IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27001

OAKLEY BERNARD ENGESSER,

Petitioner and Appellee,

v.

DARIN YOUNG, Warden, South Dakota State Penitentiary,

Respondent and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE WARREN G. JOHNSON
Circuit Court Judge

APPELLANT'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Paul S. Swedlund
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: 605-773-3215
Facsimile: 605-773-4106

ATTORNEYS FOR APPELLANT

RONALD A. PARSONS

Johnson, Heidepriem & Abdallah
P.O. Box 2348
Sioux Falls, SD 57101
Telephone: 605-338-4304

MICHAEL J. BUTLER

Butler Law Office
100 South Spring Street, #210
Sioux Falls, SD 57104
Telephone 605-331-4774

ATTORNEYS FOR APPELLEE

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Boyles v. Weber, 2004 SD 31, 677 N.W.2d 531

Engesser v. Dooley, 2008 SD 124, 759 N.W.2d 309

Moeller v. Weber, 2004 SD 110, 689 N.W.2d 1

The trial court denied respondent's motion to dismiss for lack of jurisdiction.

DID THE TRIAL COURT ERR IN FINDING, DESPITE THE ABSENCE OF ANY RECOGNIZED STANDARD GOVERNING THE MERITS OF ENGESSER'S NOVEL CLAIM, THAT ENGESSER HAD PROFFERED APPROPRIATE EVIDENCE OF HIS ACTUAL INNOCENCE

No cases speak to the issue of whether the trial court erred in finding that Engesser's evidence satisfied the standard for a free-standing actual innocence claim because no such claim has been recognized and, therefore, no evidentiary standards have been set.

The trial court ruled that Engesser had proffered "clear and convincing" evidence of his actual innocence.

DID THE TRIAL COURT ERR IN FORECLOSING RESPONDENT'S BROADER DISCOVERY INTO THE CONTENTS OF ENGESSER'S PRIOR COUNSEL'S FILE FROM AN EARLIER *HABEAS CORPUS* PROCEEDING AFTER LIMITED DISCOVERY REVEALED THAT THE FILE CONTAINED EVIDENCE THAT PROVED THAT ENGESSER AND HIS PRIOR COUNSEL HAD TESTIFIED FALSELY ABOUT FACTS MATERIAL TO ENGESSER'S CASE

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SDCL 19-13-5(3)

The trial court denied respondent's motion for further discovery into Engesser's prior counsel's file.

STATEMENT OF THE CASE

Petitioner and appellee Oakley Bernard "Bernie" Engesser filed a fourth petition for a writ of *habeas corpus* that sought to overturn his conviction on a jury verdict for vehicular homicide and battery. Engesser's petition alleged no more than his theory that the testimony of two "new" witnesses in combination with two other known witnesses proved his actual innocence. Engesser did not allege, however, that the omission of either "new" witness from his original criminal trial was the result of constitutional error as is required to vest a circuit court with jurisdiction to hear a *habeas corpus* claim.

Respondent moved to dismiss Engesser's petition for failing to state a recognized form of *habeas corpus* claim over which the court could exercise jurisdiction. The trial court denied the motion to dismiss and ordered a trial on Engesser's petition.

At trial, the court heard live testimony from one new witness who claimed to have seen someone other than Engesser driving the subject car prior to the fatal accident. The court also heard testimony from respondent's witnesses.

The court ruled that the "new" witness testimony, in combination with other witness testimony in the record as a whole, provided "clear and convincing" proof that Engesser had not been driving the subject vehicle at the time of the fatal crash as had been found by Engesser's

criminal trial jury. The court vacated Engesser's conviction subject to a new trial. The state now appeals.

References to Engesser's criminal trial will be cited as TRIAL (EXHIBIT R26). His first, second, and fourth state *habeas corpus* proceeding transcripts (CIV 03-408, CIV 06-578, CIV 13-62) will be cited as HC1 (EXHIBIT R27), HC2 (EXHIBIT R28), and HC4 respectively. His federal *habeas corpus* hearing transcript will be cited as FHC (EXHIBIT R29). Other respondent's exhibits from the HC4 trial will be cited as EXHIBIT R#. All transcript or exhibit references will be followed by citation to the appropriate page/line or number.

FACTS

Dorothy Finley died on July 30, 2000, in a high speed collision between her Corvette and a minivan carrying a family of four. An intoxicated Oakley Engesser was driving the Corvette at least 112 miles per hour on I-90 east of Sturgis when he lost control. EXHIBITS R2, R4, R11. The Corvette's passenger side smashed into the rear of the minivan broadside and then careened into the median and rolled. EXHIBIT R4. The mangled car landed on its roof. Dorothy Finley was found pinned between the passenger seat and the roof, already dead when the first passing Samaritans and EMT personnel rushed to render aid. Engesser was lying face down on the ground six to ten feet from the Corvette's open driver's-side door, battered but alive. TRIAL 296/3, 298/8, 534/13; HC2 at 127/18.

A convenient case of alleged amnesia prevents the lone survivor of the crash – Oakley Engesser – from remembering that he was driving, or from answering any questions about his activities in the hours or seconds leading up to the crash. It is a known fact, however, that an afternoon of cruising and drinking led to the fatal crash. Engesser, with Finley as his passenger, drove the Corvette from Rapid City to Black Hawk to visit his sister. TRIAL at 646/19; HC1 45/25; EXHIBIT R2 at 2. From there, they proceeded to the Slash J Bar in Piedmont for lunch where Engesser "had a couple of drinks . . . while eating." HC1 at 44/23, 47/12, 48/11. According to Engesser, Finley drove the Corvette from the Slash J to the Full Throttle Saloon outside of Sturgis where Engesser said he "may have had a couple of beers." HC1 at 46/25, 48/9, 49/11. It was more than just a matter of *may* – Roanna Clifford saw Engesser, beer in hand, at the saloon. TRIAL at 280/1.

Finley and Engesser left the Full Throttle Saloon around 6:00 p.m. TRIAL at 280/25; HC1 at 49/18; FHC at 108/25. Finley was driving the Corvette. HC1 at 50/4; FHC at 98/1.

The ensuing two hours and ten minutes – between their departure from the Full Throttle and crashing into the minivan ten miles away at 8:10 p.m. – are lost to Engesser's alleged amnesia. HC1 at 51/11, 51/23, 52/9, 53/15, 53/18; FHC at 106/23; TRIAL at 544/16, 607/2. Considering their prior stops, one suspects that Finley and Engesser

spent those two lost hours in a Sturgis bar where Engesser worked up the .125 BAC he registered at the time of the crash. TRIAL at 479/15-24.

The Corvette was next spotted one to two minutes before the accident entering I-90 eastbound via the Exit 32 onramp. Coincidentally the two witnesses who spotted the Corvette at Exit 32 – Beau Goodman and Phil Syverson – both knew Dorothy Finley and her car. HC2 at 4/10-14, EXHIBIT R15 at 5/42, 9/1-29, 11/4; HC4 at 96/12-97/3. According to Goodman, he was driving on I-90 when he saw the Corvette merging off of Junction Avenue onto the Exit 32 onramp. The driver's side window was up. Though he recognized the car and knew its owner, he could not see who was driving through the tinted window. TRIAL at 287/6; HC2 at 135/3; FHC 119/22.

Syverson was driving I-90 eastbound behind Goodman and saw the Corvette as it drove the onramp at speeds approximating his own until it quickly accelerated ahead of him about 100 yards from the end of the ramp. FHC at 119/5-12. Syverson glanced over at the Corvette two or three times during the five-second span of time that the two cars paced each other. FHC at 120/4, 121/13. Due to the curvature of the onramp, the Corvette was between 125 and 60-75 feet to Syverson's right during the five seconds that the Corvette paced alongside and then merged ahead of him. FHC2 at 113/16, 119/9, 129/15; EXHIBIT R3.

Syverson's attention was directed mainly toward the Corvette itself rather than its driver. FHC 123/20-124/8. Even then, Syverson's

attention was not "focused completely on the Corvette" but on "mak[ing] sure that we were going to merge safely." FHC at 126/7-11. When he did happen to glance specifically toward the driver, Syverson "thought" he saw the "profile" of what "appeared to be a female" driving the Corvette. FHC at 112/22, 113/12, 122/25. The Corvette sped onto I-90 ahead of Syverson before Syverson – who *knew* Dorothy Finley – saw anything that identified the driver to him as Finley.

A short ways up the road, the Corvette came "flying" past Goodman to the left in the passing lane. TRIAL at 285/22. As it approached behind him, Goodman looked in his rearview mirror to see if Dorothy Finley was driving her car and he was not able to identify the driver. HC4 at 100/11. As it sped passed him, the tinted passenger side window was up and Goodman could not see who was seated on that side. TRIAL at 287/6, 19; HC4 at 98/24, 101/1.

Moments later, Goodman saw the Corvette skidding sideways on the road behind the minivan. The van went "shootin' down into the ditch" and the Corvette kicked up "a cloud of dust" as it rolled. TRIAL at 286/12-25. Goodman slammed on his brakes and stopped his car on the shoulder within seconds. HC4 at 101/21. He was the first to arrive at the Corvette. HC2 at 16/7; HC4 at 102/2, 112/12. He found the driver's side door open. TRIAL at 291/8; HC4 at 102/7. Goodman looked inside the car and found Dorothy Finley's corpse on the passenger

side. Once he had determined she was dead, Goodman, an EMT trainee, went to render aid to Engesser.

The Corvette also flew past Ramona Dasalla, who was the passenger in a Nissan crew cab pickup being driven by her boyfriend not far behind Goodman. Dasalla allegedly saw the "silhouette" of what she believed was a woman at the Corvette's wheel because the driver had long hair. HC4 at 32/18, 36/13. Dasalla could not describe any other features of the driver that made her believe it was a woman. EXHIBIT R13 at 33/15, 33/32-47, 34/13-23, 52/6-13, 53/39, 54/34. Dasalla and her boyfriend stopped at the scene but left without talking to law enforcement. HC4 at 30/12.

When Syverson came to the crash site he also stopped. His wife went to the aid of the minivan's occupants while he remained in the car with their daughter. Though he supposedly had information pertaining to the identity of a driver involved in a traffic fatality, Syverson and his wife, like Dasalla, left the scene without talking to law enforcement. FHC at 124/25.

Mary Redfield and her husband were traveling toward Sturgis in the westbound lane and stopped when they saw the overturned Corvette and Engesser lying in the ditch. TRIAL 294/16-21. Redfield, a nurse anesthetist, went to Engesser, who she found lying on the ground 6-10 feet outside the open driver's side door, and opened his clogged airway so he could breath. TRIAL 296/3, 298/8, 534/13; HC2 at 127/18.

Redfield caught the "unique smell" of alcohol and blood on Engesser's breath. TRIAL 297/14, 529/15. From where she knelt beside Engesser, Redfield could see the Corvette's steering wheel and into the interior through the open driver's side door. TRIAL at 296/7-13, 301/8. While Redfield tended to Engesser, her husband crawled into the Corvette's driver's side door to turn off the motor. Unsuccessful in turning the Corvette off, Redfield's husband insisted she move away from the Corvette because he feared it would explode. TRIAL at 296/7-16.

When the investigating officer, Trooper Ed Fox, arrived at the scene, he found the Corvette upside down on its roof, the side windows shattered, and Dorothy Finley dead on the passenger side of the car, her head "pinned between the passenger seat head rest and the roof of the Corvette." TRIAL at 340/12-21, 366/10, 369/24, 375/19, 384/11; HC2 at 126/1-7, 129/19. With the passenger side blocked by Finley, the roof intact, and the driver door open, Fox concluded that Engesser had been ejected out the driver's side door. TRIAL at 546/18; HC2 at 18-25, 126/1, 126/19.

While EMTs tended to Engesser and Finley, Fox started interviewing witnesses at the scene, none of whom – Eric Eckholm and Charlotte Fowler in particular – were able to provide him with any information about who had been driving the Corvette. TRIAL at 534/5; EXHIBITS R2, R5, R11. Fox initially assumed that Finley had been driving because the car was titled to her and because an EMT had

mistakenly told him that he had found Finley on the driver's side of the car. TRIAL at 582/4; EXHIBITS R2, R11.

After further investigation, however, Fox, who by then had served as the lead investigator for 100 to 150 automobile accidents, concluded that Engesser had been driving. TRIAL at 519/10, 558/11, 601/4. The physical evidence – vehicle damage, bodily injury patterns, confined cabin space, seat placement, and occupant resting positions – pointed to Engesser as the driver.

Also, when interviewed by Fox, Engesser was not forthcoming or forthright. He claimed he had no recollection of anything that transpired after he and Finley left the Full Throttle. TRIAL at 598/2. At the outset of the interview he launched into a "rehearsed" monologue about Finley's habit of driving fast before Fox even brought the subject up. TRIAL at 539/25. Engessser told Fox that he had consumed only two drinks that day, which Fox knew to be a lie because two drinks do not equate to a .125 BAC. TRIAL at 540/22. Engesser had also conceded that he could have taken over driving again sometime after leaving the Full Throttle, but denied any recollection of doing so. EXHIBITS R2, R11.

A jury of Engesser's peers, with the help of corroborating physical evidence, determined that Engesser had been behind the wheel of the speeding Corvette and convicted him of vehicular homicide and battery. Engesser has been protesting his innocence ever since.

ARGUMENT

The merits of this case can be analogized to this mathematical equation: 0 + 0 + 0 + 0 = 0.

In its denial of Engesser's second *habeas corpus* petition, this court previously found the testimony of two of Engesser's witnesses – Eric Eckholm and Charlotte Fowler – to be "questionable." *Engesser v. Dooley,* 2008 SD 124, ¶¶ 4, 13, 759 N.W.2d 309, 311, 314. To these two, Engesser's fourth *habeas corpus* petition added two "new" questionable witnesses – Phil Syverson and Ramona Dasalla.

But, just as the sum of the equation 0 + 0 + 0 + 0 will equal zero no matter the number of zeroes added together, the sum of four questionable witnesses equals a questionable body of evidence. Thus, even assuming a *habeas corpus* action alleging naught but one's actual innocence exists at law, Engesser has failed to produce unquestionable (clear and convincing) proof that he actually is innocent.

A. The Trial Court Had No Jurisdiction Under South Dakota Law To Entertain A Habeas Corpus Claim That Alleged No More Than Engesser's Actual Innocence

A *habeas corpus* petition is an attack on the jurisdiction of the court of conviction, which is satisfied only by showing that constitutional error tainted the defendants' trial before that court. *Boyles v. Weber,* 2004 SD 31, ¶ 6, 677 N.W.2d 531, 536. Engesser's petition herein made no such claim. Instead, Engesser claimed only that Syverson and

Dasalla's testimony, which had not been omitted from Engesser's criminal trial by any constitutional error, proved his actual innocence.

This court, however, has stated that freestanding claims of actual innocence do not exist under South Dakota law. *Boyles,* 2004 SD 31 at ¶ 10, 677 N.W.2d at 537. In *Boyles,* a defendant claimed that a host of new witnesses established his innocence. As in *Boyles,* this case involves the question of who was behind the wheel of a car that killed a person. As in *Boyles,* this case involves a defendant driver who claims amnesia of the event. As in *Boyles,* this case involves late eye witnesses who claim to have seen someone other than the defendant behind the wheel of the car. As in *Boyles,* this late eyewitness testimony is not conclusively exculpatory – like DNA or a traffic camera photograph – but is laden with suggestion, contradiction, bias, and perceptual fallibility.

As in *Boyles,* Engesser's "claim that he should be entitled to a new trial based on th[e] newly discovered [Syverson and Dasalla] evidence is . . . not within the jurisdiction of the . . . circuit court in a habeas action" because it does not itself "establish[ ] a deprivation of constitutional rights." *Boyles,* 2004 SD 31 at ¶ 11, 677 N.W.2d at 537. The absence of Syverson's or Dasalla's testimony from Engesser's original trial was not due to ineffective assistance of his trial counsel, police concealment, prosecutorial misconduct, or some other procedural defect. *Boyles,* 2004 SD 31 at ¶ 11, 677 N.W.2d at 537. And unlike *Boyles,* there is convincing physical evidence in this case that corroborates Engesser

being the driver. Thus, Engesser would have the jury's verdict vacated based solely on the fuzzy, decade-old memories of (allegedly) newly-identified eyewitnesses who exhibit bias and whose testimony contradicts the physical evidence.

It is, by now, established state and federal law that a claim of actual innocence, standing alone, is not grounds for habeas relief. *Boyles*, 2004 SD 31 at ¶ 11, 677 N.W.2d at 537.[1] Imagine the flood of petitions that would flow from opening that gate given the drought of penitentiary denizens who admit their guilt. Because Engesser's claim is no more than a protestation of innocence based on unreliable evidence whose omission from his original trial was not due to constitutional error, he failed to state a claim over which the court below could exercise its *habeas corpus* jurisdiction.

B. Even Assuming South Dakota Law Would Recognize A Freestanding Actual Innocence Claim, Engesser Did Not Proffer Appropriate Evidence Of His Actual Innocence

Even if a freestanding actual innocence claim exists, Engesser has failed to produce evidence of his innocence that is so clear and convincing that no reasonable juror would vote to convict him (which is the standard arbitrarily adopted by the court below). Engesser argues that the testimony from Dasalla, Syverson, Eckholm, and Fowler

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[1] *Everitt v. Solem*, 412 N.W.2d 119, 123 (S.D. 1987)("A change of testimony, additional testimony, or additional evidence might be grounds for a new trial or some other relief, but they are not appropriate for granting habeas corpus relief"); *Moeller v. Weber*, 2004 SD 110, ¶ 13, 689 N.W.2d 1, 7 ("[N]ewly discovered evidence is not a sufficient ground for habeas relief where no deprivation of a constitutionally protected right is involved").

purporting to have seen a woman driving the doomed Corvette cumulatively proves his actual innocence. Engesser is incorrect because, for differing reasons, the testimony of these four witnesses is inherently unreliable.

1. The Laws Of Physics

Engesser's new witness testimony is unreliable in part because the laws of physics militate against their ability to have seen the detail they now claim. A car driving 112 miles per hour, as Finley's Corvette was prior to and at the point of impact, will travel 164 feet in one second. EXHIBIT R4; HC2 at 125/8. A car driving 37 miles per hour, which is the minimum speed differential between the Finley Corvette and Dasalla's vehicle (112 – 75 = 37), will travel 53 feet per second.[2] These numbers, in combination with other physical evidence, allow us to estimate with reasonable precision the fractured second that each witness had to view the car and its occupants, and, with it, the improbability that any of the witnesses could have seen what they now claim to have seen.

2. Bias, Suggestion, and Invention

Engesser's "new" witness testimony is unreliable in part because neither witness has definitive evidence of the driver's identity. Engesser starts with the sketchy, 13-year-old impressions of two witnesses –

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[2] 37 ÷ 60 = .61 miles per minute. With 5,280 feet per mile, this equals 3,220 feet per minute, which, divided again by 60, equates to 53 feet per second.

Dasalla and Syverson – who *think* that a woman was driving the ill-fated Corvette, though neither *know* who was driving because neither saw the faces of the Corvette's occupants. *Boyles*, 2004 SD 31 at ¶ 22, 677 N.W.2d at 539 (witness who saw hair but not face of driver unreliable); FHC at 113/12; HC4 at 17/1; EXHIBIT R13 at 34/22, 52/21. They do not *know* because the split-second during which the flying Corvette's occupants were visible did not allow them to detect gender-defining features of either the driver or passenger. To compensate for their lack of definitive evidence, there is evidence of bias, suggestion, and invention in the formation of their testimony to make it better fit Engesser's case theory.

a. Ramona Dasalla

Dasalla's testimony is unreliable for two reasons: (1) under the high-speed circumstances, she did not have the opportunity see anything of the Corvette's occupants; and (2) she is transparently biased.

As respects her opportunity to see into the Corvette, if Dasalla's husband was driving the speed limit, the speed differential between her vehicle and the Corvette was 37 miles per hour (112 – 75 = 37), or 53 feet per second. Indeed, the speed differential was likely greater because Dasalla's old truck had trouble going much over 60 and the Corvette certainly braked and lost speed prior to hitting the minivan. HC4 at 19/10, 29/24. The actual speed differential could have been as much as 52-65 miles per hour.

Assuming for purposes of discussion that the speed differential between Dasalla's vehicle and the Corvette was only 37 miles per hour, the distance during which the Corvette's cabin was parallel with Dasalla's truck until it was too far ahead for her to see into it had to be at most 30 feet, which places the Corvette's occupants within Dasalla's field of view for at most .56 (30 ÷ 53) or ½ of a second. This was not sufficient time for her to see anything of the Corvette's occupants' faces or features to definitively determine their respective genders. HC4 at 17/2, 32/16. The one feature of the driver that Dasalla caught in her ½ second view of the speeding Corvette that led her to believe that the driver was female was longer hair on the driver's silhouette than on the passenger's. EXHIBIT R13 at 54/34; HC4 at 17/1, 33/14-16, 36/15, 37/8; EXHIBIT R22a-j.

A longer haired driver, however, implicates Engesser because his hair was longer than Finley's. HC2 at 78/25, 79/6, 92/8, 97/17, 103/8. Though tricked by Engesser's longer hair into believing the driver to be female, Dasalla admitted she had seen "no boobs" or breasts on the driver, which again fits Engesser more than Finley. HC4 at 33/12; EXHIBIT R13 at 53/21.

Dasalla also felt that the passenger had a masculine "barrel chest," but, again, this observation proves little. Dasalla did not see the passenger in profile but, rather, the passenger was turned toward the driver showing more of the passenger's back. HC4 at 34/12. Thus, the

passenger was not really positioned to permit Dasalla to see the passenger's chest in profile. As far as seeing a "man body" in the passenger seat, Dasalla would not know – not knowing Finley personally – that she was short-haired, barrel-chested, flatter-chested, and appeared to others as looking "somewhat manly." EXHIBIT R1; HC2 at 92/5. It is also noteworthy that when Dasalla saw Engesser lying on the ground outside the Corvette, she could not tell that he was a male. EXHIBIT R13 at 40/10. Dasalla's inability to register any definitive gender or identity information about the Corvette's occupants renders her testimony "questionable" even before one considers the evidence of her pro-Engesser bias.

As respects her bias, Dasalla said nothing to anyone about what she allegedly saw on the day of the accident until she phoned a newspaper reporter 13 years later. Acting on the lead from the reporter, DCI Agent Brett Garland interviewed Dasalla before she met with Engesser's legal team and before trial. After she met with Engesser's legal team, Dasalla changed her story in ways that conflicted with her DCI interview and that were materially favorable to Engesser:

1. DASALLA FALSELY DENIED MEETING WITH ENGESSER'S ATTORNEYS – Dasalla's testimonial dissembling started when she emphatically testified that she had "never" met with Engesser's legal team prior to her trial testimony. HC4 at 39/20-23. After two pages of further cross-examination probing her about her

contacts with them, Dasalla finally admitted she had in fact met with Engesser's legal team just the day before her testimony. HC4 at 41/6, 218/8.

2. DASALLA SWITCHED FROM SEEING ONLY SILHOUETTED FORMS TO SEEING ACTUAL PERSONS – During her interview, Dasalla repeatedly described the forms occupying the Corvette as no more than silhouettes, yet she testified to seeing "an actual woman" driving. HC4 at 16/9.
3. DASALLA SWITCHED FROM BEING UNSURE TO BEING "POSITIVE" – During her interview, Dasalla qualified her explanation of why she thought the driver's silhouette was female with a lot of "I don't knows," yet she testified that she was "positive" and "absolutely sure" that she saw a female silhouette at the wheel. HC4 at 16/11, 43/24, 47/10-49/19.
4. DASALLA ORIGINALLY SAID "HE" WAS DRIVING – During her interview, Dasalla three times referred to the driver as "he" – as in "*he* was just zooming" and "*he* was going fast and *he* zoomed past us," but when she testified Dasalla backtracked and said "she didn't mean it" when she identified the driver as a "he." HC4 at 45/19-47/4, 46/14.
5. DASALLA SWITCHED FROM SAYING THE TINTED WINDOWS WERE UP TO SAYING THEY WERE DOWN – During her interview, Dasalla said the Corvette's tinted windows were up, but she

testified that the windows were down so as to make it possible for her to see into the Corvette when she really could not. HC4 at 30/15-31/13.

6. DASALLA TRIED TO INCREASE THE AMOUNT OF TIME THE CORVETTE WAS IN HER FIELD OF VIEW – During her interview, Dasalla said she did not see the Corvette until it was "right next to" her truck, yet she testified that she had "seen it a little bit before" it was alongside her truck because she had "felt it coming," again to make it seem possible for her to see in when she really could not. HC4 at 31/17-32/9.
7. DASALLA TRIED TO INCREASE THE SIZE OF THE PASSENGER – During her interview, Dasalla said she thought the passenger's chest was simply "bigger," yet she testified more affirmatively that the passenger's entire "frame" – not just the chest – "was *much* larger than the [alleged] female driver." EXHIBIT R13 at 54/6-15; HC4 at 42/13-43/16.
8. DASALLA SWITCHED FROM SEEING LONG HAIR ON THE DRIVER TO NOT SEEING THE HAIR OF EITHER OCCUPANT – During her interview, Dasalla's only explanation for believing that the driver's silhouette was female was that the driver "did have long hair," yet she testified that she "didn't see . . . their hair." HC4 at 17/2. Dasalla switched from seeing "long hair" on the driver (as she had said in her interview) in order to fit her

testimony to the headshot of a short-haired Dorothy Finley shown to her by Engesser's counsel the day before. EXHIBIT R8; EXHIBIT R13 at 54/34; HC4 at 36/14, 37/13, 41/6.

9. DASALLA TRIED TO DENY SEEING THE PHOTOGRAPH SHOWING FINLEY WITH SHORT HAIR – During her testimony, Dasalla tried to deny having seen the Finley headshot. EXHIBIT R8. When pressed about whether she had been shown any photographs during her meeting with Engesser's counsel, Dasalla initially admitted to seeing only pictures of Finley's corpse on the ground outside her Corvette. HC4 at 40/3-13. When pressed further, Dasalla also admitted to seeing photographs of Engesser in the hospital. HC4 at 40/17. When asked if she had seen any other photographs, Dasalla said "No." HC4 at 41/1. It was not until the state's counsel showed her the Finley headshot that Dasalla reluctantly admitted that she had seen the picture the day before. HC4 at 41/6.

10. DASALLA TRIED TO DENY THAT SHE SAW ENGESSER LYING 10-15 FEET OUTSIDE THE CORVETTE'S OPEN DRIVER'S SIDE DOOR – During her interview, Dasalla had no problem placing Engesser 10-15 feet from the Corvette's open driver's side door; yet, in order to be consistent with Engesser's theory that he ejected from the passenger seat at the point of impact, Dasalla testified that she did not "know

how many feet" he was from the door because supposedly she "can't measure feet." EXHIBIT R13 at 40/14-17; HC4 at 18/21-24, 39/2-13.

Dasalla's eagerness to adopt the pro-Engesser narrative imparted to her in her covert meeting with Engesser's handlers reveals her pro-Engesser bias.

b. Phil Syverson

Syverson's testimony also bears indicia of bias and invention. First, as noted below, Engesser knew that Syverson was some form of witness to the accident back in 2007. Engesser even told his attorney at the time, Rena Hymans, to talk to Syverson. Yet, when the time came to file Engesser's third state *habeas corpus* petition, no Syverson claim was made. EXHIBIT R16. Engesser did not bring a Syverson claim until 2011, on the eve of the trial on his federal *habeas corpus* petition. The change in Syverson's story between what made him a witness of no interest in 2007 and what made him a witness of interest in 2011 suggests bias.

Second, like Dasalla and Eckholm, Syverson reports detail about the occupants of the Corvette that is inconsistent with the high-speed, split second opportunity he had to view the car, and, thus, indicative of bias. According to Syverson, he drove alongside the Corvette for approximately five seconds before the Corvette accelerated ahead of him 100 yards from the convergence of the onramp and the interstate driving

lane. During this time, the Corvette was between 125 and 60 feet to his right and between 19 and 6 feet below him. FHC at 119/16; EXHIBIT R3.

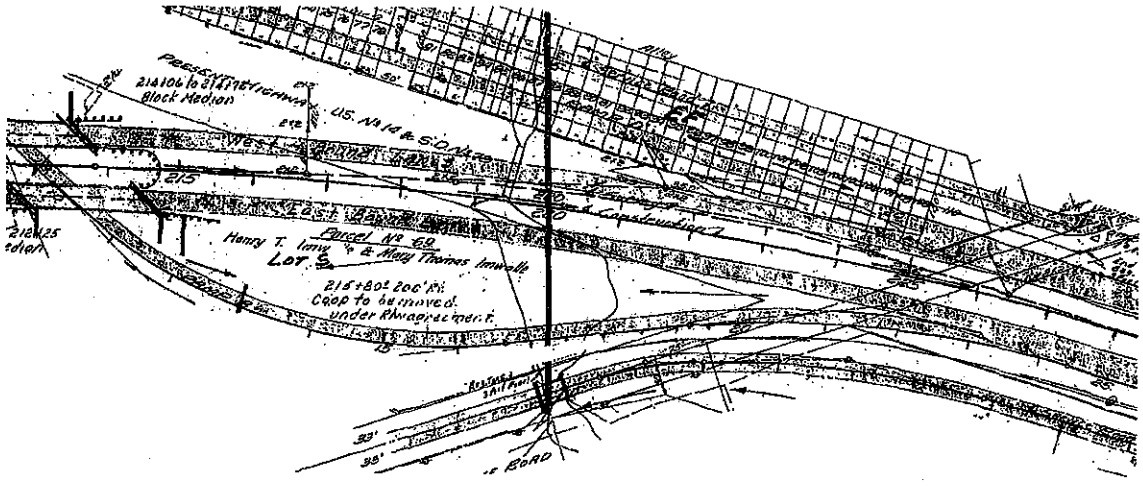


Figure A: Syverson Field Of View Of Corvette At Exit 32

During those five seconds, Syverson – while keeping control of a car carrying his wife and nine-year-old daughter traveling 75 miles per hour (110 feet/second) – is focused primarily on the Corvette itself (as opposed to its occupants) and on mentally mapping distance and speed to merge safely with it. FHC 123/20-124/8; 126/7-11. He is probably checking his mirrors to see if he can switch into the left lane if he has to. FHC at 112/18. He glances toward the driver two, maybe three, times in that five second interval. With everything he has to do as a driver in these five seconds, Syverson could not afford to invest more than one second total in studying the Corvette's driver.

Yet, despite having only a fraction of a second to observe the Corvette's driver each time he glanced over, Syverson supplies some impossible detail. From 60-125 feet away, through tinted windows,

Syverson allegedly saw poofy, curling iron-styled, medium brown hair on the driver. FHC at 112/22, 113/1-4, 113/12, 122/25, 126/10. Not dark brown, not light brown – *medium* brown. How was Syverson capable of gathering so much detail in fractions of a second while driving 75 miles per hour?

He wasn't. Shortly before his federal *habeas corpus* testimony – eleven years after the crash – Syverson was shown photographs of Finley and Engesser. FHC at 113/23; EXHIBIT R8. Not coincidentally, Syverson's subsequent testimonial description of the driver matches the Finley headshot that Engesser's counsel was circulating among the witnesses. FHC at 123/8. Seeing a photograph of a mustached Engesser before he testified also "convinced" Syverson that Engesser was not driving, because he allegedly did not recollect seeing a ¾-of-an-inch profile of a mustache on the profile of the driver he saw through the tinted window of a car 75 feet to his right while traveling at 75 miles per hour along I-90 some 11 years earlier. FHC at 127/19.

Implicit in admitting that the Engesser photograph convinced him that Finley was driving is the converse; namely that Syverson was "unconvinced" whether a male or female was driving before seeing the photograph. If Syverson's perception of a non-mustached, poofy-haired, curling iron-styled, "feminine profile" behind the wheel of the Corvette 11 years earlier was so firm and fast, why would he need photographic convincing? HC4 at 218/14.

Stripped of its embellishments, however, Syverson's testimony implicates Engesser as the driver as much as it does Finley. At best, Syverson saw nothing more than a "profile" with poofy, curly brown hair. FHC at 113/1, 122/25, 123/2. Engesser had frizzy, light brown curly hair that tended to poof out or, in his own words, had a "way of flying" off his head. HC2 at 78/25, 79/6. Indeed, Syverson had to admit that he really could not testify to who was driving the Corvette. FHC at 125/9.

Finally, an obvious source of the bias in Syverson's reporting can be found in the fact that Rusty Engesser, Oakley's loyal cousin, was Syverson's *boss* at the time that Syverson first allegedly fingered Dorothy Finley as the driver back in 2007. HC4 at 143/3-4, 147/6-17; FHC at 128/10; EXHIBIT R15 at 8/29, 9/1-29; EXHIBIT R24. Evidence of bias and invention renders Syverson's testimony as "questionable" as Dasalla's, Eckholm's, and Fowler's.

c. Eric Eckholm And Charlotte Fowler

Though his current petition does not raise affirmative claims concerning Eric Eckholm or Charlotte Fowler (Delaney), these two witnesses must be addressed because Engesser claims that their testimony, combined with Dasalla and Syverson, proves his actual innocence. Like Dasalla, Eckholm's and Fowler's memories have improved with each opportunity to testify.

When interviewed at the scene, neither Eckholm nor Fowler supplied any information about the appearance or identity of the driver.

HC2 at 120/23, 122/16; EXHIBITS R2, R5, R11. They now say that they never discussed the driver's identity with law enforcement because nobody asked them to. HC2 at 37/4, 67/7; FHC at 46/5, 62/11. Really? Fox reported that the results of his interviews with Daniel Huss, Redfield, Goodman, and Eckholm/Fowler were that "no one [was] able to identify the driver," so it is not as though he was not asking the question. TRIAL at 534/4; HC2 at 137/3. Yet, Eckholm and Fowler claim they were never asked?

Moreover, they are allegedly eyewitnesses to a traffic fatality obviously caused by the Corvette's driver. EXHIBIT R6 at 9/9. That being the case, do *both* Eckholm and Fowler really wait to be *asked* before telling law enforcement what they know about who was driving the Corvette? Are we to accept that Fox was so oblivious to the urgent question of fault that he failed to ask Eckholm and Fowler about what they could tell him about the Corvette's driver? TRIAL at 534/4. It is implausible beyond belief on its face.

It becomes even more implausible when one considers the exquisite detail of their later testimony. According to Eckholm, he was standing roadside behind his crippled car with his back to traffic when he heard tires squealing. HC1 at 18; HC2 at 28/18, 29/1, 33/17, 45/5; FHC at 12/16-20, 13/1-5. He did not look behind him but first looked up because he thought Fowler was leaving, and then suddenly he was "startled by a red car skidding by" him to his left. FHC at 20-23; HC2 at

45/7-11. He says he could look straight into the windshield as the Corvette skidded past and came within two feet of killing him. FHC at 14/8-20, 36/25. According to Eckholm, he saw "a woman driving, steering, [frantically] trying to get control of the car." FHC at 13/11, 14/6. The woman had frosted hair that was "blowing around," sparkly jewelry on her wrist, and dark red fingernail polish. HC2 at 47/18-48/9; FHC at 14/8-20, 36/25. Not red, *dark* red. Eckholm allegedly possessed this technicolor proof that Finley had caused the whole "big wreck," yet he did not see fit to so inform law enforcement when asked at the scene or when interviewed again by Fox a few days later? EXHIBITS R2, R5, R11; HC2 at 47/11, 75/12-23, 77/4, 122/3, 134/1-11; FHC at 20/30. Incredible.

One must also question how Eckholm could have seen such vivid detail in the first place. According to the yaw marks in Trooper Anthony Melaragno's reconstruction, the Corvette's back end, not its front, was facing Eckholm as it skidded past him – giving him a view, if any, in through the rear window. HC2 at 131/20; EXHIBITS R4, R7, R9. Eckholm himself confirms that when he looked to his left "the back of the car was facing me" and "the back of the car missed" hitting him. HC2 at 33/16, 45/8. Thus, the physical evidence, and Eckholm's own testimony, does not support his claim that he ever had a frontal view of the windshield. EXHIBITS R7, R9.

Moreover, the Corvette was traveling 164 feet per second as it skidded past Eckholm. From the point that the Corvette entered Eckholm's field of view it skidded the 30 feet to impact in .18 of a second.

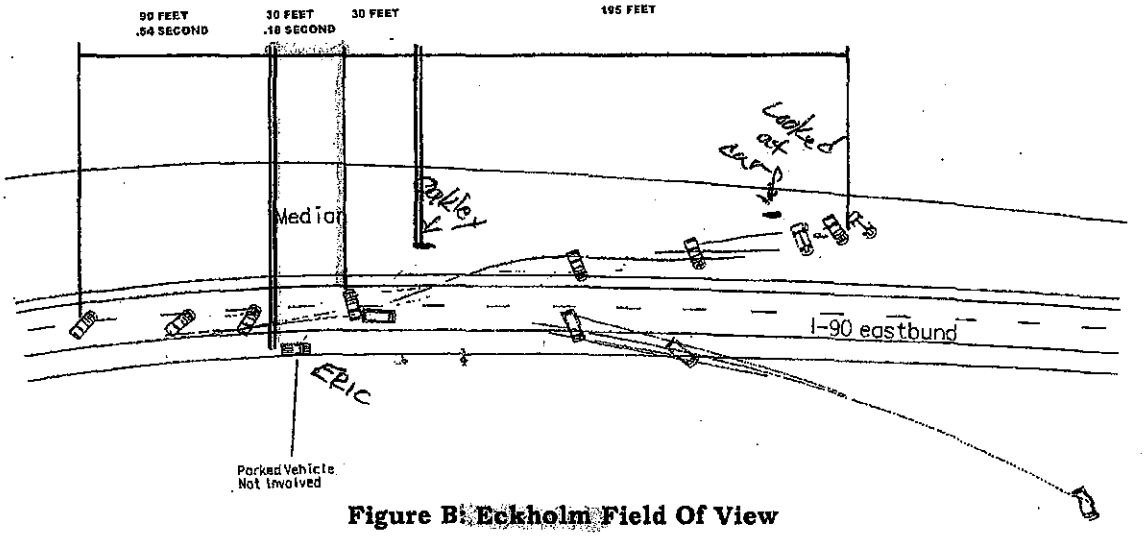


Figure B: Eckholm Field Of View

EXHIBIT R7. Eckholm would have us believe that in less than a ¼ of a second's time he got "a pretty good look" at a female driver with frosted hair, sparkly bracelets, and dark red fingernail polish through the rear window of a Corvette shrouded in tire smoke skidding past him at 112 miles per hour. HC2 at 37/9. Eckholm is embellishing his story to help exonerate Engesser.

Why? It is hard to say what lurks in the minds of men except that we know that Eckholm felt he had gotten a "raw deal" from Meade County law enforcement for busting him for two DUIs. HC2 at 48/19; EXHIBIT R6 at 12/21; FHC at 32/7-25. When he chalked up his third DUI bust, Eckholm lashed out at the officer, whom he said had "lied about the way she pulled [him] over." HC2 at 49/16, 49/24. Eckholm called Engesser's attorney, Tim Rensch, to ask him to defend his second

DUI. HC2 at 38/19. Rensch declined the representation, but during that conversation Eckholm told Rensch that he did not want Engesser to get a "bad rap" from Meade County like he was getting. HC2 at 39/6; FHC 52/4; *Engesser v. Dooley,* 686 F.3d 928, 932 (8th Cir. 2012)(noting Eckholm was concerned that Engesser was "being wronged by the highway patrolman").

Ostensibly to help Engesser, Eckholm told Rensch that he thought a female was driving the Corvette because the driver had "shoulder length," "light blond hair" that was "long" enough to "fly" around. HC2 at 46/6-13, 92/7, 103/8; FHC at 35/6; EXHIBIT R6 at 8/6. Rensch did not find this bit of information helpful to Engesser's defense because Dorothy Finley had short, "dark hair" while it was Engesser who had "flying" light brown hair that would bleach blond during the summers when he worked construction out in the sun. HC2 at 92/4, 103/9; EXHIBIT R1. Since Eckholm's description of the driver was "more consistent with Bernie than it was with Dorothy," Rensch did not pursue the Eckholm lead further. HC1 at 16/4; HC2 at 78/25, 79/6, 96/20, 97/17, 103/7-22.

Not to be deterred, Eckholm has since shaped his testimony to make it ever more detailed and helpful to Engesser. Originally, Eckholm only told Rensch about seeing a blond-haired human form in the driver's seat, which he assumed (like Dasalla) was a woman because of the long hair. By the time of his deposition, Eckholm claimed to have "looked [the

driver] right in the face" as he saw "her hands and fingernails" "frantically steering" the Corvette. At the second state *habeas corpus* trial – before he saw any photograph of Dorothy Finley – Eckholm embellished his testimony with even greater detail, such as seeing bracelets on the "long," "blond" haired driver's wrists and dark red fingernail polish. HC2 at 29/6, 46/6-13, 47/19-48/1. See TESTIMONY EVOLUTION CHARTS, Appendix at 1-3. By the federal *habeas corpus* trial, the bracelets were "sparkly." FHC at 14/8.

Eckholm's testimony needed a makeover after the second state *habeas corpus* trial. For one thing, his long-blond-haired-driver story did not match Finley's hair in the headshot that Engesser had procured on the eve of his federal *habeas corpus* trial and was showing to all his witnesses. HC2 at 92/4, 103/9; EXHIBIT R8. For another, Eckholm's description of seeing red fingernail polish must have struck even Engesser's legal team as far-fetched. Putting aside the fact that a Corvette skidding at 112 miles per hour would be no more than a blur to Eckholm in the .18 of a second it was in his field of view, who clutches a steering wheel so that their fingernails face outward rather than downward at any time let alone during a high-speed skid?

Eckholm obliged the necessary testimonial makeover. He told the federal court that "the driver did not have blond hair." FHC at 38/20. Eckholm explained away this contradiction by saying that his observation of blond hair referred to the frosted highlights one sees on

Finley's short brown hair in the headshot. FHC at 14/20; EXHIBIT R8. Eckholm also said he maybe did not really remember dark red nail polish on the driver as the Corvette sped past him but rather *bright* red blood on Finley's fingertips as she lay dead in the overturned Corvette. FHC at 36/22-37/5.

The bottom line is that Eckholm started out telling Fox that he could not identify the driver's gender. TRIAL at 534/4; EXHIBIT R5; EXHIBITS R2, R11. At the second *habeas corpus* trial, Eckholm's testimony had evolved to claiming that, though not directly asked, he insinuated the driver's gender to Fox by referring to the driver as "she" and "her" when he gave his verbal statement. HC2 at 37/3; FHC 20/10. Eckholm would have us believe that Fox was too dense to pick up on these cues and inquire further of Eckholm why he was referring to the driver in terms of feminine pronouns. By the time of the federal *habeas corpus* trial, Eckholm had come to being "sure" that he told Fox the driver was a woman. FHC at 28/3-7, 31/12. However, Eckholm apparently forgot that he had already admitted in the second *habeas corpus* trial that he did not remember telling Fox that he saw who was driving. HC2 at 43/19.

Indeed, beyond the self-evident fact that a fatal crash occurred, Eckholm cannot bring himself to agree with even one of law enforcement's deductions or findings about how it happened – even in the face of the hard evidence that proves him flat-out wrong:

1. THE SPIN – When caught in the obvious contradiction between reporting that he was almost hit by the back of the car yet claiming to have had a view straight into the windshield, Eckholm said that the Corvette spun around backward after it nearly hit him. HC2 at 29/4, 30/21-25, 131/20; FHC at 12/25, 37/12. Thus, according to Eckholm, the Corvette hit the minivan "straight backward," end-to-end as in Figure C rather than as reconstructed by Melaragno in Figure D:

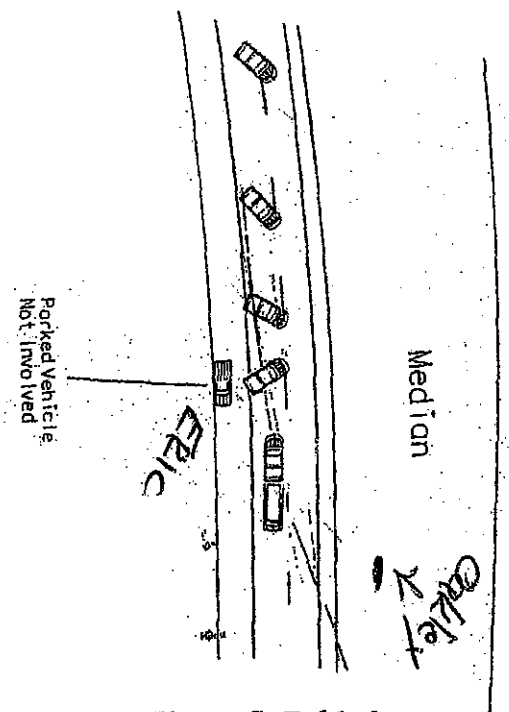


Figure C: Eckholm

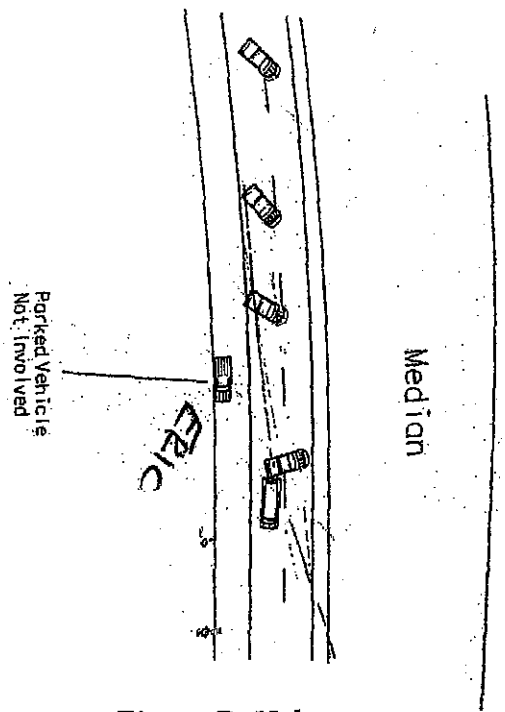


Figure D: Melaragno

Eckholm's scenario contradicts the physical evidence. Melaragno did not find yaw marks to substantiate Figure C. Also, there was no damage to the Corvette's rear bumper or fascia while there was extensive damage to its passenger side, consistent with the broadside impact reported by law

enforcement. EXHIBITS R4, R10; TRIAL at 354/3, 380/22, 381/2, 507/2, 514/4, 619/11-21, 625/17, 628/21.

2. THE EJECTION POINT/RESTING POSITION – Eckholm claims that Engesser ejected from the Corvette on impact (to distance him from the open driver's side door) whereas law enforcement and rescue personnel at the scene – Fox, Walker, Hermanson, Redfield, Zimmiond, Koan - unanimously place Engesser 10-15 feet from the capsized Corvette, 195 feet from the point of impact. EXHIBIT R9; TRIAL at 333/10, 335/5, 335/17, 352/25, 353/2, 380/23, 385/1-15, 386/11, 534, 580/11; HC2 at 30/25, 31/25 126/14, 127/18; EXHIBITS R2, R11. Even Ramona Dasalla originally placed Engesser 10-15 feet from the driver's side door. EXHIBIT R13 at 40/17.
3. THE OPEN ROOF – Obviously, Engesser could not eject out the passenger window on impact (as Engesser claims) because the minivan's back end would block that path out of the Corvette. In order to plot a trajectory out of the Corvette that would permit Engesser's ejection at the time of impact, Eckholm testified that Engesser was ejected out of the Corvette's roof. To make this scenario even remotely possible, Eckholm claimed that "everything was open" – the car's side windows were down and "it was like a T-top and there was no top." EXHIBIT R6; HC2 at 16/7; FHC at 15/7, 37/23, 41/12, 44/18-24.

However, the evidence shows that the windows had been up and that the Corvette's roof was intact. TRIAL at 546/18; HC2 at 126/19-25; FHC at 119/19. Moreover, the force of the impact would have propelled Engesser to his right, toward the minivan, rather than upward. TRIAL at 619/16, 623/3. Engesser, like Finley, would have been pinned in his seat had he been the passenger.

4. THE ROLL – Eckholm claims the Corvette rolled six or seven times (so it would be more likely that Finley tumbled from the driver to the passenger seat). EXHIBIT R6 at 5/14. Eckholm backtracked in his federal testimony to saying the Corvette rolled two to three times. FHC at 41/22. In reality, it rolled only 1½ turns. HC2 at 127/3.

When it comes to the mechanics of this tragic collision, Eckholm is just making stuff up in order to put the car into a position that provided him with his alleged view into the windshield, and to distance Engesser from the open driver's side door. Whether the car had a roof or hit the van broadside are not even debatable points, but don't tell that to Eckholm. Eckholm knows best because law enforcement investigators are a pack of lying nincompoops to him. HC2 at 49/16, 49/24, 50/11; FHC at 30/15, 46/12. What, except for naked bias, accounts for Eckholm's stubborn disacceptance of the facts?

The subject of spin is an apt point of transition to Charlotte Fowler's testimony, which surpasses even Eckholm's in its powers of

invention. Where Eckholm was merely silent about his ability – or inability – to identify the driver when interviewed by Fox, he at least reported *seeing* the car before the crash. When interviewed by Fox at the scene and again a few days later, Fowler twice affirmatively *denied* seeing *anything* – not the Corvette, not the driver, not even the collision – because she had been looking down into the floor console of her car when it all happened. HC2 at 133/14-25; EXHIBITS R2, R11. The Corvette was already kicking up a blinding cloud of smoke and dust when Fowler first looked up to see what all the commotion was about. EXHIBITS R2, R11. She saw nothing.

Yet, with the passage of time, Fowler has come to claim that she saw everything – through her sideview mirror no less. FHC at 57/16-21. It is not necessary to map all of the ludicrous permutations of Fowler's testimony because it fits a pattern of progressive improvement in witness testimony that is by now a familiar phenomenon in this case. It suffices to say that by the time of the federal *habeas corpus* trial, Fowler's description of Finley's frosted, short bobbed hair coincidentally matched the photo of Finley that she had been shown (like Dasalla) the day before her testimony. FHC at 63/10-20, 73/12; EXHIBIT R8; TESTIMONY EVOLUTION CHARTS, Appendix at 1-3. Despite Fowler's ready adoption of this pro-Engesser narrative, she was forced on cross-examination to concede that she really did not *know* who was driving. FHC at 72/20; HC2 at 59/22, 67/23.

d. Rusty Engesser

E-mails recovered from Rena Hymans' file after trial prove that Rusty Engesser lied when he testified that he waited until 2011 to tell Oakley Engesser about Syverson. EXHIBIT R15 at 1/37, 10/15-17, 13/26, 29/23; EXHIBIT R24. We also find Rusty Engesser, testifying very differently from his interview in other ways designed to falsely posture Syverson as a newly-discovered witness.[3] Rusty Engesser, who has no understanding of the workings of statutes of limitations or *habeas corpus* waiver provisions, did not determine on his own that his interview statements were fatal to his cousin's case, or how to spin his interview statements into testimony to mitigate the damage done. Someone helped him with that.

e. Oakley Engesser

To put it politely, Oakley Engesser himself is credibility challenged. Engesser lied when he said he would not tell a lie to cover up any adverse facts in his case. HC4 at 118/23. Engesser steadfastly lied when he testified that he did not learn about Syverson until 2011. HC4 at 66/17, 69/10, 72/6, 72/21, 73/18, 74/7, 74/14, 78/20, 79/19, 80/2, 80/11; EXHIBIT R24. Engesser's civil interrogatory answers prove that he lied to conceal his level of drinking that day. EXHIBIT R17 at 7, Answer 18. Engesser has either lied about having amnesia or lied about

[3] *Compare* HC4 159/23-161/4 *with* EXHIBIT R15 at 1/37, 10/15-17, 13/26, 29/23; HC4 at 159/16, 160/18 *with* EXHIBIT R15 at 16/24-30, 29/27-39; HC4 at 163/11-24, 164/12-17 *with* EXHIBIT R15 at 13/16, 20/33; HC4 at 163/24-164/11 *with* EXHIBIT R15.

being asleep at the time of the accident as he claimed in his civil interrogatory answers because his alleged amnesia would preclude him from remembering that he was sleeping. HC4 at 124/23; EXHIBIT R17 at 5, Answer 10.

Whether due to "amnesia" or to being "asleep," any account of total memory loss is a lie because Engesser remembered enough about driving the Corvette out of Sturgis to remember to minimize his alcohol intake when interviewed by Fox later. EXHIBIT R11. Who but the driver has a motive to lie about having more than two beers that day? Engesser has even lied about not lying about his drinking; according to Engesser the story he told Fox about having had only two beers at the Full Throttle that day is technically true, even though he left out the part about the two beers he drank earlier that day at the Slash J and other beers he drank after leaving the Full Throttle. HC4 at 122/1. According to Engesser such lying by omission is not a lie so long as the part he told about having only two beers at the Full Throttle was true. HC1 at 46/25, 48/9, 49/11; TRIAL at 280/1.

And Engesser's lies have been transparently calculating. He lied about when he learned about Syverson to keep this case alive. Engesser's civil liability hinged on whether he was driving, but, as he learned in his criminal case, his amnesia story did not foreclose that he was driving. But being *asleep* would foreclose it so Engesser comes up with his I-was-asleep story for the civil case because it allows him to both

deny driving and to avoid questions about the accident where his amnesia story did not. HC4 at 124/23.

3. The Physical Evidence

It is important to remember that Engesser's criminal jury did not vote to convict him without some persuasive physical evidence that implicated Engesser as the driver:

1. SEAT PLACEMENT – Dorothy Finley was 5'4" tall and Engesser is 5'9" tall. TRIAL at 543/7, 541/6. The Corvette's driver's seat was positioned to be comfortable for a person 5'9" in height. TRIAL at 606/6.
2. CABIN SPACE – Compared to an ordinary passenger car, the Corvette's cabin was a cramped, cockpit-style space bisected by a raised center floor console. There is insufficient space in such a small interior for bodies to tumble and switch sides during a rollover as in a passenger car. TRIAL at 555/4-556/22, 605/12-20, 621/9.
3. FINLEY INJURY PATTERN – The passenger side of the Corvette hit the minivan "broadside," imparting the brunt of the impact to the occupant of the passenger seat. TRIAL at 619/11-21. Law enforcement and rescue personnel described the Corvette's passenger side as "crushed" and "all bashed up" while, except for losing its skin, there was no damage to the driver's side door. TRIAL at 354/3, 380/22, 381/2, 507/2, 514/4, 625/17,

628/21; EXHIBIT R1. In such a collision, the passenger would exhibit injuries primarily on the right side, which Finley did. TRIAL at 404/9, 406/20-24, 407/3-6, 409/11, 453/12-19, 623/8; EXHIBITS R2 at 2-3, R11. It also stands to reason that the person who sustained the most serious injuries is the person who absorbed the brunt of the impact.

4. ENGESSER INJURY PATTERN – Engesser's injuries – which his treating physicians and Fox reported as a sore chest, injured right knee, closed head injury at his left parietal lobe, open gash wound on the back of his head, lacerations on the left side of his nose, broken bones on the left side of his nasal cavity, bruising on his left side, and lameness in his left leg – are consistent with striking the door, window, and door frame to his left when he rebounded from the impact and as he was ejected out the driver's side of the car. EXHIBITS R2 at 2, R11, R12. According to Fox and Engesser's medical providers, drivers tend to sustain chest injury from impact with the steering wheel and compression injury to the right leg from hard braking during impact. TRIAL at 455/1, 544/4.
5. OCCUPANT RESTING POSITIONS – As previously noted, Finley was found pinned in the passenger seat while Engesser was found six to ten feet from the capsized Corvette's open driver's-side door, right where logic and physics suggest he would spill

out as the Corvette made its final turn from the driver's side onto the roof. TRIAL at 341/10, 342/5, 369/24, 384/2, 386/11, 534/11; HC2 at 129/19. These positions are more consistent with the state's theory that Engesser was ejected from the driver's seat than with the defense theory that Engesser was ejected out the passenger window on impact with the van and replaced on the passenger side by Finley in the cramped cockpit of a rolling Corvette. HC1 at 36/7-22.

6. PURSE PLACEMENT – Dorothy Finley's purse was found lodged underneath the dashboard on the passenger's side, which was consistent with her habit of tucking her purse on the floor at her feet when she rode in a car. TRIAL at 648/4-15.

4. The Trial Court Improperly Considered Syverson's Testimony

Though Engesser's Syverson claim had been dismissed from his pending petition, the trial court nevertheless considered Syverson's federal *habeas corpus* testimony as part of its comparison of Dasalla's testimony to "the record as a whole." Admitting Syverson's testimony for this purpose was error.

SDCL 21-27-3.3 prohibited Engesser from adjudicating his Syverson claim in his fourth petition because he filed his claim more than two years from the date that he discovered that Syverson might be a

witness. Likewise, SDCL 21-27-5.1 prohibited a Syverson claim in Engesser's fourth petition because this witness is not "newly discovered."

Federal limitations are even more stringent. They prohibit the filing of a successive *habeas corpus* petition more than one year from the date that the petitioner discovered the basis for the claim. 28 USC § 2244(d)(1). Also, 28 USC § 2254(e)(2) prohibits a federal court from even holding an evidentiary hearing regarding a claim that was not previously presented to a state court unless its basis is newly discovered.

In his petition and testimony given herein, Engesser represented that he discovered Syverson "approximately one month before" the June 30, 2011, federal *habeas corpus* trial. Thus, the federal court took Syverson's testimony only because it believed Engesser's false representation that Syverson was a new witness.

The e-mails from Rena Hyman's file conclusively prove that Oakley Engesser actually knew about Syverson in 2007. EXHIBIT R24; RECORD at 135-37. Thus, at the time of his federal claim (as in this claim), Engesser's Syverson claim was barred by the one-year statute of limitations and the prohibition on taking old evidence not previously presented in state court. The transcript of Syverson' federal testimony that Engesser backdoored into this case would not even exist had Engesser not falsely proffered Syverson as a "new" witness in the federal *habeas corpus* trial.

The trial court should not have rewarded Engesser's manipulation of the federal and state courts, and overridden clear state law prohibitions on stale claims, by allowing Engesser's Syverson claim in through the backdoor of the overall "record of this case." The trial court should have stricken all references to Syverson from the record herein as requested by the state.

C. The Trial Court Improperly Denied Respondent Broader Access To Engesser's Prior Counsel's File To Search For Evidence To Impeach Engesser, Engesser's Counsel, And Other Witnesses Who Testified Falsely In This Case

Respondent moved to dismiss Engesser's claim pertaining to "new" witness Phil Syverson because it was time barred and procedurally defaulted by reason of Engesser's failure to bring his Syverson claim during proceedings on his third petition for a writ of *habeas corpus* filed in 2009. Respondent also moved to have Syverson's testimony stricken from the record as a whole. RECORD at 195-97.

Engesser defended against these motions by testifying that he did not know about Syverson during the proceedings on his 2009 third state *habeas corpus* petition. HC4 at 66/17, 69/10, 72/21-73/25. Engesser had his cousin, Rusty, and his wife back this story up for him HC4 at 91/24, 148/4-152/10, 158/23-160/5, 163/11-164/17; EXHIBIT R15. But the *pièce de résistance* in Engesser's defense against respondent's claim that he had known about Syverson far enough in the past to bar consideration of Syverson from his fourth *habeas corpus* petition, was the testimony of his third *habeas corpus* counsel, Rena Hymans.

Hymans took the stand, took her oath, and testified that she did not know about Syverson at any time during the time she represented Engesser in his third state *habeas corpus* petition. HC4 at 84/15-87/12. Hymans testifed that she had "comb[ed]" through her file for any mention of Phil Syverson and found nothing. HC4 at 84/6-17.

Because Hymans had vouchsafed that her file contained no evidence that Engesser had any knowledge of Syverson prior to the filing of his third *habeas corpus* petition, respondent moved to access her file to verify her testimony. HC4 at 87/16. Engesser's counsel did not object to giving respondent access and the court granted the motion without limitation. HC4 at 87/23. Engesser's counsel herein reviewed Hymans' file before giving respondent access.

As it turns out, Engesser, his cousin, his wife, and his lawyer all gave false testimony. Three e-mails from Hymans' file showed that Engesser knew about Syverson in 2007, consistent with what Rusty Engesser had originally told law enforcement. EXHIBIT R24; RECORD at 135-37, 161-63. When respondent pressed for access to Hymans' file as ordered at trial, Engesser's counsel refused. Respondent moved the trial court for an order compelling Engesser's counsel to provide access to Hymans' file, but the court denied the motion. RECORD at 152, 230.

The trial court should have either granted respondent access to Hymans' file or conducted an *in camera* inspection of the file for the evidence respondent sought as requested. RECORD at 154, ¶ 6.

First, even though the Syverson claim was time barred and procedurally defaulted, the trial court considered his testimony anyway as part of its review of the record as a whole. RECORD at 669, ¶ 4, 673/66.

Second, unlike, Eckholm, Fowler, Dasalla, and Rusty Engesser, the state did not get the opportunity to interview Syverson before he met with Engesser's past and current legal teams. The state does not know what story Syverson was telling back in 2007 and there is no way to go back in time to interview Syverson before his story was massaged and shaped over time, as the stories of Eckholm, Fowler, Dasalla, and Rusty Engesser have been. See TESTIMONY EVOLUTION CHARTS, Appendix at 1-3. For example, did Syverson describe the driver as having poofy, curling iron-styled, medium brown hair in 2007 or did that description not come about until after Syverson was shown the Finley headshot in 2011? Was Syverson's original description of the driver from 2007, like Eckholm's, more consistent with Engesser than Finley? Hymans' file is the only source of available evidence for what version of the story Syverson was telling in 2007. *Kaarup v. St. Paul Fire & Marine Ins. Co.* 436 N.W.2d 17, 21-22 (S.D. 1989)(work product privilege may be overcome if party shows substantial need for material and inability to obtain the material by other means). More to the point, Hymans' file is the only source of available evidence concerning why she and Engesser

did not pursue the Syverson lead back in 2007, which would bear on the credibility of both Syverson and Engesser.

Third, in his opposition to the state's motion for further access to Hymans' file, Engesser explained that Syverson had been omitted from his third state *habeas corpus* file because of Hymans' ineffectiveness, which waived any privilege claim to the file under SDCL 19-13-5(3).

Engesser opened the door to Hymans' file when he had her vouch for his credibility, vouch for the absence of any Syverson content in her file, when he called her ineffective, and when he pushed the trial court to consider Syverson's ill-gotten federal *habeas corpus* testimony as part of the record as a whole. APPENDIX at 9/2-15. Thus, the state should have been given access to Hymans' file.

CONCLUSION

The day may come when it will become necessary for this court to open the courthouse door to a freestanding *habeas corpus* claim of actual innocence, but that day is not today and Engesser is not a petitioner worthy of being the first to walk through that door. If clear and convincing evidence existed of Oakley Engesser's innocence, undersigned counsel would personally petition for his release. It does not profit the state to incarcerate the innocent.

We are not confronted here, however, with newly discovered footage from a security or traffic camera moments before the crash showing Dorothy Finley driving. Instead, we have an aggregation of

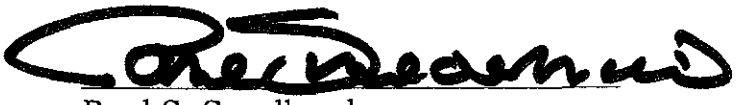
biased, 13-year-old witness testimony that, at best, presents a questionable case of *arguable* innocence, and then only to those who ignore the inherent unreliability of their perceptions and the corroborating physical evidence.

Accordingly, Engesser's latest petition for a writ of *habeas corpus* – freeing him from his culpability for Dorothy Finley's death – must be denied for failing to state a recognized legal claim, or for failing to proffer appropriate proof of his actual innocence (assuming such a claim exists).

Dated this 2nd day of April 2014.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL



Paul S. Swedlund
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: 605- 773-3215
Facsimile: 605-773-4106
paul.swedlund@state.sd.us

CERTIFICATE OF COMPLIANCE

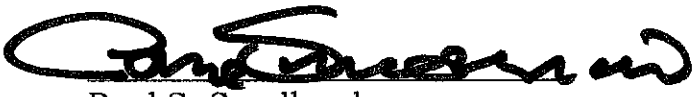
1. The undersigned hereby certifies that Appellant's Brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellee's Brief contains 9,999 words.

2. The undersigned hereby certifies that the word processing software used to prepare this brief is Microsoft Word 2010.

Paul S. Swedlund
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of April 2014 a true and correct copy of the foregoing appellant's brief was served on Meade County States Attorney Kevin J. Krull via first class mail at 1425 Sherman Street, Sturgis, SD 57785 and via e-mail on Mike J. Butler at mike.butlerlaw@midconetwork.com and Ronald A. Parsons at ron@jhalawfirm.com.



Paul S. Swedlund
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27001

OAKLEY BERNARD ENGESSER,

Petitioner and Appellee,

vs.

DARIN YOUNG,
Warden of the South Dakota State Penitentiary,

Respondent and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE WARREN G. JOHNSON
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE

ATTORNEYS FOR APPELLANT:

Marty J. Jackley
ATTORNEY GENERAL

Paul S. Swedlund
ASSISTANT ATTORNEY GENERAL
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

ATTORNEYS FOR APPELLEE:

Michael J. Butler
BUTLER LAW OFFICE
100 South Spring Street #210
Sioux Falls, SD 57104

Ronald A. Parsons, Jr.
Delia M. Druley
JOHNSON HEIDEPRIEM
& ABDALLAH LLP
P.O. Box 2348
Sioux Falls, SD 57101-2348

Notice of Appeal Filed on February 12, 2014

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PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Index are cited as (R.). References to Appellant State of South Dakota's Appendix are cited as (App.). References to the Addendum to this brief are cited as (Add.).

References to the original trial transcript are cited as "T." References to the evidentiary hearing held before Judge Johnson in this action on July 12, 2013, are cited as "HT." References to the exhibits admitted at that hearing are cited as "Ex."

The record contains an affidavit of counsel that includes the following exhibits: (1) Judge Macy's findings of fact and conclusions of law; (2) the transcript of the evidentiary hearing before Judge Macy; (3) Judge Schreier's findings of fact and conclusions of law; and (4) the transcript of the evidentiary hearing before Judge Schreier. (R. 527).[1] The transcript of the second state habeas hearing before Judge Macy is cited as "SH." (R. 514). The transcript of the federal evidentiary hearing before Judge Schreier is cited as "FH." (R. 318).

REQUEST FOR ORAL ARGUMENT

Appellee Oakley Engesser respectfully requests the privilege of oral argument.

[1] In habeas actions, a court may take judicial notice of an applicant's prior judicial proceedings, as such materials are "not subject to reasonable dispute" and their "accuracy cannot reasonably be questioned." *Jenner v. Dooley*, 1999 S.D. 20, ¶ 15, 590 N.W.2d 463, 470 (quoting SDCL 19-10-2).

STATEMENT OF THE ISSUES

I. Did the trial court commit legal error in exercising jurisdiction over a freestanding actual innocence claim based on newly discovered evidence pursuant to SDCL 21-27-5.1 and as a matter of due process and cruel punishment protection guaranteed by the South Dakota Constitution?

The trial court held that it had jurisdiction over such a claim pursuant to SDCL 21-27-5.1 and the South Dakota Constitution and denied the State's motion to dismiss.

- *Jenner v. Dooley*, 1999 S.D. 20, 590 N.W.2d 463
- *Brakeall v. Weber*, 2003 S.D. 90, 668 N.W.2d 79
- *Montoya v. Ulibarri*, 163 P.3d 476 (N.M. 2007)
- *People v. Washington*, 665 N.E.2d 1330 (Ill. 1996)

II. Based upon its findings of fact and credibility assessments, none of which are clearly erroneous, did the trial court err in granting the petition and holding that the petitioner demonstrated actual innocence under the clear and convincing standard so as to warrant a new trial?

The trial court granted the habeas petition and ordered a new trial.

- SDCL 21-17-5.1
- *Sommerville v. Warden*, 641 A.2d 1356 (Conn. 1994)
- *Montoya v. Ulibarri*, 163 P.3d 476 (N.M. 2007)
- *People v. Washington*, 665 N.E.2d 1330 (Ill. 1996)

Punishment of the innocent may be the worst of all injustices. To avoid such a grievous outcome courts should solemnly consider reopening a case if a 'truly persuasive' showing of actual innocence lies close at hand.

-- South Dakota Supreme Court in *Jenner v. Dooley*

STATEMENT OF THE CASE

On July 30, 2000, Oakley Engesser was involved in a fatal rollover accident and collision while riding in a red Corvette owned by his friend, Dorothy Finley. Both Finley and Engesser had been drinking. Finley was killed in the accident. Engesser was ejected from the vehicle and seriously injured. Months later in February 2001, he was charged with vehicular homicide and battery.

The sole issue at trial was whether Engesser was driving Finley's car when the accident occurred. On August 30, 2001, Engesser was convicted. He was sentenced to twenty-five years in prison. On appeal, this Court affirmed in a 3-2 decision. *See State v. Engesser*, 661 N.W.2d 739 (S.D. 2003).

Second state habeas petition

In 2007, Engesser filed a second state habeas petition. The case was assigned to the Hon. Randall L. Macy. Following an evidentiary hearing, the court granted the petition, holding that Engesser's trial counsel was constitutionally ineffective for failing to discover exculpatory evidence from Eric Eckholm and Charlotte Fowler, the only known eyewitnesses to the accident. (R. 515).

The State appealed. On December 23, 2008, this Court reversed, holding that Engesser had failed to demonstrate that his first state habeas counsel was ineffective,

then a requirement before a successive petition could be considered. *See Engesser v. Dooley*, 759 N.W.2d 309 (S.D. 2008).

Second federal habeas petition

In 2011, Engesser filed a *pro se* federal habeas petition in the District of South Dakota. The Hon. Karen E. Schreier, who had denied Engesser's earlier federal petition, appointed counsel to represent Engesser. On June 30, 2011, the district court held an evidentiary hearing. (R. 318).

On September 30, 2011, Judge Schreier ruled upon the merits of Engesser's new federal claim, upholding Judge Macy's conclusions that Engesser was prejudiced by his trial counsel's unreasonable failure to interview known eyewitnesses with exculpatory testimony. *See Engesser v. Dooley*, 823 F.Supp.2d 910, 930 (D.S.D. 2011).

On appeal, the Eighth Circuit reversed on procedural grounds, holding that Engesser's ineffective assistance claim was barred by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(b)(2) because its factual predicate was previously discoverable. *See Engesser v. Dooley*, 686 F.3d 928, 937-38 (8th Cir. 2012).

Current petition

In 2012, the South Dakota Legislature enacted SDCL 21-27-5.1, which provided a new avenue by which a state prisoner may file a successive habeas petition. On February 14, 2013, Engesser filed a motion for leave to file a successive habeas petition in Meade County of the Fourth Judicial Circuit. (R. 9). The petition alleged both a statutory actual innocence claim pursuant to SDCL 21-27-5.1 and a

freestanding actual innocence claim based upon the South Dakota Constitution. (R. 9). The case was assigned to the Hon. Warren G. Johnson.

On April 2, 2013, the circuit court granted Engesser's motion. (R. 21). After the Rapid City Journal published an article regarding the new petition, Ramona Dasalla, a resident of Rapid City, contacted the newspaper reporter to inform her that she had witnessed the accident and had seen a woman driving the red Corvette. The reporter, Andrea Cook, placed Dasalla in touch with Engesser's counsel. On May 23, 2013, Engesser filed an amended petition and an affidavit from Dasalla. (R. 84).

On July 12, 2103, an evidentiary hearing was held before Judge Johnson at which Dasalla testified. On October 29, 2013, the circuit court issued its decision granting Engesser a writ of habeas corpus pursuant to SDCL 21-27-5.1 and his state constitutional claim of actual innocence. (R. 230). On February 10, 2014, the circuit court entered its findings of fact and conclusions of law. (R. 686). On February 21, 2014, the circuit court entered its Judgment and Writ of Habeas Corpus. (App. 12).

This appeal followed.

STATEMENT OF THE FACTS

I. The Evidence Presented at Trial

The actual evidence presented at trial on the ultimate question of whether Finley or Engesser was driving Finley's car when the accident occurred was exceedingly limited and entirely circumstantial. On July 30, 2000, Finley and Engesser were at the Full Throttle Saloon in Sturgis, a few days before the Sturgis Motorcycle Rally. (T 275-78). Roanna Clifford saw them in the bar. (T 276-78). Finley mentioned to Clifford that she was driving her Corvette:

Q: And you probably don't know what they were driving that day?

A: I do because we talked and she said she had a Vette.

(T 281). Clifford did not see Finley and Engesser leave, but guessed that they departed sometime around six p.m., "or, you know, somewhere in that area." (T 280-82). No witness called to testify saw them in the parking lot as they departed in Finley's red Corvette. (T 281).

Sometime around 7:30 to 7:45 p.m., a man named Beau Goodman was driving east on Interstate 90 and saw a red Corvette pass him at a high speed. (T 285). He did not see its occupants. (T 286, 287). Following the curve of the highway, he saw a cloud of dust and a white minivan heading into the ditch. (T 286). The Corvette had struck the minivan from behind and then went into a violent, high-speed roll. (T 286-87, 307). The occupants of the minivan, who suffered non-life-threatening injuries, never saw the Corvette or its occupants. (T 307-12, 317-19).

Shortly thereafter, Mary Redfield, a nurse, came upon the scene. (T 294).[2] She saw several stopped vehicles, an overturned car, and a man lying on his face in the ditch. (T 294). She went to assist Engesser. (T 295). She stayed with him and did not see anyone in the crushed Corvette. (T 296, 300).

At that point, Linda Keszler was approaching in her car from the opposite direction. Coming over the hill, she noticed a string of cars parked near an overturned, red Corvette, wheels faced up toward the sky. (T 289). She called 911. (T 290). She saw Engesser in the ditch being administered first aid by a female. (T 290). Engesser was west of the car, the direction closest to the open driver's side door, although the car had rolled and was upside down. (T 290-91). Keszler then saw Finley inside the car. (T 290-91). She believed that Finley's body was toward the passenger side, but could not remember her positioning or even whether her feet were pointed toward the front or back because she "didn't look that close." (T 292). Emergency responders began to arrive. (T 298).

Deputy Sheriff Mike Walker was next on the scene. (T 331). He saw "a red Corvette, laying on its top, it was pointing southwest, the front of it was towards the eastbound lane of the interstate." (T 332). The car "was busted up pretty good," the

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[2] Redfield was not first on the scene. Eric Eckholm and Charlotte Fowler were on the side of the road and were the only two witnesses to actually see the collision as it occurred. Greg Smeenk was next on the scene. (FH 80). He was the person who pulled open the driver's side door in order to take Finley's pulse to see if she was still alive. (FH 82). Smeenk, who had his young daughters in his car, then departed without speaking to law enforcement as assistance began to arrive. None of these critical witnesses testified at trial.

top crushed, and "the driver's door was open[.]" (T 333, 345). Emergency personnel were working on Engesser. (T 334-35).

Deputy Craig Johnson then arrived. (T 333, 353). He and Walker went to check the pulse of Finley, "the person that was underneath the Corvette." (T 334). Because the vehicle was crushed, Finley's body was not even visible from the passenger side. (T 354). Johnson entered the open driver's door, crawled in, and determined there was no pulse. (T 353-54). According to Johnson, Finley was facing down, her upper back or neck touching the passenger seat, though he did not remember the position of her arms or legs. (T 366-67). According to Walker, Finley's body was underneath the passenger's seat in the overturned car. (T 340). Although he was "not positive," he believed Finley's body was facing the ground with her feet pointed to the front of the vehicle. (T 340, 342-43). Walker made no notes about the position of Finley's body and did not take any photographs. (T 342-43).

The fire department arrived to extricate Finley's body. (T 383-84). Lieutenant Hermanson testified that she was basically on the passenger side, facing downward toward the roof of the inverted car. (T 384). If the car was right side up, Finley's body would have been facing up with the back of her waist resting on top of the seatback and feet facing toward the rear of the vehicle. (T 384). When Hermanson arrived, Engesser was being treated by medics about fifteen feet from the car. (T 385). No one photographed Finley before she was removed from the car. (T 388).

Tom Wilts, the Meade County Deputy Coroner, testified that Finley suffered an injury to the right side of the head. (T 406). He also testified that at the time of

Finley's death, her blood alcohol content was .102 percent. (T 414). Wilts testified that Engesser suffered a traumatic brain injury, resulting in memory loss, from serious injuries to his head and neck. (T 428, 433, 443-44). He had a contusion to the right side of his body and a laceration on the right side of his head. (T 445-47). His blood alcohol content was .081 percent when the sample was drawn. (T 476). Wilts estimated that it was .125 percent when the accident occurred. (T 479-80).

Trooper Anthony Melaragno testified that in his opinion the Corvette was going 112 miles per hour. (T 501). He was not able to give any opinion regarding who was driving or about the force that would be inflicted upon occupants of a vehicle when a car becomes airborne and begins spinning. (T 502). Melaragno agreed that if vehicle occupants are not wearing seat belts, as both Finley and Engesser were not, they would be thrown violently all over the interior of the vehicle in a rollover accident. (T 509-10). He agreed it was possible that Engesser was ejected from the car through the passenger side window. (T 511). It was not disputed that the passenger side window had shattered during the accident and was completely gone and the driver's side window was intact. (T 545).

Trooper Ed Fox was the least experienced officer on the scene, with only three years of service. (T 518). Fox testified that he arrived on the scene *after* Finley's body had been removed from the car and Engesser had been transported to the hospital. (T 522). When Fox attempted to interview Engesser at the hospital that evening, Engesser was largely incoherent, but mumbled that he was not driving the car. (T 528, 598). On his incident report, Fox listed Finley as the driver. (T 532).

Based upon what he had been told by others about the final position of Finley's jostled body after the rolling car finally came to rest upside down, as well as his "experience in interviewing people," Fox testified that Engesser was "lying" when he denied driving Finley's car. (T 558, 539). He was permitted to testify to his belief that Engesser was the driver at the time of the accident. (T 558). Fox admitted that he had no training that would allow him to draw conclusions concerning the type of force inflicted upon the occupants of a vehicle in a rollover accident. (T 567-68). He admitted that no witness, at any time, placed Engesser behind the wheel of Finley's car. (T 594).

Fox also claimed for the first time during his *redirect* examination, almost as an afterthought and without any foundation or explanation, that he thought the seat positioning in the crumpled car was consistent with someone of Engesser's height: "I don't recall the exact measurements but it indicated to me that the seat positioning on the driver's side was such that somebody five-foot-nine would have been comfortable driving the vehicle." (T 606). That sentence constitutes the entirety of his opinion in that regard. Trooper Fox was the *only* witness at trial who testified to any belief that Engesser was driving Finley's car when the accident occurred.

II. New Evidence Never Presented At Trial

The testimony of not less than six eyewitnesses flatly contradicts the unreliable and circumstantial speculation offered by Trooper Fox at trial. At the evidentiary hearing on his second state habeas petition, Eckholm and Fowler testified for the first time. Although never called at trial, they were the *only* direct witnesses on the

immediate scene of the accident. The collision between Finley's Corvette and the minivan literally happened right before their eyes.

Prior to their pivotal testimony, trial witness Beau Goodman was called to the stand at the hearing. Goodman testified that Finley was a very fast driver who liked to "race around town" in her Corvette. (SH 4). As he explained, "[s]he was always driving fast and, you know, looking to have a good time." (SH 4).

Eric Eckholm

Eckholm was identified on the accident report as a direct witness to the collision between Finley's Corvette and the minivan, but Engesser's trial counsel never interviewed him. (SH 25). Eckholm and his friend, Charlotte Fowler (then Delaney), were on the shoulder of the interstate where the accident occurred. (SH 28). Earlier, Eckholm's truck had broken down and Fowler gave him a ride to retrieve some tools. (SH 28, 56-57). Fowler was sitting in her car as Eckholm was walking back to his truck. (SH 56-57). He heard tires squealing and looked up:

> And then I just caught the car, it came by me sideways and spun, did a complete 180, spun backwards. And that's when I looked right at both the people in the car. I saw the woman driving. I saw her frantically steering the car. And they spun completely around, and I looked right at them in the car. I saw the guy hanging on, and then she hit the minivan going that way with the back end of her car. That's when I saw him get ejected out of the car. And then the Corvette crashed into the ditch and the minivan went down into that culvert there.
>
> . . . I looked right at both of them, saw him hanging on and her, you know, steering the car.

(SH 29, 37). He saw that the woman had hair long enough to move and he believed it was blond. (SH 46). He also believes that he saw a bracelet and nail polish on the

woman's hands. (SH 47). Finley's Corvette missed hitting Eckholm by a few feet. (SH 33). Eckholm continued:

> . . . And then I walked over. I turned around and all the traffic had just come to a complete stop. There was smoke and dirt. I walked by the guy in the – he was in the ditch, and I walked right by him. I didn't see him. I walked over to the car, and I saw her underneath the car. And when I was coming back to my truck, that's when I noticed him in the ditch. I mean, I looked right at him. I saw her driving the car and watched him fly out of the car, so . . .

(SH 29-30). As Eckholm made clear, and other witnesses confirmed, Engesser was ejected as the Corvette hit the minivan and *before* it began to roll. (SH 31-32).

According to Eckholm, "the whole back of [Engesser's] head and back was bleeding." (SH 33-34). Asked to describe the Corvette's condition after the rollover, he said, "[i]t was wrecked bad, upside down. Not much left of it. It was smoking and – She [Finley] was just laying underneath the seats. They were, you know, bent up, and she was just laying underneath the car, face down." (SH 30).

Eckholm told the troopers on the scene that the woman had been driving, but the officers did not write it down. (SH 35-37). He explained that they were not focused on who was driving the vehicle, but rather on how the accident occurred. (SH 52). As Judge Johnson found, "[t]he initial report confirms that Eckholm told the trooper on the scene that the woman had been driving the car, because Finley was listed on the initial police report as having been the driver." (App. 36). No one from law enforcement contacted Eckholm after the accident. (SH 37, 43).

Two or three years after Engesser was convicted, Eckholm read an article about the case in the newspaper. He called Engesser's trial counsel and told him that

he had seen a woman, Finley, driving when the accident occurred. (SH 37, 39, 40). The attorney, however, never contacted him again. (SH 38, 40). Eckholm called a second time and was told that Engesser "was kind of a bad guy anyways and had been in some trouble, and they kind of wanted to put him away anyways." (SH 38).

Charlotte (Delaney) Fowler

Charlotte Fowler, who was on the scene with Eckholm, corroborated his testimony. (SH 55). After being contacted by Engesser's attorney for his second state habeas, Fowler traveled from Texas to testify because she thought it was the right thing to do. (SH 66-68). Prior to the accident, Fowler had noticed a red Corvette driving around town in Sturgis. (SH 64). The driver was clearly a female who Fowler thought had blond, possibly shoulder length hair. (SH 65).

When the collision occurred on the interstate, Fowler was sitting in her van, watching Eckholm walk to his truck. (SH 56). "And then all of a sudden I see this car, and it's coming – it's out of control, and I really thought the momentum was – She was going to come into us. I thought that we were gone." (SH 58). Like Eckholm, Fowler saw Engesser ejected from the Corvette after the impact with the minivan: "… and he was flying through the air. He got ejected immediately on impact. … The back of the car hit the van, and he got shot out." (SH 59).

The state police took Fowler's statement, although the question of who was driving did not seem to be an issue. (SH 67). She informed Trooper Fox that she had seen a woman driving the red Corvette earlier in the day. (SH 67). At the time, Fowler assumed that Engesser had died in the accident. (SH 66). Like Eckholm, she

was not called at trial or contacted by Engesser's defense. (SH 56, 62-66, 90, 102).

Trooper Fox was also called to the stand at the state hearing. (SH 72). He admitted that he had spoken with both Eckholm and Fowler at the scene of the accident on that evening as reflected in his notes. (SH 72). He admitted that he did not have any memory of speaking to them again, although he thought that he must have done so based on certain cryptic notations he made. He further admitted that he had no expertise or training in attempting to ascertain the original positioning of an unbelted occupant following a rollover accident. (SH 141).

Greg Smeenk

At the federal habeas hearing, Greg Smeenk testified that he was driving with his young daughters on the interstate and came upon the accident just after it occurred. (FH 80). He saw a woman attending to Engesser in the ditch about thirty yards from the smashed Corvette. (FH 83, 90-91). He went to the car and pulled open the driver's door, which was closed, establishing that Engesser had *not* exited the vehicle through that door as the prosecutor claimed at trial:

> Q: So you pulled the door open on the driver's side of the Corvette?
>
> A: Right. That's correct.
>
> Q: What did you do once you got the door open?
>
> A: Just got down on my hands and knees and looked in there. It was pretty crunched down. Then I just crawled in there and reached in there. You couldn't see much.

(FH 82). Smeenk took Finley's pulse and realized that she was dead. (FH 82). Because several others had stopped to help and he wanted to get his young girls away

from the gruesome scene, Smeenk got back into his car and drove away. (FH 82-83, 91). Years later, in 2007, he came forward and contacted law enforcement when he read about Engesser's habeas proceedings. (FH 82-83). Smeenk had testified to these same facts at a supplemental hearing before Judge Macy. (FH 84).

As Judge Johnson found, "[b]ecause Smeenk is the person who opened the driver's side door, the window of which was intact, his testimony indicated that the only possible method of exiting the car would have been through the passenger side window, which had shattered. Engesser, of course, was the only person ejected from the car." (App. 41). Engesser also had a traumatic brain injury and a laceration on the right side of his head, where a person ejected through the passenger window would likely be injured. (T 445-47). Although the Corvette had a sunroof, it is undisputed that it was intact and still in place, with no broken glass, following the rollover and could not have been the exit point for Engesser. (T 546-47, 557).

Shawn Boyle

The next witness at the federal hearing was Shawn Boyle. Boyle was an acquaintance of Finley's who worked as security at the Full Throttle Saloon where she and Engesser were last seen prior to the crash. (FH 94-95). Boyle described Finley as having brown hair with lighter highlights. (FH 94). He testified that he remembered seeing and speaking with Finley and Engesser at the Full Throttle on the day of the accident and that both were drinking beer. (FH 94-97). Boyle saw Finley get into the driver's side of her Corvette when she and Engesser left the bar:

> Q: Like I said, I was standing up towards the entrance. That's also the exit. When they were heading out, I waved at them

and walked over to them. They were getting ready to go in the parking lot. I followed them out and was just saying bye. I can't tell you what we talked about. I kind of walked them right up within 10 feet of her car when they both got in.

Q: Who got in the driver's side?

A: Dorothy did.

Q: Describe the vehicle she got into.

A: It was a red Corvette, fairly new.

. . .

Q: Any question in your mind she's the one that got on the driver's side of the car?

A: No, none at all.

(FH 97-100). Boyle testified that they left around 6:30 or 7:00 pm. (FH 96).

Phillip Syverson

Phillip Syverson also testified. He and his family were driving on I-90 just prior to the accident on July 30, 2000. (FH 112). Being in the car industry, he took particular notice of the red Corvette driving parallel to them to the right at the same speed as it merged onto the highway. (FH 112-13, 120, 123). He saw a small woman with femininely styled, moderate length, medium brown hair in the driver's seat:

Q: Did you look at the Corvette and have any opportunity to see the driver?

A: Yes. As that car was right beside me, you're looking over there to see if you need to get over so that car can merge. So, yes, I did see the driver of that car.

Q: What did you see? Describe for the Judge what you saw.

A: What I saw was – appeared to be a female driving that vehicle. It had more feminine features and definitely feminine hair.

Q: Describe the hairstyle, as best you can recall.

A: The hairstyle was a little poofy, looked like it had been – like somebody had used a curling iron, that type. Probably about – it wasn't long hair. It was probably medium brown.

(FH 112-13; 114). Based on the space between the top of the woman's head and the top of the car window, he believed the woman was "smaller in stature." (FH 114). The Corvette then roared past them.

Minutes later, Syverson came around the curve and saw the Corvette upside down in the median. (FH 113). They pulled over and Syverson's wife got out to see if she could assist. (FH 117). Because they had not actually seen the accident and several others were on the scene, they concluded there was nothing they could do and drove on without speaking to anyone. (FH 117, 124-25). Thus, law enforcement never knew that Syverson had been there and he was not contacted until years later after telling people that he had witnessed the accident and seen a woman driving. (FH 117). Syverson identified the last known photograph of Finley as having a hairstyle similar to the woman he saw driving Finley's Corvette:

(Ex. 4). Syverson was also shown a photograph of Engesser taken within days of the accident in the hospital. As he testified, "In no way was that the driver, in my opinion. I seen that. It couldn't have been, unless he was wearing a wig." (FH 116).

Syverson was also certain that the woman that he observed driving Finley's Corvette a few minutes before the crash did not have short dark hair with a receding hairline or a moustache, as Engesser did on that day:

(Ex. 4; FH 127, 129-30).

Ramona Dasalla

Ramona Dasalla testified at the evidentiary hearing on the Respondent's motion to dismiss. Dasalla read an article published by the Rapid City Journal on April 3, 2013 entitled "Belle Man Gets Another Chance at Freedom" and realized that she had witnessed the accident thirteen years ago. (Ex. 1; HT 13). On that day, Dasalla, her boyfriend, and children were on I-90 returning from Spearfish Canyon when a red Corvette passed them. (HT 14). Dasalla saw "a woman driving and a

man passenger zoom by." (HT 14). When she realized upon reading the article that Engesser had been convicted and imprisoned for the car accident, Dasalla "felt like I had to tell somebody" and contacted the reporter, Andrea Cook, who put her in contact with Engesser's counsel. (HT 14-15).

Even though the Corvette was traveling fast, Dasalla is certain she saw a diminutive woman driving with a larger, barrel-chested man in the passenger seat:

> Q: What is it about what you saw that makes you believe a woman was driving and a man was a passenger?
>
> A: Because I seen an actual woman driving. I seen a woman driving and I seen a man passenger. I'm absolutely sure. And he was sitting three-quarters like this – (indicating) – toward the window.

(HT 16, 33, 37, 42, 53). Dasalla paid special attention to the Corvette because she loves Corvettes and Camaros, so "she was attracted to it and looked at it." (HT 14). Due to the differences in body size and shape between the driver and the passenger, Dasalla is certain that she saw a male passenger and a female driver: "I can tell it was a man and I can tell it was a woman. And I always remembered it because I thought it was cool that a woman was driving the Corvette." (HT 17).

Less than a minute later, when they drove up on the accident scene, the Corvette was on the right side of the median upside down; a white van turned over on its side. (HT 17-18). There was white smoke and Dasalla could see a body laying "quite a ways back" from the Corvette. (HT 18). Although they stopped for a moment, Dasalla and her boyfriend never left the car or spoke to law enforcement. (HT 18). Under vigorous cross-examination, Dasalla maintained that she was

"positive" that a woman was driving the Corvette. (HT 44, 49, 51) ("You know, I am positive. I'm still positive. I know I seen what I seen"). Dasalla came forward because it was the right thing to do:

> I said, 'I'm not really doing this to – I'm not really doing this to help somebody. I mean, it's like it's just justice. You know? When you see the truth and it's like you got to tell somebody.' And that's exactly how I felt. I had to tell somebody because I know what I seen. I don't know him and I don't have anybody here. I just seen what I see and I just had to tell the truth.

(HT 54). After listening to Dasalla's testimony, Judge Johnson found it to be "credible, persuasive, and compelling" and made an express factual finding that "Ramona Dasalla is a credible witness" and that "Dasalla's testimony that she saw a woman driving the red Corvette on Interstate 90 immediately prior to the accident in which Dorothy Finley died is accurate and true." (App. 46).

STANDARD OF REVIEW

The written findings of fact and conclusions of law entered by the lower court reflect its final and determinative thoughts for purposes of appellate review. *See State v. Labine*, 2007 S.D. 48, ¶ 16, 733 N.W.2d 265, 270.

Because a habeas action is a collateral attack on a final judgment, this Court's review is limited. *See Davis v. Weber*, 2013 S.D. 88, ¶ 9, 841 N.W.2d 244, 246. A habeas applicant has the initial burden to establish a colorable claim for relief. *See id.* Correspondingly, the State has the burden of meeting the petitioner's evidence. *Thompson v. Weber*, 2013 S.D. 87, ¶ 37, 841 N.W.2d 3, 11 n. 4. "A habeas court's findings of fact will be upheld unless such findings are clearly erroneous." *Davis*,

2013 S.D. 88, ¶ 9, 841 N.W.2d at 246. Legal conclusions and constitutional questions are reviewed do novo. *See id*; *Steichen v. Weber*, 2009 S.D. 4, ¶ 7, 760 N.W.2d 381, 387.

This Court may affirm the ruling of the habeas court if it is "right for any reason." *Erickson v. Weber*, 2008 S.D. 30, ¶ 17, 748 N.W.2d 739, 744.

ARGUMENT

The State's brief reads like a highly personalized closing argument, brimming with inflammatory rhetoric, supposition, innuendo, conspiracy theories, and aspersions cast upon the integrity of fellow members of the State Bar. The brief is more notable, however, for what it does not contain. There is no reference to this Court's standard of review; no analysis of the governing statutes; no discussion of the numerous state decisions recognizing actual innocence claims; no critique of the trial court's memorandum decision; and not a single reference to the trial court's findings of fact or conclusions of law. Because the trial court's findings of fact are not clearly erroneous and its legal conclusions are correct, the judgment granting the petition should be affirmed.

I. THE TRIAL COURT HAD JURISDICTION OVER THE HABEAS PETITION PURSUANT TO SDCL 21-27-5.1 AND THE SOUTH DAKOTA CONSTITUTION.

The State's first argument is that the trial court did not have "jurisdiction" over Engesser's habeas petition based upon newly discovered evidence that, if accepted by the trier of fact as credible and true, demonstrates his actual innocence. (Brief at 10-12). Tellingly, the State does not address the 2012 amendments to the habeas statutes directed to newly discovered evidence within the context of actual

innocence nor does it respond to – at all – the trial court's legal conclusions that the South Dakota Constitution prohibits incarceration of actually innocent citizens. This asserted basis for reversal should be denied because the trial court clearly had "jurisdiction" over Engesser's petition.

The South Dakota Constitution grants circuit courts "the power to issue, hear and determine all original and remedial writs" and guarantees its citizens access to habeas corpus. S.D. Const., Art. V, § 5; Art. VI, § 8. A petition for habeas relief is an original civil remedy "for the enforcement of the right to personal liberty[.]" *Pellegrino v. Loen*, 2007 S.D. 129, ¶ 17, 743 N.W.2d 140, 143. (quoting *Woodford v. Ngo*, 548 U.S. 81, 91 n. 2 (2006)). Its essential purpose is "to afford relief to those whom society has 'grievously wronged.'" *Moeller v. Weber*, 2004 S.D. 110, ¶ 36, 689 N.W.2d 1, 12 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

To be sure, habeas is not a substitute for direct review. *See Piper v. Weber*, 2009 S.D. 66, ¶ 7, 771 N.W.2d 352, 355. In general, habeas may be used to review: (1) whether the court had jurisdiction over the crime and the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights. *See Davis*, 2013 S.D. 88, ¶ 9, 841 N.W.2d at 246.

In criminal cases, "a violation of the defendant's constitutional rights constitutes a jurisdictional error." *Monette v. Weber*, 2013 S.D. 79, ¶ 6, 840 N.W.2d 117, 119. As this Court has explained, "[i]n the context of habeas corpus, jurisdictional error is given an expansive construction. Of course, this includes

personal and subject matter jurisdiction, but due process violations and compliance with substantive statutory procedures are also subject to challenge in habeas corpus proceedings." *Security Savings Bank v. Mueller*, 308 N.W.2d 761, 762-63 (S.D. 1981).

The trial court granted Engesser's habeas petition and ordered a new trial on two grounds: (1) SDCL 21-27-5.1 (App. 47-48); and (2) a freestanding actual innocence claim based upon the South Dakota Constitution. (App. 51-52).

A. The trial court correctly held that SDCL 21-27-5.1 authorizes an actual innocence claim based on newly discovered evidence.

Many states recognize that a habeas petitioner may bring an actual innocence claim based on newly discovered evidence, either through post-conviction statutes that incorporate such claims or as constitutional claims rooted in state due process guarantees that may – like any other claim of constitutional error – be brought pursuant to a habeas petition.

In 2012, the South Dakota Legislature enacted comprehensive legislation making clear that prisoners who identify new, credible evidence sufficient to demonstrate actual innocence under a stringent standard may bring successive habeas petitions. (Add. 1). In part, SDCL 21-27-5.1 provides:

> The assigned judge shall enter an order denying leave to file a second or successive application for a writ of habeas corpus unless:
>
> (1) The applicant identifies newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the applicant guilty of the underlying offense

SDCL 21-27-5.1. As the trial court recognized, this statute establishes a standard for demonstrating an actual innocence claim. (App. 24).

SCDL 21-27-14 then grants independent authority to the circuit court to act on a petition meeting the statutory actual innocence standard (or otherwise falling within the habeas statutes) and to hear evidence, make factual findings, and grant appropriate relief, including the grant of a new trial:

> The court or judge shall proceed in a summary way to settle the facts by hearing the evidence and arguments, as well of all persons interested civilly, if any there be, as of the applicant and the person who holds him in custody, and shall dispose of the applicant as the case may require.

SDCL 21-27-14. Read together, these statutes authorize a circuit court to grant appropriate relief on a successive petition where the trial court finds that newly discovered evidence, proved to the court's satisfaction, when viewed in light of the evidence as a whole is sufficient to establish by "clear and convincing evidence that no reasonable fact finder would have found the applicant guilty of the underlying offense."[3] That is what Judge Johnson found in granting the petition on Count I and ordering a new trial. (App. 48, COL # 5, 7).

Though its brief does not discuss SDCL 21-27-5.1, the State presumably would argue that it does not allow a petitioner with newly discovered evidence demonstrating actual innocence to bring a successive petition unless it also raises a brand new, never-before-raised claim of constitutional error at the underlying trial.

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[3] SDCL 21-27-14. The Minnesota Supreme Court recently recognized a trial court's jurisdiction over a successive habeas petition based on actual innocence seeking "a new trial based on newly discovered evidence" pursuant to Minn.Stat. § 590.01, subd. 4(b)(2), under a provision very similar to SDCL 21-27-5.1, although it affirmed denial of relief because the new evidence did not meet the "clear and convincing" standard established by the statute. *Riley v. State*, 819 N.W.2d 162, 166-69 (Minn. 2012).

That construction does not make sense. *See Krukow v. South Dakota Board of Pardons & Paroles*, 2006 SD 46, ¶ 12, 716 N.W.2d 121, 124 ("it is presumed that the Legislature did not intend an absurd or unreasonable result"). The language of SDCL 21-27-5.1 does not condition relief for the actually innocent upon a procedural violation at trial.

In addition to establishing a standard for actual innocence claims, SDCL 21-27-5.1 prohibits any underlying claim of error raised in a prior petition: "A claim presented in a second or subsequent habeas corpus application under this chapter or otherwise to the courts of this state by the same applicant shall be dismissed." SDCL 21-27-5.1. Under the State's theory, then, unless a petitioner can come up with some kind of new claim of constitutional trial error never raised in prior habeas proceedings, a petitioner who actually *meets* the actual innocence standard established by the statute and identifies newly discovered evidence accepted by the trier of fact as demonstrating, clearly and convincingly, "that no reasonable fact finder would have found the applicant guilty of the underlying offense," the petition nonetheless must be dismissed, even though SDCL 21-27-5.1 *prohibits* dismissal when the actual innocence standard is met.

It is illogical and unreasonable to presume that the Legislature enacted this statute intending that a petitioner who identifies new evidence and demonstrates actual innocence under its exacting standard must nonetheless remain in prison or be executed because he or she was unable to discern some kind of new procedural defect occurring at trial so inscrutable as not to have been identified on prior habeas

review. Such an interpretation would render the statute pointless because an actually innocent petitioner could virtually never obtain relief.

As further made clear by the mandate in SDCL 21-27-14 authorizing the circuit court to settle the facts and grant relief "as the case may require," the Legislature enacted SDCL 21-27-5.1 knowing and intending that actually innocent prisoners could be granted relief. *See State v. Young*, 2001 S.D. 76, ¶ 10, 630 N.W.2d 85, 89 (explaining that this Court must construe statutes together and harmonize them, giving effect to all of their provisions). The exercise of jurisdiction and grant of a new trial on Count I based upon SDCL 21-27-5.1 should be affirmed.

B. The trial court correctly held that a petitioner may bring a freestanding actual innocence claim based on newly discovered evidence rooted in the due process and cruel punishment clauses of the South Dakota Constitution.

The Supreme Court has not yet squarely recognized a convicted defendant's freestanding claim of actual innocence based on the federal constitution, consistently leaving the question open.[4] It has emphasized, however, that federalism imperatives underlie its hesitancy to recognize such claims, noting that federal courts should not exercise unwarranted power over state criminal proceedings, but rather that states are to be the chief arbiters of their own criminal adjudications. *See Herrera v. Collins*, 506 U.S. 390, 401 (1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)).

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[4] It now seems inevitable, however, that the Supreme Court will recognize that a freestanding actual innocence claim is cognizable under the federal constitution. *See In re Davis*, 557 U.S. 952 (2009) (granting evidentiary hearing to determine whether newly discovered evidence established petitioner's actual innocence claim).

States are empowered, not constrained, by principles of federalism. Unlike many cases of constitutional caliber in which the federal constitution dominates the analysis, actual innocence claims brought by those convicted under state law are – and should be – governed by the state constitution. *See Bostick v. Weber*, 2005 S.D. 12, ¶ 14, 692 N.W.2d 517, 521 (explaining that federal habeas decisions do not control the interpretation of the South Dakota habeas remedy). The question here is whether the South Dakota Constitution tolerates the incarceration of an actually innocent person or whether it requires additional process when there is new evidence demonstrating actual innocence under the clear and convincing standard.

In several states where post-conviction statutes do not expressly provide for a freestanding actual innocence claim, courts have recognized that state constitutional due process guarantees prohibit the incarceration or execution of actually innocent persons and authorize freestanding claims of actual innocence under habeas corpus. Such claims are rooted state constitutional principles that "a person who has not committed any crime has a liberty interest in remaining free from punishment" and "the conviction or incarceration of a guiltless person violates elemental fairness, deprives that person of freedom of movement and freedom from punishment and thus runs afoul of the due process clause of the State Constitution" and, further, that "punishing an actually innocent person is disproportionate to the crime (or lack of crime) committed and violates the cruel and inhuman treatment clause" of a state constitution. *People v. Cole*, 765 N.Y.S.2d 477, 485 (Sup. Ct. 2003) (recognizing actual innocence claim based on New York constitution).

In Illinois, for example, defendants can raise a habeas claim for actual innocence through its Post-Conviction Hearing Act. The Act, however, requires an allegation of an infringed state or federal constitutional right unless the death penalty has been imposed. In *People v. Washington*, 665 N.E.2d 1330, 1337 (Ill. 1996), the Illinois Supreme Court recognized that a defendant could assert actual innocence through the state constitution's due process clause by bringing forth new evidence. The court held that to ignore such a claim both would be "fundamentally unfair" as a matter of state procedural due process and "so conscience shocking as to trigger operation of" state substantive due process protection. *See id.* at 1336. Thus, violation of these constitutional rights satisfied the Act's requirements. In order to obtain relief on such a claim, the new evidence must be of "conclusive character that it will probably change the result on retrial." *Id.* at 1337; *see also People v. Coleman*, 996 N.E.2d 617, 637-38 (Ill. 2013) (reaffirming standard established in *Washington*).

The New Mexico Supreme Court has also recognized a freestanding state constitutional claim of actual innocence. As it explained, "[p]rinciples of federalism which informed the majority's decision in *Herrera* do not constrain this Court in our determination of whether the protections within the New Mexico Constitution allow a habeas corpus petitioner to assert a freestanding claim of actual innocence." *Montoya v. Ulibarri*, 163 P.3d 476, 483 (N.M. 2007). It then held "that the conviction, incarceration, or execution of an innocent person violates all notions of fundamental fairness implicit within the due process provision of our state constitution." *Id.* at 484. The court further held that the state constitution's prohibition on cruel and

unusual punishment supported such a claim, because "[i]t cannot be said that the incarceration of an innocent person advances any goal of punishment, and if a prisoner is actually innocent of the crime for which he is incarcerated, the punishment is indeed grossly out of proportion to the severity of the crime." *Id.* As the court then explained, "a petitioner asserting a free-standing claim of innocence must convince the court by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 487.

In Missouri, as well, a defendant may bring a freestanding actual innocence habeas claim based upon its state constitution. *See Amrine v. Roper*, 102 S.W.2d 541, 543-47 (Mo. 2003). The *Amrine* oral argument produced a chilling colloquy:

> JUDGE STITH: Are you suggesting, even if we find Mr. Amrine is actually innocent, he should be executed?
>
> ASST. ATTORNEY GENERAL: That's correct, your honor.[5]

The Missouri Supreme Court, of course, rejected this grim and unsustainable reading of its state constitution.

The highest courts in Connecticut, Texas, California, and Montana have likewise recognized state constitutional claims based upon actual innocence in the absence of an underlying constitutional violation at trial. *See Sommerville v. Warden*, 641 A.2d 1356, 1369 (Conn. 1994); *Gould v. Commissioner of Correction*, 22 A.3d 1196 (Conn. 2011); *Ex parte Elizondo*, 947 S.W.2d 202, 204 (Tex. Crim. App. 1997); *In re Bell*, 170

[5] *See* Hon. Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 Val. U. L. 421 (2004).

P.3d 153, 157 (Cal. 2007); *State v. Beach*, 302 P.3d 47 (Mont. 2013). More states will surely follow suit.

Neither the due process clause in section two nor the cruel punishment clause in section three of Article VI of the South Dakota Constitution look more charitably upon the imprisonment of the actually innocent than the constitutions of Illinois, Texas, California, Missouri, New York, New Mexico, Connecticut, or Montana. This Court "has recognized that 'questions of constitutional magnitude involving due process are reached when a prisoner is sentenced on the basis of assumptions concerning his criminal sentence which were materially untrue." *Brakeall v. Weber*, 2003 S.D. 90, ¶ 23, 668 N.W.2d 79, 86 (citation omitted). And it has held as a matter of settled law that it is "violative of defendant's right to due process to have his sentence based on inaccurate information." *Id.* (citation omitted). If it violates due process for a defendant's *sentence* to be based "inaccurate information" or assumptions that are "materially untrue," surely it could not possibly be said – with any degree of logic or consistency – that it does not also violate due process where a defendant's *conviction* is based upon inaccurate information or untrue assumptions.

As this Court has declared, "[p]unishment of the innocent may be the worst of all injustices. To avoid such a grievous outcome courts should solemnly consider reopening a case if a 'truly persuasive' showing of actual innocence lies close at hand." *Jenner*, 1999 S.D. 20, ¶ 19, 590 N.W.2d at 471. Therefore, "[w]hen newly developed scientific procedures can establish innocence in a conviction laden with doubt, then elementary fairness may compel the new testing." *Id.* (citing *United States*

v. Bagley, 473 U.S. 667, 674-75 (1985) (explaining that due process mandates that courts work to "ensure that a miscarriage of justice does not occur")).

If fundamental fairness under the due process clause can require *testing* where new procedures may establish actual innocence, how could it not also obligate courts to entertain jurisdiction and grant relief when the evidence comes in and *demonstrates* actual innocence under a clear and convincing standard? The showing required for testing required by South Dakota's due process clause in *Jenner* was that (1) the new evidence would be admissible at a new trial; and (2) that a favorable result would most likely produce an acquittal in a new trial. *See Jenner*, 1999 S.D. 20, ¶ 20, 590 N.W.2d at 472. That is essentially the standard applied by Judge Johnson in granting the habeas petition here and ordering a new trial.

This Court has also recently affirmed the circuit court's jurisdiction and resolved a habeas petition on the merits where the claim did *not* allege any underlying constitutional violation at trial, but rather solely challenged the "sufficiency of the evidence" at trial, a claim very similar to an actual innocence claim. *Lawrence v. Weber*, 2011 S.D. 19, ¶ 8, 797 N.W.2d 783, 785.

As the circuit court correctly held, the incarceration of an actually innocent person violates the due process and punishment clauses of the South Dakota Constitution. Because that is so, the circuit court clearly had jurisdiction over Engesser's freestanding actual innocence claim. *See Monette*, 2013 S.D. 79, ¶ 6, 840 N.W.2d at 119 (explaining that in criminal cases, "a violation of the defendant's constitutional rights constitutes a jurisdictional error" for purposes of granting habeas

review); *Brakeall*, 2003 S.D. 90, ¶ 23, 668 N.W.2d at 86 (recognizing that due process violation provides basis for habeas relief); *Steichen*, 2009 S.D. 4, ¶ 7, 760 N.W.2d at 393 (holding that violation of S.D. Const. Art VI, § 23 provides basis for habeas relief). To the extent that *Boyles v. Weber*, 2004 S.D. 31, 677 N.W.2d 531, *Moeller v. Weber*, 2004 S.D. 110, 689 N.W.2d 1, or *Everitt v. Solem*, 412 N.W.2d 199, 123 (S.D. 1987) – all of which predate SDCL 21-27-5.1 – conflict with the South Dakota Constitution and the principles adopted by this Court in *Jenner*, *Brakeall*, and *Lawrence*, they should be subordinated or overruled. Unlike Boyles, Moeller, and Everitt, the petitioner here has, as discussed above, demonstrated a violation of his state constitutional rights under the actual innocence standard.

Finally on this issue, the state raises the spectre of opening the "floodgates" to actual innocence claims. (Brief at 12). This argument is unpersuasive. The number of South Dakota prisoners who could possibly be eligible to meet such a standard is thankfully very low for several reasons: (1) a viable actual innocence claim must be based upon entirely new, exonerating evidence; (2) it must be evaluated against all of the other evidence and credited by a court under the exacting "clear and convincing" standard; (3) the vast majority of criminal cases are resolved by guilty pleas, foreclosing any actual innocence claim; (4) one cannot bring a state habeas petition unless still incarcerated, effectively reserving actual innocence claims based on new evidence only for those serving long sentences or committed to death; (5) there is no right to appointed counsel for such a successive claim; (6) a circuit court's denial of leave to file a successive petition "shall not be appealable" pursuant to SDCL 21-27-

5.1; and (7) post-conviction relief based upon DNA testing is already available pursuant to SDCL 23-5B-15. The number of inmates who could come up with plausible claims of constitutional error at trial, particularly ineffective assistance of counsel, is *far* greater than those with credible, clear and convincing claims of actual innocence based upon newly discovered evidence.

Indeed, a viable claim of actual innocence – that new evidence establishes that a person did not commit the crime for which he is imprisoned – is the *least* frivolous habeas claim imaginable.[6] Truly frivolous claims – those in which a guilty prisoner making no pretense of actual innocence tries to twist the underlying procedural facts to fit into some kind of nonexistent constitutional error – are much more common. Acknowledgement that a prisoner with new evidence demonstrating actual innocence may seek relief on that basis as a matter of state constitutional principles prevents such doctrinal stretching and has a truly beneficial effect on respect for the law.

This Court should affirm the circuit court's exercise of jurisdiction and grant of a new trial based on Count II of the petition as well.

II. BASED UPON ITS FINDINGS OF FACT AND CREDIBILITY ASSESSMENTS, NONE OF WHICH ARE CLEARLY ERRONEOUS, THE TRIAL COURT CORRECTLY HELD THAT ENGESSER PRESENTED CLEAR AND CONVINCING EVIDENCE OF ACTUAL INNOCENCE.

The State has also appealed from the circuit court's conclusion that the petitioner met the clear and convincing standard for actual innocence so as to warrant

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[6] *See* Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 Wash. L. Rev. 139 (2012) (an excellent overview).

relief. As an initial matter, the State's suggestion that this standard applied by the circuit court was "arbitrarily adopted" is not correct. (Brief at 12). It was taken directly from the SDCL 21-27-5.1 and is consistent with the standard utilized in other states on similar constitutional claims. (App. 24).

If Ramona Dasalla is credible and her testimony accurate and true, Engesser was not driving Finley's Corvette at the time of the accident and cannot possibly be guilty of the crimes for which he was convicted. Judge Johnson listened to her testimony, found it to be "credible, persuasive, and compelling," and made express findings that "Ramona Dasalla is a credible witness" and that "Dasalla's testimony that she saw a woman driving the red Corvette on Interstate 90 immediately prior to the accident in which Dorothy Finley died is accurate and true." (App. 46, FOF 80-81). These findings are anchored in the evidence and not clearly erroneous.

The circuit court then concluded that "Engesser's evidence demonstrating his actual innocence is credible, persuasive, and compelling" and that he had "shown by clear and convincing evidence that the newly discovered evidence, in light of the evidence as a whole, would create reasonable doubt of his guilt in the mind of a reasonable juror." (App. 51, COL 25-26).

As discussed extensively in the statement of facts and incorporated by reference here, an objective assessment of the evidence as a whole more than sustains that conclusion. Trooper Fox was the only trial witness who would even testify to a *belief* that Engesser was driving Finley's car when the accident occurred. He based this primarily on his expert opinion that that Engesser was "lying" when he denied

being the driver. (T 558, 539). He admitted that he had no training that would allow him to draw conclusions concerning the type of injuries inflicted in a rollover accident. (T 567-68). And he did not even arrive on the scene until after Finley had been removed from the car and Engesser transported to the hospital. His one-sentence opinion on redirect that the seat positioning seemed consistent with someone who was Engesser's height (he was five inches taller than Finley and Fox never measured the length of their legs) lacked any foundation at all. (T 606).

At trial, the prosecution's theory was that Engesser was driving and came out of the open driver's side door. Unknown to the jury, however, was that both Eckholm and Fowler saw Engesser shoot out of the car upon its high-speed impact with the minivan *before* it went into the violent roll. The jury also never learned that Greg Smeenk, the first passerby on the scene, is the person who actually opened the driver's side door just after the accident to determine if Finley was still alive. Prior to that, the driver's side door was shut, its window was intact, the sunroof was intact, but the passenger window had been completely shattered at the same time that Engesser shot out of the car and suffered a traumatic head injury. The only exit point for Engesser was the shattered passenger side window.

After the impact and Engesser shot out of the car and into the ditch, the car went into its violent roll with *only* the unbelted Finley inside. As one jurist opined in 2006, without the benefit of the new evidence and not knowing that Finley was alone in her car as it rolled:

> When an automobile driven at a high rate of speed rolls over, who knows where the occupants' bodies will end up? The majority's

> position fails on that uncertainty. Although the majority suggests otherwise, the prosecution produced no strong evidence that Engesser rather than Finley was the driver. No observers witnessed the accident, and the parties presented inconclusive circumstantial evidence. Both Finley and Engesser sustained injuries on the right sides of their bodies, which would be consistent with injuries suffered by one in the passenger seat. One witness stated that authorities found Finley with her legs under the dash and her face turned toward the driver's side; yet another testified that her legs pointed to the back of her car and her head toward the front.
>
> In addition, a highway patrol accident reconstructionist testified that in a high-speed rollover bodies can be thrown "all over the place in [the] vehicle." More than one witness testified that, during a rollover, a passenger could be ejected through the passenger-side window and end up on the driver's side of the car. Further, a witness testified it would have been possible for the driver of a vehicle to end up in the passenger's seat during a high-speed rollover. Even the state's forensic expert could not opine whether Finley was the passenger or the driver.

Engesser v. Dooley, 457 F.3d 731, 740-41 (8th Cir. 2006) (Bright, J., dissenting).

After the trial, as the result of publicity from habeas proceedings, six eyewitnesses came forward, most of whom placed Finley behind the wheel of her car. Fowler saw Finley in the driver's seat earlier in the day. Boyle saw Finley get behind the wheel when she left the Full Throttle as late as 7:00 p.m., the last place that she and Engesser were seen before the accident. Both Syverson[7] and Dasalla saw a woman driving the red Corvette and a man in the passenger seat moments before the accident occurred. From the side of the road, Eckholm saw Finley driving and

[7] The State's suggestion that the circuit court committed legal error in considering Syverson's testimony – not as newly discovered evidence – but as part of all of the evidence as a whole to which new evidence must be compared, is groundless. (Brief at 38-39). That is what SDCL 21-27-5.1 requires.

Engesser in the passenger seat *while* the accident occurred. And no eyewitness, at any time, placed Engesser behind the wheel of Finley's car. (T 594). The circuit court correctly determined by clear and convincing evidence that no reasonable fact finder, permitted to hear *all* of the evidence, would have found Engesser guilty of the underlying offense. The grant of habeas relief and new trial should be affirmed.

III. THE TRIAL COURT DID NOT "IMPROPERLY DENY BROADER ACCESS" TO THE FILE OF THE PETITIONER'S PRIOR ATTORNEY.

The State's final issue on appeal is that it should have been able to take possession of the legal file of Engesser's prior habeas counsel, Rena Hymans. Upon receiving Hymans' file after the evidentiary hearing, Engesser's current counsel discovered the emails referring to Syverson and immediately turned them over to the State and Judge Johnson. (App. 4-5). Engesser's current counsel offered the file to the court for an in camera review. (Add. 4). The State made a motion for unfettered access to potentially privileged materials and then, as the court recognized, never set it for hearing. (App. 14). This issue provides no basis for reversal.

CONCLUSION

The trial testimony of Trooper Fox should be closely examined. The idea that a person could be sentenced to twenty-five years in prison upon the basis of one individual's personal beliefs, speculation, and unscientific analysis – and nothing more – is terrifying. But the terror transforms into societal grief, of the kind this Court recognized in *Jenner*, when one is presented with all of the exculpatory evidence – *six* new eyewitnesses, five of whom place Dorothy Finley in the driver's seat of her own Corvette – that the jury never knew about.

As a matter of South Dakota constitutional law, innocence matters. Every trier of fact – Judge Macy, Judge Schreier, and now Judge Johnson – to listen to these new witnesses and evaluate their testimony has deemed them credible and found it to be compelling, clear, and convincing evidence that Finley was driving her car when the accident occurred and Engesser is therefore actually innocent of the crime for which the State has imprisoned him all of these years.

WHEREFORE, the petitioner respectfully requests that this Honorable Court *affirm* in all respects.

Dated this 11th day of June, 2014.

BUTLER LAW OFFICE

BY */s/ Ronald A. Parsons, Jr.*

Michael J. Butler
100 S. Spring Street # 210
Sioux Falls, SD 57501-8501
(605) 331-4774
Mike.Butlerlaw@midconetwork.com

Ronald A. Parsons, Jr.
Delia M. Druley
JOHNSON HEIDEPRIEM & ABDALLAH LLP
P.O. Box 2348
Sioux Falls, SD 57101-2348
(605) 338-4304
ron@jhalawfirm.com
delia@jhalawfirm.com

Attorneys for Appellee Oakley Engesser

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Brief of Appellee** was served via email upon the following:

Paul S. Swedlund
Assistant Attorney General
atgservice@state.sd.us

on this 11th day of June, 2014.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 9,872 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

ADDENDUM

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27001

OAKLEY BERNARD ENGESSER,

Petitioner and Appellee,

v.

DARIN YOUNG, Warden, South Dakota State Penitentiary,

Respondent and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE WARREN G. JOHNSON
Circuit Court Judge

APPELLANT'S REPLY BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Paul S. Swedlund
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: 605-773-3215
Facsimile: 605-773-4106

ATTORNEYS FOR APPELLANT

RONALD A. PARSONS

Johnson, Heidepriem & Abdallah
P.O. Box 2348
Sioux Falls, SD 57101
Telephone: 605-338-4304

MICHAEL J. BUTLER

Butler Law Office
100 South Spring Street, #210
Sioux Falls, SD 57104
Telephone 605-331-4774

ATTORNEYS FOR APPELLEE

Notice of Appeal Filed February 12, 2014

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STANDARD OF REVIEW

Engesser claims that SDCL 21-27-5.1 supplies the standard of review for a freestanding actual innocence claim. This is true only if SDCL 21-27-5.1 creates a freestanding claim, which it does not.

Engesser also claims that Judge Johnson's findings of fact must be upheld unless they are clearly erroneous. Apart from the fact that it was clearly erroneous to find the wildly contradictory, obviously coached, and blatantly biased testimony of Engesser's "new" witnesses credible, the state does not concede that a trial court's factual findings on review should receive the same deference in this proposed new breed of actual innocence claim as they have customarily been given in traditional *habeas corpus.* "The weight of the interests at stake" in an actual innocence claim compels a less deferential, "heightened level of scrutiny" to appellate review of a trial court's findings. *Miller v. Comm'r of Corr.,* 242 Conn. 745, 803-06, 700 A.2d 1108, 1136-37 (Conn. 1997).

For example, Connecticut's Supreme Court reviews actual innocence claims for "whether, after an independent and scrupulous examination of the entire record, we are convinced that the finding of the habeas court that the petitioner is actually innocent is supported by substantial evidence." *Miller,* 242 Conn. at 803-06, 700 A.2d at 1136-37. This court should review the decision below just as independently and scrupulously.

REBUTTAL FACTS

Though Engesser's counsel bristles at the state's "aspersions"[1] that witnesses have been coached in this case, they have again taken liberties with witness testimony by spinning adverse testimony into favorable assertions of material fact that are not warranted by the testimony cited.

A. Amnesia

Contrary to the assertion made in Engesser's brief, Dr. Daniel Hoffman did not "testif[y] that Engesser suffered a traumatic brain injury, resulting in memory loss, from serious injuries to his head and neck." APPELLEE'S BRIEF at 9.

Looking at the three portions of the trial transcript cited in support of this position, one sees what Hoffman (mistakenly identified as Tom Wilts in Engesser's brief) actually said:

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[1] The state's "aspersions" are not "personalized" as Engesser claims; they simply voice justifiable concerns about the consistent pattern of Engesser's witnesses' changing their stories in material ways beneficial to him after coming into contact with, and/or being shown photographs by, his legal team. For first-rate, truly personalized aspersions, one can look to Engesser's briefing below in which undersigned counsel is described as an attorney "who used to be . . . in a large law firm in Rapid City that did mostly insurance defense work. He uses a common tactic of arguing that everyone should be discredited. He did it on a frequent basis when doing insurance defense. It appears that this is the only method Mr. Swedlund knows." The trial court was told point blank "do not trust him." SETTLED RECORD at 158, ¶¶ 10, 11. Engesser's counsel's alleged distaste for "aspersions cast upon the integrity of fellow members of the State Bar" did not deter them from accusing Tim Rensch of betraying his client to Eric Eckholm by saying that he was not going to pursue Eckholm's alleged exculpatory evidence because Engesser "was kind of a bad guy anyways and had been in some trouble, and they kind of wanted to put him away anyways." APPELLEE'S BRIEF at 13; HC2 at 104-05. Aspersions upon the integrity of fellow counsel do not get much more literal or personal than these.

> TRIAL at 428 – Hoffman testified that Engesser reported "injuries to his head and neck."
>
> TRIAL at 433 – Hoffman testified that Engesser had sustained a "serious" though "not immediately life-threatening" injury to his head.
>
> TRIAL at 443-44 – Hoffman testified generally that a person who sustains a serious head trauma may afterward be conscious and speaking but may not later remember what he or she said during that time. Hoffman further testified that his observations of Engesser's behavior in the hospital immediately after the accident were consistent with Dr. Finley's later finding that Engesser had sustained a traumatic brain injury.

While the state is not contesting that Engesser sustained a serious head injury, Hoffman's testimony does not establish that Engesser sustained memory loss as a result; Hoffman testified simply that Engesser reported and exhibited behavior consistent with traumatic brain injury.

Though Hoffman also testified hypothetically that persons who are conscious after sustaining a "severe head trauma" might say things they do not later remember, he did not specifically diagnose Engesser with this affliction, and he certainly did not opine that Engesser had lost his memory of events leading to the accident itself. Hoffman's testimony falls far short of the diagnosis of head injury-induced amnesia that Engesser represents it to be.

Engesser wants to spin Hoffman's testimony into a medical diagnosis of amnesia because his alleged amnesia was called into question in the proceedings below by newly-discovered civil interrogatory answers in which Engesser claimed that he had been asleep at the time of the accident. HC1 at 51/11, 51/23; HC4 at 123/3, 124/23; EXHIBIT

R17 at 5, Answer 10. Logically, if Engesser had amnesia of everything that followed his leaving the Full Throttle Saloon he could not remember thereafter going to sleep.

Confronted with this contradiction, Engesser said that the "amnesia deal" was just something other people had said – even though he had feigned amnesia when initially interviewed by Trooper Ed Fox. Compare HC4 at 125/3 with EXHIBIT R2 at 2/TRIAL at 598/4. The new truth, according to Engesser, is that he "went to sleep directly after the Full Throttle" and "slept between 6 p.m. and 8:10 p.m. when the accident happened." HC4 at 124/25-126/8. According to Engesser's new story, we are supposed to believe that he slept in a Corvette's cramped seat in the sweltering July heat for two hours – right through Finley stopping the Corvette somewhere else, exiting, reentering, and restarting the car at least once. R13 at 34/28, 57/29. One has to ask why Engesser would feign amnesia to Fox if he remembered being asleep? EXHIBIT R2 at 2.

Amnesia is not what prevents Engesser from testifying to the events leading up to the crash that killed Dorothy Finley. Posturing Hoffman's testimony as an affirmative medical diagnosis of post-traumatic memory loss is just another example of how Engesser's entire case rests on a foundation of manipulated witness testimony.

B. Ejection

Engesser again stretches the facts when he claims that Trooper Anthony Melaragno "agreed it was possible that Engesser was ejected

from the car through the passenger side window." APPELLEE'S BRIEF at 9. This is not quite what Melaragno said. Melaragno agreed only that "[i]t's possible that somebody could be ejected through" a broken-out passenger window of a Chevrolet Corvette. As with Hoffman, Engesser turns hypothetical testimony about what might be possible for some unspecified person under unspecified circumstances into an affirmative expert opinion supportive of Engesser's innocence narrative.

Engesser's ejection theory fails the most basic tests of physics and logic. At the moment of impact, which is when Engesser, through Eckholm, claims he was ejected, the passenger would have been thrown directly to the right into the passenger door, not upward out of the passenger seat and through a window. TRIAL at 622/24-623/3. The driver is more likely to eject out of the passenger window because he has no door to his immediate right to pin him into his seat as he is thrown to the right. Even with a broken window, the path out of the Corvette through the passenger window opening was blocked by the rear end of the van. By the time the van separated from the Corvette to clear a path out through the window, the Corvette would be rebounding from the impact, which would throw the passenger to the left, away from the broken-out window not through it.

Thus, to the extent the trial court found that Engesser ejected out of the passenger side window from the passenger seat on impact (on only Eric Eckholm's word), that finding is wholly without physical or logical

support. The more Engesser strains to spin Melaragno's testimony to bolster Eckholm's "questionable" testimony, the more he exposes how little support the court's finding has. *Engesser v. Dooley,* 2008 SD 124, ¶¶ 4, 13, 759 N.W.2d 309, 311, 314.

C. Witnesses To Engesser Driving

In another overstatement of testimony, Engesser represents that Fox allegedly "admitted that no witness, at any time, placed Engesser behind the wheel of Finley's car." APPELLEE'S BRIEF at 10. Fox actually agreed only that he had never "found a witness who saw Bernie Engesser driving that car shortly before the accident." TRIAL at 594/3.

It takes Fox's testimony too far to say that Fox affirms that "no witness" ever placed Engesser behind the wheel of Finley's car when Engesser himself admitted to Fox that "he could have been driving" the Corvette at the time of the accident, which was corroborated by the fact that Engesser had driven the Corvette from Rapid City to Piedmont earlier that day. TRIAL at 646/19; HC1 at 45/25; EXHIBIT R2 at 2. Specifically, Engesser told Fox that "it was possible that [he and Finley] had switched" driving sometime during the 1½ to 2 hours of lost time after they left the Full Throttle Saloon. EXHIBIT R2 at 2; HC4 at 124/7-11. Engesser said that "if he was driving" at the time of the accident, "they [he and Finley] must have switched somewhere." EXHIBIT R2 at 2; HC4 at 124/7-11. When one looks at what Fox actually said, and the facts as a whole, it is not accurate to argue that Fox did or could affirm

that "no witness, at any time, placed Engesser behind the wheel of Finley's car."

D. Conclusion

If the state is wrong, and something other than bias and coaching accounts for all the conveniently shifting stories coming from Team Engesser, then Engesser should set that explanation forth in his brief . . . but he never does. Engesser's brief just peddles an idealized version of the facts and accuses the state of casting aspersions and conspiratorial thinking. If Engesser's prickly concept of ethical rules or professional standards precludes a party from complaining about coaching when the evidence is there to support it, then what restraint on, or defense against, witness coaching is there? Simply accusing the state of discourtesy or paranoia hardly settles the concerns about bias and coaching raised in respondent's brief.

ARGUMENT

A. The Trial Court Had No Jurisdiction Under South Dakota Law To Entertain A Habeas Corpus Claim That Alleged No More Than Engesser's Actual Innocence

Just because South Dakota's Constitution, as any sensible constitution anywhere must, "prohibits incarceration of actually innocent citizens," it does not follow that Engesser has stated a claim. *Boyles,* 2004 SD 31, ¶6, 677 N.W.2d 531, 536. The United States Constitution prohibits the incarceration of the innocent as strongly as South Dakota's but the United States Supreme Court has never made a freestanding

claim of actual innocence available to federal convicts. *McQuiggin v. Perkins,* 133 S.Ct. 1924, 1931 (2013). South Dakota is in the company of 42 states that have yet to recognize a freestanding actual innocence claim.

South Dakota's constitutional prohibition on "incarceration of actually innocent citizens" extends only so far. Far enough, certainly, to mandate certain pre-conviction criminal due process. Not so far, however, as to prohibit incarceration altogether, which would be the only assured means of preventing the incarceration of the innocent.

The advent of DNA testing and other reliable methods of scientifically proving innocence led the legislature to enact SDCL 23-5B-1, which provides a post-conviction remedy outside of traditional *habeas corpus* for petitioning a court to order certain new scientific testing that could prove a defendant's actual innocence. SDCL 23-5B-1 does not, unlike a *habeas corpus* claim, require proof of trial error for relief.

The problem with extending an SDCL 23-5B-1-style remedy to cases such as this one is that no scientific or technological advancements have improved the probative value of testimonial evidence over what it has historically had. While the state might have more confidence in Engesser's "new" witnesses if they had passed law enforcement polygraph testing as a pre-condition to testifying in a post-conviction proceeding of this sort, no science yet exists that can confirm witness credibility in a purely testimonial case with the certainty of DNA

testing as might warrant deviation from traditional *habeas corpus* practice.

Like the federal statute on which it is based, SDCL 21-27-5.1 created a gateway to filing a successive, otherwise-barred *habeas corpus* claim in the event of newly-discovered evidence. *State v. Strauser,* 63 N.W.2d 345, 347 (1954)(state legislation patterned on federal law is presumed to have the same meaning and effect as its federal counterpart). Once through the gate, the petitioner must allege "a deprivation of constitutional rights" due to trial error to state a *habeas corpus* claim. *Boyles*, 2004 SD 31 at ¶ 11, 677 N.W.2d at 537. Thus, for example, in *McQuiggin,* the petitioner's new evidence of actual innocence was deemed sufficient to open the gate to a *habeas corpus* petition alleging ineffective assistance of his defense counsel. *McQuiggin,* 133 S.Ct. at 1931; *Boyles*, 2004 SD 31 at ¶ 11, 677 N.W.2d at 537.

The legislature's enactment of SDCL 21-27-5.1 within the statutory scheme of *habeas corpus,* rather than outside it (as it did with 23-5B-1), has a significance that Engesser overlooks; it cements SDCL 21-27-5.1's purpose as a gateway to the forms of *habeas corpus* relief recognized by the statutory scheme of which it is a part. In other words, it signifies that the legislature wanted, consistent with *Boyles,* to limit the statutory scope of non-science-based actual innocence claims to those that called the fairness of a defendant's trial, as opposed to his conviction, into question. *Boyles,* 2004 SD 31 at ¶ 11, 677 N.W.2d at

537 ("Newly discovered evidence is generally an insufficient ground for *habeas corpus* relief when the evidence pertains to guilt rather than a deprivation of constitutional rights" at trial). This limitation may seem "illogical" to Engesser, but it makes perfect sense when one considers the problems inherent in revisiting a conviction based on testimonial evidence alone. *Boyles,* 2004 SD 31 at ¶23, 677 N.W.2d at 540.

As in *Boyles,* a new freestanding cause of action should not be created here on witness testimony exhibiting bias and lacking in credibility. *Boyles,* 2004 SD 31 at ¶¶5, 11, 677 N.W.2d at 536, 537 (witnesses all acquainted with petitioner or had grudge with prosecutor). If this court should ever determine the need to create a constitutional freestanding actual innocence claim, it should only do so when presented with the right case and the right facts. Engesser's is not that case.

B. Even Assuming South Dakota Law Would Recognize A Freestanding Actual Innocence Claim, Engesser Did Not Proffer Appropriate Evidence Of His Actual Innocence

Even if a freestanding actual innocence claim exists, Engesser has failed to produce "truly persuasive" evidence of his innocence. *Herrera v. Collins,* 506 U.S. 390, 404-05, 113 S.Ct. 583 (1993). Given Engesser's indignation at the state's "inflammatory rhetoric, supposition, innuendo, [and] conspiracy theories," one would expect appellee's brief to methodically and dispassionately disprove the state's "aspersions." One would expect Engesser to convincingly explain how it is that all these

"new" witness's stories have conveniently changed exactly as needed to fit the Engesser innocence narrative *du jour* without bias and coaching.

No such explanation appears in appellee's brief. Appellee's fact summation blithely recounts only the testimony that favorably assists his innocence narrative and pretends that all the impeaching, contradictory evidence does not even exist. It seems Engesser expects this court to view all the evidence in the light most favorable to him, as though he were defending a summary judgment motion and not an appeal that raises serious questions about his "new" witnesses' credibility. Engesser simply proclaims his witnesses credible because the trial court found them credible, but Engesser never explains how the trial court's credibility findings are proper in the face of so much contradiction, adjustment, and evidence of bias in their testimony.

1. Ramona Dasalla

Intuitively one might conclude that a speed discrepancy of 37 miles-per-hour is not so great as to preclude a person from identifying the gender of the occupants of a passing automobile. To dispel this misconception, the state reconstructed the circumstances under which Dasalla claims to have seen, in ½ of a second or less, through tinted windows, "an actual woman" driving the Corvette as it "zoomed" past her 37 to 52 miles-per-hour faster than the truck she was occupying. R13 at 33/9; HC4 at 16/9, 19/10, 29/24.

Trooper Todd Albertson reconstructed Dasalla's field of view into the Finley Corvette by placing a video recorder at eye level in the passenger seat of the same model of truck she was occupying and driving two 1998 Corvettes, one with and one without tinted windows and each carrying a man and a woman in varying seating positions, at approximately 37 miles per hour past the parked truck. EXHIBITS R22a, R22b, R22i, R22j. He observed his testing with his own eyes and also videotaped what he saw; in none of the tests could Albertson see identifying features of either the driver or passenger. HC4 at 172/12-173/9, 176/10-177/4, 205/10; EXHIBIT R22j; EXHIBITS R22c, R22d, R22e.

After watching Albertson's video, the trial court commented that it "couldn't even tell if there was anybody in the car," let alone could the court see any identifying features of the Corvettes' occupants. EXHIBIT 22j; HC4 at 207/18. Albertson's video proves how difficult, if not impossible, it would have been for Dasalla to identify anything about anyone seated in the speeding Corvette.

Albertson's video is also consistent with Dasalla's DCI interview statements that she saw nothing more than silhouetted forms in the Corvette, and no features of either the driver or passenger silhouettes (except longer hair on the driver) that identified them by gender. R13 at 33/28-47, 34/13-23, 52/3-25, 53/12-45, 54/33.

As compared to her DCI interview, Dasalla's trial testimony was clearly coached. When she spoke with Engesser's investigator, Jody Hoffman, before talking to DCI Agent Brett Garland, Dasalla was uncertain enough about who was driving to ask Hoffman "[W]hat ma[kes] you think that he [Engesser] wasn't driving? I mean, why does everybody think he wasn't?" R13 at 42/45, 45/25, 46/37-43. Hoffman told Dasalla that it was "the way that [Finley] was found" that ostensibly proved that she had been driving. R13 at 42/47, 46/39. Hoffman gave Dasalla other details that pushed her in the direction of thinking that Finley was driving. For example, Hoffman told Dasalla that Syverson had seen a woman driving the Corvette as it entered the Exit 32 on ramp. Though Dasalla told Garland that she had learned about Syverson from the newspaper (not from Hoffman), the newspaper article Dasalla read says nothing about the on ramp. R13 at 60/2; EXHIBIT P1, attached as Appendix 54. Hoffman gave Dasalla an earful of the Engesser innocence narrative before she spoke with Garland.

Though Hoffman had sown the seeds of belief that a woman was driving in Dasalla's mind, Dasalla was still uncertain when she spoke with Garland. But after meeting with Engesser's attorney the night before the trial, Dasalla became "positive" that she had seen not just an androgynous "silhouette" but "an actual woman" behind the wheel of the Corvette. Compare R13 at 33/28-47, 34/13-23, 52/3-25, 53/12-45, 54/33 with HC4 at 16/9-11, 43/24, 47/10-49/19.

While the trial court expressed bewilderment at why Dasalla, who allegedly "doesn't know a soul," would come into court and testify that she was "positive" that she saw a woman at the wheel when there's "nothing in this for her but a lot of questions from lawyers," one does not need to unearth the source of her pro-Engesser bias to question her credibility. HC4 at 207/21-208/13. After all, why would Dasalla deny meeting with Engesser's legal team the night before her testimony if not to conceal her allegiance to Team Engesser? HC4 at 39/23. The trial court erred in finding Dasalla's clearly-coached testimony to be "substantial" or "truly persuasive" evidence that Finley was driving. *Miller,* 242 Conn. at 803-06, 700 A.2d at 1136-37; *Herrera,* 506 U.S. at 404-05.

2. Phil Syverson

Albertson also testified, based on his years of experience patrolling around Sturgis, that it would be "very difficult" for Syverson to have reliably observed the Corvette driver's identity, or identifying features like curling iron-styled hair, under the circumstances. HC4 at 179/2-180/21, 195/19. Syverson admitted that he was not convinced that Finley was driving until Engesser's lawyers showed him a headshot photograph of Finley. FHC at 127/19. Proof that Syverson was coached by the photograph is found in his subsequent testimony that Finley had curled, "medium brown" hair, just as one sees in the photograph.

We know, however, that Syverson is making his testimony up because, on the day of the accident, Finley was no longer wearing the medium brown, highlighted hair one sees in the widely-circulated headshot. EXHIBITS R1, R8; APPELLEE'S BRIEF at 17. Her hair was dark brown, possibly black, with no highlights. EXHIBIT R1. Engesser's own counsel testified that Finley's hair was not medium brown on the day of the accident but "very dark." HC2 at 92/4, 103/9.

If Syverson had seen Finley driving on the day of the accident, he would have testified that the driver had short, "very dark" hair. Syverson was shown the wrong photograph to coax accurate testimony out of him. If Syverson really did see a light brown, curly haired driver at the wheel of the Corvette, then Engesser was driving. HC4 at 206/22.

But before getting too caught up in what Syverson did or did not actually see, one must first be satisfied that Syverson saw anything at all. According to the e-mails in Hymans' file (which Hymans testified did not exist), Syverson told Rusty that it was his nine-year-old daughter who "saw them in the car" and Rusty told Hymans to "talk with his [Syverson's] daughter." SETTLED RECORD at 161; EXHIBIT 24. Nothing in this initial e-mail indicates that Syverson told Rusty Engesser that he himself saw anything. Syverson's daughter was never called to testify. Did Hymans drop the Syverson lead because she learned that Syverson did not actually see anything himself? What, if anything, did Hymans learn from Syverson's daughter? Did Hymans conclude that

Syverson's nine-year-old daughter had mistook a man with long, shoulder-length, light curly hair for a woman?

Given that *McQuiggin* said a court should consider how the "timing" of the revelation of new evidence bears on its "probable reliability," one would like to compare Syverson's 2011 testimony to what he (or his daughter) or Rusty said to Hymans in 2007. *McQuiggin,* 133 S.Ct. at 1935. However, the state has not been permitted access to Hymans' file, either directly or through *in camera* inspection as requested. SETTLED RECORD at 154, ¶6. Engesser's current counsel, however, have found something in Hymans' file to make them fight tooth and nail to keep it from ever seeing the light of day. The trial court abused its discretion in allowing Engesser to have it both ways, to use Syverson's testimony as part of "the record as a whole" to support his case without granting the state access to the only available, contemporaneous evidence of what story Syverson (or his daughter) told Rusty Engesser and Hymans in 2007.

3. Eric Eckholm And Charlotte Fowler

In trying to help Engesser, Eckholm and Fowler changed from identifying the driver as having "long," "shoulder length," "light blond hair" to saying that the driver had "frosted," "highlighted dark and light" hair – just as Finley appeared in the photograph shown them by Engesser's counsel. See TESTIMONY EVOLUTION CHART, Appendix 1. As with Syverson, proof that Eckholm and Fowler are making up what

they claim they saw lies in the fact that, on the day of the accident, Finley did not have frosted, highlighted dark and light hair. She had plain, short "very dark" hair. EXHIBIT R1; HC2 92/4, 103/9.

4. Rusty Engesser

E-mails recovered from Rena Hymans' file after trial proved that Rusty Engesser knew about Syverson on June 27, 2007. SETTLED RECORD at 161. In telling Garland that he told Oakley about Syverson "right away," "the same day" that he talked to Syverson, Rusty put Engesser's Syverson claim outside the statute of limitations. HC4 at 148/2-151/25; EXHIBIT R15.

But when he testified at trial, Rusty changed his story. He said he lied to Garland because he "wanted to believe" he had really called his cousin "right away" but allegedly did not because "life's too busy to do the right thing." HC4 at 154/9-13. Rusty testified that he actually waited until 2011 to tell Oakley Engesser about Syverson. HC4 148/6, 152/5. Hymans' e-mail proved that Rusty's interview transcript (like Dasalla's) was more honest than his trial testimony.

The more probing question, though, is: How would Rusty *know* that he needed to adjust his testimony, or *how* to adjust it, to bring Engesser's knowledge of the Syverson claim back within the statute of limitations without someone telling him what to say?

5. Greg Smeenk

Greg Smeenk is the only witness to claim that the driver's side door was closed. His testimony conflicts with Beau Goodman's (and many others).

As a matter of timing, Goodman's testimony that he arrived at the Corvette before Smeenk fits the facts. He was close enough behind the Corvette to be on the scene as the crash unfolded and he stopped his car in a matter of seconds as he approached the crash site. HC4 at 101/13-21. When he arrived at the Corvette, he crawled in through the open driver's side door to check Finley's pulse. TRIAL at 287/6; HC2 at 16/7; HC4 at 102/7, 112/12. Redfield arrived while Goodman was looking in the door. HC4 at 103/9.

By contrast, Smeenk did not arrive at the scene until after the crashing and rolling was over. EXHIBIT R25 at 5/17. Smoke was already in the air when Smeenk was driving from the east toward the crash site. He drove past the Corvette and did not stop his car until he was past the crash site, which would have taken him longer to get to the Corvette. By the time Smeenk arrived, Redfield was already attending to Engesser and both Goodman and Redfield's husband had been to and left the Corvette. HC4 at 103/9; SETTLED RECORD at 125/EXHIBIT R25 at 9/13. Goodman went over to Redfield to assist in reviving Engesser and Redfield's husband was exhorting his wife and others to

step back from the car because he feared it would explode. TRIAL at 296/23-26; EXHIBIT R25 at 9/17.

Redfield herself remembers seeing into the interior of the Corvette through the open driver's side door before Smeenk arrived. TRIAL at 296/8, 301/8. If Redfield and her husband were already there when Smeenk arrived, as Smeenk says, then he was not the first person at the Corvette as he believes; Goodman and Redfield's husband had both entered the Corvette's open door before Smeenk arrived – Goodman to check Finley's pulse and Redfield to try to turn off the Corvette's ignition. TRIAL at 296/7-16, 301/8. In view of the evidence as a whole, Smeenk does not supply clear and convincing evidence that the driver's side door was closed after the roll.

All the skirmishing over whether Goodman, Redfield, or Smeenk arrived at the wrecked Corvette first obscures the fact that it was most likely Eckholm who did – and he did not report that he found the driver's side door shut. As soon as the crashing stopped, Eckholm "ran down" to the Corvette. FHC at 60/12, 16/3; HC2 at 29/18, 32/7, 33/7. Eckholm said he was the "first one there," which makes sense because he was already standing alongside the road when the crash happened rather than approaching the site in a moving car that needed to be brought to a halt and parked. FHC at 16/3. Eckholm "looked in the car," unimpeded by any driver's door, saw Finley, and determined she was dead. FHC at 16/3, 16/12; EXHIBIT R6 at 6/9; HC2 at 30/12. Another guy, probably

Goodman, quickly came up behind Eckholm. FHC at 16/10. Then "people . . . started coming out of cars." EXHIBIT 6 at 7/3. Thus, there is good reason to believe that Eckholm arrived at the Corvette before any passing motorist like Smeenk. One presumes that if an Engesser partisan like Eckholm found the driver's door shut, he would have mentioned that fact.

Engesser's focus on Smeenk's testimony (to the exclusion of a half-dozen others who say the driver's door was open) also loses sight of this question: If Engesser was not ejected from the driver door, then how was he ejected? Eckholm notwithstanding, we know it was not through the roof. It was not through the windshield. Side window ejection is contrary to the logical motion dynamics of the impact and rebound. TRIAL at 605/20. Engesser is too large to eject out of a Corvette's side window opening. How was Engesser ejected out of the Corvette if not through the open driver's side door as it rolled to a stop? Engesser does not counter the state's theory with a plausible alternative ejection path out of the Corvette.

CONCLUSION

Oakley Engesser killed Dorothy Finley. He was convicted of the offense in an error-free trial. He is not innocent. He may feel put out by his conviction since he allegedly does not remember driving the doomed Corvette into a deadly crash, but the jury found that the physical evidence implicated Engesser as the driver.

The stale memories and wishful thinking of partisan witnesses do not meet the standard of an "extraordinarily high and truly persuasive demonstration of actual innocence" that might someday open the door to a species of claim that most supreme courts of the land and this state have not yet felt comfortable opening. *Herrera,* 506 U.S. at 404-05. Engesser's proof is too thin to open that door, let alone walk through it. Accordingly, the trial court's order granting Engesser's fourth amended petition for a writ of *habeas corpus* must be reversed.

Dated this 24th day of June 2014.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

Paul S. Swedlund
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: 605- 773-3215
Facsimile: 605-773-4106
paul.swedlund@state.sd.us

CERTIFICATE OF COMPLIANCE

1. The undersigned hereby certifies that Appellant's Brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellant's Brief contains 4,999 words.

2. The undersigned hereby certifies that the word processing software used to prepare this brief is Microsoft Word 2010.

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Paul S. Swedlund
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of June 2014 a true and correct copy of the foregoing appellant's brief was served on Meade County States Attorney Kevin J. Krull via first class mail at 1425 Sherman Street, Sturgis, SD 57785 and via e-mail on Mike J. Butler at mike.butlerlaw@midconetwork.com and Ronald A. Parsons at ron@jhalawfirm.com.

_____
Paul S. Swedlund
Assistant Attorney General