigate intoxication. The officers were in the process of preparing the affidavit to request a search warrant when they were advised that the suspect would imminently be heading into surgery. The investigating officer was tasked with remaining at the accident scene to investigate while the suspect was taken to the hospital. In addition to these facts, the court affirmed the circuit court's finding of exigent circumstances based on the following:

> "a suspect who had tried to flee … two vehicle occupants with significant injuries who had been transferred to different hospitals, and the need to invoke the "critical-incident protocol" that required both external and internal investigations. The investigations involved officers from the CRASH team, which inspects and reconstructs vehicle accidents. Thus, like the officers in *Schmerber,* who investigated an accident involving a car that skidded, crossed a road, struck a tree, and caused both the driver—who had been drinking—and a passenger to go to the hospital with injuries, 384 U.S. at 758 n. 2, 86 S.Ct. 1826, the police in this case had to document and preserve a crime scene, interview witnesses, attempt to reconstruct the accident, and cope with the ATV's occupants going to different hospitals for emergency medical treatment. "

The court noted, "[w]hile the complexity of an investigation alone may not justify an involuntary, warrantless blood draw, such legitimate logistical challenges must be

considered in evaluating exigency under the totality of the circumstances. *Id.* Here, Trooper Bumann had one responsibility: investigating Mr. Vortherms.

Finally, *State v Sauter*, 908 N.W.2d 697 (N.D. 2018) is distinguishable. There, a law enforcement officer responded to a fatal car accident and was advised by a first responder that Sauter smelled of alcohol. *Id.* at 702. The officer was unable to investigate Sauter because he was receiving life-saving medical treatment at the scene. *Id.* In the meantime, the officer informed his supervising officer that Sauter was heading to the hospital and that there was suspicion that alcohol was involved, but that he could not personally confirm that the driver was under the influence. *Id.* Upon receiving this information, the supervisor went to the hospital but had to wait for the suspect to return to his room. *Id.* The supervisor attempted to obtain a warrant for over an hour before being informed that the suspected was being prepped for surgery. *Id.* It was only then that the supervisor placed the suspect under arrest and ordered a warrantless blood draw. *Id.* In the instant case, there were three officers on the scene investigating Mr. Vortherms. They all had personal knowledge of facts consistent with a potential driving under the influence offense. All were capable of requesting a warrant telephonically. The evidence in the record revealed the actual ability to get a warrant within 20 minutes.

The State asks the Court to view this case in a manner that ignores the circumstances of the actual investigation for which the Trooper himself was responsible. If the State is permitted to attribute responsibility for all facets of a complex investigation or crime scene to every officer who responds, seldom will officers ever need a warrant because circumstances will always be exigent when each officer is deemed constructively responsible for everything.

The Cumulative Effect of Counsel's Errors Amounted to Ineffective Assistance of Counsel Cognizable on Direct Appeal

The State argues that trial counsel's choices related to testing the admissibility of technical and expert evidence and calling a witness were reasonable tactical decisions that do not amount to an ineffective assistance of counsel claim cognizable on direct appeal. This Court will review an ineffective assistance of counsel claim on direct appeal where trial counsel was "so ineffective and counsel's representation so casual as to represent a manifest usurpation of [the defendant's] constitutional rights." *State v. Thomas*, 2011 S.D. 15, ¶23, 796 N.W.2d 706. The Court's analysis ought to consider not merely outcome determinations but also focus on "whether the result of the proceeding was fundamentally unfair or unreliable." *Lien v. Class*, 1998 S.D. 7, ¶16, 574 N.W.2d 601, 608 (additional citations omitted).

Counsel's Failure to Test the Reliability of the State's Expert

The State argues that it was a reasonable tactical decision to cross examine the State's accident reconstructionist about his methodology rather than challenging admissibility of his testimony at the outset. The State asserts that when opposing experts are introduced at trial, reliability of their opinions is a question fact for the jury. Mr. Vortherms agrees that the question of reliability ought to be left to the jury when there are dueling experts. But this misses the point of his argument. The admissibility of the accident reconstructionist's testimony ought to have been tested prior to him ever taking the stand. Mr. Vortherms stands on his initial argument that counsel's failure to challenge the reliability of the expert witness per *Daubert v. Merrell Dow Pharm*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 prior to trial allowed the State to provide the jury with expert testimony that did not meet prongs (c) or (d) of SDCL 19-19-702. Mr. Vortherms

is not asking this Court to "second guess the tactical decisions" of defense counsel nor to "substitute [its] own theoretical judgment for that of counsel." *Lien v Class,* 1998 S.D. 7 at ¶21, 574 N.W.2d at 609. Instead, Mr. Vortherms asserts that there was no viable tactical justification for failing to question the admissibility of the State's primary evidence. Similarly, there were no tactical decisions that might justify counsel's failure to test the state's evidence about the speed of Mr. Vortherm's vehicle at the time of impact.

Mr. Vortherms relies upon the argument in his initial brief with regard to the CDR report, Trooper Wosje's testimony, and the choice not to call Ms. Dauer.

Where the State's case relied primarily on the expert testimony of the state's accident reconstructionist and evidence retrieved from the crash data recorder, it was not a reasonable tactical decision to refuse to test the legal admissibility of that evidence and failure to do so prejudiced Mr. Vortherms.

Conclusion

Mr. Vortherms respectfully requests that this Court reverse the trial court's decision on suppression and that the Court find that counsel's performance constituted a manifest injustice warranting a new trial in which the State's scientific and technical evidence are measured against the standards set forth in *Daubert* and the state rules of evidence.

Respectfully Submitted this 14th day of May, 2020.

/s/ Nichole A. Carper

Nichole Carper
Burd & Carper Law Office
4900 East 57th Street, Suite A
Sioux Falls, SD 57108
Telephone: (605) 332-4351
Email: nichole@burdandcarper.com
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided in SDCL 15-26A-66(b) using Times New Roman typeface in 12 point type. Appellant's Brief contains 3,030 words.
2. I certify that the word and character count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, certificate of counsel or any addendum materials.

Dated this 14th day of May, 2020.

/s/ Nichole A. Carper

Nichole Carper
Burd & Carper Law Office
4900 East 57th Street, Suite A
Sioux Falls, SD 57108
Telephone: (605) 332-4351
Fax: (605) 334-6844
Email: nichole@burdandcarper.com
Attorney for Appellant

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on the 14th day of May, 2020, a true and correct copy of the foregoing Appellant's Brief was served upon the following person, by emailing the same to the following email address:

Ms. Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
State Capitol Building
500 East Capitol Ave.
Pierre, South Dakota 57501-5070
Email: SCClerkBriefs@ujs.state.sd.us

Jason Ravnsburg - Attorney General
Brigid C. Hoffman – Deputy Attorney General
1302 E Hwy 14
Suite 1
Pierre, SD 5501-8501
Email: atgservice@state.sd.us

Dated this 14th day of May, 2020.

/s/ Nichole A. Carper

Nichole Carper
Burd & Carper Law Office
4900 East 57th Street, Suite A
Sioux Falls, SD 57108
Telephone: (605) 332-4351
Fax: (605) 334-6844
Email: nichole@burdandcarper.com
Attorney for Appellant