IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

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NO. 30023

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STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

vs.

MICHAEL ADAM O'NEAL,

*Defendant and Appellant.*

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

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HONORABLE Camela C. Theeler
Circuit Court Judge

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# APPELLANT'S BRIEF

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Notice of Appeal Filed on June 16, 2022

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## PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as "SR." The transcript of the Initial Appearance held September 22, 2020, is referred to as "IA." The transcript of the Arraignment Hearing held September 22, 2020, is referred to as "AR." The transcript of the Discovery Hearing held January 14, 2021, is referred to as "DH." The transcript of the Motions Hearing held July 7, 2021, is referred to as "MH." The transcript of the Jury Trial held January 5, 2022, is referred to as "JT." The Memorandum Decision written by Judge Theeler and filed on September 29, 2021 is referred to as "MD." All references are followed by the appropriate page number.

## JURISDICTIONAL STATEMENT

O'Neal appeals the Judgment and Sentence entered May 16, 2022, by the Honorable Camela C. Theeler, Circuit Court Judge of the Second Judicial Circuit: Counts 1-7 Poss/Manufacture/Distribute Child Pornography on or about December 7, 2018; Counts 8-15 Poss/Manufacture/Distribute Child Pornography on or about January 2, 2019. SR 313-16. O'Neal's Notice of Appeal was filed June 16, 2022. SR 318-19. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2 and SDCL 23A-32-9.

## STATEMENT OF LEGAL ISSUES

I. **WHETHER THE ATTENUATION DOCTRINE APPLIED TO THE UNCONSTITUTIONAL POLICE CONDUCT AND THE EVIDENCE WAS SUFFICIENTLY REMOTE OR WAS INTERRUPTED BY SOME INTERVENING CIRCUMSTANCE.**

Circuit Court Judge Theeler held in O'Neal's Motion to Suppress that the attenuation doctrine applied, thus denying the defense's Motion to Suppress.

*State v. Kleven*, 2016 S.D. 80, 887 N.W.2d 740

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

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*Mapp v. Ohio*, 367 U.S. 643 (1961)

*Utah v. Strieff*, 579 U.S. 232 (2016)

*United States v. Baker*, 58 F.4th 1109 (9th Cir.2023)

*Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)

## II. WHETHER THE SEARCH WARRANT OF O'NEAL'S CELLPHONE WAS SUPPORTED BY PROBABLE CAUSE.

Circuit Court Judge Theeler held in O'Neal's Motion to Suppress that the search warrant of O'Neal's cellphone was supported by probable cause, thus denying the defense's Motion to Suppress.

*United States v. Hogan*, 25 F.3d 690 (8th Cir.1994)

U.S. const. amend. IV

*State v. Fierro*, 2014 S.D. 50, 853 N.W.2d 235

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*United States v. Williams*, 10 F.3d 590 (8th Cir.1993)

*State v. Sweedland*, 2006 S.D. 77, 721 N.W.2d 409

## III. WHETHER O'NEAL'S DUE PROCESS RIGHTS AND RIGHT TO A FAIR TRIAL WERE VIOLATED BY A THIRTEEN-MONTH DELAY BETWEEN THE TIME OF THE ALLEGED OFFENSE AND THE RETURN OF THE INDICTMENT BY THE GRAND JURY.

Circuit Court Judge Theeler held that the thirteen-month delay between investigation and return of the indictment did not violate O'Neal's due process rights or his right to a fair trial, thus denying the defense's Motion to Dismiss.

*United States v. Marion*, 404 U.S. 307 (1971)

*United States v. Lovasco*, 431 U.S. 783 (1977)

*United States v. Page*, 544 F.2d 982 (8th Cir.1976)

*United States v. Solomon*, 686 F.2d 863 (11th Cir.1982)

*United States v. Bartlett*, 794 F.2d 1285 (8th Cir.1986)

*State v. Stock*, 361 N.W.2d 280 (S.D. 1985)

**IV. WHETHER 404(b) EVIDENCE WAS IRRELEVANT DUE TO NOT BEING DIRECT EVIDENCE AND THUS UNFAIRLY PREJUDICIAL, AND WHETHER THE CIRCUIT COURT EMPLOYED THE PROPER TWO-STEP ANALYSIS IN DETERMINING IF PRIOR BAD ACTS SHOULD BE ADMISSIBLE.**

Circuit Court Judge Theeler held that the additional hash values offered by the prosecution at trial were 404(b) evidence and were admissible at trial, thus denying the defense's motion to preclude the evidence.

SDCL 19-12-5

*State v. Owen*, 2007 S.D. 21, 729 N.W.2d 356

*State v. Andrews*, 2001 SD 31, 623 N.W.2d 78

*State v. Goodroad*, 1997 SD 46, 563 N.W.2d 126

**V. WHETHER THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUSTAIN THE JURY'S VERDICT IN LIGHT OF THE FACT THAT MINIMAL EVIDENCE WAS PRESENTED AT TRIAL SHOWING O'NEAL WAS THE INDIVIDUAL TO HAVE VIEWED OR CREATED CHILD PORNOGRAPHY.**

The jury found O'Neal guilty on all fifteen counts of possession, manufacture, or distribution of child pornography despite a lack of evidence presented at trial showing O'Neal was the individual to have viewed or created the child pornography.

*State v. Brim*, 2010 S.D. 74, 789 N.W.2d 80

*State v. Klaudt*, 2009 S.D. 71, 772 N.W.2d 117

**VI. WHETHER O'NEAL'S DUE PROCESS RIGHT TO JURY UNANIMITY WAS VIOLATED BY DUPLICITY IN THE INDICTMENT.**

The trial court did not address this issue.

*State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. 2011)

*State v. Muhm*, 2009 S.D. 100, 775 N.W.2d 508

## STATEMENT OF CASE

An Indictment was returned by the Minnehaha County Grand Jury on January 13, 2020, charging Defendant and Appellant, Michael O'Neal, with the crimes of Counts 1-7 Poss/Manufacture/Distribute Child Pornography on or about December 7, 2018, in violation of SDCL 22-24A-3(3); Counts 8-15: Poss/Manufacture/Distribute Child Pornography on or about January 2, 2019, in violation of SDCL 22-24A-3(3). Arraignment on the Indictment and Information was held on September 22, 2020. *See generally* AR.

Jury Trial began on January 5, 2022, and ended on January 7, 2022. *See generally* JT1-JT3. O'Neal moved for a judgment of acquittal at the close of the State's case. SR 650. The trial court denied the motion. SR 656. On January 7, 2022, the jury found O'Neal guilty on all counts. SR 209-14.

Prior to trial, the defense filed a motion to suppress evidence from O'Neal's cellphone, which was seized without a warrant. SR 23. The trial court ruled that the attenuation doctrine applied, thus finding that the evidence should not be suppressed. MD 12. Additionally, the defense filed a motion to suppress the cellphone evidence on the basis that the eventual search warrant was not supported by probable cause. SR 23. The defense argued that Guggenberger was not known to law enforcement as someone who provided credible information. MD 18. Nonetheless, the trial court ruled that the cellphone evidence should not be suppressed because Guggenberger was not a confidential informant subject to a higher level of scrutiny. MD 21.

The defense also argued that a pre-accusatorial delay of thirteen months between the time of the alleged crime and when the case was eventually indicted resulted in a violation of O'Neal's due process rights and the right to a fair trial. SR 1017. As a result of the delay between the time the alleged crime was being investigated and when the case was being prepared for trial, multiple audio recordings were lost. SR 974. One of the audio recordings lost due to the passage of time was the recording of the initial phone call between Guggenberger and Officer Bertram. SR 974. Another one of the audio recordings lost was the audio recording of the interaction between O'Neal and Officer Hansen, during which time O'Neal's phone was seized by the officer. SR 974. The trial court ruled that because the witnesses were available for the defense to cross-examine in court, there was no due process violation. MD 23. Additionally, the trial court ruled that because the defense could not show what exculpatory evidence would be contained within those recordings, the pre-accusatorial delay did not arise to the level to which O'Neal's due process rights would have been violated and he would have not been afforded a fair trial. MD 24.

At trial, the State offered evidence of "MD5 hash values," or the identifying marker of a digital file, as indicated in the Bill of Particulars. SR 94. However, the State also sought to introduce evidence of additional MD5 hash values, showing that O'Neal had clicked on each thumbnail and had viewed a photograph depicting child pornography. These MD5 hash values were

different than the ones included in the Bill of Particulars. SR 381. The trial court allowed the additional MD5 hash values to be considered by the jury over defense objection, ruling that the evidence was 404(b) in nature, and not an issue arising from the discovery process. SR 515.

O'Neal was ultimately found guilty by the jury of all counts in the indictment. SR 211-214.

## STATEMENT OF FACTS

On December 7, 2018, Christina Guggenberger contacted the Sioux Falls Police Department about a possible sex offense involving Michael O'Neal, her fiancée. SR 51. Officer Bertram spoke with Guggenberger over the phone. Guggenberger reported that she had looked through O'Neal's phone while he was sleeping and came across what she believed to be child pornography. SR 52. The image in question was of a topless female whom she believed to be 10 or 11 years old. SR 52. Guggenberger told Officer Bertram that O'Neal worked at Wendy's and gave a description of O'Neal's cellphone and its passcode. SR 52.

Officer Bertram reported the situation to Detective Buss who then requested an officer go to Wendy's to seize the phone. SR 52. Officer Ryan Hansen responded to the request and made contact with O'Neal at Wendy's. SR 52. O'Neal was advised of the situation and retrieved his phone for Officer Hansen. SR 52. O'Neal gave Officer Hansen the passcode to his phone and stated there was no child pornography on it. Officer Hansen seized the phone and tagged it into evidence. SR 52. On December 11, 2018, a warrant was

authorized for a search of the phone based on the information from Guggenberger. SR 52.

Pursuant to the warrant issued on December 11, 2018, Detective Buss performed a manual review of O'Neal's cellphone. SR 170. In his report, Detective Buss wrote that he "did locate 26 photos that would be classified as child exploitation material. These images were mixed with over fifty thousand other images on the phone." SR 170.

On January 2, 2019, a second search warrant was issued and executed for other property O'Neal kept in Guggenberger's apartment garage. SR 52. The items to be seized and searched included a number of hard drives, SD cards, and a pillow case containing printed photos. SR 52. The basis for the January 2, 2019 search warrant came from the conversation the police had with Guggenberger as well as evidence discovered during an initial search of O'Neal's phone, namely several images of juvenile females shirtless. SR 52.

Pursuant to the January 2, 2019 search warrant, Detective Buss reported he found evidentiary information on a "Seagate brand external hard drive," and utilized Windows 10 to export the images deemed exploitive in nature, specifically 10 photos located in a folder labeled "re." SR 170.

## ARGUMENT

### I. The attenuation doctrine did not apply to the government's warrantless search of O'Neal's cell phone, and thus evidence from the cell phone should have been suppressed.

O'Neal did not voluntarily allow police to search his cell phone with his passcode on December 7, 2018. The trial court found that no exigent circumstances existed to justify the seizure of O'Neal's cell phone without a warrant, and further that no evidence was presented to show that his cell phone would have been inevitably discovered and admissible as evidence. Therefore, the Court erred in denying O'Neal's Motion to Suppress.

Appellate courts "'view the circuit court's grant or denial of a motion to suppress involving an alleged violation of a constitutionally protected right under the de novo standard of review.'" *State v. Kleven*, 2016 S.D. 80, ¶ 7, 887 N.W.2d 740, 742 (quoting *State v. Smith*, 2014 S.D. 50, ¶ 14, 851 N.W.2d 719, 723). "'The court's findings of fact are reviewed under the clearly erroneous standard, but we give no deference to the court's conclusions of law.'" *State v. Fischer*, 2016 S.D. 12, ¶ 10, 875 N.W.2d 40, 44 (quoting *State v. Fierro*, 2014 S.D. 62, ¶ 12, 853 N.W.2d 235, 239).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The exclusionary rule—the rule that often requires trial courts to exclude unlawfully seized evidence in a criminal trial—became the principal judicial remedy to deter Fourth Amendment violations in

*Mapp v. Ohio*. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Under the Court's precedents, the exclusionary rule includes both the "primary evidence obtained as a direct result of an illegal search or seizure" and, "evidence later discovered and found to be derivative of an illegality," the so-called "'fruit of the poisonous tree.'" *Utah v. Strieff*, 579 U.S. 232, 237 (2016) (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)).

There are several notable exceptions to the exclusionary rule, including the independent source doctrine, the inevitable discovery doctrine, and the attenuation doctrine. *Strieff*, 579 U.S. at 238. As the Supreme Court noted so importantly in *Strieff*, "The exclusionary rule exists to deter police misconduct." *Id.* at 241 (citing *Davis v. United States*, 564 U.S. 229, 236-37 (2011)). Of relevance here, the attenuation doctrine states that "[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Id.* (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). "The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions." *Id.* at 238-39.

As the Supreme Court explained in *Strieff*, determining whether the attenuation doctrine applies requires the weighing of three factors:

> First, we look to the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider the presence of intervening circumstances. Third, and particularly significant, we examine the purpose and flagrancy of the official misconduct.

*Strieff*, 579 U.S. at 239 (internal citations omitted). Historically, the Supreme Court has declined to find "attenuation unless substantial time elapses between an unlawful act and when the evidence is obtained," in reviewing temporal proximity. *Id.* (citing *Kaupp v. Texas*, 538 U.S. 626, 633 (2003)).

In *Utah v. Strieff*, an officer unlawfully stopped the defendant and discovered during the detention that the defendant had a warrant out for his arrest. *Strieff*, 579 U.S. at 240. The officer arrested the defendant and conducted a search incident to arrest that led to the discovery of drug-related evidence. *Id.* at 235–36. The Court held that the discovery of the evidence "only minutes after the illegal stop" favored suppression. *Id.* at 239–40. However, the valid arrest warrant—one that preceded and was unconnected to the illegal stop—constituted an intervening circumstance that justified a finding of attenuation. *Id.* at 240.

The Court in *Strieff* reasoned that the arrest warrant obligated the officer to arrest the defendant and the arrest itself established the officer's authority to search the defendant's person. *Id.* at 240–41. As to the third factor, the officer's decision to initiate the stop rested on "good-faith mistakes" rather than a purposeful or flagrant disregard for the law. *Id.* at

241. Thus, the Supreme Court deemed the drug-related evidence admissible because "the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant." *Id.* at 242.

In a case from California, the Ninth Circuit Court of Appeals considered whether evidence resulted from an illegal search and seizure and should have been suppressed at trial, offering more insight into the attenuation doctrine. *United States v. Baker*, 58 F.4th 1109, 1116 (9th Cir.2023). In *Baker*, defendant Baker was stopped and frisked by the Los Angeles Police Department one week after an armed robbery of a Sprint store. *Id.* at 1114. No weapons or contraband were found on Baker, but an officer removed a car key from Baker's belt loop without his consent and walked to a nearby parking lot to locate the car associated with the key. *Id.* Baker denied having a car, and fled when officers located a red Buick whose flashing lights responded to the key fob. *Id.* A handgun was discovered in the vehicle and later introduced at trial as the weapon used to rob the Sprint store, and Baker was subsequently convicted of Hobbs Act robbery and conspiracy to commit robbery. *Id.*

At trial, the prosecution also introduced testimony by Baker's co-defendant, who described in detail how he and Baker planned and committed the robbery of the Sprint store where the co-defendant worked. *Id.* at 1115. Another store employee testified that a handgun was pointed at his head and he was forced on the ground and held in the back room

while the co-defendant took iPhones from the Sprint safe. *Id.* The jury was shown Facebook photos of Baker in clothing appearing to match the clothing worn by the robber in the surveillance video of the robbery. *Id.* at 1115-116. Cell phone evidence introduced against Baker included toll records showing seven calls between Baker and the co-defendant on the evening of the robbery, as well as cell site location information admitted to show Baker's movement toward the Sprint store before the robbery and away from the store after the robbery. *Id.* at 1116. The district court denied Baker's motions to suppress the evidence of the handgun. *Id.*

On appeal, the Ninth Circuit Court of Appeals considered whether the exclusionary rule required suppression of the handgun. *Id.* at 1119. The Government argued that the handgun was admissible under the attenuation doctrine based on Baker's flight from officers. *Id.* The Court ultimately found that the first and third *Brown* factors favored suppression of the evidence. *Id.* at 1120 (see *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)).

First, very little time elapsed between the seizure of the key and the discovery of the gun in the car. *Id.* As to the third factor, the Ninth Circuit Court of Appeals found that while not necessarily acting with flagrant disregard for the law, it could also not conclude that officers acted on a "reasonable but mistaken belief that Baker had consented to their actions." *Id.* The Court found that "[n]o reasonable interpretation of the

record suggests that Baker consented to, or even was equivocal about, the officers taking the car key off his belt. The record clearly demonstrates that Officer Byun removed the car key from Baker's belt loop during the patdown without asking for permission or consent." *Id.*

In the case at hand, the trial court found that the seizure of O'Neal's cell phone was unconstitutional. SR 62. Nevertheless, the trial court looked to the attenuation doctrine to determine whether the cell phone evidence should be suppressed. SR 62. Similar to the *Baker* case, there was nothing here in the record to suggest that O'Neal consented to the taking of his cell phone. Rather, the trial court found that based on the totality of the circumstances, it is reasonable that O'Neal did not believe he had a choice in giving up his passcode and did not voluntarily consent to the seizure of his cell phone. SR 57.

The trial court ultimately concluded that "The phone was not seized simply on the hope that something might turn up." SR 65. However, the hope that something might turn up was exactly what law enforcement was eager to find. Law enforcement was operating on the information of a witness who had claimed to see indecent photos on O'Neal's cellphone. Christina Guggenberger provided law enforcement with no evidence of any indecent photos. She merely expressed to law enforcement that she had seen photos on O'Neal's phone and provided a description of the phone along with the passcode. SR 71. None of this

information suggests that law enforcement should have been guaranteed to find these images on the phone. Rather, law enforcement was hoping they would find what they were looking for on O'Neal's cellphone once it was seized.

## II. The search warrant of O'Neal's cellphone was not supported by probable cause, and therefore the evidence should have been suppressed.

The Eighth Circuit has held that admissibility of evidence depends on the validity of the search warrant that led to its discovery. *United States v. Hogan*, 25 F.3d 690, 693 (8th Cir.1994). The United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. const. amend. IV. This right is generally protected by the issuance of a warrant based on a finding of probable cause. *State v. Fierro*, 2014 S.D. 50, ¶ 15, 853 N.W.2d 235, 240 (citing *State v. Smith*, 2014 S.D. 50, ¶ 15, 851 N.W.2d 719, 724). Probable cause lies somewhere between mere suspicion and beyond a reasonable doubt. *Heib v. Lehrkamp*, 2005 S.D. 98, ¶ 21, 704 N.W.2d 875, 884. The standard of probable cause for the issuance of a search warrant is a showing of the probability of criminal activity. *State v. Helland*, 2005 S.D. 121, ¶ 16, 707 N.W.2d 262, 269.

An inquiry into the sufficiency of a search warrant examines whether the information presented to the issuing court in the affidavit was sufficient enough for the judge to arrive at a "common sense" conclusion that there was a "fair probability" that a crime had been committed and that the evidence of the

offense would be found on the person, or at the place, named in the affidavit. *Id.* This examination is limited to the four corners of the affidavit. *Id.* An informant's tip to law enforcement may be enough to establish probable cause for the purposes of a search warrant. The core question in assessing probable cause based off an informant's tip is whether the information is reliable. *U.S. v. Williams*, 10 F.3d 590, 593 (8th Cir.1993). An informant's information may be sufficiently reliable if the informant has a history of supplying reliable information, or if the information is corroborated by an independent investigation. *Id.*

In *State v. Sweedland*, law enforcement received a tip from a motel that four male occupants had been smoking marijuana in their room and subsequently left in their vehicle. *Sweedland*, 2006 S.D. 77, ¶ 2, 721 N.W.2d 409, 410. The informant also provided a description of the vehicle and the license plate number. *Id.* An officer heard the dispatch and identified a vehicle with the same license plate with four males inside. *Id.* at ¶ 3. Without witnessing any traffic violations, the officer decided to stop the car to investigate the information provided by the informant. *Id.* at ¶ 4.

The South Dakota Supreme Court found that the officer lacked sufficient probable cause to search the vehicle at the time of the stop, despite the fact he had corroborated the information. *Id.* at ¶ 24, 721 N.W.2d at 415. According to the Court, the officer had only corroborated the license plate number, direction of travel, and the gender of the four occupants in the vehicle. *Id.* The officer did

not witness any erratic driving, he did not corroborate whether the men in the vehicle had stayed at the motel, nor did he note if the men seemed impaired or even smelled of marijuana smoke. *Id.* Therefore, the officer had only corroborated "innocuous facts" and, at most, only had reasonable suspicion – not probable cause. *Id.* ¶ 24-25.

Looking to the four corners of the affidavit accompanying the current search warrant in question, the information provided within was not enough to establish probable cause. Here, the information was obtained by an informant who, according to the affidavit, is not known by the police as having a history of supplying reliable information. The trial court indicated that there was no evidence presented about Guggenberger's history with providing law enforcement with information. SR 68. However, it is plainly stated in the affidavit that Guggenberger was not known by police as having a history of supplying reliable information. The trial court also noted that there was no indication that law enforcement had done any sort of work to sufficiently corroborate the information provided by Guggenberger. SR 68. Just as in *Sweedland*, the only corroboration done, if any, was of innocuous facts. There was no corroboration done pertaining to the alleged criminal activity. No officer saw the photo Ms. Guggenberger alleged to have seen; in fact, no officer saw any illegal photos on O'Neal's cellphone before obtaining a search warrant.

As *Williams* set forth, the core question when assessing probable cause based on information supplied by an informant is whether that information is

reliable. *Williams*, 10 F.3d 590, 593 (8th Cir. 1993). Without knowledge that the informant, Ms. Guggenberger, was reliable or had a history of reliability, there is only independent corroboration to determine whether the information Ms. Guggenberger provided was reliable enough to establish probable cause. Sufficient corroboration of Ms. Guggenberger's allegations to ascertain her reliability was not performed. Therefore, the sole information on which the search warrant is based cannot rise to the standard of sufficient probable cause necessary for the issuance of a search warrant. Further, the information provided in the search warrant, that the girl in the photo was 10-11 years old with her breasts exposed, is not indicative of illegal child pornography because there was no allegation that the girl was engaged in a prohibited sexual act or that she was simulating such an act in the photo as required by SDCL § 22-24A3; a naked child is not necessarily child pornography. The subsequent search of Mr. O'Neal's phone was a violation of his Fourth Amendment protections.

## III. O'Neal's due process rights and right to a fair trial were violated by a 13-month delay between investigation and indictment, and thus the trial court should have granted the Defense Motion to Dismiss.

From the time the first search warrant was issued for O'Neal's cellphone on December 11, 2018, and when the case was indicted on February 19, 2020, thirteen months elapsed. This substantial length of time violated O'Neal's due process rights as well as his right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution. Additionally, there was a delay

from the date that the case was indicted in February of 2020 to when the arrest warrant for O'Neal had been returned in September of 2020. In *United States v. Marion*, the United States Supreme Court considered the significance, for constitutional purposes, of a lengthy preindictment delay. *United States v. Marion*, 404 U.S. 307 (1971).

> (W)e need not . . . determine when and in what circumstances actual prejudice resulting from preaccusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution."

*Id.* at 324-25.

*Marion* made clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. *Id.* The Court in *Marion* emphasized that the government had conceded that the due process clause of the Fifth Amendment would require dismissal of the indictment if it were shown that the pre-indictment delay had caused substantial prejudice to the defendant's rights to a fair trial and that the delay was intended to gain tactical advantage over the accused. *Id.* at 324.

The United States Supreme Court in *United States v. Lovasco* expanded upon the holding in *Marion*. *United States v. Lovasco*, 431 U.S. 783 (1977). In *Lovasco*, the Court held:

> So long as there are valid, good faith reasons for the investigative delay, a defendant is not deprived of due process even if his

> defense has been somewhat prejudiced by the lapse of time between the date the government acquires sufficient evidence to establish probable cause or to establish guilt beyond a reasonable doubt and the date it files an indictment or information against a defendant.

*Id.* at 790. The Court rejected the argument that prosecutors are under a duty to file charges as soon as probable cause exists but before they are satisfied that they will be able to establish the defendant's guilt beyond reasonable doubt. *Id.* at 793.

The United States Supreme Court in *Lovasco* and *Marion* outlined the parameters of proving actual prejudice to a defendant. *See Lovasco*, 431 U.S. at 788-90. "To prove actual prejudice, a defendant must specifically identify witnesses or documents lost during delay properly attributable to the government." *Id.* Speculative or conclusory claims alleging "possible" prejudice as a result of the passage of time are insufficient. *Marion*, 404 U.S. at 325-26. Additionally, the defendant must relate the substance of the testimony which would be offered by the missing witnesses or the information contained in lost documents in sufficient detail that it would permit a court to assess whether the information is material to the accused's defense. *United States v. Page*, 544 F.2d 982, 985 (8th Cir.1976). Finally, the defendant must make a showing that the missing testimony or information is not available through substitute sources. *See United States v. Tempesta*, 587 F.2d at 933-34; *see also United States v. Cederquist*, 641 F.2d 1347, 1352-53 (9th Cir.1981). Ultimately, it is up to the defendant to demonstrate that the prejudice actually impaired his ability to meaningfully

present a defense. *United States v. Solomon*, 686 F.2d 863, 872 (11th Cir.1982); *United States v. Bartlett*, 794 F.2d 1285, 1289-90 (8th Cir.1986).

The South Dakota Supreme Court adopted the test applied in *U.S. v. Lovasco* in the case of *State v. Stock*. *State v. Stock*, 361 N.W.2d 280, 283 (S.D. 1985). In *State v. Stock*, the South Dakota Supreme Court agreed with the Court of Appeals for the Eighth Circuit in that "even the legitimate excuse of a continuing undercover investigation may be stretched to the breaking point; at some point, the accused's right to due process of law must prevail." *Id.* at 284 (*quoting United States v. Jackson*, 504 F.2d 337, 340 (8th Cir.1974)). Additionally, the *Stock* Court held that the burden of establishing justification of a pre-accusatorial delay rests upon the state. *Id.*

As a result of the thirteen-month delay in filing the indictment, O'Neal lost the ability to review crucial evidence leading up to trial. The trial court found that "Defendant has not shown actual and substantial prejudice as a result of the delay." SR 73. However, as a result of the pre-accusatorial delay, O'Neal was unable to review the initial phone call between Guggenberger and Officer Bertram. O'Neal was also unable to review any recording of the interaction between himself and Officer Hansen due to the deletion of the video from the server.

At the Motions Hearing before the trial court, Officer Hansen testified that while he was not wearing a body camera, there was audio recording within the camera of his patrol vehicle. SR 83. Officer Hansen also testified that after a case

is complete, recordings are uploaded onto a server for storage, and that he had no reason to believe the footage would have not been uploaded onto a server for storage. SR 87. During the Motions Hearing defense counsel indicated that both the initial phone report with Officer Bertram and the interaction between O'Neal and Officer Hansen were not available because they had "fallen off the server." SR 115.

Thus, O'Neal was denied the opportunity to review potentially exculpatory evidence related to the seizure of his cellphone. He was unable to prepare a proper cross-examination of Guggenberger, and could not properly evaluate the motions or legal issues. At trial, Guggenberger testified that she was "pretty sure" she had called law enforcement the day after she had found a suspicious image on O'Neal's cellphone. SR 481. There was no recording of the phone call to play for the jury, and there was no recording of the phone call to be examined by O'Neal prior to trial. Similarly, there was no recording of the interaction between O'Neal and Hansen, which would have been key in determining whether O'Neal had consented to the seizure of his cellphone by law enforcement. The single reason these recordings were unavailable at trial and prior to trial was due to the extensive lapse in time from when the investigation began and when the case was indicted. Therefore, the trial court should have granted the defense's Motion to Dismiss.

## IV. 404(b) evidence was irrelevant due to not being direct evidence and was unfairly prejudicial, and the trial court did

**not properly employ the two-step process when determining if prior bad acts should be admissible.**

A defendant's other acts may be admissible under SDCL 19-12-5 (Rule 404(b)). The trial court must employ a two-step process when determining if prior bad acts should be admissible. First, the offered evidence must be relevant to a material issue in the case. *State v. Owen*, 2007 S.D. 21, ¶ 14, 729 N.W.2d 356 (citing *State v. Jones*, 2002 SD 153 ¶ 10, 654 N.W.2d 817, 819). Second, the trial could must determine "whether the probative value of the evidence is substantially outweighed by its prejudicial effect. *Id.*; SDCL 19-12-3. This balancing must be conducted on the record. *State v. Andrews*, 2001 SD 31, ¶ 9, 623 N.W.2d 78, 81.

In *State v. Owen*, the South Dakota Supreme Court considered whether the trial court abused its discretion in admitting other acts evidence. *State v. Owen*, 2007 S.D. 21, ¶ 8, 729 N.W.2d 356, 362. There, defendant Owen was convicted of aggravated assault and first-degree murder after the prosecution was allowed to present testimony at trial regarding Owen's statements and actions that happened the night of the murder. *Owen*, 2007 S.D. 21, ¶ 13, 729 N.W.2d at 362. Similar to the case at hand, the trial court in *Owen* did not conduct an on the record balancing of the offered evidence's probative value against its prejudicial effect. *Owen*, 2007 S.D. 21, ¶ 15, 729 N.W.2d at 363. The South Dakota Supreme Court determined that the evidence could still be admitted, however, as res gestae evidence. *Id.*

The *Owen* Court stated that "[o]ther bad acts evidence is admissible 'where such evidence is 'so blended or connected' with the one on trial ... that proof of one incident involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged.'" *Id.* (quoting *Andrews*, 2001 SD 31, ¶ 9, 623 N.W.2d at 81; *State v. Goodroad*, 1997 SD 46, ¶ 10, 563 N.W.2d 126, 130). Additionally, the Court stated, "'evidence of uncharged criminal activity is not considered other crimes evidence if it arose out of the same transaction or series of transactions as the charged offense.'" *Id.* The Court held that Owen's statements regarding the potential sale or trade of marijuana for money or methamphetamines is not other acts evidence, but res gestae evidence as it "'arose out of the same transaction or series of transactions as the charged offense.'" *Id.*

O'Neal's case is analogous to the facts of *Owen*. While the res gestae rule is a well-recognized exception to Rule 404(b), the evidence ruled admissible by the trial court did not arise out of the same transaction or series of transactions as the offense charged. The trial court found that the additional images offered by the prosecution "show or could show Mr. O'Neal's intent and knowledge and lack of accident." SR 515. Further, the trial court indicated that

> The state is intending to use it to show... Mr. O'Neal had clicked on the thumbnail that then popped up this image, which indicates that he would likely have known it was there; had knowledge of it being there; and that it wasn't an accident that didn't somehow just end up on his computer.

SR 515-16. The trial court did not conduct an on the record balancing of the offered evidence's probative value against its prejudicial effect against O'Neal as is required by the South Dakota Supreme Court.

The defense filed a motion for Bill of Particulars on May 28th of 2021. SR 379. In the Bill of Particulars, the prosecution provided detailed hash values, or MD5 hash values, for the first seven counts of the Indictment pertaining to O'Neal's cellphone to the defense and defense expert Meinke. SR 379-80. Since the time that the Bill of Particulars was provided to the defense, the defense consulted with its expert pertaining to the seven hash values contained in the Bill of Particulars. SR 380. The defense used those seven hash values to formulate a defense and prepare for trial. SR 380.

On January 4th, 2022, one day prior to the beginning of trial, defense received information from the prosecution regarding particular dates or times related to Count 6 of the Indictment. SR 380. The hash values provided on January 4th of 2022 were different than what was provided on July 7th of 2021 at the hearing for the Bill of Particulars. SR 380. The defense requested that the trial court preclude the state from prosecuting any of the counts with hash values other than what was provided in the Bill of Particulars response. SR 381.

In response, the prosecution stated that hash values contained in the Bill of Particulars were what the state intended to present at trial. SR 381. The prosecution indicated that while the hash values included in the Bill of Particulars were for a specific image, they were only for a thumbnail of that

image, not the image once it was clicked on. SR 381. Thumbnails are different than images, and the defense had formulated its defense around the thumbnails referenced in the Bill of Particulars provided by the prosecution before the start of trial. Therefore, the trial court should not have allowed the 404(b) evidence to be considered by the jury at trial.

**V. The evidence was insufficient to sustain the jury's verdict because there was minimal evidence introduced at trial showing that O'Neal was the individual to have viewed or created the child pornography on the cellphone or hard drive devices.**

The trial court erred in denying O'Neal's motion for judgment of acquittal on the charges of possession of child pornography, because there was insufficient evidence that O'Neal would have been the one to have viewed or created these images on either the cellphone or hard drive devices.

"'The denial of a motion for judgment of acquittal presents a question of law' that [the Court] review[s] de novo." *State v. Brim*, 2010 S.D. 74, ¶ 6, 789 N.W.2d 80, 83 (quoting *State v. Klaudt*, 2009 S.D. 71, ¶ 14, 772 N.W.2d 117, 122). "In measuring the sufficiency of the evidence, [the Court asks] whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation omitted). The Court "accept[s] the evidence and the most favorable inferences fairly drawn therefrom, which will support the verdict." *Id.* (quoting *State v. Jensen*, 2007 S.D. 76, ¶ 7, 737 N.W.2d 285, 288). "[T]he jury is the exclusive judge of the credibility of the witnesses and

the weight of the evidence," so the "Court will not resolve conflicts in the evidence, assess the credibility of witnesses, or evaluate the weight of the evidence." *Id.* (internal quotation omitted).

Here, there was insufficient evidence to support the jury's finding beyond a reasonable doubt that O'Neal would have been the one to have viewed or created child pornography images on either the cellphone or the hard drive devices. The prosecution presented no evidence proving beyond a reasonable doubt that O'Neal was the person who had viewed or created the child pornography. Additionally, O'Neal was not the sole individual who had access to either the cellphone or hard drive. Guggenberger testified that she had access to O'Neal's cellphone, even going so far as to actually provide the correct passcode to detectives. SR 478. Guggenberger herself testified that she had put in the passcode to the cellphone, gained access to O'Neal's cellphone, and looked through it. SR 478. Guggenberger also testified giving information to detectives about where the external hard drive device could be found. SR 482. This shows that someone other than O'Neal had access to both the cellphone and the hard drive device. Guggenberger testified at trial that the hard drives were located in her garage, and further testified that O'Neal did not have access to that garage on the date the alleged offense occurred on December 7. SR 491. Guggenberger also testified that one of the hard drives, a Seagate hard drive, was used by both Guggenberger and O'Neal. SR 492. She herself had documents on the Seagate hard drive, and testified that she had access to it. SR 492.

Additionally, there was evidence offered at trial that O'Neal stayed at the Bishop Dudley House in Sioux Falls, a homeless shelter. SR 476. The other evidence offered at trial concerning whether O'Neal's cellphone was ever stolen or accessed potentially by other individuals at the Bishop Dudley House was that Meinke stated he never had any indication that O'Neal ever had his phone stolen. SR 726. Thus, even taking all of the evidence in the light most favorable to the State, the trial court's denial of O'Neal's motion for Judgment of Acquittal warrants reversal. There was insufficient evidence to support the jury's finding beyond a reasonable doubt that O'Neal possessed, manufactured, or distributed child pornography. Thus, the trial court erred in denying O'Neal's motion for Judgment of Acquittal.

## VI. O'Neal's due process right to jury unanimity was violated by duplicity in the indictment.

The indictment in this case was duplicitous, violating O'Neal's due process right to jury unanimity. Duplicity is considered to be the "joining of a single count of two or more distinct and separate offenses." *State v. Muhm*, 2009 S.D. ¶ 19, 775 N.W.2d 508, 514 (quoting 1 Nancy Hollander et al., *Wharton's Criminal Procedure* § 5:12 (14th ed. 2008)). "In other words, a duplicitous indictment or information includes a single count that captures multiple offenses." *Id.* Whether an indictment is duplicitous is a question of law reviewed de novo. *Id.* at ¶ 18, 775 N.W.2d at 514.

In *State v. Muhm*, the South Dakota Supreme Court explained the danger of duplicity:

> [B]ecause the jury has multiple offenses to consider under a single count, the jury may convict without reaching a unanimous agreement on the same act, thereby implicating the defendant's right to jury unanimity. In some situations, a general verdict may not reveal whether the jury unanimously found the defendant guilty of one offense or more offenses, or guilty of one offense and not guilty of others.
>
> This concern is of even more significance in cases l[where the defendant] was charged with "single act" offenses. In such cases, the due process right to jury unanimity requires that the jury be unanimous as to the single act or acts that are the basis for the verdict. In other words, even though due process may not require time specificity in charging such cases, the jury must have been in agreement as to a single occurrence or the multiple occurrences underlying each count. And, for single act offenses, jury unanimity is not achieved if some of the jurors believed the crime occurred on one occasion during the timeframe and others believed that the crime occurred on a different occasion.

2009 S.D. 100, ¶¶ 29-30, 775 N.W.2d at 517-18 (internal citations omitted). *See also* 5 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(c) (3d ed. 2012) ("Duplicity... is unacceptable because it prevents the jury from deciding guilt or innocence on each offense separately and may make it difficult to determine whether the conviction rested on only one of the offenses or both. Duplicity can result in prejudice to the defendant in the shaping of evidentiary rulings, in producing a conviction on less than a unanimous verdict as to each separate offense, in determining the sentence, and in limiting review on appeal.") Rape and sexual contact are single act offenses. *Muhm*, 2009 S.D. ¶ 30 n.5, 775 N.W.2d at 517 n.5.

South Dakota has adopted the "either or" rule for addressing duplicitous indictments:

> The rule does not require dismissal of a duplicitous indictment. Rather, the government must elect a single offense on which it plans to rely, and as long as the evidence at trial is limited to only one of the offenses in the duplicitous count, the defendant's challenge will fail. Alternatively, if there is no election the trial court should instruct the jury it must find unanimously that the defendant was guilty with respect to at least one of the charges in the duplicitous count.

*Id.* at ¶ 32, 775 N.W.2d at 518-19. South Dakota applies a harmless error analysis to violations of this rule: "harmless error applies in cases when the trial court fails 'either to select specific offenses or give a unanimity instruction' if 'the record indicate[s] the jury resolved the basic credibility dispute against defendant and would have convicted the defendant of any of the various offenses shown by the evidence to have been committed. *Id.* at ¶ 34, 775 N.W.2d at 520 (quoting *People v. Jones*, 51 Cal.3d 294, 307 (1990)).

Here, the indictment was duplicitous because the Bill of Particulars was based off of it. Without conceding that any of the evidence was sufficient to support a guilty verdict, the state presented evidence of a number of potential acts to support each count. Based on the evidence presented, each individual juror could have relied on a different combination of individual allegations to find O'Neal guilty of fifteen counts of possession, manufacture, or distribution of child pornography. The broad language of the indictment and the jury instructions "allowed each individual juror to determine which incident he or she would consider in finding [the defendant] guilty." *State v. Celis-Garcia*, 344

S.W.3d 150, 156 (Mo. 2011 (en banc)). The trial court should have instructed the jury that it must unanimously find the defendant guilty with respect to at least one of the charges in each duplicitous count. *Muhm*, 2009 S.D. 100, ¶ 32, 775 N.W.2d at 518-19. The jury instructions should have "specifically describe[ed] the separate criminal acts presented to the jury" and "instructed that it must agree unanimously that at least one of those acts occurred" for each count. *Celis-Garcia*, 3044 S.W.3d at 157.

The jury instructions in this case did not meet this standard. The instructions on the elements of possession, manufacture, and distribution of child pornography did not specific the distinct alleged act to have violated the law. Further, the general instructions did not cure the duplicity. What was included in the Bill of Particulars were hash values of thumbnails, not images. The jury instructions were based off the Bill of Particulars, not the additional evidence the trial court allowed the state to present at trial.

## CONCLUSION

The attenuation doctrine did not apply to the government's warrantless search of O'Neal's cell phone, and thus evidence from the cell phone should have been suppressed. The search warrant of O'Neal's cellphone was not supported by probable cause, and therefore the evidence should have been suppressed. O'Neal's due process rights and right to a fair trial were violated by a 13-month delay between investigation and indictment, and thus the trial court should have

granted the Defense Motion to Dismiss. 404(b) evidence was irrelevant due to not being direct evidence and was unfairly prejudicial, and the trial court did not conduct an on-record balancing test of the two factors to consider when determining whether 404(b) evidence should be admitted. Thus, the 404(b) evidence in the form of additional hash values should not have been admissible at trial. There was also insufficient evidence to support the jury's finding beyond a reasonable doubt that O'Neal possessed, manufactured, or distributed child pornography. The prosecution presented minimal evidence that O'Neal was the person who possessed child pornography, and in fact testimony at trial showed he was not the only person with access to the devices on which child pornography was found.

For the aforementioned reasons, authorities cited, and upon the settled record, O'Neal respectfully requests this Court to remand this case to the trial court with an order to reverse the Judgment and Sentence and enter judgment of acquittals to the fifteen counts of Possession, Manufacture, or Distribution of Child Pornography.

## REQUEST FOR ORAL ARGUMENT

The attorney for the Appellant, Michael Adam O'Neal, respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 3rd day of March, 2023.

*/s/ Loranda Kenyon*
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## CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 7,403 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Office 2019.

Dated this 3rd day of March, 2023.

*/s/ Loranda Kenyon*
Loranda Kenyon
Attorney for Appellant

## APPENDIX

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|---|---|---|
| STATE OF SOUTH DAKOTA ) : SS | | IN CIRCUIT COURT |
| COUNTY OF MINNEHAHA ) | | SECOND JUDICIAL CIRCUIT |
| | | PD 18-039897 |
| STATE OF SOUTH DAKOTA, Plaintiff, | + | 49CRI20001202 |
| vs. | + | JUDGMENT & SENTENCE |
| MICHAEL ADAM O'NEAL, Defendant. | + | |

An Indictment was returned by the Minnehaha County Grand Jury on February 13, 2020, charging the defendant with the crimes of Count 1 Poss/Manufacture/Distribute Child Pornography on or about December 7, 2018; Count 2 Poss/Manufacture/Distribute Child Pornography on or about December 7, 2018; Count 3 Poss/Manufacture/Distribute Child Pornography on or about December 7, 2018; Count 4 Poss/Manufacture/Distribute Child Pornography on or about December 7, 2018; Count 5 Poss/ Manufacture/Distribute Child Pornography on or about December 7, 2018; Count 6 Poss/ Manufacture/Distribute Child Pornography on or about December 7, 2018; Count 7 Poss/Manufacture/ Distribute Child Pornography on or about December 7, 2018; Count 8 Poss/Manufacture/Distribute Child Pornography on or about January 2, 2019; Count 9 Poss/Manufacture/Distribute Child Pornography on or about January 2, 2019; Count 10 Poss/Manufacture/Distribute Child Pornography on or about January 2, 2019; Count 11 Poss/Manufacture/Distribute Child Pornography on or about January 2, 2019; Count 12 Poss/Manufacture/Distribute Child Pornography on or about January 2, 2019; Count 13 Poss/ Manufacture/Distribute Child Pornography on or about January 2, 2019; Count 14 Poss/Manufacture/ Distribute Child Pornography on or about January 2, 2019 and Count 15 Poss/Manufacture/Distribute Child Pornography on or about January 2, 2019.

The defendant was arraigned upon the Indictment on September 22, 2020, Katie Dunn appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment.

The case was regularly brought on for trial, Crystal Johnson, Deputy State's Attorney appeared for the prosecution and, Betsy Doyle, appeared as counsel for the defendant. A Jury was impaneled and sworn on January 5, 2022 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on January 7, 2022 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, MICHAEL ADAM O'NEAL, guilty as charged as to Counts 1 through 15 (all 15 counts) : Poss/Manufacture/Distribute Child Pornography (SDCL 22-24A-3(3))." The Sentence was continued to May 11, 2022, after completion of a psychosexual evaluation.

Thereupon on May 11, 2022, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

AS TO COUNT 8 POSS/MANUFACTURE/DISTRIBUTE CHILD PORNOGRAPHY : MICHAEL ADAM O'NEAL shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with credit for six hundred (600) days served and with six (6) years of the sentence suspended on the all conditions as imposed on Count 1.

AS TO COUNT 9 POSS/MANUFACTURE/DISTRIBUTE CHILD PORNOGRAPHY : MICHAEL ADAM O'NEAL shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with credit for six hundred (600) days served and with six (6) years of the sentence suspended on the all conditions as imposed on Count 1.

AS TO COUNT 10 POSS/MANUFACTURE/DISTRIBUTE CHILD PORNOGRAPHY : MICHAEL ADAM O'NEAL shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with credit for six hundred (600) days served and with six (6) years of the sentence suspended on the all conditions as imposed on Count 1.

AS TO COUNT 11 POSS/MANUFACTURE/DISTRIBUTE CHILD PORNOGRAPHY : MICHAEL ADAM O'NEAL shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with credit for six hundred (600) days served and with six (6) years of the sentence suspended on the all conditions as imposed on Count 1.

AS TO COUNT 12 POSS/MANUFACTURE/DISTRIBUTE CHILD PORNOGRAPHY : MICHAEL ADAM O'NEAL shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with credit for six hundred (600) days served and with six (6) years of the sentence suspended on the all conditions as imposed on Count 1.

AS TO COUNT 13 POSS/MANUFACTURE/DISTRIBUTE CHILD PORNOGRAPHY : MICHAEL ADAM O'NEAL shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with credit for six hundred (600) days served and with six (6) years of the sentence suspended on the all conditions as imposed on Count 1.

AS TO COUNT 14 POSS/MANUFACTURE/DISTRIBUTE CHILD PORNOGRAPHY : MICHAEL ADAM O'NEAL shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with credit for six hundred (600) days served and with six (6) years of the sentence suspended on the all conditions as imposed on Count 1.

AS TO COUNT 15 POSS/MANUFACTURE/DISTRIBUTE CHILD PORNOGRAPHY : MICHAEL ADAM O'NEAL shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with credit for six hundred (600) days served and with six (6) years of the sentence suspended on the all conditions as imposed on Count 1.

It is ordered that these sentences shall run concurrently to each other.

It is ordered that the attorney fees in this matter shall be converted to a civil lien in favor of Minnehaha County.

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

The defendant shall be returned to the Minnehaha County Jail following court on the date hereof, to then be transported to the South Dakota State Penitentiary; there to be kept, fed and clothed according to the rules and discipline governing the Penitentiary.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 16 day of May, 2022.

BY THE COURT:

JUDGE CAMELA C. THEELER
Circuit Court Judge

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

FILED
MAY 18 2022
Minnehaha County, S.D.
Clerk Circuit Court

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Appellant's Brief were electronically served upon:

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Dated this 3rd day of March, 2023.

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# IN THE SUPREME COURT
# STATE OF SOUTH DAKOTA

No. 30023

STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

v.

MICHAEL ADAM O'NEAL,

*Defendant and Appellant.*

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

THE HONORABLE CAMELA C. THEELER
Circuit Court Judge

## APPELLEE'S BRIEF


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Notice of Appeal filed June 16, 2022

Filed: 4/13/2023 8:13 AM CST Supreme Court, State of South Dakota #30023

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30023

STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

v.

MICHAEL ADAM O'NEAL,

*Defendant and Appellant.*

## PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Michael Adam O'Neal, is referred to as "O'Neal." Plaintiff and Appellee, State of South Dakota, is referred to as "State." All other individuals are referred to by name. References to documents are designated as follows:

Settled Record (Minnehaha County File 49CRI 20-1202).. SR

Suppression Hearing (July 7, 2021)..... SH

Jury Trial (January 5-7, 2022) .....JT

Exhibits ..... EX

O'Neal's Brief.....DB

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

## JURISDICTIONAL STATEMENT

O'Neal appeals the Judgment of Conviction entered by the Honorable Camela C. Theeler, Circuit Court Judge, Minnehaha County,

Second Judicial Circuit. SR 318-19. The Judgment of Conviction was filed on May 18, 2022. SR 313-16. Defendant filed a Notice of Appeal on June 16, 2022. This Court has jurisdiction as provided in SDCL 23A-32-2.

## STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER THE CIRCUIT COURT PROPERLY DENIED O'NEAL'S MOTION TO SUPPRESS?

The circuit court denied O'Neal's Motion to Suppress, finding the attenuation doctrine applied and that there was probable cause in the affidavit in support of the search warrant.

*State v. Mousseaux*, 2020 S.D. 35, 945 N.W.2d 548

*State v. Otsby*, 2020 S.D. 61, 951 N.W.2d 294

*Utah v. Strieff*, 579 U.S. 232, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016)

II. WHETHER THE CIRCUIT COURT PROPERLY DENIED O'NEAL'S MOTION TO DISMISS?

The circuit court denied O'Neal's Motion to Dismiss because he was not prejudiced in the thirteen months that elapsed between the issuance of a search warrant and O'Neal being indicted.

*State v. Stock*, 361 N.W.2d 280 (S.D. 1985)

*United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)

III. WHETHER THE CIRCUIT COURT PROPERLY ALLOWED THE STATE TO PRESENT 404(B) EVIDENCE?

The circuit court allowed the State to present 404(b) evidence in the form of the actual image contained in the thumbnail photos of the child pornography found on O'Neal's cell phone.

*State v. Birdshead*, 2015 S.D. 77, 871 N.W.2d 62

*State v. Medicine Eagle*, 2013 S.D. 60, 835 N.W.2d 886

SDCL 19-19-404(b)

IV. WHETHER THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN O'NEAL'S CONVICTIONS FOR POSSESSION OF CHILD PORNOGRAPHY?

The circuit court denied O'Neal's motion for judgment of acquittal, finding the State presented sufficient evidence for the jury to convict O'Neal on fifteen counts of possession of child pornography.

*State v. Linson*, 2017 S.D. 31, 896 N.W.2d 656

SDCL 22-24A-3(3)

V. WHETHER O'NEAL'S DUE PROCESS RIGHT TO JURY UNANIMITY WAS VIOLATED BY DUPLICITY IN THE INDICTMENT?

This issue is being raised for the first time on appeal.

*State v. Babcock*, 2020 S.D. 71, 952 N.W.2d 750

*State v. Guzman*, 2022 S.D. 70, 982 N.W.2d 875

*State v. Muhm*, 2009 S.D. 100, 775 N.W.2d 508

## STATEMENT OF THE CASE

The Minnehaha Grand Jury indicted O'Neal on fifteen counts of Possession of Child Pornography, contrary to SDCL 22-24A-3(3), each a Class 4 felony. SR 1-4. O'Neal filed several motions, including two Motions to Suppress, a Motion to Dismiss, and a Motion for a Bill of Particulars. SR 23-30. One Motion to Suppress claimed law enforcement illegally seized O'Neal's phone; the other Motion to

Suppress claimed the affidavit in support of the search warrant lacked probable cause. SR 23-24. The Motion to Dismiss alleged a due process violation for the time it took to bring the indictment. SR 25-27.

The circuit court held a hearing on the three motions and issued its Memorandum Opinion and Order Denying Motion to Suppress and Denying Motion to Dismiss. SR 51-76. The court denied O'Neal's Motions to Suppress, finding the attenuation doctrine applied and that the affidavit in support of the issuance of a search warrant contained probable cause. *Id.* The court also denied O'Neal's Motion to Dismiss, finding O'Neal did not suffer any prejudice by the delay in indictment. SR 22-24. Finally, the court did not rule on the Motion for the Bill of Particulars because the State had "provided the information as requested in the Motion for Bill of Particulars." SR 24.

After a three-day trial, the jury found O'Neal guilty on all fifteen counts. SR 211-13. The court sentenced O'Neal to ten years in prison with six years suspended on each count. *Id.* The court ordered the sentences to run concurrent to each other. *Id.*

## STATEMENT OF FACTS

In December 2018, Christina Guggenberger was using O'Neal's[1] phone when she came across of photograph of a girl around ten years old, topless. JT 108-10. She waited until O'Neal was out of the house then called law enforcement. JT 111. She spoke with Officer Bertram

[1] Guggenberger and O'Neal were engaged. JT 108.

and told her about the image. JT 207. Guggenberger described the phone as a gold iPhone with a black and white case. JT 112-13. Guggenberger said O'Neal could be located at his place of employment, Wendy's. JT 112.

Officer Bertram relayed the information to Detective Buss, an ICAC[2] Detective. JT 203, 207. Detective Buss requested Officer Hansen to go to Wendy's to get O'Neal's phone. JT 207. When Officer Hansen arrived at Wendy's he asked to speak with O'Neal. JT 128. He told O'Neal he needed his phone along with the password. JT 129. O'Neal complied and turned over both. JT 129. Officer Hansen secured the phone and placed it in airplane mode. JT 129. The phone was placed into evidence until law enforcement obtained a search warrant. JT 129, 208.

Once law enforcement obtained the search warrant for the contents of the phone, Detective Buss extracted the information using Anytrans and Cellebrite.[3] JT 209-10. It took Detective Buss a couple of months to go through the information. JT 212. There were several sexually explicit photographs of children on the phone. EX 1-7.

In January 2019, Guggenberger called Detective Buss and told him O'Neal had hard drives and sim cards at her house. JT 213, EX 18. Detective Buss examined the information contained on the items

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[2] ICAC stands for Internet Crimes Against Children. JT 205.
[3] Anytrans allows for the contents of a phone to be downloaded. JT 161. Cellebrite allows for data to be extracted from a phone. JT 159.

from Guggenberger's house. JT 214-15. The hard drive had two folders on it. JT 164. One labeled "CG" and the other "M Stuffs." JT 164. In the "M Stuffs" folder, there was sexually explicit images of children, like what was found on O'Neal's phone. JT 166.

## ARGUMENTS

I.

THE CIRCUIT COURT PROPERLY DENIED O'NEAL'S MOTION TO SUPPRESS.[4]

O'Neal filed two motions to suppress; the first claiming law enforcement illegally seized his phone, and the second claiming the affidavit in support of the search warrant lacked probable cause to support the issuance of a search warrant. SR 23-24. O'Neal claims the circuit court erred in two ways when it denied his motions: it erroneously found the attenuation doctrine applies and the affidavit in support of the search warrant lacked probable cause. DB 9-18. But both arguments fail.

*A. Standard of Review.*

This Court reviews the denial of a motion to suppress de novo. *State v. Rosa*, 2022 S.D. 76, ¶ 12, 983 N.W.2d 562, 566 (citing *State v. Rolfe*, 2018 S.D. 86, ¶ 10, 921 N.W.2d 706, 709). The "circuit court's findings of fact" are reviewed under the clearly erroneous standard with "'no deference to its conclusions of law when applying the de novo

[4] O'Neal's first two issues involve the denial of his motion to suppress. DB 9-18. The State has combined these two issues and will address them both in Issue 1 of its brief.

standard.'" *State v. Mousseaux*, 2020 S.D. 35, ¶ 10, 945 N.W.2d 548, 551 (quoting *State v. Condon*, 2007 S.D. 124, ¶ 15, 742 N.W.2d 861, 866). "'As a general matter[,] determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.'" *State v. Rosa*, 2022 S.D. 76, ¶ 12, 983 N.W.2d at 566 (quoting *State v. Rolfe*, 2018 S.D. 86, ¶ 10, 921 N.W.2d at 709).

*B. The circuit court properly found the attenuation doctrine precluded suppression of the evidence in this case.*

The circuit court found O'Neal did not voluntarily provide his phone to law enforcement. JT 57. It found Officer Hansen illegally seized the phone. JT 57. But it denied the Motion to Suppress, finding the attenuation doctrine applied. "The Fourth Amendment protects a person from 'unreasonable searches and seizures.'" *State v. Sharpfish*, 2019 S.D. 49, ¶ 25, 933 N.W.2d 1, 10 (quoting *State v. Stanage*, 2017 S.D. 12, ¶ 7, 893 N.W.2d 522, 525). As a general principle, law enforcement "'must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.'" *State v. Grassrope*, 2022 S.D. 10, ¶ 8, 970 N.W.2d 558, 561 (quoting *State v. Schumacher*, 2021 S.D. 16, ¶ 20, 956 N.W.2d 427, 432). "The remedy for unconstitutional searches and seizures is the suppression of evidence[,]" which is known as the exclusionary rule. *Mousseaux*, 2020 S.D. 35, ¶ 12, 945 N.W.2d at 552 (citing *Utah v. Strieff*, 579 U.S. 232,

237, 136 S. Ct. 2056, 2061, 195 L. Ed. 2d 400 (2016), *State v. Fierro*, 2014 S.D. 62, ¶ 25, 853 N.W.2d 235, 244).

But "suppression of evidence . . . has always been [this Court's] last resort, not [its] first impulse." *Mousseaux*, 2020 S.D. 35, ¶ 13, 945 N.W.2d at 552 (quoting *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S. Ct. 2159, 2163, 165 L. Ed. 2d 56 (2006). So even if a seizure violates the Fourth Amendment, the evidence may be admissible if an exception applies. *Id.*

Evidence may be admissible under the attenuation doctrine[5] if "the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance," so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Utah v. Strieff*, 579 U.S. at 238, 136 S. Ct. at 2061, 195 L. Ed. 2d 400 (2016) (quoting *Hudson*, 547 U.S. at 593, 126 S. Ct. at 2164). In determining whether the attenuation doctrine applies, this Court must weigh three factors.

> First, we look to the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider the presence of intervening circumstances. Third, and particularly significant, we examine the purpose and flagrancy of the official misconduct.

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[5] While there are other exceptions to the exclusionary rule, the attenuation doctrine is the only exception being contested in this case.

*Mousseaux*, 2020 S.D. 35, ¶ 17, 945 N.W.2d at 553 (quoting *Strieff*, 579 U.S. at 239, 136 S. Ct. at 2062). Because no one factor controls, each must be addressed. *Mousseaux*, 2020 S.D. 35, ¶ 17, 945 N.W.2d at 553 (citing *Brown v. Illinois*, 422 U.S. 590, 603–04, 95 S. Ct. 2254, 2261–62, 45 L. Ed. 2d 416 (1975).

1. Temporal Proximity

When assessing temporal proximity, the Supreme Court has historically "declined to find 'attenuation unless substantial time has elapse[d] between an unlawful act and when the evidence is obtained.'" *Mousseaux*, 2020 S.D. 35, ¶ 18, 945 N.W.2d at 553 (quoting *Strieff*, 579 U.S. at 239, 136 S. Ct. at 2062). In *Strieff*, law enforcement received a tip of drug activity at a particular residence. *Strieff*, 579 U.S. at 235, 136 S. Ct. at 2059. Law enforcement observed the comings and goings of the residence for a week. *Id.* An officer observed Strieff leave the residence and walk to a nearby convenience store. *Strieff*, 579 U.S. at 235, 136 S. Ct. at 2060. Law enforcement detained Strieff. *Id.* Upon learning Strieff's identity law enforcement discovered Strieff had an outstanding warrant. *Id.* Strieff was arrested pursuant to the warrant and a search incident to arrest occurred. *Strieff*, 579 U.S. at 236, 136 S. Ct. at 2060. During the search law enforcement found drugs on Strieff. The Supreme Court found this short time interval between the illegal stop and discovery of drugs favored suppression. *Strieff*, 579 U.S. at 240, 136 S. Ct. at 2062.

Similarly, in *Mousseaux*, Mousseaux was detained by law enforcement. 2020 S.D. 35, ¶ 5, 945 N.W.2d at 550-51. During the detention, law enforcement discovered Mousseaux had an outstanding warrant for her arrest. *Id.* ¶ 6, 945 N.W.2d at 551. During the search incident to arrest, methamphetamine was found in her bag. *Id.* ¶ 7, 945 N.W.2d at 551. This Court found a short time elapsed between the illegal detention and the discovery of the evidence during a search of Mousseaux's bag, which weighed in favor of suppression. *Id.* ¶ 19, 945 N.W.2d at 553.

Here, the State agrees with the circuit court's finding that a substantial amount of time had elapsed between law enforcement taking the phone. The illegal seizure occurred when law enforcement took the phone from O'Neal. The temporal proximity occurred instantly.

2. Intervening Circumstances

This Court has previous found that a valid arrest warrant discovered after an initial illegal seizure was an intervening factor that supported the State, weighing in favor of not suppressing the evidence. *Mousseaux*, 2020 S.D. 35, ¶¶ 21-22, 945 N.W.2d at 554. In both *Strieff* and *Mousseaux*, there was preexisting arrest warrants that were considered intervening circumstances. Here, there was no intervening circumstance between the seizure of the phone and the issuance of the search warrant.

3. Flagrancy of Police Misconduct.

"Despite the existence of a valid warrant, suppression may nevertheless be warranted if the police engage in 'a suspicionless fishing expedition 'in the hope that something w[ill] turn up.' " *Mousseaux*, 2020 S.D. 35, ¶ 23, 945 N.W.2d at 554 (quoting *Strieff*, 579 U.S. at 242, 136 S. Ct. at 2064). "'The purpose and flagrancy of the official misconduct is 'the most important factor because it is directly tied to the purpose of the exclusionary rule-deterring police misconduct.'" *Mousseaux*, 2020 S.D. 35, ¶ 23, 945 N.W.2d at 554 (quoting *United States v. Herrera-Gonzalez*, 474 F.3d 1105, 1110 (8th Cir. 2007)). In reviewing this factor, this Court considers whether: "(1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless; and (2) the misconduct was investigatory in design and purpose *and executed 'in the hope that something might turn up.'*" *Mousseaux*, 2020 S.D. 35, ¶ 23, 945 N.W.2d at 554 (quoting *United States v. Simpson*, 439 F.3d 490, 496 (8th Cir. 2006)).

Officer Hansen acted upon the direction of Detective Buss. Guggenberger had reported seeing an image of a topless girl, around ten years old on O'Neal's phone. It was a credible tip, and the phone was seized as part of the investigation. It was not a fishing expedition to see if law enforcement might find something. There was a purpose and reason to believe there were sexually explicit images of children on the

phone. Also, there was no evidence to suggest Officer Hansen knew at the time of the seizure his conduct was likely unconstitutional. *See* SR 77-125. Also, law enforcement had a purpose for taking the phone. They had received a tip from O'Neal's fiancé that she found an image of a girl around ten years old, topless.

While the first two factors weigh in favor of suppressing the evidence, the third factor does not. Viewing the totality of the factors, suppressing the evidence would not be appropriate. Because Officer Hansen was not merely on a fishing expedition, nor was he aware he might be violating O'Neal's constitutional rights, "'the interest protected by the constitutional guarantee that has allegedly been violated would not be served by suppression of the evidence.'" *Mousseaux*, 2020 S.D. 35, ¶ 27, 945 N.W.2d at 555 (quoting *Hudson*, 547 U.S. at 593, 126 S. Ct. at 2164).

C. *The Affidavit in Support of the Search Warrant Contained Sufficient Probable Cause to Support the Issuance of the Warrant.*

When considering the sufficiency of evidence to support a search warrant, this Court looks "at the totality of the circumstances to decide if there was at least a 'substantial basis' for the issuing judge's finding of probable cause." *State v. Gilmore*, 2009 S.D. 11, ¶ 7, 762 N.W.2d 637, 641 (quoting *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202). "It is not the duty of this Court to review the court's probable cause determination de novo, but rather to examine the court's decision

with 'great deference.'" *Id.* This Court "reviews the issuing court's probable cause determination independently of any conclusion reached by the judge in the suppression hearing." *Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d at 202 (quoting *State v. Helland*, 2005 S.D. 121, ¶ 12, 707 N.W.2d 262, 268).

When reviewing the sufficiency of a search warrant, courts are limited to the four corners of the affidavit. *Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d at 269 (citing *State v. Raveydts*, 2004 S.D. 134, ¶ 9, 691 N.W.2d 290, 293). And probable cause for a search warrant rises or falls on the affidavit itself. *State v. Jackson*, 2000 S.D. 113, ¶ 11, 616 N.W.2d 412, 416. But the affidavit will not be reviewed in a hyper-technical manner; its reviewed as a "whole, interpreted in a common-sense and realistic manner." *Dubois*, 2008 S.D. 15, ¶ 14, 746 N.W.2d at 203 (quoting *State v. Habbena*, 372 N.W.2d 450, 456 (S.D. 1985)). "All reasonable inferences that can be drawn will be construed 'in support of the issuing court's determination of probable cause to support the warrant.'" *State v. Wilkinson*, 2007 S.D. 79, ¶ 16, 739 N.W.2d 254, 259 (quoting *Helland*, 2005 S.D. 121, ¶ 17, 707 N.W.2d at 269).

There is no specific formula for determining the amount of evidence sufficient for probable cause. *Helland*, 2005 S.D. 121, ¶ 15, 707 N.W.2d at 268 (citing *Jackson*, 2000 S.D. 113, ¶ 22, 616 N.W.2d at 420). "In determining whether probable cause exists to support the

issuance of a search warrant, 'there must be a showing of probability of criminal activity.'" *State v. Otsby*, 2020 S.D. 61, ¶ 14, 951 N.W.2d 294, 299 (quoting *State v. Tenold*, 2019 S.D. 66, ¶ 30, 937 N.W.2d 6, 14).

Probable cause to issue a search warrant need not rise to the level of a prima facie case. *Id.* Instead, "probable cause lies somewhere between mere suspicion and the trial standard of beyond a reasonable doubt." *Helland*, 2005 S.D. 121, ¶ 15, 707 N.W.2d at 269 (quoting *Heib v. Lehrkamp*, 2005 S.D. 98, ¶ 21, 704 N.W.2d 875, 884). It is a "fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules." *Gilmore*, 2009 S.D. 11, ¶ 12, 762 N.W.2d at 642-43 (quoting *Illinois v. Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 2329, 76 L. Ed. 2d 527 (1983)).

The affidavit in support of a search warrant is not part of the record before this Court.[6] *See* SR. "This Court has repeatedly instructed that the party claiming error carries the responsibility of ensuring an adequate record for review." *State v. Andrews*, 2007 S.D. 29, ¶ 9, 730 N.W.2d 416, 420 (citing *State v. Cates*, 2001 S.D. 99, ¶ 18, 632 N.W.2d 28, 36). When the record is incomplete, it is presumed the circuit court acted properly. *Id.* And any alleged error fails if there is not an adequate record. *Id.* Because the affidavit in support of the

[6] The circuit court included the citation for the search warrant file in its memorandum decision, but there is no indication it took judicial notice of the file. Nor did either party make such request.

search warrant is not part of the record, this Court cannot adequately address whether the circuit court erred in finding probable cause existed.

Should this Court find that it can adequately address the issue based on the record before it, there was sufficient evidence in the affidavit to support the issuance of a search warrant.[7]

The affidavit relied on information provided by Guggenberger. Information provided by an informant can support a probable cause finding to issue a search warrant. *See Gilmore*, 2009 S.D. 11, ¶ 10, 762 N.W.2d at 642. When assessing probable cause based on information provided by a citizen, the question is whether the information is reliable. *United States v. Williams*, 10 F.3d 590, 593 (8th Cir. 1993). An informant who identifies herself is considered more reliable than an anonymous tipster. *Dubois*, 2008 S.D. 15, ¶ 15, 746 N.W.2d at 203 (citing *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897, 908-09 (2004), abrogated by *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009)). Also, corroboration of an informant's tip by independent police work can also strengthen the value of the information. *Gilmore*, 2009 S.D. 11, ¶ 16, 762 N.W.2d at 643 (citing *Gates*, 462 U.S. at 241, 103 S. Ct. at 2334). While corroboration of the information by law enforcement is important, not every piece of information provided by an informant

[7] The circuit court included the body of the affidavit in support of the search warrant in its memorandum decision; this Court could reference that information to make its determination that probable cause existed.

requires corroboration. *Gilmore*, 2009 S.D. 11, ¶ 16, 762 N.W.2d at 643. If "an informant is right about some things, he is more probably right about other facts." *Gilmore*, 2009 S.D. 11, ¶ 16, 762 N.W.2d at 643 (quoting *Gates*, 462 U.S. at 244, 103 S. Ct. at 2335). Plus, "an 'explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles the informant's tip greater weight than might otherwise be the case.'" *State v. Tenold*, 2019 S.D. 66, ¶ 34, 937 N.W.2d at 16. In fact, an "informant 'whose identity is known, who personally observes the alleged criminal activity, and who openly risks liability by accusing another person of criminal activity-may not need further law enforcement corroboration.'" *Dubois*, 2008 S.D. 15, ¶ 15, 746 N.W.2d at 203 (quoting *State v. Griggs*, 306 Mont. 366, 34 P.3d 101, 104 (2001)).

The affidavit laid out the facts of the case, stating Guggenberger called law enforcement to report that she saw what she believed to be child pornography on O'Neal's phone. Officer Bertram contacted Guggenberger. Guggenberger told Officer Bertram that she saw an image of a ten- or eleven-year-old female, with her breasts exposed. Guggenberger thought the female to be that age based on her young-looking face and breast size. Guggenberger said O'Neal's phone was a gold iPhone in a black and white case and provided the phone number and passcode to unlock the phone. She said that O'Neal had the phone with him at his place of work.

Officer Hansen went to Wendy's to meet O'Neal. He contacted O'Neal and obtained the iPhone that Guggenberger described. O'Neal told Officer Hansen the passcode for his phone — the same passcode provided by Guggenberger.

Guggenberger was not an anonymous tipster;[8] her identity is known. Her statements are not subject to the stricter scrutiny that an anonymous tipster would be. She potentially risked liability for reporting her finance's wrong doings. She provided a detailed description of the alleged wrongdoing she witnessed. Law enforcement corroborated much of the information provided by Guggenberger. She described the gold iPhone, as well as had the passcode.

Based on the totality of the circumstances, there was probable cause to support the issuance of the search warrant.

II.

THE CIRCUIT COURT PROPERLY DENIED O'NEAL'S MOTION TO DISMISS.

O'Neal argues his right to a fair trial was violated because thirteen months elapsed between the issuance of the search warrant for his phone and the indictment. DB 18-22. He claims he suffered prejudice because he is unable to view two recordings, the first was the encounter between Officer Hansen and O'Neal and the other was the

[8] When Guggenberger spoke with law enforcement, she provided her name but said she wished to remain anonymous. In the affidavit law enforcement not only referred to Guggenberger by name but also referenced that she and O'Neal were engaged.

conversation between Officer Bertram and Guggenberger. DB 18-22. But O'Neal has not shown how the missing recordings caused prejudice nor has he shown the State caused the delay for a tactical advantage.

*A. Standard of Review*

This Court reviews claims of a constitutional violation under the de novo standard of review. *State v. Schmidt*, 2012 S.D. 77, ¶ 12, 825 N.W.2d 889, 894 (citing *State v. Tiegen*, 2008 S.D. 6, ¶ 14, 744 N.W.2d 578, 585).

B. *O'Neal's Due Process Rights were not Violated by a thirteen-month delay between the issuance of a search warrant and the return of the indictment.*

When a defendant asserts a due process violation because of pre-indictment delay, the defendant must not only show prejudice, but also that the reason for the delay was intentional to gain a tactical advantage. *State v. Stock*, 361 N.W.2d 280, 282 (S.D. 1985) (citing *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971)). While "statutes of limitations . . . legislatively enacted limits on prosecutorial delay," the limitations do "not fully define defendants' rights with respect to the events occurring prior to indictment[.]" *United States v. Lovasco*, 431 U.S. 783, 788–89, 97 S. Ct. 2044, 2048, 52 L. Ed. 2d 752 (1977) (additional citations omitted). The due process clause also plays a limited role in "protecting against oppressive delay." *Id.* In fact,

> [s]o long as there are valid, good faith reasons for the investigative delay, a defendant is not deprived of due process even if his defense has been somewhat prejudiced by the lapse of time between the date the government acquires sufficient evidence to establish probable cause or to establish guilt beyond a reasonable doubt and the date it files an indictment or information against a defendant.

*Stock*, 361 N.W.2d at 283.

O'Neal claims he suffered prejudice because two law enforcement recordings were no longer available. First, there was the recording between Guggenberger and Officer Bertram. The other recording was an audio recording of the encounter between O'Neal and Officer Hansen. O'Neal claims his prejudice is caused by missing "potentially exculpatory evidence related to the seizure of his cell phone." DB 22. But as O'Neal himself recognized, possible prejudice is not enough. DB 20. O'Neal merely speculates there could be exculpatory evidence on the recordings.

Officer Hansen not only testified at the motions hearing but also at trial. SR 81-88; JT 126-36. While Officer Bertram did not testify at trial, Guggenberger did. JT 107-26. Both Officer Hansen and Guggenberger were available for O'Neal to cross-examine at trial. Thus, the substance of what would have been on those recordings was known not only to the circuit court during the motions hearing, but the jury as well. And that information was fair game to be analyzed by O'Neal's attorney.

Nor was there any evidence the State's delay was to gain a tactical advantage. At trial, Detective Buss stated there was a large amount of information on the phone. So much in fact, that he could not extract the information through Cellebrite the first time he attempted it. JT 159. Once the information was downloaded it then took a couple of months to go through. JT 212.

O'Neal also claims there was a prejudicial seven-month delay between the issuance of the indictment and the return of his arrest warrant. DB 19. But the record is void as to the cause of the delay and whether it was the State or O'Neal. Also, this argument seems to support the idea that if an individual can evade law enforcement long enough, the circuit court would have to dismiss his indictment. It is not uncommon for the circuit court to issue an arrest warrant after an indictment and the defendant cannot be found for months or even years.

Because there was no prejudice to O'Neal and because the State did not cause the delay to gain a tactical advantage, the circuit court properly denied O'Neal's motion to dismiss.

III.

THE CIRCUIT COURT PROPERLY ALLOWED THE STATE TO PRESENT 404(B) EVIDENCE.

The State, in response to O'Neal's Motion to a Bill of Particulars,

provided O'Neal with the hash value[9] of the images that went along with each count in the indictment. JT 59-63. The day before trial, the State indicated it also planned to admit the actual image that correlated with the thumbnails found on O'Neal's phone, to show that O'Neal clicked on the thumbnail and viewed the image. JT 59-63. The circuit court allowed the State to present the other images as 404(b) evidence. JT 148. O'Neal argues the court erred in doing so.

A. *Standard of Review.*

Admission of other acts evidence is reviewed under the abuse of discretion standard. *State v. Phillips*, 2018 S.D. 2, ¶ 13, 906 N.W.2d 411, 415 (citing *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 16, 835 N.W.2d 886, 892). An abuse of discretion occurs when the trial court misapplies the rule of evidence, not when it merely allows or disallows evidence. *State v. Birdshead*, 2015 S.D. 77, ¶ 50, 871 N.W.2d 62, 79 (citing *State v. Packed*, 2007 S.D. 75, ¶ 24, 736 N.W.2d 851, 859). It is not for this Court to decide whether it would have allowed the evidence. *Birdshead*, 2015 S.D. 77, ¶ 63, 871 N.W.2d at 84 (citing *State v. Mattson*, 2005 S.D. 71, ¶ 21, 698 N.W.2d 538, 546).

B. *The trial court properly allowed the other acts evidence to prove intent, knowledge, or lack of accident.*

The admission of other acts evidence is controlled by SDCL 19-19-404(b) (Rule 404(b)):

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[9] The hash value is an identifying marker for each image retrieved from O'Neal's phone. JT 211.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted with conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The circuit court must apply a two-prong analysis to determine the admissibility of the evidence. *Phillips*, 2018 S.D. 2, ¶ 14, 906 N.W.2d at 415 (citing *State v. Huber*, 2010 S.D. 63, ¶ 56, 789 N.W.2d 283, 301). This analysis requires the trial court to determine "(1) whether the intended purpose is relevant to some material issue in the case, and (2) whether the probative value of the evidence is substantially outweighed by its prejudicial effect." *Id.* Rule 404(b) prohibits the use of other act evidence to "solely prove character." *Phillips*, 2018 S.D. 2, ¶ 14, 906 N.W.2d at 415 (quoting *State v. Wright*, 1999 S.D. 50, ¶ 17, 593 N.W.2d 792, 800). The State has the burden to persuade the trial court the evidence has a permissible purpose. *State v. Armstrong*, 2010 S.D. 94, ¶ 11, 793 N.W.2d 6, 11 (citing *State v. Lassiter*, 2005 S.D. 8, ¶ 15, 692 N.W.2d 171, 176). Rule 404(b) is a rule of inclusion, not a rule of exclusion. *Medicine* Eagle, 2013 S.D. 60, ¶ 17, 835 N.W.2d at 892. (citing *Wright*, 1999 S.D. 50, ¶ 13, 593 N.W.2d at 798).

*1. The other acts evidence was factually relevant.*

"The determination of whether evidence is relevant 'is committed to the sound discretion of the trial court, for which this Court will not substitute its own judgment.'" *State v. Birdshead*, 2015 S.D. 77, ¶ 38,

871 N.W.2d at 76 (quoting *State v. Wilcox*, 441 N.W.2d 209, 212 (S.D. 1989)). When considering whether other acts evidence should be admitted to prove intent, knowledge, or lack of accident the circuit court must compare the similarities between the other acts and the crime O'Neal is charged with violating. *State v. Chamley*, 1997 S.D. 107, ¶ 12, 568 N.W.2d 607, 612 (citation omitted) (overruled on other grounds by *State v. Boe*, 2014 S.D. 29, 847 N.W.2d 315). The circuit court found the images were evidence of intent, knowledge, and lack of accident. JT 147. It reasoned that the other images the State planned to introduce showed "O'Neal had clicked on the thumbnail that then popped up this image, which indicates that he would likely have known it was there; had knowledge of it being there; and that it wasn't an accident that didn't somehow just end up on his computer." JT 148. *See State v. Birdshead*, 2015 S.D. 77, ¶ 57, 871 N.W.2d at 81 (concluding the circuit court properly found other acts relevant when it said the evidence "does seem to go to the matter of whether this was an accident or not[.]").

*2. The probative value substantially outweighed the prejudicial effect.*

Before admitting other acts evidence, the circuit court must also consider whether the probative value substantially outweighs the prejudicial effect. Once the circuit court finds the other acts evidence relevant, "the balance tips emphatically in favor of admission."

*Medicine Eagle*, 2013 S.D. 60, ¶ 17, 835 N.W.2d at 893 (quoting *Huber*, 2010 S.D. 63, ¶ 59, 789 N.W.2d at 302 (citation omitted)). For the evidence to be excluded, damage to O'Neal's position must come from an unfair prejudice. *Wright*, 1999 S.D. 50, ¶ 16, 593 N.W.2d at 799. "Prejudice 'refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means.'" *Birdshead*, 2015 S.D. 77, ¶ 63, 871 N.W.2d at 83 (quoting *State v. Moeller*, 1996 S.D. 60, ¶ 38, 548 N.W.2d 465, 478). Defendant has the burden of establishing the prejudice of the evidence substantially outweighs the probative value. *Birdshead*, 2015 S.D. 77, ¶ 61, 871 N.W.2d at 82 (citing *Wright*, 1999 S.D. 50, ¶ 16, 593 N.W.2d at 799).

The circuit court stated, "with regard[s] to the balancing test, or the 404(b) analysis, I do think it is appropriate that those images . . . be allowed." JT 148. This Court has reiterated that "'the balancing process undertaken by the trial court must be conducted on the record[.]'" *Birdshead*, 2015 S.D. 77, ¶ 59, 871 N.W.2d at 81 (quoting *State v. Steele*, 510 N.W.2d 661, 667 (S.D.1994)). But the "'mere failure to make a record of its Rule 403 weighing is not reversible error.'" *Birdshead*, 2015 S.D. 77, ¶ 59, 871 N.W.2d at 81 (quoting *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 885 (8th Cir. 2006)). Instead, this Court assumes that the circuit court implicitly held that balance in favor of admission. *Id.*

While the circuit court did not expressly on the record weigh the

probative value of the images against the prejudicial effect, it did note the test on the record and found that it would allow the other images to be admitted. Because the circuit court allowed the evidence at trial, it can be assumed it conducted the balancing tests in favor of admission. Therefore, the circuit court did not error in its decision.

While O'Neal argues the circuit court did not do the two-part analysis it appears the focus of the argument is the alleged prejudicial nature of the images the State sought to introduce. DB 23-26. O'Neal argues the Bill of Particulars[10] did not include the other images and he was not notified until the day before trial that the State planned to present the other images and was thus unfairly prejudiced by the admission. DB 23-26. But the evidence against O'Neal was overwhelming, and he cannot show how he was prejudiced by the other images. *See* Argument IV, infra. Because O'Neal cannot show he was prejudice by the images, his argument fails.

IV.

THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN O'NEAL'S CONVICTIONS OF POSSESSION OF CHILD PORNOGRAPHY.

O'Neal claims there was insufficient evidence presented at trial to support his convictions for possession of child pornography. But when viewing the evidence in light most favorable to the State, there is

[10] The State's response to the Motion for a Bill of Particulars was never filed. In the circuit court's memorandum decision, it indicated the matter was resolved between the two parties. JT 74.

sufficient evidence to support his conviction.

*A. Standard of Review*

This Court reviews the denial of a motion for judgment of acquittal de novo. *State v. Manning*, 2023 S.D. 7, ¶ 27, 985 N.W.2d 743, 752 (citing *State v. Nelson*, 2022 S.D. 12, ¶ 21, 970 N.W.2d 814, 823). The question is "whether there is evidence in the record which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt." *State v. Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d 600, 606 (citing *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342). "'An appellate court is not required to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d at 606 (quoting *State v. Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d 131, 140). Rather, it reviews the evidence in a light most favorable to the verdict. *State v. Fasthorse*, 2009 S.D. 106, ¶ 6, 776 N.W.2d 233, 236 (citing *Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d at 342). Likewise, "this Court will not resolve conflicts in the evidence, assess the credibility of witnesses, or reweigh the evidence." *Id.* And "[i]f the evidence, including circumstantial evidence and reasonable inferences drawn therefrom, sustains a reasonable theory of guilt, a guilty verdict will not be set aside." *Id.*

B. *There was sufficient evidence to support O'Neal's convictions for Possession of Child Pornography.*

To convict O'Neal for Possession of Child Pornography, the State must prove that he: "knowingly possessed, distributed or otherwise disseminated any visual depiction of a minor engaging in a prohibited sexual act, or in the simulation of such an act." *State v. Linson*, 2017 S.D. 31, ¶ 6, 896 N.W.2d 656, 659; SDCL 22-24A-3(3). O'Neal's only challenge is whether he knowingly possessed the images. DB 18-22. This Court defined possession as "'dominion or right of control over contraband with knowledge of its presence and character.'" *Linson*, 2017 S.D. 31, ¶ 6, 896 N.W.2d at 659 (quoting *State v. Barry*, 2004 S.D. 67, ¶ 9, 681 N.W.2d 89, 92). Possession can be actual or constructive and "may be proven by circumstantial evidence." *Linson*, 2017 S.D. 31, ¶ 6, 896 N.W.2d at 659 (citing *Barry*, 2004 S.D. 67, ¶¶ 9, 11, 681 N.W.2d at 92-93).

Images were found on O'Neal's phone and on an external hard drive. Guggenberger testified she found an image of a topless girl, under the age of ten on O'Neal's phone. JT 110-11. She admitted to having the password for the phone, but never put photographs on his phone. JT 110, 116-17.

The State presented evidence that the time an image was downloaded matched where O'Neal would have been located. For example, Exhibit 3 was downloaded onto O'Neal's phone between 12:43

p.m. and 2:39 p.m. on November 19, 2018, at the Dudley House.[11] JT 231-32. During that timeframe O'Neal was exchanging text messages with Guggenberger. JT 245. There was also a message from Lyft with a receipt showing O'Neal went from Wendy's to the Dudley House. JT 246.

The hard drive used to belong to Guggenberger, but she gave it to O'Neal. JT 114. On the hard drive there were two separate folders, one labeled "CG" and the other "M Stuffs." JT 164. "CG" folder was Guggenberger's folder, and it contained images of cats and vacation photographs, along with receipts and bills. JT 217. "M Stuffs" folder was O'Neal's folder and it contained sexually explicit images much like those discovered on O'Neal's phone. JT 218-19.

Not only did O'Neal have the thumbnail of the images on his phone, but the evidence presented showed he likely clicked on the thumbnail to download the larger image. JT 225-26. He knew the images were there and he actively viewed them.

The evidence presented show there were sexually explicit images of minor children on O'Neal's phone and hard drive. He was the one who accessed those images. Thus, there was sufficient evidence presented by the State to sustain O'Neal's convictions.

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[11] The Dudley House is a homeless shelter O'Neal stayed at. JT 118.

V.

O'NEAL'S DUE PROCESS RIGHT TO JURY UNANIMITY WAS NOT VIOLATED BY DUPLICITY IN THE INDICTMENT.

O'Neal claims his due process rights were violated because of the duplicity in the indictment. He alleges the State "presented evidence of a number of potential acts to support each count." Not only was the State clear about what exhibit proved each count of the indictment, O'Neal also failed to preserve this issue for appeal.

A. *Standard of Review.*

Typically, "'[w]hether an indictment is duplicitous is a question of law reviewed de novo.'" *State v. White Face*, 2014 S.D. 85, ¶ 14, n. 1, 857 N.W.2d 387, 393 (quoting *State v. Muhm*, 2009 S.D. 100, ¶ 18, 775 N.W.2d 508, 514). But "[w]hen an issue has not been preserved by objection at trial, this Court may conduct a limited review to consider whether the circuit court committed plain error." *State v. Manning*, 2023 S.D. 7, ¶ 40, 985 N.W.2d at 756 (internal citation omitted). "'To establish plain error, an appellant must show (1) error, (2) that is plain, (3) affecting substantial rights; and only then may this Court exercise its discretion to notice the error if, (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *State v. Bryant*, 2020 S.D. 49, ¶ 19, 948 N.W.2d 333, 338).

B. *O'Neal waived this argument on appeal.*

"'[P]arties must object to specific court action and state the reason underlying their objection so that the circuit court has an opportunity to correct any error.'" *State v. Guzman*, 2022 S.D. 70, ¶ 26, 982 N.W.2d 875, 886 (quoting *State v. Divan*, 2006 S.D. 105, ¶ 9, 724 N.W.2d 865, 869). "'To preserve issues for appellate review litigants must make known to the [circuit] courts the actions they seek to achieve or object to the actions of the court, giving their reasons.'" *State v. Bryant*, 2020 S.D. 49, ¶ 18, 948 N.W.2d at 338 (quoting *State v. Dufault*, 2001 S.D. 66, ¶ 7, 628 N.W.2d 755, 757). "Even issues over the denial of constitutional rights may be deemed waived by failure to take action to preserve the issues for appeal." *State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 10, 785 N.W.2d 272, 277 (citing *Schlenker v. South Dakota Dept. of Pub. Safety*, 318 N.W.2d 351, 353 (S.D. 1982)).

O'Neal did not raise the issue of duplicity with the circuit court. Nor did he ask for any jury instructions to remedy any duplicity issue. Because he failed to raise the issue with the circuit court, he has waived it for purposes of an appeal to this Court.

C. *The indictment was not duplicitous.*

O'Neal claims that he suffered a due process violation because several pieces of evidence could have supported each count of the indictment. "'[A] duplicitous indictment or information includes a single

count that captures multiple offenses[.]'" *State v. Babcock*, 2020 S.D. 71, ¶ 31, 952 N.W.2d 750, 760 (quoting *Muhm*, 2009 S.D. 100, ¶ 19, 775 N.W.2d at 514). To resolve any unanimity concerns, this Court has adopted the "either/or" rule. *Babcock*, 2020 S.D. 71, ¶ 40, 952 N.W.2d at 762.

> This "rule does not require dismissal of a duplicitous indictment. Rather, the [State] must elect a single offense on which it plans to rely, and as long as the evidence at trial is limited to only one of the offenses in the duplicitous count, the defendant's challenge will fail. Alternatively, if there is no election the trial court should instruct the jury it must find unanimously that the defendant was guilty with respect to at least one of the charges in the duplicitous count."

*Babcock*, 2020 S.D. 71, ¶ 40, 952 N.W.2d at 762 (quoting *Muhm*, 2009 S.D. 100, ¶ 32, 775 N.W.2d at 518-19).

Here, there was no duplicity error. The jury was instructed that each image (exhibit 1-15) correlated with the corresponding count in the indictment. SR 195. For example, Exhibit 1 was the image to consider in determining the outcome for count 1 of the indictment. *Id.* The verdict form also included what image went with each count. SR 211-13. Both the circuit court and the State made it clear to the jury what should be considered for each charge. Thus, there was no duplicity issue.

## CONCLUSION

The State requests that Defendant's convictions and sentence be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 7,015 words.

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

Dated this 13th day of April 2023.

*/s/ Erin E. Handke*
Erin E. Handke
Assistant Attorney General

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 13, 2023, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Michael Adam O'Neal* was served via Odyssey File and Serve upon Loranda K. Kenyon at lkenyon@minnehahacounty.org.

*/s/ Erin E. Handke*
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