IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
APPEAL NO. 29165

****

STATE OF SOUTH DAKOTA, Plaintiff and Appellee

v.

CHAD A. RUS, Defendant and Appellant

****

APPELLANT'S BRIEF

****

APPEAL FROM THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT, AURORA
COUNTY, SOUTH DAKOTA

****

THE HONORABLE PATRICK T. SMITH
Judge

****

John R. Steele
404 South Main Street
PO Box 577
Plankinton, SD 57368
Prosecuting Attorney for Plaintiff and Appellee

Steven J. Bucher
P.O. Box 293
Plankinton, SD 57368
Attorney for Defendant and Appellant

Bert S. Bucher
1906 Pearl Street
Yankton, SD 57078
Attorney for Defendant and Appellant

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JURISDICTIONAL STATEMENT

This Court granted Defendant's request for Discretionary Appeal on November 13, 2019, when It entered an Order Granting Petition for Allowance of Appeal from Intermediate Order. As the issues presented are matters of interpretation of statute, the standard of review is de novo, and the Supreme Court need give no deference to the lower Court's interpretation of the statutes and caselaw as cited by this brief.

STATEMENT OF THE FACTS AND CASE

On July 25, 2019, Chad Rus was arrested on a Felony Warrant of Arrest by Charles Mix County Deputy Sheriff Rolston. The charges relate to alleged crimes in Aurora County on June 25, 2019. The Aurora County authorities well knew where Mr. Rus lived, as Aurora County Deputy Sheriff Howard and Sheriff Fink had been at his home in rural Douglas County on June 26, 2019, and conducted a warrantless search of the premises and photographed Mr. Rus' car. The legality of that warrantless search has yet to be determined on the record.

Upon arrest, Mr. Rus was removed from work in handcuffs, taken to Lake Andes, and processed as a felony

offender at the Charles Mix County Sheriff's office. That process is more in depth for a felony as it involves not only photographs and fingerprints, but also DNA sampling that is entered into a database for felony arrests and/or offenders.

The criminal investigation initially related to damage done to Les and Arla Crago's mailbox in rural Aurora County, South Dakota. Mr. Crago had been provided with information that the damage was caused by Chad Rus. At the time, unbeknownst to Mr. Crago, Chad Rus had called and left a message on Mr. Crago's cell phone on June 25, 2019. Mr. Rus' message told Mr. Crago that he had had a problem with a tire going flat and had hit Mr. Crago's mailbox, that he was sorry and offered to buy a new one.

Unfortunately Mr. Cargo had left his cell phone in his work truck so he did not get the phone message until the next day, June 26, 2019. Apparently, Mr. Crago called the authorities and reported the mailbox damage before he heard Mr. Rus' message on his cell phone.

Deputy Howard conducted the investigation that included causing Subpoenas Duces Tecum to be issued for surveillance videos from inside The 281 Bar in Stickney,

South Dakota, and also outdoor surveillance video from the nearby Stickney Elevator.

Deputy Howard went back to Mr. Rus' residence on July 1, 2019, and questioned him about the mailbox damage. Mr. Rus told the deputy that he had done the damage to the mailbox, had informed the owner by phone, had apologized, and had not only offer to pay for a new one but it was already paid for in a manner that was satisfactory with his neighbor. Upon questioning, Mr. Rus denied being under the influence of alcohol. The Complaint on file charges 3 Counts, Driving a Motor Vehicle While under the Influence of Alcohol, Reckless Driving, and Failure to Report an Accident. On October 23, 2019, in spite of objections from Mr. Rus' attorney, the state filed a Primary Information listing the 3 charges outlined above, and also a Supplemental Information for Third Offense Driving Under Influence of Alcohol. This discretionary appeal followed.

STATEMENT OF ISSUES AND ARGUMENT

1. WHETHER A DEFENDANT IS GUARANTEED A PRELIMINARY HEARING WHEN CHARGED WITH AN OFFENSE PUNISHABLE AS A FELONY?

The Trial Court ruled that a defendant is not entitled to a preliminary hearing in this instance,

because until a defendant is convicted of the first charged Driving Under the Influence (hereinafter "DUI") on the Primary Information, he does not face the enhancement to a felony. (See: p. 18 of 9-25-2019 Hearing in Aurora County Court.)

This possibility considers judicial efficiency, because it is conceivable that a defendant, acquitted at the first trial, would not then be subjected to trial of the charge or charges contained in the Supplemental Information. In so ruling, the Trial Court relied on State v. Anders, 2009 SD 15, 763 N.W.2d 547, and State v. Helling, 391 N.W.2d 648 (SD 1986), based on a theory that until convicted on both the Primary and Supplemental Informations, the charge is a misdemeanor; only after both convictions may the State enhance the penalty, or in the alternative, the penalty is automatically enhanced under the statute.

Such an interpretation of the holdings above fails to consider the second paragraph of SDCL § 23A-4-3, which states "[n]o defendant is entitled to a preliminary hearing unless charged with an offense punishable as a felony. . . ." (emphasis added) The plain meaning of that

statute provides that regardless of the classification of a charge, a preliminary hearing is guaranteed for any offense punishable as a felony.

In this case, State has indicated its intention to try defendant first on the misdemeanor, and second on the Supplemental Information alleging prior convictions of the same offense, with the ultimate goal of felony punishment. Defendant has not waived this procedural statutory guarantee, and has no intention of so doing. Because defendant declines to waive these statutory and/or procedural requirements, the case is clearly distinguishable from the cases above, in which defendants therein had waived all or some of their statutory and/or procedural rights.

2. WHETHER DENIAL OF PRELIMINARY HEARING WHEN CHARGED WITH OFFENSE PUNISHABLE AS FELONY DEPRIVES DEFENDANT OF DUE PROCESS OF LAW GUARANTEED BY BOTH U.S. CONSTITUTION, SIXTH AMENDMENT (THROUGH THE FOURTEENTH AMENDMENT'S 'DUE PROCESS' CLAUSE) AND ARTICLE VI, § 2 OF THE SOUTH DAKOTA CONSTITUTION?

Although this question was not considered by the trial court directly, this question is intertwined with the previous question presented, and it is a constitutional question properly submitted to this Court

for review and potential reversal.

The Sixth Amendment to the United States Constitution and Article VI, § 7 of the South Dakota Constitution both guarantee every defendant the right, inter alia, to be informed of both the nature and cause of an accusation against him. Additionally, the Fourteenth Amendment to the United States Constitution and Article VI, § 2 of the South Dakota Constitution both guarantee that defendants shall not be deprived of their liberties without due process of law. In this case, defendant has been informed of the cause of the accusation against him, but not the maximum possible punishments. Specifically, there now has been filed a Supplemental Information alleging previous DUI convictions. Although it may be said that defendant is now better informed of the charge, the potential punishment is still unclear.

In order to make a knowing, intelligent, and voluntary plea of guilty or not guilty, defendant must first be aware of the maximum possible penalties. In essence, the State makes a distinction which lacks any difference for any layperson, and specifically for this defendant. In defendant's view, he is facing the very real

possibility of a felony conviction following the conclusion of this matter, despite being denied the hallmarks guaranteed to other persons accused of felonies.

Such a possibility troubled this Court enough to state in a footnote of State v. Anders ". . .because a person charged with a felony DUI faces a potential penitentiary sentence and should be treated the same as those charged with other felonies, this is a procedural defect needing to be cured." Anders, at ¶ 12, f.n 3.

Additionally, to claim this case is a misdemeanor until conviction at a second trial neglects to consider that the Court is able to take judicial notice of the prior convictions, as this Court held in State v. Olesen, 331 N.W.2d 75 (SD 1983). In other words, either on motion of the State or sua sponte, the Court may admit evidence of prior DUI convictions. Id.

PRAYER FOR RELIEF

Defendant believes the South Dakota statutory scheme is intended to protect the rights of persons accused of crimes, specifically crimes of a more serious nature, as those crimes carry an enhanced or increased potential constraint of the liberties of that individual. For that

reason, defendant hereby requests that the Supreme Court of South Dakota plainly interpret SDCL § 23A-4-3, and in doing so, modify the lower Court's decision to require a preliminary hearing, so that defendant can be fully informed of the charges against him, and the potential penalty or penalties following conviction.

Dated this the ____ day of December, 2019.

_____
Bert S. Bucher
1906 Pearl Street
Yankton, SD 57078
(605) 665-5550
Attorney for Appellant

_____
Steven J. Bucher
Bucher Law Office
P.O. Box 293
Plankinton, SD 57368
(605)942-7741
Attorney for Appellant

CERTIFICATE OF SERVICE

Steven J. Bucher, Attorney for Appellant, Chad A. Rus, states that on December __, 2019, using both email and first class US Mail, I mailed a correctly stamped copy of the above and foregoing Appellant's Brief for Discretionary Appeal to the following:

John R. Steele
Deputy Aurora County States Attorney
404 South Main Street
PO Box 577
Plankinton, SD 57368-0577
Attorney for Respondent

Jason R. Ravnsborg
South Dakota Attorney General
1320 E. Hwy. 14, #1
Pierre, SD 57501
Attorney for Respondent

_____
Steven J. Bucher,
Counsel for Appellant,
Chad A. Rus

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

01CRI19-28

STATE OF SOUTH DAKOTA, Plaintiff,	)	
-vs-	)	ORDER DENYING DEFENDANT'S ALTERNATIVE MOTION FOR A PRELIMINARY HEARING OR ORDER LIMITING PUNISHMENT
CHAD A. RUS, d.o.b. 06/23/1975 Defendant.	)	

The Defendant's alternative motion for a preliminary hearing or for a court order limiting possible punishment to a Class 1 misdemeanor was heard in the courtroom of the Aurora County Courthouse on September 25, 2019. The State appeared by and through John R. Steele as prosecuting attorney, and the Defendant appeared by and through his attorney, Steven J. Bucher.

The Court, having reviewed the pleadings on file, including the briefs of both counsel, and having heard oral argument, and there good cause appearing therefore,

It is hereby ORDERED, that the Defendant's alternative motion be and the same is DENIED.

Attest:
Thiry, Deb
Clerk/Deputy

BY THE COURT:
Signed: 10/11/2019 3:24:23 PM

Circuit Court Judge
First Judicial Circuit

Appendix 1

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF AURORA — FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff, vs. CHAD A. RUS, Defendant.	No. 01CRI19-28

BEFORE: THE HONORABLE PATRICK SMITH
Circuit Court Judge

For the Plaintiff: JOHN R. STEELE
AURORA CO. STATE'S ATTORNEY
P.O. Box 577
Plankinton, SD 57368

For the Defendant: STEVEN J. BUCHER
BUCHER LAW OFFICE
P.O. Box 293
Plankinton, SD 57368

PROCEEDINGS: The above-entitled proceeding commenced at approximately 1:13 p.m. on the 25th day of September 2019 in the courtroom of the Aurora County Courthouse, Plankinton, South Dakota.

Appendix 2

have been issued. As it stands now, the Information would be filed without a preliminary hearing.

But what I think is most helpful to the Court, although I think it's potentially problematic, but that is for a different court or a legislature to determine in my view is the holding in Helling. And that is the case that we've discussed at length that involves what rights are granted a defendant charged with a DUI who's having a trial on the principal Information when a Supplemental Information has been filed.

Our Supreme Court upheld the treating of that charge as a misdemeanor, going so far as to say, yes, there is a Supplemental Information and, yes, this could potentially be a felony if he's convicted of both the underlying charge and the Supplemental information and, if he exercises his right, to two trials on those issues and is convicted by a jury in each case but until that point, it is a misdemeanor. And so the defendant who said, "Your Honor, I'm punishable as a felony" was told "no, you're not," not until and unless there is a finding of guilt on a Supplemental information.

What you are punishable right now is as a misdemeanor, and because of that, we're going to treat this as a misdemeanor. And what we're going to do is not give you felony peremptory challenges; we're going to give you misdemeanor peremptory challenges. And the Supreme Court

Appendix 3

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO: 29165

CHAD A. RUS,
Defendant and Appellant.

INTERMEDIATE APPEAL FROM THE CIRCUIT COURT
OF AURORA COUNTY, SOUTH DAKOTA
FIRST JUDICIAL CIRCUIT

HONORABLE PATRICK T. SMITH, Circuit Court Judge

BRIEF AMICUS CURIAE FOR THE SOUTH DAKOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

ALECIA E. FULLER**
Office of the Public Defender
for Pennington County
130 Kansas City Street, Suite 310
Rapid City, South Dakota 57701
(605) 394-2181
aleciaf@pennco.org

VICTORIA REKER*
Office of the Public Advocate
for Minnehaha County
415 N. Dakota Avenue
Sioux Falls, South Dakota 57104
(605) 367-7392
vreker@minnehahacounty.org

RYAN KOLBECK
Kolbeck Law Office
505 W. 9th Street, Suite 203
Sioux Falls, South Dakota 57104
(605) 306-4384
ryan@kolbecklaw.com

SARAH E. BARON HOUY
Bangs McCullen Law Firm
6340 S. Western Ave., Suite 160
Sioux Falls, South Dakota 57109
(605) 339-6800
sbaronhouy@bangsmccullen.com

OLE J. OLESEN
Office of the Public Defender
for Pennington County
130 Kansas City Street, Suite 310
Rapid City, South Dakota 57701
(605) 394-2181

DEREK FRIESE
Office of the Public Defender
for Minnehaha County
413 N. Main Street
Sioux Falls, South Dakota 57104
(605) 367-4242

Ole.Olesen@pennco.org

JUSTIN L. BELL
May, Adam, Gerdes & Thompson
503 S. Pierre Street
Pierre, South Dakota 57501
(605) 224-8803
jlb@mayadam.net

dfriese@minnehahacounty.org

JAN OLSON
Olson Law Firm, LLC
505 W. 9th Street, Suite 102
Sioux Falls, South Dakota 57104
(605) 271-1422
jan@jolsonlawfirm.com

Order Authorizing Intermediate Appeal Entered on November 13, 2019.

*President, SDCDLA.

**Immediate Past President, SDCDLA

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INTEREST OF AMICUS CURIAE[1]

The South Dakota Association for Criminal Defense Lawyers (SDACDL) is a voluntary, non-profit professional bar association that works on behalf of criminal defense attorneys to ensure the twin legal commitments of justice and due process are guaranteed to all citizens accused of crime or wrongdoing in South Dakota. SDACDL has a statewide membership of approximately two-hundred active members, including private criminal defense lawyers, public defenders, public advocates, military defense counsel, law professors, and others.

SDACDL is dedicated to advancing the fair, just, and efficient administration of justice. To that end, SDACDL files amicus briefs in circuit courts throughout the state, in hopes of contributing additional discussion in matters of critical importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

In this case, amicus submits that the court below impermissibly deviated from the plain language of SDCL 23A-4-3 when it deprived Mr. Rus of a preliminary hearing. More broadly, however, amicus writes to demonstrate the need for this Court's guidance in upholding the constitutional and statutory rights of persons charged with an offense that

[1] The parties and this Court have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part.

is punishable, or *potentially* punishable, by imprisonment in the state penitentiary.

SUMMARY OF THE ARGUMENT

After being charged with driving under the influence of alcohol (DUI) (misdemeanor), reckless driving (misdemeanor), and failure to report an accident (misdemeanor), Appellant Chad Rus was charged by supplemental information with DUI - Third Offense (Class 6 felony), in violation of SDCL 32-23-4 (stating that if a DUI conviction is "for a third offense, the person is guilty of a Class 6 felony.").

South Dakota law plainly provides that a defendant is entitled to a preliminary hearing if he is charged with "an offense punishable as a felony." SDCL 23A-4-3. A felony is defined as "a crime which is *or may be* punishable by imprisonment in the state penitentiary." *See* SDCL 22-1-4 (emphasis added). Despite the supplemental information charging Rus with violating SDCL 32-23-4, the trial court held Rus was not entitled to a preliminary hearing, finding this Court's ruling in *State v. Helling* to be controlling. The trial court openly grappled, however, with the "problematic" and "troubling" holding of *Helling*, ultimately concluding it was for this Court, not a circuit or magistrate court, to overrule it. *See* Hearing Transcript (9/25/19 hearing) at 18:3-20, 19:11-20:5, 23:8-11.

The time has come for this Court to cure the troubling procedural defect caused by *Helling* and pronounce that persons charged with third-

offense (or higher) DUI are entitled to the same procedural treatment as persons charged with other felonies, including the right to a preliminary hearing. *See State v. Anders*, 2009 SD 15, ¶12, 763 N.W.2d 547, 553, n.3 ("We find the discrepancy [created by *Helling*] troubling, and conclude that, because a person charged with a felony DUI faces a potential penitentiary sentence and should be treated the same as those charged with other felonies, this is a procedural defect needing to be cured.").

ARGUMENT

I. THE FELONY-MISDEMEANOR DISTINCTION.

The felony-misdemeanor distinction has long been described as "[t]he most important classification of crime in general use in the United States." *See* Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW 1.6(a) (3d ed. 2017). This distinction is most commonly defined by statute. *See People v. Dawson*, 210 Cal. 366, 370, 292 P. 267 (1930). Generally, a crime punishable by death or imprisonment is classified as a felony, whereas a crime punishable by a fine or confinement in a county jail is a misdemeanor. What makes the practical effect of this dividing line so significant? Plainly stated, the significance lies in its potential to impact a number of other constitutional and statutory provisions, upon which many vital interests hang. *See Mitchell v. Wisconsin*, 139 S.Ct. 2525, 2535 (2019).

For instance, in the area of substantive criminal law, "there are a number of crimes whose elements are defined, or whose punishment is

stated, with reference to felonies as distinguished from misdemeanors." LaFave, *supra*, note 1.6(a). The distinction is also implicated in areas wholly removed from the field of criminal law by way of collateral consequences. For example, a felony conviction may disqualify an individual from holding public office, serving on a jury, owning a gun, traveling abroad, receiving certain social benefits, or exercising his or her right to vote. *Id*. No such prohibitions apply to misdemeanor convictions. *Id*.

But the distinction is arguably most acutely realized in the area of criminal procedure, wherein the application of numerous procedural rules are dependent upon how the underlying crime is classified – felony or misdemeanor. *Id*. For example, the number of jurors selected to serve on a felony jury is generally more than that selected in a misdemeanor trial. *See* SDCL 23A-20-20. Additionally, in most states, a felony may only be charged by an indictment[2] returned by a duly empaneled grand jury or by the filing of an information, whereas misdemeanors may be charged via a much less formal or rigorous process. *See People v. Atchison*, 2019 IL App

[2] Although there is no requirement in the United States Constitution or federal law that requires states to utilize the grand jury system in their felony charging process, many state constitutions mandate a grand jury indictment to dispose of a felony charge. *Greg Hurley*, Trends in State Courts: The Modern Grand Jury, Natl. Ctr. for State Courts, https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2014/The-Modern-Grand-Jury.aspx (last visited December 19, 2019).

(3d) 180183, ¶ 24, ––– Ill.Dec. ––––, ––– N.E.3d ––––.; *State v. Belcher*, 25 Utah 2d 37, 38, 475 P.2d 60, 61 (1970). Likewise, there are certain procedural rules that are specific to capital cases – the most severe sanction imposed by law. For example, jurors in capital cases must be "death qualified." In *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222 (1992), the United States Supreme Court held that a capital defendant must be afforded the opportunity to conduct adequate voir dire to determine whether a potential juror is capable of imposing a life sentence upon conviction, just as the prosecution must be afforded a similar opportunity to determine whether a potential juror is capable of imposing a death sentence upon conviction. *Id.* at 729-34.

Finally,[3] of course, the statutory right to a probable cause determination via a preliminary hearing is often predicated upon the felony-misdemeanor distinction: "No defendant is entitled to a preliminary hearing unless charged with an offense punishable as a felony." SDCL 23A-4-3. *See also Brown v. State*, 454 Md. 546, 556, 165 A.3d 398, 404 (2017).

II. THE SIGNIFICANCE OF A PRELIMINARY HEARING.

The preliminary hearing is "primarily for the benefit of the accused." *Brown*, 454 Md. at 555. While the hearing is not intended to be a substitute for trial itself, it serves several important purposes, perhaps the most

[3] The foregoing list is not intended to be exhaustive.

fundamental of which is it vests the court with authority to "ferret out groundless and improvident prosecutions." *State v. Schmidt*, 2015 UT 65, ¶ 19, 356 P.3d 1204, 1209 (quoting *State v. Virgin*, 2006 UT 29, ¶¶ 19, 21, 137 P.3d 787)). In so doing, the magistrate holds the prosecutor to his or her burden of presenting "sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed it." *State v. Jones*, 365 P.3d 1212, ¶11, 2016 UT 4 (quoting *State v. Clark*, 2001 UT 9, ¶16, 20 P.3d 300)).

In *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975), the United States Supreme Court underscored the importance of a magistrate's probable cause determination in cases where the accused is charged by information rather than indictment by a grand jury. In *Gerstein*, the disputed procedure centered around a Florida law allowing "person[s] arrested without a warrant and charged by information [to] be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination." *Id.* at 116-17. The state defended this practice on the ground that "the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial." *Id.* at 117. In rejecting this view, the Supreme Court found that, "although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think

prosecutorial judgment standing alone meets the requirements of the Fourth Amendment." *Id.* In so holding, the Court was guided by its prior decision in *Albrecht v. United States*, 273 U.S. 1, 5, 47 S.Ct. 250, 251 (1927), wherein it invalidated an arrest warrant "issued solely upon a United States Attorney's information [b]ecause the accompanying affidavits were defective." *Id.* The *Gerstein* Court noted that "although the [*Albrecht*] Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment." *Gerstein*, 420 U.S. at 117. *Gerstein* further relied upon *Coolidge v. New Hampshire*, 403 U.S. 443, 449-453, 91 S.Ct. 2022, 2029-2031 (1971), which held that "a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate." *Gerstein*, 420 U.S. at 117.

In practice, the preliminary hearing serves another important purpose: to "inform the accused of the offense with which he is charged." Note, *Preliminary Hearings on Indictable Offenses in Philadelphia*, 106 U. PA. L. REV. 589, 591 (1958). This notice underpins the very canons upon which the due process clause is based,[4] and further serves to mitigate the

[4] The due process clause of the Fifth Amendment, made applicable to the states via the Fourteenth Amendment, provides that "No person shall ... be deprived of life, liberty, or property, without due process of law." *U.S. v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101 (1987); see also U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

potential risk of wrongful deprivation, thus protecting the accused's right to a fair process. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and mistaken deprivations of [liberty] can be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S.Ct. 1983, 1994 (1972).

To this end, "[i]t has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . *[And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him* and opportunity to meet it.'" *Id.* (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-172, 71 S.Ct. 624, 647, 95 L.Ed. 817, Frankfurter, J., concurring)) (emphasis added). However, "if [this] right ... is to serve its full purpose, [i]t is clear that it must be granted at a time when the deprivation can still be prevented." Ronald Ryan Smith, *Procedural Due Process: The Distinctions Between America and Abroad*, 22 WILLIAMETTE J. OF INT'L L. & DISPUTE RESOLUTION, 199, 204 (2014).

Here, the lower court orally pronounced that Rus, charged by supplemental information with a third offense driving a motor vehicle while under the influence of an alcoholic beverage ("DUI") in violation of SDCL 32-23-1 and 32-23-4, was not entitled to a preliminary hearing. In essence, the court adopted the State's position that a preliminary hearing is not required on the ground that the predicate offense is substantively a

misdemeanor, and is only elevated to a felony by operation of South Dakota's sentencing enhancement statute. This proposition is unsound in several critical respects, including but not limited to the fact that the offense charged is *punishable* as a felony. *See* SDCL 22-1-4. (emphasis added).

III. THE LOWER COURT ERRED IN DENYING RUS A PRELIMINARY HEARING.

SDCL 23A-4-3 states, in relevant part: "No defendant is entitled to a preliminary hearing unless charged with an offense *punishable as a felony*." (emphasis added). SDCL 23A-6-3 provides: "An information may be filed without a preliminary hearing against a fugitive from justice. No other information may be filed against any person for any felony until that person has had a preliminary hearing, unless that person waived his or her right to a preliminary hearing."

A. The lower court's ruling violates the plain language rule and the doctrine of *in pari materia*.

This Court has repeatedly held that "the clearest indicator of legislative intent is a statute's plain language." *State v. Livingood*, 2018 S.D. 83, ¶ 31, 921 N.W.2d 492, 499; *see also* SDCL 2-14-1 (stating "Words used are to be understood in their ordinary sense ...."). "No part of a legislative enactment is to be treated as insignificant or unnecessary, and there is a presumption of purpose behind every sentence, clause or phrase ... [so that] no word [or phrase] in a statute is to be treated as superfluous."

State v. Peeler, 271 Conn. 338, 434-35, 857 A.2d 808 (2004). "When a proposed interpretation of a statute would require the court to 'read something into the law that is not apparent from the words chosen by the legislature,' the court will reject it." *State v. Childs*, 898 N.W.2d 177, 184 (Iowa 2017) (quoting *State v. Guzman-Juarez*, 591 N.W.2d 1, 2 (Iowa 1999)). "Therefore, the starting point when interpreting a statute must always be with the language itself." *Livingood,* 2018 S.D. 83 at ¶ 31. "[I]f the words and phrases in the statute have plain meaning and effect, [the Court] should simply declare their meaning and not resort to statutory construction." *Id.* (quoting *Dale v. Young*, 2015 S.D. 96, ¶ 6, 873 N.W.2d 72, 74)). "Judicial interpretation of a statute that fail[s] to acknowledge its plain language [a]mount[s] to judicial supervision of the legislature." *State v. Galati*, 365 N.W.2d 575, 577 (S.D. 1985).

In addition, statutes must be read *in pari materia*:

> The object of the rule of pari materia is to ascertain and carry into effect the intention of the legislature. It proceeds upon the supposition that the several statutes were governed by one spirit and policy, and were intended to be consistent and harmonious in their several parts and provisions. For purposes of determining legislative intent, we must assume that the legislature in enacting a provision has in mind previously enacted statutes relating to the same subject matter. As a result, the provision should be read, if possible, in accord with the legislative policy embodied in those prior statutes.

M.B. v. Konenkamp, 523 N.W.2d 94, 97-98 (S.D. 1994) (quoting *State v. Chaney*, 261 N.W.2d 674, 676 (S.D. 1978)).

First and foremost, the State's position violates the plain language of Rule 5(c), set forth at SDCL 23A-4-3 which states, in relevant part: (emphasis added).

> No defendant is entitled to a preliminary hearing unless charged with an offense *punishable as a felony*.

The suggestion that Rus has *not* been charged with an offense "punishable as a felony" is almost laughable. Indeed, the State catches its own tail by arguing that the underlying offense is substantively a misdemeanor, and that the "felony" aspect is only the product of a sentence enhancement. The preliminary hearing statute does not speak to how an underlying offense is characterized. Instead, it is *solely* concerned with punishment. By using the phrase "an offense punishable as a felony," the Legislature quite clearly and unambiguously articulated the litmus test for whether a defendant is entitled to a preliminary hearing: How is the offense capable of being punished? It is thus the sentence enhancement itself that renders Rus eligible for a preliminary hearing.

Furthermore, it is undisputed that Rus has been charged with a 3rd Offense DUI, which is clearly characterized as a Class 6 felony by virtue of the statute cited in the supplemental information, SDCL 32-23-4: "If conviction for a violation of 32-23-1 is for a third offense, the person is guilty of a Class 6 felony[.]" Contrary to the state's labored interpretation, the statute does not provide that an accused is charged with a

misdemeanor and merely *punished* as if it were a Class 6 felony; rather, it plainly and unequivocally provides that the person is *guilty of a Class 6 felony*.

In addition to violating the plain language of the preliminary hearing statute, the State's position would violate the principle of *in pari materia* as it concerns the application of habitual and repeat offender statutes. Although the challenged conduct at issue relates specifically to DUI's, amicus urges that it would be equally unreasonable in other cases involving offenses whose statutory properties likewise allow for a class enhancement from misdemeanor to felony, including simple assault and violation of no-contact or protection orders.

SDCL 22-7-7, 22-7-8, 22-7-8.1, and 22-7-9 constitute the core statutory mechanisms used to enhance a criminal sentence for habitual offenders. For purposes of brevity, amicus will limit its analysis to SDCL 22-7-7, which provides, in relevant part:

> If a defendant has been convicted of one or two prior felonies under the laws of this state or any other state or the United States, in addition to the principal felony, the sentence for the principal felony shall be enhanced by changing the class of the principal felony to the next class which is more severe, but in no circumstance may the enhancement exceed the sentence for a Class C felony. The determination of whether a prior offense is a felony for purposes of this chapter shall be determined by whether the prior offense was a felony under the laws of this state or under the laws of the United States at the time of conviction of such prior offense.

In addition to the foregoing, our statutory scheme contains a separate set of one-class enhancement statutes specific to DUI offenses, wherein repeated convictions for the same offense result in a harsher sentence. *See* SDCL 32-23-3 to 32-23-4.9. Similar offense-specific enhancements exist within the current statutory schemes for Simple Assault and Violation of Protective or No Contact Order, wherein an offense that would otherwise constitute a misdemeanor is rendered a Class 6 felony if it is a repeat offense. *See* SDCL 22-18-1 and 25-10-13.

This Court has held that a second or subsequent DUI conviction, which is subject to the DUI-specific enhancement scheme, cannot be "doubly" enhanced via the general habitual offender provision set forth in SDCL 22-7-7. *Carroll v. Solem*, 424 N.W.2d 155, 155 (S.D. 1988). *See also State v. Anders*, 2009 S.D. 15, ¶ 15, 763 N.W.2d 547, 553. But, a prior felony DUI conviction may be used to enhance a sentence under SDCL 22-7-7 for *other* types of felony offenses.

In *State v. Anders*, the defendant was indicted for conspiracy to commit first degree murder, attempted first degree murder, or in the alternative, aggravated assault. *Anders,* 2009 S.D. 15 at ¶2. Thereafter, the state filed a supplemental information alleging that Anders was a habitual offender based in part on her prior felony DUI conviction. *Id.* In rejecting Anders' claim that the holding in *Caroll* "prohibits use of a DUI felony

conviction as the basis for a habitual offender enhancement," this Court held:

> Here, unlike in *Carroll*, Anders' principal felonies do not carry accompanying sentencing schemes allowing for enhancement based on the specific charge themselves. There is no possibility that Anders' current sentence will be doubly enhanced. Rather, it is only her prior felony DUI that permits one class enhancement of her sentence.

Id. at ¶ 15.

Here, the gravamen of the State's position is that Rus has not been charged with a felony offense. Instead, it proposes that the filing of the supplemental information merely aggravates or enhances the possible punishment as an incident of appellant's prior criminality. *See generally People v. Tafoya*, 2019 CO 13, ¶ 10, 434 P.3d 1193. Stated differently, the State asserts that the predicate DUI charge is principally a misdemeanor and is only *punished* as a felony by operation of the habitual offender statute.

Measured in this way, the State is attempting to have it both ways. On one hand, it contends that Rus (and all similarly situated defendants) is not entitled to a preliminary hearing because he is only charged with a misdemeanor. On the other hand, if Rus is charged in the future with another crime, it would undoubtedly proffer this very same DUI as a felony conviction for purposes of the habitual offender statute. The State is asking this Court to ignore whatever transpires between charge and

conviction, and to give the State, not the accused, the benefit of any ambiguity (on both sides of the equation) that ensues as a result of what can only be described as a statutory and procedural purgatory, wherein an individual can enter the criminal justice system facing a misdemeanor charge, being afforded all the while the bare minimum of constitutional and statutory protections given to those facing no more than a year in county jail, only to be churned out as a card-carrying felon facing a stint in the state penitentiary. This result flies in the face of the most basic notions of due process and justice.

B. The use of a supplemental information or other "sentence enhancement" mechanism does not change the fact that Rus is now charged with an offense that is punishable as a felony.

The State argues that the filing of a supplemental information charging Rus with a third-offense DUI is not a document that must be supported by a magistrate's probable cause determination because such a pleading does not attempt to create a separate offense, but is merely an enhancement mechanism providing for increased punishment. *Response to Defendant's Pet. for Permission to take Discretionary Appeal*, 3. Amicus disagrees for the following reasons.

First, contrary to the state's position, this Court has repeatedly categorized a supplemental information as being a separate charge. For example, in *State v. Loop*, 422 N.W.2d 420 (S.D. 1988), this Court held

that "a defendant *charged as a habitual offender* may challenge the validity of prior convictions at [a] pretrial hearing or collaterally attack [a] conviction by way of [a] habeas corpus proceeding." *Id.* (emphasis added); *See also State v. Graycek*, 368 N.W.2d 815, 815 (S.D. 1985) (Defendant appealed from a conviction charging him with, inter alia, being a habitual offender). Likewise, in *Black v. Erickson*, 86 S.D. 86, 191 N.W.2d 174 (1971), this Court recognized that "a separate hearing and trial, if necessary, [should] be held to determine the issue of recidivism," and that "whenever the state seeks the imposition of a heavier penalty on an accused as an [*sic*] habitual criminal the statutory provisions regulating the recidivist proceedings must be strictly construed and complied with." *Id.* at 89-90.

Second, a supplemental information is not merely a sentence enhancement device. On the contrary, it unquestionably authorizes the state to *charge* an individual previously accused of a Class 1 misdemeanor with, as pertinent here, a Class 6 felony. In other words, it permits the prosecutor to file a felony information without a determination of probable cause by a neutral and detached magistrate. This is the very procedure the *Gerstein* Court expressly refused to sanction. *See Gerstein*, 420 U.S. at 117. For purposes of clarity, amicus does not contend that individuals charged with being a habitual violator are entitled to a preliminary hearing on the issue of the prior convictions. *See State v. Steffenson*, 85 S.D. 136, 178

N.W.2d 561 (S.D. 1970) (defendant not entitled to a preliminary hearing on the incidental issue of prior convictions.). Rather, amicus urges that the information's substantive character (i.e., supplemental or otherwise) is wholly immaterial because it effectively charges the accused with an offense *punishable as a felony*, thus triggering the right to a preliminary hearing pursuant to SDCL 32-23-4.

This issue was recently examined by the Colorado Supreme Court in *People v. Tafoya*, 2019 CO 13, 434 P.3d 1193. In *Tafoya*, the defendant was charged with a 4th or Subsequent DUI, and she requested a preliminary hearing. The relevant Colorado statutes provided:

> *Section 42-4-1301(1)(a)*. A person who drives a motor vehicle or vehicle under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, commits driving under the influence. Driving under the influence is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions, arising out of separate and distinct criminal episodes.
>
> *Section 42-4-1301(1)(j)*. If a person has prior DUI convictions, then "[t]he prosecution shall set forth such prior convictions in the indictment or information."

Id. at ¶¶ 21-22. (emphasis added). The lower court held Tafoya was not entitled to a preliminary hearing because "the DUI count was substantively a misdemeanor that could only be elevated to a felony by way of a sentence enhancer." *Id.* at ¶ 14. The Colorado Supreme Court reversed:

> Here, [s]ection 42-4-1301(1)(a) and its related penalty provisions alternatively accord the prior convictions qualities of both elements of an offense and sentence enhancers. Moreover, as noted above, section 42-4-1301(1) authorizes the People to charge certain repeat DUI offenders with a class 4 felony (and requires the People to set forth the prior convictions in the indictment or information), and the People did so here. And *regardless of whether Tafoya's prior convictions could be deemed sentence enhancers, the prosecution "accused" Tafoya of committing a class four felony DUI* and she remained in custody on that charge."

Id. at ¶ 27. (emphasis added).

IV. THIS COURT SHOULD ANSWER THE CALL OF *ANDERS* AND OVERTURN *HELLING*.

In *Helling*, 391 N.W.2d 648 (S.D. 1986), the defendant was charged with driving while intoxicated ("DWI"), third offense. Prior to trial, defendant sought to exercise 10 peremptory challenges on the basis that a third-offense DUI was considered a felony under SDCL 32-23-4. *Id.* at 650. The trial court denied the motion, finding Helling was only entitled to three peremptory challenges because "SDCL 32-23-4 is a habitual offender statute and does not affect the procedural aspects of the underlying trial." *Id.* While this Court ultimately reversed on other grounds, it expressly agreed with the lower court's ruling relative to this issue, relying upon *State v. Holiday*, 335 N.W.2d 332 (S.D. 1983). *Id.* at 651. In dissent, however, Justice Wuest saliently observed:

> When a defendant stands charged in a supplemental information with two or more previous DWI convictions within five years, he is facing a term of in the state penitentiary. A felony is a crime which is or may be punishable by

> imprisonment in the state penitentiary. SDCL 22-1-4. ... A third DWI offense is rightly considered a serious offense in South Dakota, and it often results in a penitentiary term. ... *The law, however, provides for ten peremptory challenges for felonies and a third DWI conviction is a felony. Therefore, I would afford such offenders the same rights as those granted any other person charged with a felony.*

Id. (Wuest, J., dissenting) (emphasis added).

Twenty-three years later, in *State v. Anders*, 2009 S.D. 15, 763 N.W.2d 547, the wisdom of the *Helling* decision was called squarely into doubt by this Court:

> In *Carroll*, we recognized that our holding was in line with *State v. Helling*, "where we held that a person charged with a third offense DWI was not entitled to additional (felony) peremptory challenges on the underlying charge." *We find the discrepancy troubling, and conclude that, because a person charged with a felony DUI faces a potential penitentiary sentence and should be treated the same as those charged with other felonies, this is a procedural defect needing to be cured.*

Anders, 2009 S.D. 15 at ¶ 15, n.3 (internal citations omitted) (emphasis added).

In the seminal case of *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003), Justice Anthony Kennedy, writing for the majority, recognized that "[w]hile the doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of law, it is not an inexorable command." *Id.* at 577. *See also Rivera v. Commissioner of Correction*, 254 Conn. 214, 251, 756 A.2d 1264 (2000) ("[T]he doctrine of stare decisis counsels that a court should not overrule

its earlier decisions unless the most cogent reasons and inescapable logic require it."). While amicus recognizes the historical roots of this venerable rule, it nevertheless contends that such cogent reasons for reversal are present here, and were identified by the *Anders* Court and have been discussed in detail in this brief. Furthermore, this Court's rebuke of *Helling*'s central holding has created judicial uncertainty and reduces its precedential value to a nullity. In fact, such uncertainty is manifest in this very case as evidenced by Judge Smith's closing colloquy to the parties:

> Now, I am not unaware of the fact that the *Anders* case, which came along sometime after 2009 to be precise, addressed that unique issue, and I think I've given you the site [*sic*], but I will go ahead and give it out again. It is *State v. Anders*, A-n-d-e-r-s, 763 N.W.2d 547. And if you look at Footnote 3, it raises your point, Mr. Bucher, and *I think it's worth noting this, because this is what's given the Court the most heartburn about ruling the way I'm ruling:* 'In *Carroll* we recognize that our holding was in line with *State vs. Helling*, but where we held that a person charged with a third offense DUI was not entitled to additional felony peremptory challenges. We find the discrepancy troubling and conclude that, because a person charged with a felony DUI faces a potential penitentiary sentence and should be treated the same as though charged with other felonies, that this is a procedural defect needing to be cured.' *But what I don't think is that it needs to be cured by a circuit court judge overturning valid Supreme Court precedent. I think it needs to be cured by the Supreme Court or by the legislature in a review of any decision that I make in this case. Whether they will follow their – what they are pointing out as an issue in the Anders case or whether they will uphold the ruling in Helling is for them to determine or for the legislature to address.* And perhaps that's whom they were talking too [*sic*] – I don't know – when they wrote the footnote in Anders, but I think, bottom line, *Helling* is good law. *Helling* says it's treated as a misdemeanor until such time as it isn't.

> This isn't the time, and therefore you're not entitled to a preliminary hearing.

Hearing Transcript (9/25/19 hearing) at 19:11-25, 20:1-14.

(emphasis added). Therefore, to the extent that *Helling* is still good law, amicus moves this Court to expressly overturn it.

IV. THE STATE'S POSITION WILL YIELD RESULTS THE LEGISLATURE COULD NOT HAVE INTENDED.

Amicus do not herein suggest that the words of the statutes are absurd or ambiguous. Rather, amicus contends that the State's offered interpretation, as applied, will yield results the legislature could not possibly have intended.

"It is a well-settled proposition that statutory language be read in context and in a reasonable manner so as 'to avoid absurd or unreasonable results.'" *State v. Matthews*, 2019 WI App. 44, ¶ 17, 388 Wis.2d 335 (quoting *Kalal*, 271 Wis.2d 633, ¶ 46, 681 N.W.2d 110)); *see also Murray v. Mansheim*, 2010 S.D. 18, ¶ 7, 779 N.W.2d 379, 382 (this Court recognized "[W]e have an obligation to interpret law in a manner avoiding absurd results."). "Absurd results include results the legislature could not have intended." *Blasing v. Zurich Am. Ins. Co.*, 2013 WI App 27, ¶ 13, 346 Wis.2d 30, 827 N.W.2d 909.

As this Court is well aware, the first appearance in a formal criminal proceeding is typically the arraignment, at which the defendant "shall be provided with a copy of the indictment, information, or complaint, as is

applicable, before he is called upon to plea." SDCL 23A-7-1. At this early stage, many defendants elect to plead "not guilty" so as to afford him/herself the opportunity to consult with and retain counsel. However, nothing compels the defendant to maintain the status quo. In fact, a defendant seeking to avoid what is often a lengthy or cumbersome court process may instead plead guilty at the arraignment should he choose to do so. However, prior to accepting a guilty or nolo contendere plea, the court must inform the defendant of his or her constitutional rights as well as the rights relinquished as a consequence of entering such a plea so as to comply with the procedural safeguards of due process. Importantly, the court must also advise the defendant as to "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." SDCL 23A-7-4.

The practical effect of the State's position is such that a defendant previously convicted of a second or subsequent DUI and presently charged with a first offense Class 1 misdemeanor could conceivably plead guilty at his/her arraignment so as to avoid a possible felony enhancement. Moreover, following the entry of such a plea, the State would thereafter be precluded from filing a supplemental information as it would violate the temporal limits imposed by SDCL 22-7-11. This statute mandates that such a pleading "shall be filed as a separate information *at the time of, or before*

arraignment" on the principal charge. *Id.* (emphasis added); *see also Graycek*, 368 N.W.2d at 815 (holding "the habitual offender act should be strictly construed and applied because of its highly penal nature."). "The purpose of this requirement is to insure that [the] defendant is fully aware at the time he is arraigned on the principal felony charge that there is outstanding against him a habitual information that would have the affect [*sic*] of enhancing the punishment imposed upon him." *Loop*, 499 N.W.2d at 423 (citing *Graycek*, 368 N.W.2d at 815)).

It cannot reasonably be said that the legislature intended to characterize *all* DUI's as first offense Class 1 misdemeanors so as to shield repeat offenders from the collateral consequences of a potential felony enhancement. (emphasis added). However, this is precisely the presumption the State invites this Court to sanction. Because the Court has an obligation to interpret the law "in a manner avoiding absurd results," amicus ask that it decline to do so. *Murray*, 2010 S.D. 18 at ¶ 7.

CONCLUSION

For the reasons heretofore presented, amicus curiae SDACDL urges the Court to reverse the ruling of the lower court and hold that Rus is entitled to a preliminary hearing; urges the Court to overrule *Helling*; and urges the Court to clarify that "sentence enhancements" that transform what is otherwise a misdemeanor offense into a felony offense trigger the right to a preliminary hearing under SDCL 23A-4-3.

Respectfully submitted,

ALECIA E. FULLER**
Office of the Public Defender
for Pennington County
130 Kansas City Street, Suite 310
Rapid City, South Dakota 57701
(605) 394-2181
aleciaf@pennco.org

VICTORIA REKER*
Office of the Public Advocate
for Minnehaha County
415 N. Dakota Avenue
Sioux Falls, South Dakota 57104
(605) 367-7392
vreker@minnehahacounty.org

RYAN KOLBECK
Kolbeck Law Office
505 W. 9th Street, Suite 203
Sioux Falls, South Dakota 57104
(605) 306-4384
ryan@kolbecklaw.com

SARAH E. BARON HOUY
Bangs McCullen Law Firm
6340 S. Western Ave., Suite 160
Sioux Falls, South Dakota 57109
(605) 339-6800
sbaronhouy@bangsmccullen.com

OLE J. OLESEN
Office of the Public Defender
for Pennington County
130 Kansas City Street, Suite 310
Rapid City, South Dakota 57701
(605) 394-2181
Ole.Olesen@pennco.org

DEREK FRIESE
Office of the Public Defender
for Minnehaha County
413 N. Main Street
Sioux Falls, South Dakota 57104
(605) 367-4242
dfriese@minnehahacounty.org

JUSTIN L. BELL
May, Adam, Gerdes & Thompson
503 S. Pierre Street
Pierre, South Dakota 57501
(605) 224-8803
jlb@mayadam.net

JAN OLSON
Olson Law Firm, LLC
505 W. 9th Street, Suite 102
Sioux Falls, South Dakota 57104
(605) 271-1422
jan@jolsonlawfirm.com

*President, SDCDLA.

**Immediate Past President, SDCDLA.

APPENDIX

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STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF AURORA | FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff, vs. CHAD A. RUS, Defendant.	No. 01CRI19-28

BEFORE: THE HONORABLE PATRICK SMITH
Circuit Court Judge

For the Plaintiff: JOHN R. STEELE
AURORA CO. STATE'S ATTORNEY
P.O. Box 577
Plankinton, SD 57368

For the Defendant: STEVEN J. BUCHER
BUCHER LAW OFFICE
P.O. Box 293
Plankinton, SD 57368

PROCEEDINGS: The above-entitled proceeding commenced at approximately 1:13 p.m. on the 25th day of September 2019 in the courtroom of the Aurora County Courthouse, Plankinton, South Dakota.

INDEX OF EXAMINATIONS

NAME	PG
NONE	

INDEX OF EXHIBITS

NO.	DESCRIPTION	PG
NONE		

(Whereupon, the following proceedings were had, to wit:)
THE COURT: It is 1:10 on September 25th, 2019. My name is Judge Pat Smith, and I handle matters here in Aurora County. This is the time and place set for hearing in Criminal File 19-28 State vs Chad Rus. Mr. Steven Bucher is here regarding and representing Mr. Rus, and who's here on behalf of the County?
MR. STEELE: I'll be arguing for the State, Your Honor.
THE COURT: Mr. John Steele is present, state's attorney for Aurora County.

Mr. Bucher filed a motion - actually, he made an oral motion and then supplemented it with some filings asking to have this matter set for a preliminary hearing. His position being that this was a felony matter; in that, a supplemental Information, if not yet filed, was going to be filed, which would make this matter alleged to be a third offense and put it into the canopy of a felony and, as such under the laws of the State of South Dakota, he'd be entitled to - his client would be entitled to a preliminary hearing. And I realize, Mr. Bucher, I'm paraphrasing; I haven't exactly set forth your theory, but --
MR. BUCHER: You're doing good so far.
THE COURT: -- what you asked for, nonetheless, was that a preliminary hearing be set.

Mr. Steele, you filed a request that that be

recharacterized as a motion to dismiss that Information that was filed prior to a preliminary hearing where one was necessary. I declined to recharacterize the defendant's motion feeling that it would be up to the defendant to determine the nature of his motion, and while I did not hear an objection to your request nor did I see that it was joined in by defense. Also I felt that it was clear on its face as presented to be a question of whether he's entitled to a preliminary hearing, ultimately then being a question of whether, at this stage, the matter was a felony, so I didn't recharacterize things and I left it as it was.

I have since received briefs from both sides that set forth your positions on the issue of whether a preliminary hearing should be scheduled in this matter, and I had set today for either arguing the motion or having the preliminary hearing depending on how it goes and the availability of witnesses. The parties had asked that we not schedule a prelim - a tentative prelim until the issue was clarified. I thought that was reasonable, so at this time my only intention is to hear arguments on the request for a preliminary hearing, make a ruling, and then schedule future hearings in accordance with that ruling.

With that, Mr. Bucher, as the moving party, I have read your brief; I compliment its writing. I realize, though, that it was your son that wrote it and not you.

MR. BUCHER: He added a little.
THE COURT: Nonetheless --
MR. STEELE: If I could, Your Honor, --
THE COURT: Yes.
MR. STEELE: -- point of procedure: we also filed a motion to strike the word "felony," and I think it would be clearer if the Court dealt with that before dealing with Mr. Bucher's motion.
THE COURT: Oh, I think that makes sense. Thank you for reminding me of that, Mr. Steele.

There was a warrant, I believe, generated by the UJS system or by Odyssey but I'm not certain. But, in any event, a warrant was issued in this matter that listed that there was a warrant for a felony DUI. The State - you've moved to strike the term "felony" from that, taking the position that it's surplusage and, at this point, it's not a felony for that purpose. Is that a synopsis of your motion?
MR. STEELE: That is a good synopsis, Your Honor, but I have to take responsibility. The warrant was drafted in my office. We can't blame UJS for it. That word was inserted by - in our office.
THE COURT: And, Mr. Bucher, your position?
MR. BUCHER: I'm going to resist that, and it will be part of my argument.
THE COURT: All right. Well, I understand your resistance,

but I don't think it's necessary that a warrant identify the level of offense. There's nothing statutorily that requires it. I don't think it's binding on anyone. It's merely a warrant, an order from the Court issuing a warrant. Those warrants do often get generated by the Odyssey system. They just spit out a warrant, and I sign them at the conclusion of a court day when a number of warrants have been asked for.

I just signed one this morning generated not by your office, Mr. Steele, but by Odyssey through the clerk. I don't see any reason that it needed to be on there, and I am striking it from the language - I'm striking that language from the warrant.

MR. BUCHER: I want it clear that I'm not agreeing to that or acquiescing to it. It's actually a major part of my argument.

THE COURT: All right. Well, I'll hear your argument and reconsider it if you convince me otherwise. We're not done today, so. . . .

With that, on the actual request you've made to have a preliminary hearing scheduled as the moving party, I'll hear your arguments. Go ahead, Mr. Bucher.

MR. BUCHER: This is a - to me a fairly simple inquiry. If the Court implements 23A-4-3 that talks about "no defendant is entitled to a preliminary hearing unless charged with an offense punishable as a felony." To me that's the very

essence of this. If the legislature had meant only "felony," then the other words have no meaning at all. And I think that's where we're at.

Back to the felony warrant and the felony nature of the charge: I can tell you that, as my client got accosted, put under arrest, cuffed, and perp-walked out of his place of employment to be taken down to Charles Mix County when the Aurora County authorities knew right where he lived - they'd been on his place twice, but when he was handcuffed, taken into custody, taken 40 miles away or whatever the distance is between his place of employment, it felt a lot like a felony to him. When he was tested for DNA as felony warrants are served, it felt like a felony to him, okay? So I think it kind of comes down to: words on pages and words on pleadings make a difference, and timing of pleadings and sufficiency of pleadings make a difference.

I cited the case to the Court when I was here before, the Honomichl case. I think that stands for the proposition that correctly prepared and timely filed documents, whether they be Informations or Indictments, have a meaning and a place and a purpose. So the fact to say, "well, we'll just strike the word 'felony' and all things are back to square 1," no, no. My client's DNA, the way I understand it, is now in the system somewhere, so I don't know that that can be undone or unrung. It felt like a felony.

What was going on in the Honomichl case is pretty simple. Sioux Falls was calling people in for arraignment proceeding - right to arraignment on DUI cases, and they were not filing Informations until either later in the day or before the judgment of conviction was entered saying that there's no harm/no foul, it's there. They - well, the Supreme Court reviewed that and they said no, no, no, no, no. These documents establish subject matter jurisdiction for the Court to proceed further, and they bounced Honomichl back, and it was done correctly.

Now, of course, we don't have the standard requirement of preliminary hearing or indictment on a general Class 1 misdemeanor, but I think the meaning is still there, that it isn't just a word on a piece of paper; it isn't just a pleading that can be filed anytime. It's - there's a certain order that the State must go through if they're going to punish an individual as a felon. And that's what they're going to do here. They've made no bones about it. That's what's going to happen.

So my client, if he's convicted and if he is sentenced to the penitentiary, which he could possibly be here, will very definitely feel like he's been convicted of a felony. So if - I just don't know how the Court can ignore the language "charged with an offense punishable as a felony" to take the State's position. If the Court agrees with it, the

Court, in my estimation, would be ignoring "charged with an offense punishable," and I don't think that's what the legislature intended.

We need to give all statutes meaning to all the words if we can. I think the law is clear on that, and I just - I think that this is a case that demands a preliminary hearing; it demands correctly filed Informations at time - timely filed correctly prepared, and to do it any other way is a - I think potentially a violation of due process rights. It certainly may call into question the Court's subject matter jurisdiction to go forward with the case. And the time to figure that out is now, not when we're wondering how we're going to proceed with the arraignment on the Part 2 Information.

So that's why I'm here. That's why we've moved the way that we have. That's why I think it's important that the Court make this determination and, frankly, afford a criminal defendant a right guaranteed, I think, by the law. And no harm can come from it. It's not going to be like a - we're going to do something other than prepare the case. Frankly, I think the case will be better prepared when we know the witnesses and hear the testimony. Not my call, not my - not my decision. But to say that we can just take words out and put them in willy nilly I think misses the point of what Honomichl is saying. The timeliness and correct wording is

everything in a criminal charge, is everything. Thank you, Your Honor.

THE COURT: Well, thank you, Mr. Bucher.

Mr. Steele?

MR. STEELE: Your Honor, I think there are two different issues before the Court: one is whether or not the defendant is entitled to an Information on the charge that is filed. The other question is: if he is, what remedy is he entitled to seek from the Court?

The present state of the file, Your Honor, is Mr. Rus is charged with a misdemeanor. There's a Complaint for a DUI, which is a misdemeanor; an Information has been filed alleging DUI, which is a misdemeanor. Mr. Bucher's certainly right; we've made no bones about the fact that we intend to file a Supplemental Information after or before the time of arraignment charging him with a third offense DUI. That Information is, in fact, prepared; it's in my file; and it's waiting to be filed with the Court at an appropriate time.

With regard to whether he's entitled to a preliminary hearing, I would refer to the same statute Mr. Bucher is referring to, but I would point out a couple of things in addition to the arguments that are in our brief, and I'll touch on that in a little bit. He's entitled to a preliminary hearing unless charged with - he's not entitled to a preliminary hearing unless charged with an offense

punishable by a felony - as a felony. Is he charged with an offense punishable as a felony? And the answer is no, he's not. He won't be and he can't be until he makes an appearance in circuit court. The magistrate court has no jurisdiction over a felony over a Supplemental Information and only has jurisdiction over a felony for purposes of binding it over to the circuit court. I think we all know that. We've all been around this a long time.

If we did have a preliminary hearing, would the magistrate court, this court sitting as magistrate court, have the authority to bind him over on a felony? The answer is clearly not. If there's a bind-over order after a preliminary hearing in this case, it would be a bind-over for the charge that is set out in the Complaint, the same charge that is set out in the Information that has been filed.

The statute goes on to speak in terms of a preliminary not being held if the defendant is indicted before the date set for the preliminary hearing. If he were indicted, he wouldn't be indicted on a felony; he can only be indicted for the charge that is otherwise handled in the Complaint and in the Information.

We don't have to present probable cause evidence at any stage of the proceeding prior to the trial on the Supplemental Information. We don't have to present any evidence in support of a felony charge. There is nothing

felonious for him to have a preliminary hearing on. He's trying to get a preliminary hearing on a misdemeanor charge, and the statute clearly says he's not entitled to one.

Now, with regard – and with regard to the cases argued in the brief - I forget which case it is, but it's all set out in the brief - the Supreme Court has said: even though there may be a felony charge enhancement, Supplemental Information on file in a case, the trial procedure - in essence, everything prior to the trial on the Supplemental Information is all misdemeanor procedure.

The particular case - and I think the Court alluded to this one in the - at some point to us - the particular case is a person on trial for a DUI where there's a felony Supplemental Information pending, was not given the felony number of peremptory challenges; he was given misdemeanor number of peremptory challenges. It's a misdemeanor until we get to the trial of the Supplemental Information. That's the clear holding of the Supreme Court. It's the - it's the fair reading of the statute that's involved.

Now, if he is entitled to a preliminary hearing, despite our argument, what is the proper remedy for the defendant to seek from this Court? And I would submit that the Information is on file. The only jurisdiction this Court would have, if it concludes that a preliminary hearing was not - should have been held in this case, is set out in

23A-8-2. Defense says - said that they elect not to seek that relief, but I believe that's the only relief this Court has the authority to grant if it is persuaded by the defense argument, and I'd note the defendant --

THE COURT: And I --

MR. STEELE: I'm sorry?

THE COURT: I'd just ask a question there, and I think you're going to get to this, but I just want to clarify. So you don't believe I would have the authority to simply hold the Information in abeyance, not accept it as a filing despite the fact that you filed it, I, as the keeper of the record, say "we're not accepting it as a filing" and it would just be held in abeyance until a prelim is held? You don't think I'd have that. What I would need to do is, because it's been filed, dismiss it.

MR. STEELE: That's exactly what I'm arguing, Your Honor, --

THE COURT: Go ahead.

MR. STEELE: -- yes. And that's what the statute says: when a defendant is charged by Information and did not either have or waive a preliminary hearing - obviously in a case where he's entitled to a preliminary hearing - before the Information is filed, the Court must dismiss the Information on the motion of the defendant. If the defendant is not electing to make that motion, then I believe then that the Information stands. And I'm not trying to put Steve boxed

into a corner with regard to that motion. I believe that's the proper motion for this Court to be hearing today, and if he wanted to amend it, I'd be happy to have him amend it.

But I would like to have the Court make a clear ruling: if he's not entitled to a preliminary hearing, then we need to proceed on the arraignment on the Information that is on file. If the Court dismisses the Information, that is an appealable order, and it would be my expectation that the State would appeal that. There's a statute that says it's clearly an appealable order. We'd appeal it, and we'd get an answer to this question from the Supreme Court. Obviously it's your call, but I would like to have one or the other of these results. Either we're going to go forward with this case as it is on the Information that's on file or you're going to dismiss the Information, and we will appeal it on the issue of whether or not it's a case covered by 23A-8-2(9), that it's a case that should have had a preliminary hearing before the Information is filed.

That's my view of what a proper remedy for the defense to seek in this case would be, and I see nothing in the code that suggests a motion after the Information is filed to hold a preliminary hearing is a proper motion. I can't say there's anything saying clearly that it's not a proper motion, but he has an obvious remedy under the code. I don't think that the Court should be expanding its scope of options

beyond what's clearly set forth in the code which is clearly the remedy he would be entitled to if, in fact, the Court agrees with him that he's entitled to a preliminary hearing.

I think the Honomichl case, if I remember correctly, supports the State's view that that is the correct remedy, that the case should have been dismissed if an Information was not filed prior to arraignment and the case should be dismissed if an Information is filed when there should have been a preliminary hearing held first, and that's basically what we have, Your Honor, in addition to what's set forth in the brief.

THE COURT: Thank you. Mr. Bucher, I'll give you a brief opportunity to rebut anything you think was raised.

MR. BUCHER: Well, of course I think the Honomichl case extends from the proposition that the parties can't stipulate to the subject matter jurisdiction. It's according to the Court if it does or it doesn't with filings.

I haven't done any exhaustive search, Your Honor, but I do think that there are other criminal actions that can turn into more severe punishment. Reckless driving comes to mind, domestic assaults, those types of thing, and I think some of them can turn into felonies. I have haven't done any exhaustive search, but I think that's exactly what this statute is contemplating, that it's going to be punishable as a felony even though it doesn't start out as one.

The case that we've talked about - it's in the brief about the extra perempts, you know, making that as a distinction - there was a waiver of the preliminary hearing; there was a waiver of many of the things before they got to that point. It used to be Courts allowed or at least considered a separate jury on the felony part of the Part 2 Information.

THE COURT: That's still the case.

MR. BUCHER: Yeah, in which case, that would be a question of how many perempts at that time not really at the principal trial, and I think that's a distinction that we may never see again. Certainly a felony conviction on a DUI charge can be used as a springboard later on for a habitual offender, so it's a felony in that regard.

We're heading towards a felony. I want to make sure that my client has given the Court every opportunity it can to do what we believe is required under the law and to make sure that there's no question that there's been any waiver or stipulation, which there haven't been. We're wanting all the rights the law entitles a criminal defendant so charged to happen.

MR. STEELE: I would have one follow-up point, Your Honor, if I may?

THE COURT: Okay.

MR. STEELE: Sorry for not mentioning this before, but I

believe it would be a correct statement of the law that the State is not required to inform either the defendant or the Court or the magistrate court of its intention to file a Supplemental Information prior to filing it at the time or just before the arraignment. That's certainly not been our policy. We try to be upfront with defense counsel in every way we can. We certainly try to be upfront with the Court, but I don't believe there's anything in the law or - that it would be a matter of due process for us to inform the defendant before filing the actual Supplemental information, at which time the time for having a preliminary hearing, if one were required, would be past, --

THE COURT: All right.

MR. STEELE: -- so. . . .

THE COURT: I think you're correct in that statement, Mr. Steele, if you look at - and I'm sure you have - 32-23-4.3. It requires that the defendant be put on notice of the fact that this will be alleged as a felony at the time of arraignment. So I do believe it has to be filed prior to him being advised of his rights so that the Court can make a full advisement of exactly what his rights are and what he's facing at that point. I think at that point it would be a circuit court that would be doing that and a preliminary hearing, while in the past, when that statute was written, would have already been held or waived or an Indictment would

have been issued. As it stands now, the Information would be filed without a preliminary hearing.

But what I think is most helpful to the Court, although I think it's potentially problematic, but that is for a different court or a legislature to determine in my view is the holding in Helling. And that is the case that we've discussed at length that involves what rights are granted a defendant charged with a DUI who's having a trial on the principal Information when a Supplemental Information has been filed.

Our Supreme Court upheld the treating of that charge as a misdemeanor, going so far as to say, yes, there is a Supplemental Information and, yes, this could potentially be a felony if he's convicted of both the underlying charge and the Supplemental information and, if he exercises his right, to two trials on those issues and is convicted by a jury in each case but until that point, it is a misdemeanor. And so the defendant who said, "Your Honor, I'm punishable as a felony" was told "no, you're not," not until and unless there is a finding of guilt on a Supplemental information.

What you are punishable right now is as a misdemeanor, and because of that, we're going to treat this as a misdemeanor. And what we're going to do is not give you felony peremptory challenges; we're going to give you misdemeanor peremptory challenges. And the Supreme Court

said that's right and he should only get misdemeanor peremptory challenges. To me that's on all fours with what we have here.

I have a case currently charged by Information with a Supplemental contemplated and intended to be filed prior to arraignment so the defendant can be made aware of that, and the defendant is seeking to have that treated at this stage as a felony. Our Supreme Court said that doesn't happen. You wouldn't get multiple strikes, and I think it's the same as saying you don't get a preliminary hearing.

Now, I am not unaware of the fact that the Anders case, which came along sometime after 2009 to be precise, addressed that unique issue, and I think I've given you this site, but I will go ahead and give it out again. It is State vs Anders, A-n-d-e-r-s, 763 N.W.2d 547. And if you look at Footnote 3, it raises your point, Mr. Bucher, and I think it's worth noting this, because this is what's given the Court the most heartburn about ruling the way I'm ruling.

In Caroll we recognize that our holding was in line with State vs Helling, quote, where we held that a person charged with a third offense DUI was not entitled to additional felony peremptory challenges. We find the discrepancy troubling and conclude that, because a person charged with a felony DUI faces a potential penitentiary sentence and should be treated the same as though charged with other felonies,

that this is a procedural defect needing to be cured. But what I don't think is that it needs to be cured by a circuit judge overturning valid Supreme Court precedent. I think it needs to be cured by the Supreme Court or by the legislature in a review of any decision that I make in this case.

Whether they will follow their - what they are pointing out as an issue in the Anders case or whether they will uphold the ruling in Helling is for them to determine or for the legislature to address. And perhaps that's whom they were talking about too - I don't know - when they wrote the footnote in Anders, but I think, bottom line, Helling is good law. Helling says it's treated as a misdemeanor until such time as it isn't. This isn't that time, and therefore you're not entitled to a preliminary hearing.

Now, here's an interesting question that I haven't quite wrapped my head around either. This may be the next brief that gets written. Mr. Steele, I anticipate, as the law requires under 32-23-4.3, that you will file a Supplemental Information. You've indicated that's your intention prior to arraignment. I will proceed with an arraignment, but at that point, there's an Information on file that's alleging a felony. That statute redates the requirement - or the waiver of the prelims and perhaps felt that the prelim issue was addressed at the magistrate level. I don't know.

The question becomes: Would the defendant be entitled

to a preliminary hearing on the Supplemental Information or to move to have it dismissed if it's been filed without one? I don't know the answer to that. My thinking would be - but you've given me food for thought today - that this may not be correct would be that it would - that if it were to be pushed, if someone were to demand a preliminary hearing on a Supplemental Information, that now that it's a felony allegation, they'd be entitled to one just as they'd be entitled to a felony amount of strikes in a jury trial.

But then how do we get around the statutory requirement that the Information not be filed until a prelim be held? My thinking would be that that would be the general statute that would be overruled by the more specific statute requiring that the Information be filed prior to arraignment so that a judge could advise as to the effect of the Supplemental Information, and my logic then would be to hold it in abeyance and, prior to the trial, have a preliminary hearing on the Supplemental. And that's a question we don't have to answer yet. We haven't even had the arraignment.

I do think you have to file it. I don't think, therefore since it's required to be filed, that it would be subject to dismissal because there wasn't a prelim, but I do think the statute that says "felonies get prelims" might leave room for the idea that we hold it in abeyance until there is a prelim.

MR. STEELE: And if that were the Court's ruling, Your Honor, would the prelim be on the Supplemental Information that we would have to show probable cause that he had the two priors that we would otherwise be alleging?

THE COURT: Yes. I think it would be a prelim on the allegations contained in the Supplemental just as the new trial. I think it's - yeah, 32-23-4.4 basically says all of the rights that a person has on the primary Information they have on the Supplemental information, the right to a jury trial. But that's not a retrial of the DUI; it's a trial on whether he committed a third offense DUI by having two prior convictions. And that trial - that issue would be the same issue that he'd have a right to a prelim on.

Now, whether he does or not, I don't know, because I don't know that removing preliminary hearings from the equation at the front end changes what has always been the practice in accordance with what has generally believed to be South Dakota law on the back end, which was Supplemental got filed and then you had a trial and, if you needed one, you had a second one. There was no prelim on the Supplemental. The fact that there used to be one on the primary probably is of no consequence.

And I realize I'm doing a whole lot of talking off the top of my head here. There's issues to raise, and I haven't really decided on them, but it is interesting. I've never

heard this raised ever in the history of Supplemental Informations.

MR. STEELE: I've certainly never heard of anybody having a preliminary hearing on one.

THE COURT: I agree, so I don't know what the answer is. I think I don't have to answer that today.

MR. STEELE: Understood.

THE COURT: I think it's very clear Helling is controlling authority until somebody decides Helling should be reversed, and I don't think that's my place. So I'm denying your motion for preliminary hearing. I'm scheduling this for arraignment on my next court date.

THE CLERK: October 9th.

THE COURT: That will be October 9th at 1 o'clock.

One final thing I should point out: I don't disagree with your position, Mr. Bucher, that it sure felt like a felony. This is not a question - this is a question of what the - and you often referred to it as something that he has a right to. This is a statutorily created right not a constitutional one, and you didn't say "constitutional." And it's not a question of what it felt like; it's a question of what the statutes require.

For instance, your client's not here with you today. This is a critical stage where I'm making a decision on an issue - a motion that he has filed, but I said he didn't have

to be here; you were fine with him not taking off work. Yet on all felony appearances, he would be required to attend. The reason he doesn't have to be here is because it's not a felony, at least that's in part why I don't believe he's required to be in attendance. But at some point, it will be, and when it is, his attendance will be required at every stage, at least every critical stage, and I think that's worth noting. So arraignment will be on the 9th at 9 o'clock.

Thank you, all, for your attendance.

MR. STEELE: Thank you, Your Honor.

(Proceedings concluded at 1:46 p.m.)

C E R T I F I C A T E

STATE OF SOUTH DAKOTA)
) ss:
COUNTY OF DAVISON)

I, Stephanie L. Moen, RPR, Court Reporter and Notary Public within and for the State of South Dakota, took the proceedings of the foregoing case contained on the foregoing pages 1 - 24 inclusive, was reduced to stenographic writing by me and thereafter caused to be transcribed; that said proceeding commenced on the 25th day of September 2019 in the courtroom of the Aurora County Courthouse, Plankinton, South Dakota; and that the foregoing is a full, true, and complete transcript of my shorthand notes of the proceedings had at the time and place above set forth.

In testimony whereof, I have hereto set my hand this 22nd day of November 2019.

/s/ Stephanie L. Moen
Stephanie L. Moen, RPR
Official Court Reporter

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
APPEAL NO. 29165

****

STATE OF SOUTH DAKOTA,	Plaintiff and Appellee
v.	
CHAD A. RUS,	Defendant and Appellant

****

APPELLEE'S BRIEF

****

APPEAL FROM THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT,
AURORA COUNTY, SOUTH DAKOTA

****

THE HONORABLE PATRICK T. SMITH
Judge

****

John R. Steele PO Box 577 Plankinton, SD 57368	Prosecuting attorney for Plaintiff and Appellee
Rachel Mairose PO Box 577 Plankinton, SD 57368	Prosecuting attorney for Plaintiff and Appellee
Steven J. Bucher PO Box 293 Plankinton, SD 57368	Attorney for Defendant and Appellant
Bert S. Bucher 1906 Pearl Street Yankton, SD 57078	Attorney for Defendant and Appellant

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JURISDICTIONAL STATEMENT

Appellee concurs with the jurisdictional statement as written in the Appellent's Brief.

STATEMENT OF THE FACTS

The Defendant was charged with driving a motor vehicle while under the influence of an alcoholic beverage ("DUI") (SDCL 32-23-1(2)), reckless driving (SDCL 32-24-1), and failure to report an accident (SDCL 32-34-6) in a complaint filed on July 11, 2019. The charges were the result of a lengthy investigation by Aurora County Deputy Sheriff Derek Howard. The event leading to the charges took place on June 25, 2019, on the road in front of the Les Crago ("Crago") home, in rural Stickney, Aurora County, South Dakota.

On June 26, Crago called the Aurora County Sheriff's office to report that someone had hit his mailbox the preceding evening. He suspected that Rus was the perpetrator and gave the address to Rus's residence. Deputy Howard drove to Rus's residence, and when he arrived, no one was home. A car sat in Rus's driveway with the hood up, the driver's side door open and damage on the front passenger side and windshield of the car. Deputy Howard assessed the damage on the car and took photographs. He then visited the Crago residence and examined the damaged

mailbox. He concluded that the damages on the car and on the mailbox were consistent with one another.

Deputy Howard also collected video surveillance from the 281 Bar in Stickney that showed Rus driving to the bar the previous evening with no damage visible to his car. The video also showed Rus consuming ten sixteen-ounce beers and exiting the bar with a six-pack of beer. Deputy Howard also collected video surveillance from the Stickney elevator that showed that Rus's car did not have any damage on it after leaving the bar, just prior to the time when the mailbox was hit.

On June 28, Crago called the Aurora County Sheriff's Office to report that Rus had called Cargo's wife, Arla, and that Rus had admitted hitting the mailbox. Deputy Howard called Arla, and she reported that Rus had called her on June 26 and stated that he was sorry for hitting the mailbox and would pay for a replacement.

Deputy Howard then went to Rus's house on July 1, 2019, and conducted an interview with Rus. During their conversation, Rus admitted that he hit the mailbox but denied having too much to drink. He stated that he did not know how many beers he had consumed and was on the phone when the mailbox was hit. Subsequently, the Aurora County State's Attorney filed charges.

PROCEDURAL HISTORY

An accurate statement of the procedural history of this case is a prerequisite to a clear analysis of the defendant's rights and remedies, if any, with respect to his various complaints and, in particular, to the question of whether the defendant has been denied the right to a preliminary hearing to which he was entitled under applicable law.

The significant events in this matter, which will be referred to as "procedural" even though in a strict legal sense some may not be considered procedural, are the following, which will later be referred to, for ease of reference, by the abbreviation "PE" (for "Procedural Event") followed by a hyphen and the number of the event as listed below. For example, the filing of the principal information, the fifth event listed below, will be referred to later as "PE-5." Not all of the events here listed are of independent significance. Each of them is listed for the sake of clarity and analysis. The events are these:

1. 6/25/19. An incident took place in front of the Les Crago residence in rural Stickney, Aurora County, South Dakota, in which the Crago mailbox was damaged as the apparent result of having been struck by a motor vehicle.

2. 6/26/19. The damage to the mailbox was discovered by Crago and reported to the Aurora County Sheriff's office. An investigation was then commenced by the Sheriff's office.

3. 7/11/19. Following an extensive investigation, a complaint was filed with the Aurora County clerk of courts alleging three class 1 misdemeanors to have been committed by the defendant, Chad A. Rus. One of those class 1 misdemeanors was a count of driving under the influence of an alcoholic beverage in violation of SDCL 32-23-1. The charges other than the single count of DUI are not relevant to this appeal.

4. 7/11/19. Based on the complaint (PE-3) an arrest warrant was issued for the arrest of the defendant. The arrest warrant was issued by the Aurora County clerk-magistrate, based on the complaint.

5. 7/11/19. The principal information charging the same counts as the complaint was filed with the clerk of courts.

6. 7/19/19. A new arrest warrant was issued by the clerk-magistrate labeled as a "felony warrant."

7. 7/25/19. The new warrant (PE-6) was executed in Charles Mix County, South Dakota, by Deputy Rolston of the Charles Mix County Sheriff's Office. Deputy Rolston took

the defendant into custody and delivered him to the custody of the Aurora County Sheriff's Office.

8. 7/25/19. The defendant was taken before the Aurora County clerk-magistrate for bonding. He was released on his personal recognizance, without posting cash or surety.

9. 7/31/19. The defendant appeared in circuit court, along with his attorney, Steve J. Bucher. The case had been anticipated to be scheduled for an arraignment. However, defendant, through defense counsel, moved the court for an order scheduling the matter for a preliminary hearing, or, in the alternative, an order limiting punishment to that of a class 1 misdemeanor. The court ordered the state and defendant to both submit briefs on the issue.

10. 9/25/19. The defendant's motion was argued before the Circuit Court, the Hon. Patrick Smith, Circuit Court Judge. The court entered its oral ruling denying the defendant's motion and directed the states attorney's office to prepare an appropriate written order.

11. 9/25/19. At the time of the motion hearing on the defendant's motion, the state offered to stipulate that the motion be treated as a motion to dismiss the information pursuant to SDCL § 23A-8-2(9) The defendant declined to so stipulate and the court ultimately ruled on the defendant's motion as it was made by the defendant.

12. 9/25/19. The court entered an order, on motion of the state, striking references to "felony" from the arrest warrant (PE-6) as surplusage.

13. 10/11/19. The court's written order denying the defendant's motion was entered by the court. This is the order from which the defendant's intermediate appeal has been granted.

14. 10/17/19. Notice of entry of the court's order of 10/11/19 (PE-13) was given to the defendant.

15. 10/22/19. A supplemental information was filed by the state alleging that the defendant had been convicted of two prior violations of SDCL § 32-23-1.

16. 10/23/19. The defendant was arraigned on the principal information (PE-5) before Judge Smith and entered a plea of not guilty to all three counts of the principal information, including the misdemeanor count of DUI. He was advised of the filing of the supplemental information and its effect if he were found to have committed two prior DUIs, but no plea was or has been taken on it.

STATEMENT OF THE ISSUES AND ARGUMENT

1. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ALTERNATIVE RELIEF.

a. Had defendant been entitled to a preliminary hearing, his only relief would have been to seek dismissal under SDCL § 23A-8-2(9).

The defendant raises numerous issues about the procedural events enumerated above, some by argument and others by implication. His chief argument, of course, is that the court should have granted his motion for a preliminary hearing, or, in the alternative, for an order limiting the defendant's punishment to that of the Class 1 misdemeanor (PE-11). The state's view is that the defendant's analysis of the significant events of the case is defective and has the effect, presumably unintentionally, of obfuscating a sound analysis.

The first question to be answered is whether, supposing that the defendant was entitled to a preliminary hearing on the DUI charge that was made against him, what was the remedy that the court could have given to him if it had agreed with him? Significantly, the principal information charging him with DUI was already on file before the defendant appeared with his attorney on July 31 (PE-9). The gist of his complaint is that the state was attempting to proceed on that information without him having been afforded a preliminary hearing. If that contention is correct, he had a plain statutory remedy which he declined to pursue, even though the state offered to stipulate that his motion should have been so construed (PE-11). That

statutory remedy is set out in SDCL § 23A-8-2(9). That statute states in pertinent part:

> Upon motion of a defendant . . .the court must dismiss an . . .information in any of the following cases: . . . (9) When a defendant charged by information did not have or waive a preliminary hearing before the information was filed.

At the request of the defendant, the court concluded that it could "hold the information in abeyance" and consider the defendant's motion to schedule a preliminary hearing. The court declined to do so based on its reading of the prior decisions of this court. However, there is no statutory authority nor has counsel discovered any case authority for the procedure employed by the trial court. The only relief that defendant would have been entitled to if the court concluded that the information was filed against him in a case where he was entitled to a preliminary hearing would be to grant a motion to dismiss the information on the count on which he was determined to be entitled to a preliminary hearing.

It is respectfully submitted to this court that, if it determines that the trial court was incorrect and that the defendant was entitled to a preliminary hearing in the instant case, the relief that should be granted to the defendant would then be a dismissal of the information. At that point, the state could have determined whether to

appeal the trial court's order, refile the complaint and schedule a case for a preliminary hearing, submit the matter to a grand jury, or proceed only on the remaining counts. Those decisions, however, are not for the court but a matter of the discretion and judgment of the prosecution, part of a separate branch of government.

With regard to the defendant's alternative request for relief, that the defendant's punishment be restricted to that of a Class 1 misdemeanor, it is respectfully submitted that there is neither statutory nor case authority for the granting of such a motion, nor has any been cited by defendant to either the trial court or this court, and that the trial court properly declined to give it serious consideration.

b. The defendant's charge of DUI should not be dismissed under SDCL 23A-8-2(9) because he is not entitled to a preliminary hearing.

The second question that is raised is whether the trial court should have granted a motion to dismiss, had defendant made it, and whether this court should now on its own direct the entry of such an order dismissing the DUI count of the principal information pursuant to SDCL 23A-8-2(9).

Defendant asserts that he is entitled to a preliminary hearing on the DUI charge because he is charged with an

offense that is punishable as a felony. Whether that statement is accurate is key to deciding this issue. The state's position is that the right to a preliminary hearing is a purely statutory one, subject to regulation or even abolition by the legislature, and is a matter of statutory criminal procedure. The defendant is entitled to a preliminary hearing if and only if the applicable statutes, reasonably interpreted by the court, give him that right.

The defendant has been charged, first by complaint and then by information, with a misdemeanor offense of DUI. That is all that he was charged with, even arguably, until the filing of the supplemental information (PE-14). Of course, because the state's attorney's office does not play "hide the ball" with either the trial court or defense counsel, defense counsel was informed as soon as he notified the state that he was retained, that the state expected to file a supplemental information at an appropriate point in the proceedings, alleging that the defendant had two prior DUI convictions within the statutory time period. The trial court was also informed of the same intention, not later than the defendant's first appearance before the Circuit Court on July 31, 2019. Does the intention to file a supplemental information in the future, acknowledged by the prosecuting attorney, mean that

the defendant was then charged with an offense punishable as a felony?

This court answered that question in State v. Helling by holding that SDCL § 32-23-4 is a punishment enhancement statute and is not a statute that charges an independent offense. 391 N.W.2d 648, 650 (S.D. 1986). Similar to the facts of the present case, in Helling, the defendant was facing a misdemeanor DUI charge, with a supplemental information alleging that he had two prior convictions. Knowing that if he was found guilty of the misdemeanor, he could be then tried on a supplemental information after his trial on the principal information, he asked for ten peremptory challenges during voir dire. The trial court, and subsequently this court, both held that his trial on the principal information charging DUI must be treated procedurally as a misdemeanor trial. The possibility of a felony-level sentence did not create a new offense, but would have simply allowed the court to impose a more severe penalty, but only if the defendant was found guilty on the supplemental information. Likewise, Rus is asking to be given the same rights as a defendant charged with a felony, despite only facing misdemeanor charges, if he goes to trial on the principal information.

Assuming that the defendant goes to trial on the information to which he objects, the principal information, and assuming further that he is convicted at trial, does he then stand convicted of a felony? Of course, that answer is clear and it is "no." He is not then convicted of a felony. He is entitled to a second trial, presumably with all the panoply of a felony trial, on the supplemental information. What the defendant is asking this court to do in asking it to overrule Helling, is to rule that he is entitled to two felony trials, one on the principal information charging a misdemeanor and one on the supplemental information enhancing punishment to a felony. He is asking this court to impose the procedural rigors of a felony trial on a misdemeanor charge. Helling made sense when it was decided and it continues to make sense to this day. It should not be overruled.

Additional case law supports the holding in Helling. In State v. Steffenson, this court held that prior convictions of DUI do "not create or constitute a new, separate, or independent offense" simply because there is "the possible infliction of a more severe penalty on an accused who is a persistent violator." 178 N.W.2d 561, 564 (S.D. 1970). The Court's analysis on the purpose of the preliminary hearing is especially relevant: "the purpose of a preliminary

examination is to determine whether or not 'a public offense has been committed' and if 'there is sufficient cause to believe the defendant is guilty thereof.'" Id. (internal citations omitted). Therefore, a preliminary hearing on a supplemental information would be improper and superfluous because "The issue of prior convictions is a matter of identification rather than guilt or innocence." Id.

The Association of Criminal Defense Lawyers argues that this issue was recently decided by the Colorado Supreme Court in favor of granting preliminary hearings to repeat DUI offenders, but Colorado's statutory scheme is distinguishable from South Dakota's to the point where no consideration should be given to Colorado's holding in Tafoya. Under Colorado law, a fourth offense DUI is a Class 4 Felony. Colo. Rev. Stat. Ann. § 42-4-1301(b). It also specifies which charges are entitled to a preliminary hearing. As discussed in Colorado v. Tafoya, a defendant can request a preliminary hearing if charged with certain felony offenses, including a Class 4 Felony for DUI, but only if the defendant is in custody for that offense when the request is made. 434 P.3d 1193, 1196 (Colo. 2019); Colo. Rev. Stat. Ann. § 16-5-301(b)(II). If the defendant has been released from custody, "the court shall vacate the

preliminary hearing" if it has not yet been held. Id. In Tafoya, the defendant was unable to post bond and was still in custody when her request for a preliminary hearing was made, which formed the basis for the court's holding that she was entitled under the statute to a preliminary hearing. Id. at 1194, 1197. Because Colorado's statutory scheme as to the circumstances under which preliminary hearings may be held does not align with South Dakota's, no consideration should be given to the holding in this case.

The only information on file when the defendant's motion was made, heard and ruled on was the one which charged him with DUI, reckless driving, and failure to report an accident. These are misdemeanor charges, and the defendant did not object to its filing or move for its dismissal. While the state was upfront about its intent to file a supplemental information, one had not yet been filed when the motion was made. In effect, what the defendant has requested is a preliminary hearing on the information charging him with three misdemeanors. South Dakota's code on pretrial criminal procedure does not allow for preliminary hearings on misdemeanor charges. The court's denial of defense counsel's motion was proper.

2. WHETHER DENIAL OF THE PRELIMINARY HEARING DEPRIVED THE DEFENDANT ANY CONSTITUTIONAL RIGHTS.

Defendant's contention that he was unaware of the potential punishment facing him, and was therefore deprived of Due Process, is without merit and is ironic since his motion for a preliminary hearing was predicated on the state's disclosure of its intention to file a supplemental information. Appellant's Brief at 6. The supplemental information charging him as a habitual offender was filed on October 22, 2019 (PE-15), a day before the defendant was arraigned on the primary information (PE-16). At the defendant's arraignment, the trial court advised him of the filing of the supplemental information and the effect of it if he was found to have committed the alleged prior offenses.

In filing the supplemental information, the state followed the letter of the law as stated in SDCL § 32-23-4.2, which directs former convictions to be alleged in a separate supporting information signed by the prosecutor. If a defendant elects to make a plea on the principal information, he must be informed of the contents of the supplemental information outside the presence of the jury. SDCL § 32-23-4.3. If a plea of guilty is made on the

principal information, then the defendant may elect to have a trial on the supplemental information. SDCL § 32-23-4.4.

South Dakota has held that it is not constitutionally required that prior convictions in the supplemental information be tried in the same manner as the charges in the principal information. Steffenson, 178 N.W.2d at 564. The Court set forth three reasons why this is so. First, the supplemental information does not prejudice the defendant in any manner because it is withheld from the jury until after the defendant is convicted of the charges in the principal information. Id. Second, "it satisfies due process by granting an accused timely and formal notice of the alleged prior convictions before pleading to the primary charge." Id. Third, the charges in the supplemental information are not essential elements of the charges in the principal information and are merely related to punishment and sentencing. Id. As long as the procedural requirements for alleging former DUI convictions are followed under SDCL § 32-23-4.1 through SDCL § 32-23-4.4, due process is satisfied.

The issue of whether the defendant is entitled to a preliminary hearing is based on statutory, not constitutional, law. The state is in agreement with the South Dakota Association of Criminal Defense Lawyers which

states in its Amicus brief that the right "to a probable cause determination via a preliminary hearing" is a "statutory right." Brief Amicus Curiae for the South Dakota Association of Criminal Defense Lawyers in Support of Appellant at 5. To the extent that defendant's contentions are based in constitutional law, by asserting that his right to a preliminary hearing was unconstitutionally denied, the defendant is, in a roundabout way, claiming that no probable cause determination has yet been made. This is simply not true.

In 1981, this court adopted U.S. Supreme Court precedent which mandated that arrest warrants be issued only upon a finding of probable cause by the issuing magistrate. State v. Gage, 302 N.W.2d 793, 796 (S.D. 1981). The court held that "the language of the Fourth Amendment, that '...no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing...the persons or things to be seized,' of course applies to arrest as well as search warrants." Id. at 795-96.

The arrest of the defendant in this case was made upon a finding of probable cause by the magistrate-clerk Deborah Thiry on July 11, 2019. Attached to the complaint upon which the magistrate-clerk issued the warrant and

incorporated therein was the report of Deputy Sheriff Derek Howard. His report described the detailed investigation he undertook which led to the filing of these charges. The facts of this case are unlike the facts in the Supreme Court case that the Association of Criminal Defense Lawyers cited in its Amicus brief, Gerstein v. Pugh, 420 U.S. 103 (1975). In that case, the defendant was arrested upon the prosecutor's information only without a judicial determination of probable cause. Id. at 105. The Court held "that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." Id. at 114. In the case at hand, the charges stemming from the defendant's actions have already passed one probable cause determination when the arrest warrant was issued by the magistrate-clerk. Just as with Search warrants, the defendant has the right to test the sufficiency of the probable cause determination made simultaneously with the issuance of the Arrest Warrant by moving to quash it. The defendant has made no such motion in this case.

The Court in Gerstein noted that "state systems of criminal procedure vary widely." Id. at 123. They also noted that states have flexibility in shaping their pretrial procedures, and that there is no single pretrial

procedure that must be followed by the states. Id. An example of the varying state procedures can be found by comparing Colorado's pretrial procedures, discussed earlier in this brief, to South Dakota's. Notably, South Dakota has adopted a statutory pretrial procedure scheme in which misdemeanor offenses are not afforded probable cause hearings beyond the probable cause determination made when an arrest warrant is issued.

None of defendant's constitutional rights have been violated in this proceeding. He was put on notice of the charges against him when both the principal and supplemental informations were filed prior to his arraignment. A probable cause determination was made when his arrest warrant was issued by the magistrate-clerk. Most importantly, none of defendant's contentions stem from constitutional violations, but are based in South Dakota's statutory scheme as to pretrial criminal procedure. If he does not agree with the statutory scheme and remedies afforded him, his remedy is to petition the legislature for amendments to our state's code on pretrial criminal procedure.

PRAYER FOR RELIEF

The trial court was correct when it held that the defendant was not entitled to a preliminary hearing. The

South Dakota Legislature has mandated which offenses are entitled to a preliminary hearing, and DUI is not one of those offenses because it is a misdemeanor charge. It is punishable as a felony only when a defendant has been convicted on a supplemental information, which only becomes pertinent if he is first convicted of a misdemeanor. This court should affirm the trial court's ruling.

Dated this 24th day of February, 2020.

/S/ Rachel Mairose
Rachel Mairose
Aurora County State's Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF COMPLIANCE

I certify that Appellee's Brief is within the limitations provided for in SDCL § 15-26A-66(b) using Courier New typeface in 12-point type. Appellee's Brief contains 4,523 words and is 20 pages in length, which is less than the total words permitted by the rule of this Court.

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

/s/ Rachel Mairose
Rachel Mairose
Aurora County State's Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certified that on the 24th day of February, 2020, a true and correct copy of Appellee's Brief in the matter of South Dakota v. Chad A. Rus was served via electronic mail, at the emails listed below, upon these individuals:

Jason Ravnsborg
Attorney General, State of South Dakota
atgservice@state.sd.us

Steven J. Bucher
Bucher Law Office
bucherlaw@siouxvalley.net

Bert S. Bucher
Attorney-at-Law
Bucher89@gmail.com

Alecia E. Fuller
Attorney for Amicus
aleciaf@pennco.org

/s/ Rachel Mairose
Rachel Mairose
Aurora County State's Attorney
Attorney for Plaintiff/Appellee