IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28760

BRAD REAY
Petitioner/Appellant

vs.

DARIN YOUNG, Warden of the South Dakota State Penitentiary
Respondent, Appellee

Appeal from the Circuit Court
Sixth Judicial Circuit
County of Hughes, South Dakota

The Honorable John L. Brown
Presiding Circuit Court Judge

BRIEF OF APPELLANT

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Notice of Appeal was filed October 12, 2018

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JURISDICTIONAL STATEMENT

COMES NOW, Brad Reay, the Appellant in the aforementioned Habeas Corpus Writ, and makes and files the following Brief in support of his appeal to the South Dakota Supreme Court.

Brad Reay filed his October 12, 2018 Notice of Appeal from the trial court's September 17, 2018 Order Granting Certificate of Probable Cause herein. The Order Granting Certificate of Probable Cause was the final order in the underlying habeas action.

STATEMENT OF THE LEGAL ISSUE

WAS TRIAL COUNSEL FUNCTIONING AS COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION WHEN HE FAILED TO PURSUE EXPERTS FOR BITE MARKS, DNA, AND TOOL MARKS?

The trial court ruled that the trial counsel was not ineffective in its Order Denying Petition for Habeas Corpus Relief dated August 31, 2018.

Relevant Cases:

1. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 LE.2d 674 (1984).
2. *Knecht v. Weber,* 2002 SD 21, 640 N.W. 2d 491.
3. *Lien v. Class*, 1998 SD 7, 574 N.W. 2d 601.
4. *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993).

Relevant Constitutional and Statutory Provisions:

1. Article VI §7 To The South Dakota Constitution
2. Sixth Amendment to the United States Constitution

PRELIMINARY STATEMENT

Throughout this brief, the Appellant, Brad Reay will be referred to as "Reay." Trial counsel, Tim Rensch will be referred to as "Rensch". Respondent and Appellee, State of South Dakota will be referred to as the "State." References to the habeas hearing transcript will be "HT" followed by the appropriate page number and line. References to the settled record will be "SR" followed by the appropriate page number.

STATEMENT OF CASE

On February 9, 2006, Brad Reay was arraigned on the charge of murder in the first degree (SDCL 22-16-1(1), 22-16-4, and 22-16-12) (Class A Felony), on or about February 8, 2006. (File No. 06-87) At the Arraignment, Tim Rensch, a Rapid City attorney, was appointed to represent Mr. Reay. Brad Reay's jury trial began on January 6, 2007 through January 23, 2007 in Hughes County, South Dakota. At the conclusion of that trial, Mr. Reay was unanimously convicted of First Degree Murder in the stabbing death of his wife Tami. He was sentenced on March 6, 2007 to serve a life sentence in the South Dakota Penitentiary, without the possibility of parole. ST 17.

Reay appealed the judgment of conviction, and this Court affirmed the trial court, in a written decision dated February 11, 2009. *State v. Reay,* 2009 SD 10, 762 N.W. 2d 356.

On May 27, 2009, counsel for the State and Petitioner, stipulated and the court Ordered that the time for filing an amended Petition for Writ of Habeas Corpus could be extended. SR 19-21.

An Amended Petition was filed on October 30, 2014. SR 38.

Petitioner filed a Motion for Appointment of Experts on March 25, 2015. SR 64. Respondent filed a joint motion for summary judgment on pro se claims and their response to Petitioner's Motion for Experts on November 14, 2014. SR 48. Petitioner filed an Amended Motion for Appointment of Experts on July 23, 2015. SR 134. On September 2, 2015, Respondent filed a Motion and Brief in support thereof, *inter alia*, for Petitioner's Motion for Appointment of Experts. SR 204 and 206. On September 4, 2015, the Court, after hearing arguments from the parties, denied Petitioner's Motion for Appointment of Experts. The Order was filed on September 29, 2015. SR 286.

The undersigned was appointed by the Court on May 17, 2017. SR 291.

A habeas trial was held on June 15, 2018. Both parties filed proposed findings of fact and conclusions of law. The Petitioner filed objections to the State's proposed findings. SR 668-700. The court denied Petitioner's proposed findings and entered its findings, conclusions and order on August 31, 2018. SR 702.

Petitioner filed a Motion for Certificate of Probable Cause on September 11, 2018. The court granted the Certificate of Probable Cause on September 17, 2018. SR 721. Petitioner filed a Notice of Appeal on October 12, 2018. SR 734.

STATEMENT OF THE FACTS

The factual history of the underlying criminal case is set forth in *State v. Reay*, 2009 SD 10, 762 N.W. 2d 356. The issue in this case the ineffective assistance of counsel at the time of trial.

At the habeas trial, Mr. Rensch was the only witness called. Mr. Rensch relied heavily on his prior track record for murder cases, and stated that "the strategy I use is the strategy I use." HT 14:21-22. Rensch testified that the general strategy of the case was to

"buttress" the Reay's claim that his daughter murdered the victim. HT: 17:9-12. Mr. Rensch testified that an alternate explanation of death could exonerate his client. HT 17:13-19.

Mr. Rensch testified that the issue of bite marks was discussed at trial. HT 18:2-4. Mr. Rensch recalls that the governments pathologist, Dr. Habbe, and the agent Braley testified for the State at the jury trial that the marks above the victim's nipple area could be bite marks. HT 18:5-19:7. Mr. Rensch testified that the bite marks were a theory of the Defense. HT 19:22-23. Mr. Rensch believed the bite marks were at least plausible, however, he unilaterally decided not to consult with an odontologist because the daughter wore braces and that Mr. Rensch believed Odontology was a debunked science. Mr. Rensch testified that he was not a dental expert and he never worked for a dentist. HT 22:8-23:15.

Mr. Rensch also chose not to hire an expert to test certain DNA evidence found on a towel. Mr. Rensch testified that he would have been able to get an expert to test the towel if he wanted, however, he would rather argue possibility without expert than have a "direct DNA test." HT 40:9-41:2. Mr. Rensch testified as to all experts that he would have been able to get funding and approval for expert witnesses if he needed. HT 42:6-43:11.

Mr. Rensch also testified that he chose not to get a tooling expert to analyze the holes in the tarp that was used to wrap the victim's body. HT 47:25-48:8. Mr. Rensch testified at the habeas trial that he "really didn't care" what an expert had to say about the cuts in the tarp, because he did not believe the trial was lost on the tarp issue. HT 52:21-23. Mr. Rensch admitted that the number of holes in the tarp and the bedsheets did not add up, and that argument had "weak spots." HT 49:9-16. Nevertheless, Mr. Rensch chose not to get an expert to analyze the holes in the tarp to see how they were caused or how they compared in relation to the wounds on the victim's body.

ARGUMENT

WAS TRIAL COUNSEL FUNCTIONING AS COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION WHEN HE FAILED TO PURSUE EXPERTS FOR BITE MARKS, DNA, AND TOOL MARKS?

Standard of Review

This Court reviews a habeas court's "factual findings under the clearly erroneous standard and legal conclusions under the de novo standard." *McDonough v. Weber*, 2015 S.D. 1, ¶ 15, 859 N.W.2d 26, 34 (quoting *Meinders v. Weber*, 2000 S.D. 2, ¶ 5, 604 N.W.2d 248, 252). "A claim of ineffective assistance of counsel presents a mixed question of law and fact." *Id.* ¶ 16, 859 N.W.2d at 34 (quoting *Vanden Hoek v. Weber*, 2006 S.D. 102, ¶ 9, 724 N.W.2d 858, 862).

Analysis

The standards for addressing a claim of ineffective assistance of counsel were set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 LE.2d 674 (1984).

> *[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.*

466 US at 690.

The United States Supreme Court has set forth a two-prong test applicable to ineffective assistance of counsel claims. *Strickland*, supra. The well-established two-prong test for a claim of ineffective assistance of counsel requires a showing "(1) that counsel's representation fell below an objective standard of reasonableness; and (2) that such deficiency prejudiced the defendant." *Crutchfield v. Weber,* 2005 SD 62, ¶11, 697 N.W. 2d 756, 759 (citations omitted); *Moeller v. Weber*, 2004 SD 110, ¶18, 689 N.W. 2d 1, 8, citing *Coon v. Weber*, 2002 SD 48, ¶11, 644 N.W. 2d 638, 642.

The deficient performance prong requires Petitioner to prove that the trial counsel's performance fell below an objective standard of reasonableness. He must show that trial counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment.

The United States Constitution and the South Dakota Constitution both guarantee an individual's right to be represented by counsel. US Cont. Amend. VI; SD Const. Art. VI, §7. That guarantee necessarily mandates that defendants who procure the advice of counsel will receive "adequate and effective assistance." US Const. Amend. VII; SD Const. Art. VI, § 7; *Stacy v. State*, 349 N.W. 2d 439, 442-43 (SD 1984). This includes counsel using "good faith judgment"; and token or cavalier representation does not satisfy the constitutional guarantee. *State v. McBride*, 296 N.W. 2d 551, 553-554 (SD 1981).

Petitioner is well aware that his trial counsel failed to request any experts. It is difficult to know whether or not Petitioner's case would have had a different outcome when Petitioner's trial counsel never even had an expert of any type look over the

potential evidence. Many times, one or both sides employ experts who then are not used at trial. At least if an expert had been employed, the case would have had clear direction at the trial level.

While it is true that perhaps the trial attorney's strategy was to not request experts, the problem is that trial counsel did not have any facts, let alone adequate facts, to know to what an expert might testify to regarding this case.

The Supreme Court in *Lien v. Class*, 1998 SD 7, 574 N.W. 2d 601 at ¶ 52, citing *Eldridge v. Atkins*, 665 F.2d 228, 232 (8th Cir. 1981), *cert denied*, 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed 2d 168 (1982) stated:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

Reay is not required to show that he would have been acquitted, but must only undermine confidence in the trial's likely outcome. *Lien*, citing *Hill v. Lockhart*, 474 U.S. at 59, 106 S.Ct. at 370, 88 L.Ed. 2d at 210.

Under *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993), reasonable performance of counsel

> [I]ncludes adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories. An attorney must make a reasonable investigation in preparing a case or make a reasonable decision not to conduct a particular investigation.

Here, counsel did not conduct an adequate investigation in facts upon which he could base a reasonable decision to defend at trial. Instead he relied on his "seven or eight murder cases" prior to Reay's trial. HT 9:19-22.

Rensch's theory of defense after using the 12 year old daughter as the actual murderer, can be broken down to three main areas: bite marks, DNA, and the tool marks on the tarp that was admitted into evidence at trial.

A. BITE MARKS. Rensch testified he could have gotten a dental expert to try to explain the two marks on the left breast of the victim, Tami. HT 26:2-9. Rensch testified at the habeas trial that part of his theory of defense was the possible bite marks next to the nipple with a gap in between them that witnesses opined could possibly be bite marks. HT 19:22-23. He further testified that he cross examined two government witnesses, Dr. Habbe, a pathologist, and Mike Braley, a state investigator on the bite marks. HT 19:8-12. Rensch testified "…because, you know, the bite marks were a part of the theory of the defense." HT 19:22-23.

When asked how he proposed to tie in the bite marks with [his] theory of the defense, he testified at length about the plausibility of this defense, and finally concluded, bite mark experts have been "debunked" based on a previous case. HT 23:8-24. If this is the case, then why would he try to use this as a defense theory? However, Rensch admitted that he never met with an expert in this field to determine if at the time of this case, forensic dental analysis was a valid science. HT 25:6-9. He admitted he never attempted to get a court order to compel at least a bite sample from Reay's daughter. HT 26:2-5.

Rensch testified that he argued to the jury that the State intentionally did not test the bite marks, which he felt was a "home-run" piece of evidence. HT 29:25-30:7. Yet, he did not investigate viable theories, as is required by *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993). Counsel should not be allowed to forego necessary testing, because a defendant has not requested it. Not many clients even know what to request. It is unreasonable to think that Rensch's actions were reasonable, when this was his theory of defense.

There were two marks near the victim's breast that could have been bite marks, as opined by Dr. Habbe, the pathologist that testified for the State in the underlying jury trial. There was a slight gap between the two marks. If they were bite marks, they could not have been caused by Reay, because he has no gap between his front teeth, but he alleged that the daughter did have gapped teeth. At trial, State Agent Michael Braley, testified without objection that he did not think they were bite marks. (Trial transcript, pp. 1585-1586, 1628. Although Braley admitted he was not qualified to give such testimony (Trial transcript, p 1644), no objection was made by attorney Rensch. Dr. Habbe, testified there was a measurable gap between the marks. (p. 1851). Habbe also testified he was not qualified to testify about bite marks; a forensic odontologist would be needed for that purpose. Nevertheless, he was allowed to testify without objection that one of the photos depicted a mark he felt was not a bite mark. (Trial Exhibit 264-L). At a minimum, Rensch, using his own knowledge of forensic odontology, should have tried to impeach Dr. Habbe for deferring to a debunked science. It appears that Dr. Habbe does did not share Mr. Rensch's distrust for forensic odontology. Curiously, after

remaining silent at jury trial, Mr. Rensch now voices his clear understanding that forensic odontology is debunked.

Braley's testimony about bite marks was without a proper foundation, and he was not qualified to testify about bite marks. Therefore, Rensch should have objected to the testimony and should have filed a motion in limine to bar introducing such a statement at trial. The same is true of Habbe's testimony since he admitted he was not qualified to give an opinion. Petitioner realizes none of this could be prejudicial to him, unless there was competent evidence that the marks really were bite marks, and really were inconsistent with Reay's teeth. On habeas, this could not be proven since the habeas court refused to allow an expert to be appointed.

The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defense." The purpose of this constitutional guarantee is to assure "that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067. A lawyer does not satisfy this constitutional mandate if his representation falls below an objective standard of reasonableness. In this case, it did because Rensch expected a jury to acquit Reay based on a remark brought up in closing.

B. DNA TESTING. At trial, Rensch did question the state lab on the DNA found on a purple washcloth. The testing results showed the victim's DNA, could not rule out Reay's DNA, and found there was DNA from an unidentified third person, which did not match Reay. While Reay could not be excluded, the DNA did not link directly to him. Yet, again, Rensch did not have that DNA tested. HT 38:7-10. When questioned at the

hearing, Rensch testified that if the daughter's DNA was on the washcloth, it would not be unusual to have all family members DNA on it. HT 34:11-14.

Rensch tried to explain away his deficient representation as trial counsel, by blaming the State, because they did not test the DNA of the daughter, even though they knew it was the defense theory that she was the one who murdered her mother. HT 37:10-13. Rensch admitted that he likely would have gotten a DNA expert if he had requested the same. HT 42:15-19. He further testified that he really did not worry about money in a court appointed case. HT 43:9-11. Yet, he did not want to know whether the daughter's DNA was even on the washcloth. He also did not want a direct link to the evidence because he considered a possibility of it as an advantage of surprise, rather than a direct link with the disadvantage of notice. HT 41:12-16.

At trial, the defense presented was that Reay did not commit the crime, and that it was likely committed by a family member. The DNA of the family member was never compared by the State's expert to the evidence found at the scene. Specific testing designed to compare the DNA found at the crime scene with that of the family member would have substantially supported the defense offered, and would have demonstrated Reay's actual innocence of the crime.

Rensch testified that since he was court appointed, and this was a murder case, and you have a theory of defense that can be supported by an expert and you can lay out a reason for an expert, there is a good chance the Court will approve one. He doubted he would have been denied an expert if he had requested one. HT 42:13-24.

C. TOOL MARK EXPERT. At trial, the prosecution asserted the victim was wrapped in a blue tarp at the time she was stabbed, and that marks found on the tarp

were consistent with marks made by a knife. No expert was ever called by either side on this subject at trial. Petitioner claimed at trial that although the victim was indeed wrapped in a tarp, the marks on the tarp were not caused by a knife.

In its closing, the State was able to argue that the Petitioner, and only the petitioner, could have killed the victim because she was stabbed after being wrapped in the tarp. The assistance of an expert could have proven that the State's theory was erroneous. Such evidence could have had a significant effect at trial in disproving the State's case.

Rensch admitted that he looked at the tarp well in advance of trial. HT 44:3-5. Rensch, again, did not consider having an expert appointed. HT 52:18-22. He admitted that he does not know the composition or how a tarp is manufactured. HT 46:4-7. Rensch testified that there was more blood on the tarp than on the sheets, which he erroneously opined was consistent with his theory that the daughter killed her mother in her bed, on the sheets, and Reay, scooped Tami up in the tarp after death. HT 46:16-48:8.

Rensch testified that no one had found a pattern on the tarp of stab wounds to account for the wounds on Tami's body. HT 48:18-21. He testified that Agent Braley could not find a pattern in the tarp to account for all the stab wounds. However, he did find a pattern in the sheets that matched the four stab wounds in the victim's breast. HT 47:9-15.

Rensch testified that everything to do with the stabbing was damaging to Reay. HT 49:17-22. Yet, his opportunity to hire experts in these areas, did not support nor help the defense strategy. Reay maintains the hiring of experts would have rebutted the

state's case. Rensch's failure to retain experts made the entire trial proceeding "fundamentally unfair." *Conley v. Groose*, 26 F.3d 126, 1994 WL 203379 (8th Cir. (Mo) 1994)

Rensch testified that he does *not* use a lot of defense experts in a murder case.

> Usually murder cases are pretty fact specific. I guess I would say, you know, it depends on the case. There are cases where you may need an expert and I guess it could be said that it's *common that you could resort to experts in a murder case.*

(Emphasis added). HT p. 55:10-16.

Rensch testified that he did not contact any other lawyers in preparation for this case, or in deciding if he needed an expert. HT 89:16-19. He also did not use any other consultants to help him decide if he needed any experts. HT 89:20-22.

In *Knecht v. Weber,* 2002 SD 21 @ P. 19, 640 N.W. 2d 491, one of the defense attorneys testified regarding his father, and co-counsel's, reasoning for not electing to hire an expert. The lawyer testified that it was his father's practice to informally consult with experts before hiring them. These attorneys also presented cross examination that was consistent with their defense theory. *Id.*

Here that did not occur. Rensch consulted with no other attorneys, consultants or others to decide if he needed an expert. HT 89:16-22.

When questioned, Rensch did not believe that even with experts, collectively, testifying about bite marks, DNA and tool marks who could possibly rebut the state's case, would have made a difference. Again, Rensch testified that "there is no such thing as a bite match." HT 104:21-25. Nevertheless, that was part of Rensch's theory of defense.

CONCLUSION

Brad Reay was charged with first degree murder. He had a right to have effective counsel, who would handle his case leaving no reasonable stone uncovered. Rensch testified that he could have received authorization to hire experts. Yet, he failed to do so. His trial strategy was one of trying a first degree murder case on the theory that he would raise reasonable doubt as to the DNA, tool marks, and the bite marks, and whatever else the State failed to do. This was a serious murder trial. The stakes were high. If Rensch were actually representing his client as required under the Sixth Amendment to the Constitution, he would have wanted to look at every viable defense and utilize proper experts to make options not based on "debunked science" or personal experiences. Mr. Rensch is not an expert. Why would you try to raise reasonable doubt on an issue you believe is junk science? Why did he not get a tool mark expert to determine whether or not the wounds were made before or after death. In the trial closings, the State was able to argue that the petitioner, and only the Petitioner, could have killed the victim because she was stabbed after being wrapped in the tarp. The assistance of an expert could have proven that the State's theory was erroneous. Such evidence could have had a significant effect at trial in disproving the State's case.

Rensch thought his previous experiences and opinions on bite marks, tarps, and DNA would get his client through this case. It did not work. Rensch really put Reay in the position to save himself by his own testimony. In actuality, Reay was left to testify to make his own defense. He called no witnesses to support Reay's testimony. However, in a trial where expert analysis could have helped determine whether or not

reasonable doubt existed, trial counsel fell very short of being an effective counsel. For the foregoing reasons, Brad Reay respectfully prays that this Court reverse the decision of the habeas court and grant his Permanent Writ of Habeas Corpus.

REQUEST FOR ORAL ARGUMENT

Petitioner/Appellant respectfully requests oral argument on these issues.

Respectfully submitted this ____ day of January, 2019.

_____
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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL §15-26A-66(b) using Times New Roman font, 12 point type.
2. I certify that Appellant's Brief contains 4,118 words and 23,436 characters (with spaces).
3. I certify that the word processing software used to prepare this brief is Apple Pages, 2018. The file will be converted to Microsoft Word for submission to the Court.

Dated this ____ day of January, 2019.

_____
Robert T. Konrad
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I, Robert T. Konrad, do hereby certify that I served two (2) true and correct copies of the Appellant's Brief on the persons next designated by mailing same by first class mail, postage prepaid, addressed as follows:

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Dated this ____ day of January, 2019.

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STATE OF SOUTH DAKOTA COUNTY OF HUGHES	*	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
BRAD REAY *Petitioner,* vs. **DARIN YOUNG,** Warden, South Dakota State Penitentiary, *Respondent.*	*	CIV. 09-177 ORDER DENYING PETITION FOR HABEAS CORPUS RELIEF

Petitioner filed his pro se Petition for Writ of Habeas Corpus which was filed on February 9, 2015, challenging a Judgment on Conviction of Sentence for the count of First Degree Murder in in violation of SDCL 22-16-1(1), 22-16-4, and 22-16-12, which had been issued by the Honorable Kathleen F. Trandahl on March 6, 2007. This Court issued its Provisional Writ of Habeas Corpus on May 5, 2009. Counsel was appointed for Petitioner. An Amended Application for Writ of Habeas Corpus was filed on May 5, 2009. The parties stipulated on May 27, 2009 to extend the time to file an amended application. An Order was granted extending time on May 27, 2009.

A hearing was held on the merits of the habeas application on June 15, 2018. Petitioner was personally present and was represented by counsel, Robert Konrad. Respondent was represented by Paul Swedlund. The Court took judicial notice of the underlying criminal court file (CR 06-86), and the transcripts and other proceedings therein. The Court took judicial notice of the Habeas Corpus file (civ. 09-177). The Court entered an oral ruling from the

bench. The Court has issued its Findings of Fact and Conclusions of Law; therefore, it is hereby

ORDERED, ADJUDGED and DECREED, That the Petition for Writ of Habeas Corpus is denied for the reasons set forth in the Court's Findings of Fact and Conclusions of Law.

Dated August 31, 2018.

BY THE COURT:

THE HONORABLE JOHN L. BROWN
Presiding Judge for the
Sixth Judicial Circuit

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:ss	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

BRAD REAY, Petitioner, v. DARIN YOUNG, Warden, S.D. State Penitentiary, Respondent.	)	CIV. 09-177 ORDER GRANTING CERTIFICATE OF PROBABLE CAUSE

Upon request of Petitioner and review of the file, it is hereby determined that, pursuant to SDCL 21-27-18.1, a motion seeking issuance of a certificate of probable cause was timely filed from the date the final order was issued; service of a motion for certificate or probable cause has been made upon both the Attorney General and the state's attorney. Therefore, it is hereby;

ORDERED, ADJUDGED and DECREED that there is probable cause to believe appealable issues exist, and Petitioner Brad Reay may pursue an appeal of each ground for habeas relief submitted to the trial court, namely, that defense counsel acted ineffectively under the Sixth Amendment; that such actions by counsel deprived him of his right to a fair trial under the Fourteenth Amendment right to due process as stated in the United States Constitution, as well as Article VI of South Dakota's Constitution; that defense counsel failed to request the appointment of an expert to conduct independent testing for DNA on various items of evidence taken from the scene of the crime, that defense counsel failed to request the appointment of a bite mark expert to investigate the marks found on the victim's body, defense counsel failed to request the appointment

of an expert to examine the tarp in which the victim's body was found, and defense counsel failed to follow through on a motion when his ex-parte motion for psychological testing of his client was denied because he failed to notice it for a hearing all in violation of his rights under the United States Constitution and South Dakota Constitution.

Wherefore, based upon the Motion of Petitioner for a Certificate of Probable Cause, the written submissions in support thereof, and this Court being fully informed of the record in this matter, including the underlying Hughes County criminal file (Cr. No. 06-86), this Court grants Petitioner a CERTIFICATE OR PROBABLE CAUSE to appeal this Court's ruling with respect to the claims raised in Petitioner's Amended Application for Writ of Habeas Corpus.

BY THE COURT

Signed: 9/17/2018 12:21:16 PM

HONORABLE JOHN L. BROWN
PRESIDING JUDGE

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28760

BRAD REAY,

Petitioner and Appellant,

v.

DARIN YOUNG, Warden, South Dakota State Penitentiary

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
6th JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN L. BROWN
Circuit Court Judge

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OTHER AUTHORITIES

PRELIMINARY STATEMENT

Citations to the criminal trial and *habeas corpus* trial transcripts will be cited as TRIAL and HABEAS respectively followed by citation to pertinent the page/line number. Pertinent excerpts from the criminal trial transcript cited herein were entered into the record of the *habeas corpus* trial as EXHIBIT 1. Other exhibits from the *habeas corpus* trial will be referred to as EXHIBIT followed by citation to the pertinent exhibit number.

JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to SDCL 23A-32-5.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

DID COUNSEL IN REAY'S MURDER TRIAL RENDER INEFFECTIVE ASSISTANCE BY NOT RETAINING "BITE MARK," DNA AND "TOOL MARK" EXPERTS?

Jenner v. Dooley, 1999 SD 20, 590 N.W.2d 463

Knecht v. Weber, 2002 SD 21, 640 N.W.2d 491

Del Torro v. State, 2001 WL 487996 (Tex.App.)

Strickland v. Washington, 466 U.S. 668 (1984)

The circuit court ruled that trial counsel's decision to not retain certain experts was strategically sound and did not prejudice Reay's trial.

STATEMENT OF CASE AND FACTS

The facts of this case are well described in this court's opinion affirming Reay's conviction for first degree murder. Those facts are as follows.

Brad Reay, his wife, Tamara (Tami), and their daughter lived in Pierre, South Dakota. Reay was an assistant manager at Wal-Mart.

Tami worked in the shoe department at Kmart. She met Brian Clark, who also worked at Kmart. He was married with children. In December 2005, Tami and Brian began an affair.

In the first week of February 2006, Tami told Reay she wanted to date other people: she wanted a divorce. Reay wanted to work things out. He even called Tami's mother, Bonnie Burns, asking that she help convince Tami to salvage the marriage. Tami would not relent. She suggested a divorce after their daughter's school year ended.

On Tuesday, February 7, 2006, Tami went to Georgia Morse Middle School in the afternoon to watch her 13-year-old daughter play basketball. Following basketball and fast food, Tami and her daughter went shopping, and then headed home. She was in bed by 9:00 p.m. Later, in describing that night, the daughter would tell the jury that while she was awake in bed, Reay opened her bedroom door: "He had a bunch of clothes in his arm and I asked him what he was doing . . . . He just said 'nothing' [a]nd he put the clothes down and then came and laid with me." He told her he loved her. She fell quickly back to sleep. When Reay woke his daughter the next morning, she noticed that the laundry machines were running. She asked where her mother was, and Reay responded that she was in bed. Tami and Brad Reay had separate bedrooms.

She went to her mother's bedroom, but all she found was an unmade bed. Her mother's cell phone was on the dresser. She looked

in the garage and found her mother's car there. She discovered her mother's purse in the kitchen. When she told her father that her mother was not in the house, he replied that she had a boyfriend and she might be at his home. As he drove her to school that morning, Reay told her "Don't tell anybody [about Tami not being home] because it's personal." She recalled that on the Sunday previous to her mother's disappearance, when she first learned from her parents that they were getting a divorce, her father was "acting weird . . . . He wouldn't eat and he'd just sit in his bed and not talk or anything."

Tami commonly telephoned her mother, Bonnie, every day. When Bonnie did not receive a call from Tami on Wednesday, February 8, 2006, she called Reay's daughter at her school. She said that the last time she saw her mother was the previous evening. Bonnie then called Brian at Kmart to ask if he had seen Tami. She was scheduled to work at 10:00 a.m., but failed to show up. Brian called the Pierre Police Department and reported Tami missing. He disclosed to Lieutenant Dave Panzer his affair with Tami and expressed his fear that Reay may have done something to her.

Lieutenant Panzer contacted Detective David DeJabet to assist in the missing person investigation. Detective DeJabet sent Detective Troy Swenson to the Georgia Morse Middle School to talk to Reay's daughter. In the meantime, Lieutenant Panzer and Detective DeJabet went to Reay's home. Lieutenant Panzer knocked on the front door, but nobody

answered. Detective DeJabet went to the back door and looked through a window into the garage. He saw a parked black Dodge Durango. He also noticed "a reddish brown stain on the door."

With mounting apprehension, Lieutenant Panzer called Patrol Officer Leasa McFarling to watch the house while Detective DeJabet and Lieutenant Panzer met with Reay in the security office at Wal-Mart. The officers explained to Reay that they had concerns that Tami was missing. Reay told the officers that when he got home the night before, Tami was not there. Reay said that at 1:00 a.m. he heard a vehicle pull into the driveway. He looked and saw the Durango parked there, without Tami, and another vehicle driving away. Reay said he pursued the vehicle in the Durango, but without success.

Lieutenant Panzer and Detective DeJabet then asked if Reay would meet them at his home to see if Tami had returned. Reay agreed and accepted a ride with the officers. Officer McFarling was still at the home when Lieutenant Panzer, Detective DeJabet, and Reay arrived. Detective Troy Swenson showed up shortly thereafter. Lieutenant Panzer asked Reay for written consent to search his home and vehicles. He consented, and Detectives Swenson and DeJabet and Lieutenant Panzer entered the residence together. Reay waited outside. During the search, the officers saw what appeared to be a blood droplet on the garage floor. They also smelled a strong odor of cleaning solution coming from the Dodge Durango. Detective DeJabet suspected

homicide. He directed the officers to stop the search while a search warrant was obtained.

Reay was taken to the police station, where he was interviewed by Detective Swenson, Lieutenant DeJabet, and Division of Criminal Investigation Agent Guy DiBenedetto. The interview lasted five hours. Reay repeatedly denied doing anything to Tami and denied knowing her whereabouts.

As Reay was being interviewed, Special Agent Michael Braley, a crime scene investigator, along with other law enforcement officers, executed a search warrant on Reay's home and vehicles. The search revealed that the Dodge Durango had been freshly cleaned and that there was fresh laundry on Reay's bed and in the washer and dryer. Swabbed samples were taken from the blood spot on the garage floor, the washer, certain walls, a light switch, trim, a bed, and Tami's dresser. After Reay's interview, he was arrested for first degree murder and taken to the Hughes County Jail.

Two days later, a pilot flying a National Guard helicopter spotted a body by the emergency spillway at Oahe Dam. It was Tami. Her body, nude, throat slashed, had been stabbed over thirty times. A knife-riddled T-shirt and bloody gloves were nearby. She was taken to Rapid City for an autopsy, where a pathologist, Dr. Donald Habbe, obtained her fingernail scrapings, DNA samples, rectal and vaginal swabs, and blood samples.

While Reay was in custody awaiting trial, he carried on various conversations and correspondence with his twin brother, Bret. These were monitored by the Hughes County Jail. Bill Dodge, the administrator at the jail, released the recorded conversations and photocopied correspondence to Agent DiBenedetto and Hughes County Sheriff, Mike Leidholt. In one such correspondence was a map drawn by Reay, purporting to tell Bret where the good fishing spots were around Oahe Dam. Using this map and other information gathered during Reay's conversations with Bret, Agent Braley and the Watertown Search and Rescue Team, aided by a bloodhound and cadaver dog, uncovered three City of Pierre garbage bags containing bloody linens, rubber gloves, bloody blankets, panties, a bloody tarp, and a box of condoms with one missing. The garbage bags were hidden in a row of juniper hedges, vegetation similar to what law enforcement officers collected from the bottom of Reay's shoes. Also, the garbage bags were the same type as those found in Reay's garage.

During another monitored exchange between Reay and his brother, Reay had Bret hand copy a letter Reay had written. After copying the letter to a notebook, Bret left the jail. Later that day he was apprehended in Spearfish, South Dakota, and a warrant was issued to search his car. His notebook was confiscated. Bret told the officers that he had copied a letter from Reay and sent it to four people as

directed by Reay. Bret was later indicted on four counts of accessory to murder. He pleaded guilty to two counts.

The day after Bret's arrest, the Attorney General's office received four anonymous letters, supposedly written by Tami's killer, disclosing an unknown detail: Tami was "raped, lost rubber in ass." After seeing these letters, Agent DiBenedetto asked the pathologist, Dr. Habbe, to re-examine Tami's body, which was still in the morgue in Rapid City. The examination revealed that a condom was in fact in her rectum.

Reay was indicted for first-degree murder or in the alternative first-degree manslaughter. In his defense, Reay maintained that his daughter killed her mother. He concealed the homicide, he said, because he "didn't want her to get in trouble." He testified that on the night Tami was killed, he found his daughter standing by Tami's dead body holding a knife. She said nothing when Reay asked her "what have you done." According to Reay, his daughter had blood on her face and hands, and was bleeding from the nostrils. He described her as "Catatonic or in shock. I can't really say." He told the jury that to conceal what his daughter had done, he washed the blood from her, cleaned the scene, planted a condom in Tami's rectum, hid evidence, dumped Tami's body by the Missouri River, lied to law enforcement officers during their investigation, and tried to direct suspicion toward Brian Clark.

Tim Rensch represented Reay in the criminal trial. The jury found Reay guilty of first-degree murder and the court imposed the mandatory sentence of life in prison without the possibility of parole. Reay's conviction was affirmed on appeal and he sought relief in *habeas corpus* alleging that his trial counsel was ineffective for failing to hire "bite mark," DNA and "tool mark" experts. Reay now appeals from the denial of his *habeas corpus* petition.

STANDARD OF REVIEW

A court may deny *habeas corpus* relief when a petition sets forth no facts to support its claims. *Jenner v. Dooley,* 1999 SD 20, ¶ 13, 590 N.W.2d 463, 469. A petition for *habeas corpus* must pass a minimum "threshold of plausibility." *Jenner,* 1999 SD 20 at ¶ 13, 590 N.W.2d at 469. If an applicant's allegations are unspecific, conclusory or speculative, a court may deny the claim. *Jenner,* 1999 SD 20 at ¶ 13, 590 N.W.2d at 469.

Failure to hire an expert is not ineffective assistance of counsel *per se*. *Knecht v. Weber,* 2002 SD 21, ¶ 20, 640 N.W.2d 491, 500. If the omitted evidence "could not have exonerated" the defendant or "rebutted the state's case," the verdict rendered was not unreliable, nor the proceeding "fundamentally unfair." *Knecht,* 2002 SD 21 at ¶ 20, 640 N.W.2d at 500, citing *Conley v. Groose,* 26 F.3d 126 (8th Cir. 1994). In order to obtain relief, the lack of expert testimony must undermine confidence in the outcome of the trial. *Knecht,* 2002 SD 21 at ¶ 20, 640

N.W.2d at 500, citing *Kluck v. State,* 30 S.W.3d 872, 877 (Mo.App. 2000). "The fact that an error by counsel might have had some conceivable effect on the outcome is not sufficient." *Kluck,* 30 S.W.3d at 877. "Conjecture or speculation is not sufficient to establish the required prejudice flowing from the failure to call a witness to testify." *Kluck,* 30 S.W.3d at 877. As stated in *Siers v. Class,* 1998 SD 77, ¶27, 581 N.W.2d 491, 497, "there is no prejudice if, factoring in the uncalled witnesses, the government's case remains overwhelming."

"The decision to call (or not to call) an expert is a matter of trial strategy." *Davi v. Class,* 2000 SD 30, ¶31, 609 N.W.2d 107, 114-115. There is a presumption that counsel acted competently. *Ramos v. Weber,* 2000 SD 111, ¶12, 616 N.W.2d 88, 92. The fact that an expert could have strengthened a defendant's defense theory does not equate to ineffective assistance. *Knecht,* 2002 SD 21 at ¶20, 640 N.W.2d at 500. "The defendant must show more than that the trial strategy of the defense counsel backfired or that another attorney would have prepared and tried the case in a different manner." *Weddell v. Weber,* 2000 SD 3, ¶32, 604 N.W.2d 274, 283.

Habeas corpus does not exist to "second guess the strategic decisions of trial attorneys." *Weddell,* 2000 SD 3 at ¶32, 604 N.W.2d at 283. To prevail, a petitioner must show not just "[a] difference [in] trial strategy" but also "[a] reasonable probability of a different outcome" in his case. *Knecht,* 2002 SD 21 at ¶¶5, 21, 640 N.W.2d at 495, 500.

ARGUMENT

Rensch's strategy at trial was to convince the jury that Reay's daughter killed Tami Reay during some unexplained disassociative episode, and that his culpability was limited to disposing of the body and evidence after the fact. HABEAS at 17/8, 20/3, 21/1, 28/6, 56/6. In the history of horrible defenses (which, in fairness to Tim Rensch, was foisted on him by Reay), Reay's was uniquely horrible for being not only immoral but illogical. HABEAS at 57/1, 57/25. It required a jury to believe that a child with no history of disassociative spells or motive to kill her mother suddenly experienced a "catatonic" episode in which she was sufficiently lucid to formulate a plan to locate her father's hunting knife wherever it was in the house and then go to her mother's room and viciously attack her, and, further, that Tami Reay was incapable of fending off this entranced, waifish, 80-pound girl (who did not have the arm strength to serve a volleyball overhand) in the fight for her life, and further still, that such an attack could occur without so much as one drop of Tami Reay's blood landing on the pajamas that Reay's daughter was wearing that night. TRIAL at 1905/5, 1935/19. Qualitatively, the "omitted" expert testimony would not have cured the inherent illogic of Reay's defense, and was not otherwise sufficiently exculpatory to warrant the strategic risks attending the introduction of such evidence.

A. Qualitative Deficiencies

Expert testimony in any one of Reay's three identified areas would not have benefitted him unless it convincingly assisted in establishing that his daughter, rather than Reay himself, stabbed and killed Tami. Reay's proffered expert testimony would not have achieved this objective.

1. Odontology Expert

The judiciary's brief and disastrous flirtation with forensic bite mark identification is, thankfully, on the path to extinction. Many lives were ruined by odontological charlatans, such as Reay's proffered "bite mark" expert, Dr. Ira Titunik, before science overtook showmanship and finally discredited bite mark odontology as a forensic identifier suitable for a court of law.

To say the least, odontology is not a "hard science" with rates of certainty associated with fingerprinting or DNA:

> The science behind bite mark evidence is murky at best. The underlying theory, that a mark found on a dead victim can be traced to the dentition of the perpetrator, is dubious. The uniqueness of human dentition is questionable, and there is little empirical support for such a proposition . . . . Nor is there any system of blind, external proficiency testing using realistic models. Error rates are unknown.

Beecher-Monas, *Reality Bites: The Illusion of Science in Bite Mark Evidence,* 30 CARDOZO L.REV. 1369, 1371 (2009). Victims are often struggling against their attackers while they are being bitten, which, in

combination with the natural elasticity of human skin, and the lack of uniformity in how individual humans bruise or abrade, generally precludes the formation of a reliable impression. *Leal v. Dretke,* 2004 WL 2603736 at *14. Bite marks have been compared to a smudged fingerprint. *Leal,* 2004 WL 2603736 at *14.

When used to identify unknown remains by comparing dentition to dental records, interpret oral injuries, or opine on dental malpractice, odontology still has a place in the courtroom. The field vastly overreached, however, when it attempted to posit dentition as a unique human identifier on par with fingerprints. In 2009, the National Academy of Sciences (NAS) effectively discredited the practice of trying to match bite marks on victims to particular defendants. *Strengthening Forensic Science in the United States: A Path Forward,* http://www.nap.edu/catalog/12589.html (2009), EXHIBIT 5 at 00009.

According to the NAS, "bite marks on the skin will change over time and can be distorted by the elasticity of the skin, the unevenness of the surface bite, and swelling and healing." EXHIBIT 5 at 00011. "No thorough study has been conducted of large populations to establish the uniqueness of bite marks." EXHIBIT 5 at 00012. "[T]here is not established science indicating what percentage of the population or subgroup of the population could have produced the bite." EXHIBIT 5 at 00012. "[T]he uniqueness of the human dentition has not been scientifically established" and "the ability of the skin to maintain that

uniqueness has not been scientifically established." EXHIBIT 5 at 00013. Consequently, "the scientific basis is insufficient to conclude that bite mark comparisons can result in a conclusive match." EXHIBIT 5 at 00013.

In reaction to the widespread overselling of odontology as a forensic identifier by some members of the field, and the unjust incarceration of scores of innocent defendants on the testimony of so-called bite mark experts, in 2013 the American Board of Forensic Odontology (ABFO) issued guidelines delimiting the testimony its members could give. *American Board of Forensic Odontology Diplomates Reference Manual* (2013), EXHIBIT 5 at 00015. First, ABFO members (which includes Dr. Titunik) are not permitted to opine on any bruise pattern that is not definitively a bite mark. Golden, *Bite Mark and Pattern Injury Analysis: A Brief Status Overview,* JOURNAL CALIFORNIA DENTAL ASSOCIATION (June 2015), EXHIBIT 5 at 00034. Per ABFO guidelines, to qualify as a definitive bitemark, a bruise must present "a) classic features, b) all the characteristics, or c) typical class characteristics of dental arches and human teeth in proper arrangement so that it is recognizable as an impression of the human dentition." EXHIBIT 5 at 00026. Bruising or abrasions "suggestive of a bite mark" are described as "marks resembling tooth marks . . . but the arch configuration is missing." Marks that are merely "suggestive" of a bite mark are not amenable to forensic analysis and identification.

EXHIBIT 5 at 00034. Second, even when a definitive bitemark is present, "unconditional identification of a perpetrator" by ABFO members is "not sanctioned as a final conclusion." EXHIBIT 5 at 00026.

Here, each of Tami Reay's breasts were stabbed directly through the nipple. TRIAL at 1841/8. An abrasion characteristic of a hilt mark, or "possibly" a bite mark, was alongside each of the stab wounds. TRIAL at 1586/18, 1847/13. These abrasions were not, however, a series of bruises in opposing "half moon shape[s]" one normally finds from "the upper and lower teeth as they make contact and apply pressure to the skin." TRIAL at 1586/5. Instead they were "line-like" marks that "possibly" could have been created by two upper or lower front teeth or blunt force injury from a knife hilt. TRIAL at 1845/23, 1849/7. There is a gap in one line which Reay argued is indicative of a gap in the alleged biter's front teeth. EXHIBIT 264-A. Such a gap, however, even if the "line-like" abrasions are bite marks, could exist because clothing, like Tami's T-shirt, padded that area enough to inhibit gapless teeth from creating an uninterrupted line. TRIAL at 1850/13.

The alleged bitemarks do not present the "classic features" or "characteristics of dental arches and human teeth." Instead, the short linear bruising on Tami Reay's breasts, which are no more than an impression of two upper or lower front teeth, and which may also be hilt

marks, do not present an arch configuration. TRIAL at 1586/5 (no opposing "half moon shape[s]" representing arch configuration). Consequently, testimony of allegedly identifying characteristics of the possible bite marks on Tami Reay's breasts would not be sanctioned by the ABFO.

Dr. Titunik's forensic quackery has put at least two innocent men behind bars. Gerard Richardson was convicted of the 1994 murder of Monika Reyes based on the testimony of Dr. Titunik. *Description of Bite Mark Exonerations,* Innocence Project, EXHIBIT 5 at 00036, ¶2. At Richardson's trial, Dr. Titunik testified that "there was no question in [his] mind" that a bite mark on the victim's back "was made by Gerard Richardson." According to Dr. Titunik, Richardson, "in effect, left a calling card . . . It's as if he left a note that said 'I was here,' and signed it because the mark on her back was made by no one else's teeth." EXHIBIT 5 at 00036, ¶2. Except for Dr. Titunik's bogus bite mark testimony, there was no physical evidence tying Richardson to the crime. EXHIBIT 5 at 00036, ¶2. Richardson was sentenced to 30 years in prison, and served 19, before DNA science advanced to the point that testing of saliva on a swab collected from the bite mark excluded Richardson as the culprit. EXHIBIT 5 at 00036, ¶2.

"I thought it was crazy," Richardson later said of Dr. Titunik's "expert" testimony. "There was no way it was possible. The FBI looked at hairs, fibers, blood, everything the police found at the crime scene.

None of it came from me. Just this bite mark." *How the Flawed "Science" of Bite Mark Analysis Has Sent Innocent People to Prison,* EXHIBIT 5 at 00044. Nearly 20 years after Dr. Titunik's irresponsible testimony put Richardson behind bars, Richardson was able to stand in a courtroom and hear a judge declare to the public that "DNA proves that Gerard Richardson is not the person who committed this crime. He is completely innocent." *Why Forensic Odontology Fails: An Ongoing Innocence Project Case,* EXHIBIT 5 at 00049.

Again, in the case of Edmund Burke, Dr. Titunik, backed up a bite mark identification by a fellow ABFO forensic odontologist that implicated the defendant in the rape and murder of a 75-year-old woman. EXHIBIT 5 at 00041, ¶2; Fisher, *Forensics Under Fire: Are Bad Science and Dueling Experts Corrupting Criminal Justice?,* EXHIBIT 5 at 00052. Burke spent 41 days in jail until DNA testing on saliva taken from the bite mark excluded Burke as a possible suspect. EXHIBIT 5 at 2. The actual killer was later identified when the DNA profile taken from the bite mark was matched to a profile in the national DNA database. EXHIBIT 5 at 00042, ¶2; EXHIBIT 5 at 00045.

Dr. Michael Bowers, a California odontologist, has been a longtime critic of the Dr. Tituniks in his field. Dr. Bowers conducted a workshop, at the American Academy of Forensic Science's 1999 conference to test the ability of odontologists to accurately match dentition to particular bite marks. 63% of the odontologists who

participated made incorrect identifications. EXHIBIT 5 at 00068. Dr. Titunik may have been among those 63%. Dr. Bowers wrote in 1996 that:

> Physical matching of bite marks is a non-science which was developed with little testing and no published error rate . . . . An opinion is worth nothing unless the supportive data is clearly describable and can be demonstrated in court. How does one weigh the importance of a single rotated tooth in a bite mark when the suspect has a similar tooth? The value judgments range widely on the value of this feature. This is not science. Instead, statistical levels of confidence must be included in the process.

EXHIBIT 5 at 00068. According to ABFO standards, no credentialed odontologist should be identifying suspects from even definitive bite marks let alone "line-like" marks that "possibly" may have been created by two upper or lower front teeth. TRIAL at 1845/23, 1849/7.

Courts have granted *habeas corpus* relief for counsel's failure to retain an odontological expert only in exceptional cases, and under circumstances that do not pertain to this case. For example, in *Jackson v. Day,* 121 F.3d 705 (5th Cir. 1997) *unpublished*, the court found that the defendant's counsel had not been ineffective for failing to retain an odontologist, even though the state's odontologist had testified that bite marks on the victim matched the defendant's dentition, because there was extensive physical and circumstantial evidence implicating Jackson in the crime aside from the bite marks. *Walters v. State,* 720 S.2d 856, 869 (Miss. 1998)(counsel not ineffective for failing to retain odontologist

when "bite mark evidence was but one small bit of evidence identifying" the defendant).

Again in *Del Torro v. State,* 2001 WL 487996 (Tex.App.), the court ruled that the defendant had not been prejudiced by his counsel's failure to retain an odontologist when the defendant's guilt hinged not on physical evidence but on the jury's determination of the defendant's credibility *vis-à-vis* the victim's. Defendant admitted having sex with the victim, but claimed it was consensual. The victim claimed rape. The *Del Torro* court found that, since "the jury could have chosen to believe" the victim "even without the benefit" of the state's bite mark evidence, "there [was] no support in the record that an [odontology] expert appointed to the defense would have altered the outcome of the trial." *Del Torro,* 2001 WL 487996 at *3-*4.

By contrast, in *Ege v. Yukins,* 380 F.Supp.2d 852 (E.D.Mich. 2005), the court ruled that defendant had been prejudiced by counsel's failure to retain a rebuttal odontologist when "the [state's] bite mark evidence was the only physical evidence tying [Ege] to the crime." *Ege,* 380 F.Supp.2d at 880.

In this case, the investigator testified that the abrasions were not definitively bite marks. TRIAL at 1586/18, 1644/8. The pathologist testified that the abrasions were only "possibly" bite marks caused by two upper or lower front teeth. TRIAL at 1845/22, 1849/7. More importantly, the state did not call an odontologist to opine that the

abrasions were bite marks, that the marks matched Reay's teeth, or that the marks did not match Reay's daughter's teeth. HABEAS at 72/19. The marks were not used by the state, as they had been in *Jackson, Walters,* or *Del Torro,* to establish Reay's identity as the killer.

Meanwhile, as in *Jackson* and *Walters,* there was a mound of physical and circumstantial evidence, including Reay's own admissions, tying him to the murder. And, as in *Del Torro*, Reay's innocence hinged on whether the jury chose to believe his story over his daughter's. TRIAL at 1900/13.

Odontology is too inexact to identify the linear abrasions in question as bite marks or causally connect a gap in one abrasion to a gap in teeth – as opposed to a gap caused by clothing or movement by the victim – to the level of certainty required for *habeas corpus* relief. Given the lack of a scientific basis for forensic bite mark identification, and ABFO rules prohibiting it, Reay was miles short of demonstrating "[a] reasonable probability of a different outcome" in his case if his trial counsel had retained a bite mark expert. *Knecht,* 2002 SD 21 at ¶¶ 5, 21, 640 N.W.2d at 495, 500.

2. DNA Expert

Reay asserted that his daughter's DNA should have been compared to alleged third-party blood DNA on a washcloth he used to clean up the murder scene. EXHIBIT 287. According to Reay, linking this third-party blood DNA on the towel to his daughter would have

corroborated his story that he wiped blood from her nose after the murder.

It is worth noting that investigators did not find any of Tami Reay's blood on the pajamas that Reay's daughter wore to bed and was wearing when she woke up the next morning. HABEAS at 68/17; TRIAL at 1656/14. Reay claimed that he cleaned blood from his "catatonic" daughter's face and hands after she allegedly stabbed her mother to death because he "didn't want her to get in trouble." TRIAL at 2243/9, 2300/10. But if Reay's daughter's face and hands were covered in blood from stabbing her struggling mother 20 times, Tami's blood should have been on her pajamas, as it was on the light switch, wall trim, dresser, walls and bed in Tami's room; if Reay's goal was to "save [his] daughter," he would have concealed or destroyed the pajamas as he did other cloth items bearing Tami's blood. HABEAS at 69/24; TRIAL at 2247/9, 2304/10, 2387/18. The fact that Reay did nothing to conceal or destroy his daughter's pajamas is a Freudian slip that unequivocally betrays Reay's awareness that his daughter was never in proximity to the murder. TRIAL at 1656/14; HABEAS at 70/6. The probative value of a spot of Reay's daughter's DNA on the towel is minuscule when none of Tami Ray's blood was on her pajamas.

The mere presence of Reay's daughter's DNA on household linens Reay used to clean up or conceal the crime is hardly remarkable given that she lived in the home. HABEAS at 34/14. Reay's daughter may

have used the towel to dry her hands or mop sweat from herself after playing sports before Reay used it to mop up his wife's blood. HABEAS at 99/14; TRIAL at 2018/18. The towel could have picked up some of Reay's daughter's blood from a torn cuticle or saliva from wiping her mouth after brushing her teeth. The presence of Reay's daughter's DNA or blood on a washcloth from the home she lived in does little to establish that she, rather than he, killed Tami Reay. HABEAS at 34/14, 99/14.

Because the best possible DNA evidence (*i.e.* a positive match between blood DNA on the towel and Reay's daughter) would not have conclusively linked her to the murder, Reay was again short of demonstrating that the absence of DNA testimony undermined confidence in the outcome of the trial. *Knecht,* 2002 SD 21 at ¶20, 640 N.W.2d at 500.

3. "Tool Mark" Expert

According to Reay, Rensch should have hired a "tool mark" expert to opine that puncture holes in a blue plastic tarp used to dispose of Tami Reay's body were not created by the murder weapon. The tarp in question was a 6x8-foot blue plastic tarp extensively stained with a 4x6-foot patch of blood. TRIAL at 1649/2. Within the stained area were 16 cuts that coincidentally correlate in number and shape to 16 puncture holes in the front of the T-shirt the victim was wearing when

she was murdered (in addition to four holes in the back of the shirt). TRIAL at 1600/21; 1653/9.

The linear shape of the slits in the tarp were consistent with multiple punctures by the same knife. HABEAS at 82/5, 93/22; TRIAL at 1491/15-1492/6, 1600/21. From the bedsheet (which had four bloody linear slits), the victim's T-shirt and the tarp, it appeared that Reay initially stabbed Tami Reay fourteen times in the back, throat, clavicle and shoulders while she slept to incapacitate her. When he covered Tami with a tarp to transport her and/or to minimize transfer of her DNA to himself, she fought back, stabbed her 16 more times in the torso through the tarp and her T-shirt.

According to Reay, expert testimony that an implement other than the murder weapon accounted for the 16 slits in the tarp would have corroborated his claim that his daughter killed her mother as she lay in her bed *before* he wrapped Tami in the plastic tarp. Reay's assertion overstates the probative value any such testimony would have had.

First, there is no unimpeachable tool mark science available here. This case does not involve striations imparted by one metal object to another, such as a screwdriver to a strike plate, which markers can be compared to known objects and tested. The murder weapon was never recovered so there was no knife to compare the punctures in the tarp against. HABEAS at 48/22, 81/10, 82/2. Reay never

demonstrated – through treatises or published articles – that there is any area of science that can examine the frayed ends of plastic fibers that do not, unlike metal, record striations from the implements that cut them and identify the implement that caused the puncture or differentiate puncture holes caused by a putty knife or a box cutter during some pre-murder use of the tarp for a painting project from knife punctures caused during the murder.

Second, even if the science itself were unimpeachable, proof of Reay's "innocence" does not follow from an alternate origin of the slits in the tarp. While the presence of knife holes in the tarp certainly implicated Reay by contradicting his story that his daughter had killed Tami Reay in her bed *before* he wrapped the victim in the tarp, inconclusive testimony that attributed the punctures to something other than the murder weapon would not have directly implicated Reay's daughter. It would just mean that Tami rolled over in the bed after being stabbed in the back, throat, hands, shoulder and clavicle fourteen times and was stabbed sixteen more times in the chest and abdomen by Reay before he placed her in the tarp. The jury heard testimony from both Reay and his daughter and determined that Reay's claim that is daughter did the stabbing was not credible. *Del Torro,* 2001 WL 487996 at *3-*4 (record did not support that expert testimony would have altered the outcome of the trial when physical evidence was

inconclusive and the jury could have based conviction on victim's credibility).

Since no state expert testified to forensic markers establishing that the cuts came from a knife and no other implement or object, no state expert was left unrebutted by Reay's counsel's "failure" to retain a tool mark expert. Simple logic suggests that cuts that look like knife cuts likely were knife cuts given that they were embedded within a massive blood stain and the correlation in their number and size to the stab wounds on the front of Tami Reay's T-shirt and to her torso. The jury was at liberty to accept or reject that logic with or without expert advice. *Del Torro,* 2001 WL 487996 at *3-*4.

B. Strategic Considerations

Tim Rensch was an experienced criminal defense lawyer at the time of he represented defendant Reay in the criminal case. HABEAS at 9/21, 102/22. Rensch had been trusted by the state's courts with appointments in several murder cases, including a capital murder case, prior to defending Reay. HABEAS at 10/3. Retaining and introducing testimony from bite mark, DNA or tool mark experts for the purpose of trying to convince the jury that Reay's daughter killed Tami entailed certain strategic risks. Testimony from these proffered experts would have been inconclusive at best and, thus, not strongly probative of the questions of identity, guilt or credibility. At the same time, the proffered

expert testimony could have backfired and implicated Reay even further.

1. Bite Mark Strategy

Rensch capitalized on Dr. Habbe's opinion that the abrasions *could* be bite marks to argue that the gap in the bite marks correlated to the gap in Reay's daughter's teeth. HABEAS at 27/1-29/23, 59/13, 60/14, 73/14, 73/24, 101/2. If Rensch had hired a bite mark expert, the state would have hired its own expert to opine that the abrasions were not bite marks, that, if they were, the gap could be explained in several ways, and that the science of forensic bite mark identification was unsound. HABEAS at 28/9.

Prompting the state to hire an odontological expert would have exposed the extent to which Reay's bite mark defense rested on dubious, even debunked science, and undermined Rensch's credibility with the jury. HABEAS at 71/1, 72/1, 74/3. But by not prompting the state to hire its own bite mark expert to rebut Reay's defense, Rensch strengthened his arguments that the linear abrasion was a bite mark, that the gap implicated Reay's daughter and that the state was ignoring evidence that exculpated Reay and implicated his daughter. HABEAS at 30/12, 60/14, 80/11, 99/11; TRIAL at 2697/8, 2704/9.

2. DNA Strategy

The state's own DNA testing raised the possibility of blood DNA on a towel used to clean up the murder scene from a person other than Reay and the victim. HABEAS at 33/5. This finding allowed Rensch to

argue that the possible third-party blood DNA belonged to Reay's daughter. HABEAS at 64/1, 101/4-102/8. If Rensch had hired an expert to test the towel, his expert may not have been able to link the possible third-party DNA to Reay's daughter or, worse yet, may have ruled her out as the source. HABEAS at 38/10, 60/14, 65/19, 66/2. Hiring a DNA expert likely would have prompted the state to conduct further testing to rule Reay's daughter out as the source of the possible third-party DNA. Any testing that ruled out Reay's daughter as the source of the "third-party blood DNA" which would have significantly weakened Reay's case. HABEAS at 61/22, 66/9.

But even if Rensch had hired an expert to test the towel, it would not have greatly improved Reay's defense theory because the "third-party blood DNA" could have come from an intermingling of the daughter's skin, sweat or saliva from a pre-murder use of the subject towel with her mother's blood. HABEAS at 34/16, 36/6, 36/14, 66/17, 125/15. In other words, Reay's daughter's non-blood DNA could have intermingled with Tami's blood, sufficiently changing Tami's blood to test as "third-party blood" rather than her own. A hybrid DNA sample such as this would have been inconclusive as to both Tami Reay and her daughter. Even if the "third-party blood" tested 100% as Reay's daughter's, the blood could have come from a paper cut or a torn cuticle or any number of ways that a washcloth can pick up blood particles from the members of a household who use it. HABEAS at 34/14.

By not testing the DNA, or prompting the state to further test the DNA, Rensch avoided the worst-case scenario of results that ruled Reay's daughter out as the source of the "third-party blood DNA" yet preserving the arguments that the third-party DNA was her blood and that the state again was ignoring evidence that exculpated Reay and implicated his daughter. HABEAS at 37/21-41/4, 60/14, 61/23, 62/4, 99/12; TRIAL at 2678/23-2680/25, 2684/23, 2703/24.

3. Tool Mark Strategy

The bloody tarp was a problematic item of evidence. The top sheet from the bed had slits that matched the wound pattern on the victim's back, which "corroborated" Reay's claim that his daughter stabbed her mother as she lay in bed (though not ruling out that Reay stabbed his wife in her bed). HABEAS at 46/16-49/22, 84/18. Nevertheless, Rensch did not want to call attention to the tarp because there was no explanation for why, if the victim had been killed in her bed by the daughter rather than in the tarp by Reay, there was significantly more blood in the tarp than on the bedsheets. HABEAS at 94/13, 96/11-97/22, 126/2. Hiring a tool mark expert would have called greater attention to the tarp and carried the further risk that the expert might correlate the slits in the tarp to a single-edged knife of the type used to murder the victim, which would have implicated Reay, who owned a single-edged hunting knife that was missing from the house. HABEAS at 86/18. Also, Rensch believed he would undermine his

credibility with the jury by arguing that the knife-shaped slits in the tarp were caused by rocks during a pre-murder use of the tarp for a camping outing as his client had suggested. HABEAS at 98/23.

In view of the personalized and sexual nature of the injuries and degradations inflicted on the victim, Reay's patent motive for murder, the damning incriminating evidence against him, and the inconclusive nature of the best conceivable testimony from "bite mark," DNA and "tool mark" experts, Reay failed to meet his burden of showing that expert testimony could have "exonerated" him or "rebutted the state's case" against him. TRIAL at 1841/9; *Knecht,* 2002 SD 21 at ¶20, 640 N.W.2d at 500. No expert testimony would have convincingly established that Reay's daughter, rather than Reay himself, stabbed and killed Tami and may, in fact, have implicated Reay further. Thus, Rensch made sound strategic decisions at trial to not retain these "experts." HABEAS at 126/22. Strategic decisions such as these are "virtually unchallengeable" in *habeas corpus* proceedings. *Strickland v. Washington,* 466 U.S. 668, 690 (1984)

CONCLUSION

The jury heard both Reay and his daughter testify. The jury did not buy Reay's story that his daughter killed Tami Reay (before she was wrapped in the tarp) and that his involvement was limited to disposing of the evidence in order to "save [his] daughter." TRIAL at 2304/10. If

Reay was so keen on protecting his daughter, he would not have been so quick to try to pin the murder on her at trial.

This blatant contradiction aside, Rensch's strategic decisions to not hire odontological, DNA or tool mark experts are not grounds for relief in this case because not even the best possible testimony from these witnesses would have been enough to exonerate Reay or undermine confidence in the jury's verdict. *Knecht,* 2002 SD 21 at ¶20, 640 N.W.2d at 500. Brad Reay alone had a motive to kill Tami Reay, and the physical strength to overpower her as she fought for her life. Accordingly, this court can comfortably affirm the circuit court's denial of *habeas corpus* relief in this case.

Dated this 6th day of March 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that appellee's brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's brief contains 6,892 words.

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

Dated this 6th day of March 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 6, 2019, a true and correct copy of the foregoing brief was served via email on Robert T. Konrad at rkonrad@olingerlaw.net.

Paul S. Swedlund
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Assistant Attorney General

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28760

BRAD REAY
Petitioner/Appellant

vs.

DARIN YOUNG, Warden of the South Dakota State Penitentiary
Respondent, Appellee

Appeal from the Circuit Court
Sixth Judicial Circuit
County of Hughes, South Dakota

The Honorable John L. Brown
Presiding Circuit Court Judge

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Notice of Appeal was filed October 12, 2018

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TABLE OF AUTHORITIES

THERE ARE NO AUTHORITIES CITED IN THE REPLY BRIEF. APPELLANT RESTS ON THE AUTHORITIES CITED IN APPELLANT'S INITIAL BRIEF.

PRELIMINARY STATEMENT

Throughout this brief, the Appellant, Brad Reay will be referred to as "Reay." Trial counsel, Tim Rensch will be referred to as "Rensch". Respondent and Appellee, State of South Dakota will be referred to as the "State." References to the habeas hearing transcript will be "HT" followed by the appropriate page number and line. References to the settled record will be "SR" followed by the appropriate page number.

This brief is submitted on this day, pursuant to a motion granted by Chief Justice Gilbertson granting counsel for Reay additional time to file this reply brief. The State did not object to that request. This brief is resubmitted on May 6, 2019 pursuant to a request to certain corrections to be made pursuant to letter from the Supreme Court Clerk dated April 25, 2019.

REPLY ARGUMENT

Because the trial court denied the Appellant's motion for appointment of a dental expert during the habeas proceedings, Appellant has the benefit of the unknown. It appears from the the habeas transcript that Rensch planned to use the bite marks as a "theory of the defense." HT 19:22-23. The Appellee glosses over this fact in its brief, and attempts to play both sides of the field. On one had, Appellee attempts to dissuade the court regarding the reliability of dental odontologists. On the other hand, the State argues that Rensch's trial defense was sound and well within the realm of effective assistance of counsel. However, it seems to cut against the grain that Rensch based at least some of his trial defense on the bite marks. It can be concluded from Rensch's remarks that the bite marks played a significant role in the case.

Rensch made no attempt to hire an expert, even though he referred to the marks as bite marks. It also should be noted that Reay continuously denied killing the victim and never told Rensch that he made the dental marks. It follows that Rensch made a conscious decision to base at least some portion of his defense on what he believed to be "junk science."

Rensch spent considerable time at the habeas hearing discussing how much he knew about dental odontology, but he never once mentioned the state's position (at the time of the criminal trial and investigation). At a minimum, it is routine practice for an attorney to consult with experts. Rensch could have requested a forensic dental expert and had the expert at least look at the photos and the give some informed opinion. This could have been done on an ex-parte basis which would have alleviated Rensch's concerns about tipping off the state to his theory of the case. If the odontologist would have concluded the bite marks were made by the daughter, clearly, that would have resulted in, at least, a battle of the experts regarding he validity of the science, all occurring in front of a jury that need only find reasonable doubt. On the other hand, if the odontologist concluded that the marks were not bite marks, Rensch would have been able go to trial just as he did, and stay within the the realm of ambiguity. Rather than consult with an actual expert, Rensch relied upon his preconceived notions about forensic dental experts, even though he himself is not a dentist and he has never used a dental expert. Now, on this stage, Rensch and the State unite in their opinions about forensic dental experts.

Rensch had the ability to request a dental expert, because he failed to do do, Reay is left without knowing. This makes Reay's case difficult, however, it still seems hard to conceive that Rensch based at least some of his defense on the "bite marks."

Regarding the DNA, the state chooses to address alternative reasons for the daughter's blood to show up on the towel, rather than looking that the reasons why Rensch failed to hire an expert witness. The aspect of the case was far less of a surprise tactic than the bite marks because the state tested the towel. Again, Rensch could have hired an expert to confirm or dispel the presence of the unknown DNA. In fact, the state argues numerous reasons why the DNA of the daughter would be on the towel, which would tend to link the daughter to the murder. In this case, the state seems to concede that the DNA from the daughter would likely be on the towel.

The state prefers to piecemeal the issues in this habeas case and reason that no one issue or turn of events would have changed the outcome of the trial. However, if the bite marks could have been confirmed, coupled with the fact that the daughter's DNA is likely on the towel, it would have undoubtedly made Reay's case stronger. The state makes no mention of the effectiveness of Rensch's representation on this issue and concedes that it is likely the daughter's DNA is on the towel.

Lastly, regarding the tooling expert, Rensch by his own words indicates that the tool marks were problematic, including the idea that the number of slits in the tarp appeared to correlate to the number of stab wounds. However, Rensch himself testified that he was never able to locate the three stabs in the row. He testified:

> But when I looked at the tarp there was never a spot where there were three or four stabs that were just, bing, bing, bing, bing, just like you saw on Tami Reay's chest.

HT 48:22-25. The state argues on page 22 of their brief that "[Reay] covered Tami with a tarp to transport her and/or minimize the transfer of her DNA to himself, she fought back, stabbed her 16 more times in the torso through the tarp and into her T-shirt."

Rensch's analysis of the 3-4 slits in a tight row, and the state's version of the events at the criminal trial and in their brief do not make sense when taken together. On one hand, the state argues that the holes were clearly caused by the murder weapon penetrating the tarp, but on the other hand, Rensch said he could not find on the tarp where the three-four slits could be found. Rensch himself identified a major problem with the state's case, but rather than confront it head on by exploring alternative theories for the the origination of the holes, he chose to remain silent. Even explaining one or two holes could take way from the "coincidence" that the 16 alleged holes in the tarp matched the 16 stabs in the torso. Rather than confront this case with science or facts, Rensch chose to ignore or gloss over the tarp because the evidence was very damaging in his eyes. Rensch testified:

> Well, I don't remember that. And I don't remember the number of holes in the tarp corresponding with the number of holes in the shirt. But yeah, Braley, I mean everything having to do with the stabbing was damaging in this case to Brad Reay. I mean it was damaging.

HT 49: 4-8.

Although Rensch identified issues with the tarp, he testified that he could "could care less about the tarp." HT 94:12. The Appellant submits that this is the wrong attitude for defense counsel to have, especially once defense counsel learned of inconsistencies with the state's case. Reay did mention alternative causes for holes in the tarp, but Rensch ignored the tarp.

Overall, Rensch had three distinct areas where he could have bolstered Reay's case. While the dental results are still a bit up in the air because no expert was ever hired, the DNA and the tool mark issues are right in front of us. The state concedes that it would be highly likely that the daughters DNA would be on the towel. Why would Rensch not want that information if it was so likely? Similarly, with regard to the tool marks, even Rensch could see inconsistencies in the state's argument, but he chose to care less.

Taken together, the failure of Rensch to hire appraise experts and investigate the case certainly caused Mr. Reay to proceed to trial with ineffective assistance of counsel. For that reason, Reay was convicted, and now sits a life sentence as a result of Rensch becoming his own dental, DNA, and tool mark expert. He had ample access to these experts but chose otherwise and deprived Reay of effective representation. Had these experts been hired, and the real truth investigated, the result of the trial would have been different.

CONCLUSION

Wherefore, Appellant respectfully requests that the court grant the relief sought in Appellant's brief.

REQUEST FOR ORAL ARGUMENT

Petitioner/Appellant respectfully requests oral argument on these issues.

Respectfully submitted this 6th day of May 2019.

_____
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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL §15-26A-66(b) using Times New Roman font, 12 point type.
2. I certify that Appellant's Brief contains 1,415 words and 23,436 characters (with spaces).
3. I certify that the word processing software used to prepare this brief is Apple Pages, 2018. The file will be converted to Microsoft Word for submission to the Court.

Dated this 6th day of May, 2019.

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Robert T. Konrad
Attorney for Appellant/Petitioner

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The undersigned attorney hereby certifies that the foregoing Reply Brief of Appellee, was sent by e-mail for electronic filing and service to:

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on May 6, 2019.

On this same day, the original and two copies of the Reply Brief of Appellee were mailed, by U.S. mail, postage prepaid, to:

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