APPELLANT'S BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 26764

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

RODNEY SCOTT BERGET,

Defendant and Appellant.

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

HONORABLE BRADLEY G. ZELL
CIRCUIT JUDGE

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Notice of Appeal Filed July 18, 2013.

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APPELLANT'S BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. No. 26764

RODNEY SCOTT BERGET,

Defendant and Appellant.

PRELIMINARY STATEMENT

All references in this brief to the Settled Record of this action are referred to as SR, followed by the page number. The April 29, 2011, Arraignment is referred to as AR. The November 17, 2011, Change of Plea Hearing is referred to as PL. The February 6, 2012, portion of the Presentence Hearing is referred to as TE. The transcript of the April 16, 2013, Motion Hearing will be referred to as T. The page number of the transcript cite will follow the hearing designation. Findings of Fact will be abbreviated as FF, and Conclusions of Law will be abbreviated as CL.

JURISDICTIONAL STATEMENT

A Complaint charging defendants Rodney Berget and Eric Robert with two counts of first degree murder was filed with the Clerk of Courts for Minnehaha County and the Second Judicial Circuit on April 13, 2011 (SR 6). An Indictment charging first degree murder, felony murder (first degree) and simple assault on a Department of Corrections employee was returned and filed on April 26, 2011 (SR 19). A Part II Information alleging Berget to be a habitual offender was filed on the same date (SR 22).

On April 29, 2011, Defendant Berget was arraigned before Circuit Judge Joseph Neiles, and entered pleas of not guilty to all charges (AR 11). On November 17, 2011, against the advice of counsel [PL 2-3, 8], Berget entered a plea of guilty to the charge of first degree murder (PL 9).

A presentence hearing, pursuant to SDCL 23A-27A-2 and 23A-27A-6, was conducted January 30 through February 2, 2012. On February 6, 2012, Circuit Judge Bradley G. Zell orally announced that he was imposing the death penalty (TE 35). The Judgment of Conviction and Sentence (SR 316) and Warrant for Execution (SR 318) were filed on February 23, 2012.

Notice of Appeal (SR 334) was filed on March 23, 2012.

Oral argument was held before this Court in Sioux Falls, South Dakota, on October 1, 2013, the same day Appellant's Reply Brief was to have been due to be filed with the Court. On January 2, 2013, this Court affirmed in part and reversed in part and "remand[ed] for resentencing . . .." State v. Berget, 2013 SD 1, ¶118, 86 N.W.2d 1.

A Petition for Rehearing was filed with this Court on January 22, 2013. The Order Denying Petition Rehearing was issued and filed on February 12, 2013.

Defendant Berget filed a Demand for Hearing (SR 363) on February 21, 2013. A hearing was held on that request on April 16, 2013, before the Honorable Bradley Zell.

On May 7, 2013, without further hearing and without Defendant's presence in court, Judge Zell filed an Amended Pre-Sentence Hearing Verdict (SR 453) and re-imposed the death sentence on Mr. Berget. On the same date, Judge Zell filed an Order Denying Post-Remand Demand and Motions (SR 455).

On June 24, 2013, an Amended Judgment of Conviction and Sentence (SR 502, Exhibit A) and a Warrant of Execution (SR 504) were filed with the Court. On August 5, 2013, this Court entered an Order for Stay of Execution of the death sentence pending this appeal. It is from the Amended Judgment of Conviction and Sentence that Berget appeals.

STATEMENT OF ISSUES

I. WHETHER APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT NEW MITIGATION EVIDENCE UPON RE-SENTENCING.

Trial Court held in the negative.

Most Relevant Cases:

Lockett v. Ohio, 438 U.S. 586 (1978)

Skipper v. South Carolina, 476 U.S. 1 (1986)

Davis v. Coyle, 475 F.3d 761 (6th Cir. 2007)

II. WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT WITHOUT APPELLANT'S PRESENCE IN THE COURTROOM AND WITHOUT AFFORDING APPELLANT HIS RIGHT OF ALLOCUTION.

Trial Court handed down the sentence by signing and filing an Amended Judgment and Sentence.

Most Relevant Cases:

Kost v. State, 344 N.W.2d 83 (S.D. 1983)

State v. Garber, 2004 SD 2, 674 N.W.2d 320

United States v. Blake, No. 12-3176 (7th Cir. February 26, 2013)

III. WHETHER THE TRIAL COURT ERRED IN NOT RECUSING ITSELF PRIOR TO RE-SENTENCING.

Trial Court held in the negative.

Most Relevant Cases:

State v. Nelson, 1998 SD 124, 587 N.W.2d 439

State v. Page, 2006 SD 2, 709 N.W.2d 739

United States v. DeMott, 513 F.3d 55 (2d Cir. 2008)

STATEMENT OF THE CASE

The trial court was the Honorable Bradley G. Zell. A guilty plea to first degree murder was accepted by the court on November 17, 2011. A presentence hearing was held January 30 through February 2, 2012, with a verdict of death being pronounced on February 6, 2012.

The Judgment and Conviction and Sentence (SR 316) and Warrant of Execution (SR 318) were signed by Judge Zell and filed on February 23, 2012. Defendant Berget filed his Notice of Appeal (SR 334) on March 23, 2012, appealing his Judgment and Sentence, and requesting the statutorily mandated review under SDCL 23A-27A-9 be consolidated with the appeal pursuant to SDCL 23A-27-10.

This Court reversed the Judgment of the trial court in part and remanded for re-sentencing. A Petition for Rehearing was filed with his Court on January 22, 2013. An Order Denying Petition for Rehearing was issued and filed on February 12, 2013.

On February 15, 2013, Appellant sent Judge Zell an informal request to recuse himself (Exhibit E) pursuant to SDCL 15-22-21.1. When Judge Zell denied the informal request, Berget filed an Affidavit for Change of Judge (SR 435) on February 22, 2013. An Order denying that request (SR 448, Exhibit F) was signed by the Honorable Larry Long,

Presiding Judge of the Second Judicial Circuit on March 8, 2013, and filed on the same date.

Berget filed a Demand for Hearing (SR 363) on February 21, 2012. On May 7, 2013, Judge Zell filed an Amended Pre-Sentence Hearing Verdict (SR 453), and an Order Denying Post Remand Demand and Motions (SR 455). On May 21, 2013, Berget filed Defendant's Objections to State's Proposed Findings of Fact and Conclusions of Law Upon Re-Sentencing (SR 461), and Defendant's Proposed Findings of Fact and Conclusions of Law as to Recusal and Demand for Hearing (SR 458).

On June 24, 2013, an Amended Judgment of Conviction and Sentence (SR 502) was filed with the Court. It is from that Amended Judgment and Sentence that Berget appeals.

STATEMENT OF THE FACTS

The facts of the homicide that is the subject of this action are not germane to the legal issues in this appeal, and have been adequately addressed by the parties and this Court in the previous appeal. State v. Berget, 2013 SD 1, 86 N.W.2d 1.

The procedural facts which give rise to the legal issues raised in this appeal will be discussed in the Arguments below.

ARGUMENT

I. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT NEW MITIGATION EVIDENCE UPON RE-SENTENCING.

This Court ruled that the trial court committed error by using a psychiatric report that was not offered at the sentencing hearing "as evidence weighing against the *mitigating evidence available*." Id. at ¶116 (Emphasis added.) This court went on to state:

> Due to the importance of this information, we cannot determine that the circuit court's error in utilizing Berget's statement to Dr. Bean for the purpose of diminishing the value of Berget's acceptance of responsibility was harmless beyond a reasonable doubt. We therefore *reverse Berget's sentence and remand for resentencing* without the use of or consideration of Dr. Bean's report . . ..
>
> Pursuant to SDCL 23A-27A-13(2), we remand to the circuit court for the purpose of *conducting a sentencing* without this error. Per this statute, it is to be conducted on the existing record without reference to, or considering of, the report of Dr. Bean.

Id. at ¶118, 120. (Emphasis added.)

Berget submitted a Demand for Hearing to consider mitigating evidence that was not available to present to the court at the pre-sentence hearing. A hearing was held on that Demand for Hearing.

At that hearing, Berget made an offer of proof as to what evidence he would intend to introduce at a re-

sentencing hearing (T 9-10, 25). That offer of proof demonstrated that Berget had strong mitigating evidence of the positive impact he has had on his son and his son's family since the original death sentence was handed down. That evidence would also rebut factual assertions that the State had made in paragraph #3 of its Response to Demand for Sentencing Hearing (SR 442), which according to this Court's definition "record," as including "all the filed papers in the case," (Id. at ¶43) was part of the record that Judge Zell could consider on re-sentencing.

The trial court was somewhat perplexed by this Court's remand language. That confusion is understandable in that this Court stated it was remanding this matter pursuant to SDCL 23A-27A-13(2), but SDCL 23A-27A-13 deals only with cases that are remanded pursuant to this Court's authority to conduct proportionality review. On all the proportionality issues raised by Berget in the initial appeal, this Court affirmed.

This Court made the distinction between proportionality review and other appeal issues(Id. at ¶4) when it noted that in reviewing death sentences, the Court has to make three separate determinations, the third of which is "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. .

..” The language of SDCL 23A-27A-13 makes it clear that it only applies to this Court’s proportionality review of a death sentence. That issue is addressed in paragraphs 18-31 of the earlier decision and the proportionality of the sentence was upheld by this Court.

This Court stated, “We therefore reverse Berget’s sentence and remand for resentencing . . .,” (Id. at 118) and reiterated the matter was being remanded “for the purpose of conducting a sentencing.” (Id. at 120) The trial court’s narrow construction of this Court’s phrase “on the existing record” effectively prevented a re-sentencing that could pass constitutional muster. Id.

Berget pointed out that Lockett v. Ohio, 438 U.S. 586 605 (1978) held that the decision on whether to impose the death penalty must be an “individualized decision . . . [that treats the] defendant in a capital case with that degree of respect due to uniqueness of the individual. . ..”

This Court has held that determination must be made “on the basis of the character of the individual and the circumstances of the crime.” State v. Rhines, 1996 SD 55, ¶80, 548 N.W.2d 415, citing Tuilaepa v. California, 512 U.S. 967 (1994). Furthermore, the sentencing court or jury is to consider “all evidence concerning any mitigating

circumstances." Moeller v. Weber, 2004 SD 110 ¶43. See also, State v. Rhines, supra; Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990); State v. Piper, 2006 SD 1, ¶32, 709 N.W.3d 783; State v. Page, 2006 SD 2 ¶72, 709 N.W.2d 739, 763; SDCL 23A-27A-2(4).

In Skipper v. South Carolina, 476 U.S. 1, 8 (1986), the United States Supreme Court found it to be error to exclude mitigating evidence of how a defendant conducted himself in the seven months between the offense and the trial, ruling that a defendant must be "permitted to present any and all mitigating evidence that is available."

That rationale was applied by the Sixth Circuit in Davis v. Coyle, 475 F.3d 761, 774 (6th Cir. 2007) to a re-sentencing after reversal of the original death sentence: "[A]t resentencing, a trial court must consider any new evidence that a defendant has developed since the initial sentencing hearing." In Davis the trial court (a three-judge panel under then-existing Ohio law) sentenced Davis to death. The Ohio Supreme Court vacated the sentence and remanded the case for re-sentencing. Id. at 763-764. The sentencing was vacated because the sentencing court (or panel) "improperly considered non-statutory aggravating circumstances." Id. at 765. "Relying solely upon the record from the first sentencing hearing . . ." the trial

court re-imposed the death sentence. At the re-sentencing the defense was not allowed to present "testimony concerning this exemplary behavior on death row between the two sentencing hearings." Id. at 770. The mitigating circumstances in Davis were far less powerful than those Berget had attempted to introduce before re-sentencing.

The Davis court found as persuasive authority the United States Supreme Court decision of Ayers v. Belmontes, 549 U.S. 7, 127 S.Ct. 469, 166 L.Ed.2d 334 (2006), that a capital murder defendant must be allowed to introduce, as mitigation, evidence that he would lead a constructive life in prison in the future. If further projected conduct is admissible, positive mitigation that has already happened at the time of re-sentencing must be admissible.

Finally, the Davis court relied on a series of ineffective assistance of counsel cases where courts have found it to be defense counsel's duty, upon re-sentencing, to present "newly available" mitigation evidence. Davis v. Coyle, 475 F.3d at 774, citing Robinson v. Moore, 300 F.3d 1320, 1345-48 (11th Cir. 2002); Smith v. Stewart, 189 F.3d 1004, 1008-14 (9th Cir. 1999).

In Spaziano v. Singleton, 36 F.3d 1028 (11th Cir. 1994), a death sentence was reversed for reasons which included, "[T]he sentencing judge had considered

confidential information and a presentence investigation report without first giving the defense an opportunity to respond . . .," a situation strikingly similar to the one at hand. The Spaziano court, applying Lockett, supra, ruled that keeping out new mitigation evidence violated Lockett's rule; in a capital case, a sentencing judge (or jury) cannot be precluded from considering any mitigating evidence. Spaziano, 36 F.3d at 1032.

A series of comments made by the trial court indicate that the court thought it *should* or *would* consider the new mitigating evidence, if only it *could*. However, the trial court felt constrained by its interpretation of the phrase "on the record" in this Court's previous decision. The court below stated, "This Court doesn't have the jurisdiction to go outside what the South Dakota Supreme Court tells it." (T 20). The trial court went on to say "[I]f this opinion indicated that this matter is to be sent back for a new sentencing hearing . . ., then it would be clear what the Supreme Court's intent was but they did not say that." (T 20).

Despite the fact this Court did "remand for re-sentencing" and spoke of "conducting a sentencing without this error," the trial court narrowly interpreted this Court's "on the record" comment as precluding any new

mitigation evidence, even though, as indicated in Davis, Ayers, and Spaziano, the consideration of new mitigation evidence was constitutionally mandated. The trial court erred in considering only the evidence on the record at that point minus Dr. Bean's extra-record psychological evaluation.

Counsel pointed out to the trial court this Court's decision in Junge v. Jerzak, 519 N.W.2d 29, 32 (S.D. 1994), holding that a trial court has the inherent power to grant a new hearing or new trial, but to no avail. In this case, the trial court knew of something of which the appellate court was unaware at the time of its decision, new evidence of mitigation. The trial court had the inherent power to protect Berget's rights under the Fifth, Eighth, and Fourteenth Amendments, and Article VI, Sections 2 and 23 of the South Dakota Constitution, but declined to exercise that power, choosing instead to read this Court's language as precluding consideration of new mitigation evidence.

Judge Zell even seemed to concede the legitimacy of Berget's position (T21):

> And I understand *your argument* and they *may be well* argued and *supported*, but that's not what the Supreme Court entered an order for me. They entered an order for me, as set forth in the language here, to consider on remand on the record all the information this Court had considered up to the point it entered its verdict

without consideration of Dr. Bean.

(Emphasis added.) But the trial court obviously felt that this Court forbade him to consider new evidence of mitigation, even though this Court did not know of its existence at the time it rendered its decision. The trial court's frustration became evident when it stated, "[I]n point of fact, based on the decision of the South Dakota Supreme Court I was hoping that they would grant your petition for a rehearing so that there may be more direction to this court . . .." (T 22).

The trial court finally concluded, "[T]he record from the Supreme Court doesn't allow me to go forward and consider new things that have been brought up here . . .." (T 24).

This Court's opinion never contemplated the existence of new mitigation evidence, so it could not have prohibited its consideration. Such an implied prohibition violates both the due process clause and the constitutional protection against cruel and unusual punishments.

II. THE TRIAL COURT ERRED IN SENTENCING APPELLANT WITHOUT APPELLANT'S PRESENCE IN THE COURTROOM AND WITHOUT AFFFORDING APPELLANT HIS RIGHT OF ALLOCUTION.

A. Berget had a statutory right to be present in the courtroom at the time of re-sentencing.

SDCL 23A-39-1 states, "*A defendant shall be present* at his arraignment, at the time of his plea, at every stage of his trial including the impaneling of the jury and the return of the verdict, and *at the imposition of sentence*, except as provided by §§23A-39-2 and 23A-39-3." (Emphasis added.) The exceptions are for absconding, but, only in *noncapital cases*, courtroom misconduct, or if the defendant is a corporation. The statute is clear on its face. None of the exceptions apply.

The trial court hinted at the motion hearing (T 26-27) that he was considering issuing a sentence without even holding a hearing for re-sentencing. Sensing that, when filing Objections to the State's Proposed Findings of Fact and Conclusions of Law, Berget objected to what apparently was going to be an overt violation of SDCL 23A-39-1 at Objection #3. (SR 459)

Refusal of the Berget's right to be present at this critical life or death phase of a criminal proceeding was not only a statutory violation, it was also a constitutional violation. Article VI, Section 7 of the South Dakota Constitution states, "In all criminal prosecutions the accused shall have the right to defend *in person* and by counsel . . .." (Emphasis added.)

In Kost v. State, 344 N.W.2d 83, 85 (S.D. 1983) the

Court, citing State ex rel. Kotilinic v. Swenson, 99 N.W. 1114 (S.D. 1904), stated, "Where a felony is charged, the defendant['s] . . . personal presence is not necessary at times other than those prescribed by statute." The Court then cited 23A-39-1, which states a defendant must be present "at the imposition of sentence." The judgment was affirmed in Kost because the discussions in chambers that Kost did not attend were determined not to be prejudicial error. Exclusion from a chambers conference about witness sequestration, however, is a far cry from sentencing someone to death.

Rule 43 of the Federal Rules of Criminal Procedure, after which SDCL 23A-39-1 was modeled, has a similar requirement that "[T]his defendant's presence is required at . . . sentencing." The Eighth Circuit has held that absence from proceedings involving "only a conference or hearing on a question of law" does not constitute a Rule 43 violation, United States v. Clark, 409 F.3d 1039 (8th Cir. 2005). But the stakes here were much higher, and the proceeding was not a mere "conference or hearing on a question of law." Berget was available, he had not been disruptive in the courtroom, and the factual and legal issues to be determined arose in the context of a death penalty case.

The Second Circuit has expressly recognized that "a defendant has a constitutional right to be present [during resentencing], because technically a new sentence is being imposed in place of a vacated sentence." United States v. Arrous, 320 F.3d 355, 359 (2d Cir. 2003)(citation omitted).

In Ex Parte De Bruce, 651 So.2d 624, 630, (Ala. 1994), the Alabama Rule requiring a defendant's presence was modeled on Federal Rule 43. In that case, the court held that the trial did not begin until the jury was sworn so that defendant's absence was not during his trial. The court did note, however, that there are only two situations where a defendant cannot even waive his right to be present, and one of those "is where the defendant is charged with a violation of an offense punishable by death."

B. Berget was denied his right of allocution.

Any defendant has the right of allocation at sentencing. SDCL 23A-27-1; State v. Garber, 2004 SD 2, ¶18, 674 N.W.2d 320. It is reversible error requiring remand for re-sentencing to not allow a defendant this right. United States v. Washington, 255 F.3d 483, 485 (8th Cir. 2001); State v. Wallace, 2013 Ohio 2871, ¶6 & 8 (Ohio App. 2013).

That right of allocution also exists when one is resentenced. In United States v. Blake, No. 12-3176 (7th Cir. February 26, 2013), the case was remanded for re-sentencing after United States v. Booker, 543 U.S. 220 (2005) was handed down. The Seventh Circuit, "once again remanded the case for re-sentencing after concluding that Blake had not been given his right of allocution during his re-sentencing hearing." (Id. at p.2).

Inherent to one's right to allocution at re-sentencing is one's right to be present, in open court, when re-sentenced. Due to the procedure utilized by the trial court, Berget was denied both his right to allocution and his right to be personally present at sentencing.

That error, arising in a context where sentence was imposed by Judge Zell outside the presence of the defendant, his attorney, and the prosecutor, was not harmless. As the Second Circuit noted in remanding a case for a second re-sentencing, "Since a new sentence was imposed out of the presence of the defendant, his lawyer, and the prosecutor, we cannot confidently decide there has been no harm." United States v. DeMott, 513 F.3d 55, 58 (2d Cir. 2008).

The statute is clear. The state constitution is clear. A defendant must be personally present when he is

sentenced, and this defendant was sentenced to death by a judge signing a document in his office and the Clerk of Courts filing it.

III. THE TRIAL COURT ERRED IN NOT RECUSING ITSELF PRIOR TO RE-SENTENCING.

Counsel for Berget filed an Affidavit for Change of Judge on February 22, 2013. The reasons are set out in the Affidavit (SR 435). Berget is fully aware of SDCL 15-12-24, and concedes that he had previously submitted to the jurisdiction of the trial court by electing to have Judge Zell preside over the presentence hearing.

Berget asserts his right to have a change of judge, however, pursuant to the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and Article VI, Section 2 of the South Dakota Constitution in that the due process clause encompasses the right to a fair trial. State v. Nelson, 1998 SD 124, ¶14, 587 N.W.2d 439, 445.

In State v. Page, 2006 SD 2, ¶14, 709 N.W.2d 739, 749, this Court held "that a defendant's opportunity to disqualify a judge is statutory . . . and not a constitutional right, except as it may be implicit in a right to a fair trial." Citing State v. Hoadley, 2002 SD 109, 651 N.W.2d 249 and State v. Goodroad, 1997 SD 46, 563

N.W.2d 126.

This case differs from the Hoadley, Page, and Piper trilogy of cases. All three of those defendants fought for their respective lives at their presentence hearings. Any decision the trial judge made about the facts of the case were after those facts were challenged and contested. Here, the first defendant to be sentenced, Mr. Robert, challenged nothing. He wanted to die. Judge Zell made Findings of Fact in that setting that he merely parroted in the subsequent Findings issued in Berget's case. (See Appellant's Brief, pp. 11-13 in Appeal #26318 for a comparison of the factual findings in this case.)

The similarity between the trial court's Findings and Conclusions at the original sentencing and those submitted on remand are set forth in Defendant's Objections, Objection #1 (SR 460), and Objection #8 to the original Findings and Conclusions (SR 329). Again, the Court, in determining whether someone lives or dies, simply "cut and pasted." To see how little consideration the trial court gave this matter on remand, one need look no further than Findings of Fact #62 (SR 303) and Findings of Fact #82 (SR 302), where the Court repeats the same grammatical and spelling errors that were objected to the first time (Objection #21, SR 327, and Objection #30, SR 326) which

objections were renewed in Berget's Objections dated May 31, 2013 (SR 461). For these reasons, the denial of the Affidavit for Change of Judge constituted a constitutionally prohibited due process violation.

Berget therefore requests that if this case is again remanded for re-sentencing, the criteria for deciding whether to reassign a case on remand, enunciated in United States v. Robin, 553 F.2d 8, 10 (2nd Cir. 1977), cited with approval in United States v. Lyon, 488 F.2d 581, 583 (8th Cir. 1979), should be considered:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous,
> (2) whether reassignment is advisable to preserve the appearance of justice, and
> (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Id.

CONCLUSION

Because the death sentence in this case was re-imposed in violation of Mr. Berget's constitutional right to present new mitigation evidence upon re-sentencing, and because Mr. Berget was denied his statutory and constitutional right to be present at his sentencing, the death sentence should be vacated and the matter remanded to the circuit court for re-sentencing, with instructions as

to whether that re-sentencing should be before the same or a different judge.

REQUEST FOR ORAL ARGUMENT

Counsel for Rodney Berget respectfully requests twenty minutes for oral argument.

Respectfully submitted this _____ day of October, 2013.

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APPENDIX

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26764

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APPEAL FROM THE CIRCUIT COURT
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MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE BRADLEY G. ZELL
Circuit Court Judge

APPELLEE'S BRIEF

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RODNEY SCOTT BERGET,

Defendant and Appellant.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to SDCL 23A-32-2 and SDCL 23A-32-9.

PRELIMINARY STATEMENT

Citations to Berget's plea and five-volume sentencing hearings will be cited as PLEA and SENTENCING I-V respectively with jump cites to the corresponding page/line of each transcript. The trial court's amended findings of fact and conclusions of law, attached in the appendix hereto, will be referenced as FOF/COL followed by a jump cite to the appropriate page/paragraph. The April 16, 2013, remand hearing will be cited as REMAND with a jump cite to the page/line. Trial exhibits are referenced by their number/letter as EXHIBIT.

STANDARD OF REVIEW

This court reviews alleged violations of constitutional law *de novo. State v. Berget,* 2013 SD 1, ¶ 38, 826 N.W.2d 1, 15.

STATEMENT OF THE LEGAL ISSUES AND AUTHORITIES

WAS BERGET ENTITLED TO PRESENT ALLEGEDLY NEW MITIGATING EVIDENCE AT HIS LIMITED RESENTENCING?

Skipper v. South Carolina, 106 S.Ct. 1669 (1986)

State v. Chinn, 709 N.E.2d 1166 (1999), *certiorari* denied *Chinn v. Ohio,* 120 S.Ct. 944 (2000)

State v. Roberts, --- N.E.2d ---, 2013 WL 5746121 (Ohio)

Burch v. State, 522 So.2d 810 (1988)

The trial court excluded Berget's proffered evidence of a newly-formed relationship with his son and his son's family.

WAS BERGET ENTITLED TO BE PRESENT AND REALLOCUTE AT A HEARING REIMPOSING HIS SENTENCE?

State v. Roberts, --- N.E.2d ---, 2013 WL 5746121 (Ohio)

Rust v. United States, 725 F.2d 1153 (8th Cir. 1984)

The trial court redetermined Berget's sentence on the existing record from the point of error consistent with this court's remand instructions.

WAS THE TRIAL JUDGE REQUIRED TO RECUSE HIMSELF PRIOR TO RESENTENCING BERGET ON REMAND?

Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147 (1994)

State v. Page, 2006 SD 2, 709 N.W.2d 739

State v. Hoadley, 2002 SD 109, 651 N.W.2d 249

The trial court denied Berget's motion to recuse the sentencing judge.

STATEMENT OF THE CASE

Rodney Scott Berget pled guilty to the first degree murder of corrections officer Ron Johnson. PLEA at 3/12-18, 6/15-25, 9/14-24. Berget was sentenced to death for this crime after a four-day court trial. Berget appealed his sentence on twelve grounds. This

court affirmed on eleven of Berget's twelve claims of error. However, this court vacated the death sentence out of concern that the trial judge may not have given proper mitigating weight to Berget's acceptance of responsibility because of a related reference to Dr. David Bean's forensic competency report in its sentencing verdict. SENTENCING V at 27/24; *Berget,* 2013 SD 1 at ¶ 118, 826 N.W.2d 1 at 37.

To correct this error, this court remanded with instructions to conduct a limited resentencing on the existing record without consideration of the Bean report and with due consideration to Berget's acceptance. *Berget,* 2013 SD 1 at ¶ 119-20, 826 N.W.2d at 37. Consistent with this court's instructions, the trial court held a limited resentencing hearing, heard motions and argument from Berget's counsel, and again sentenced Berget to death.

STATEMENT OF FACTS

The underlying facts of the homicide and original sentencing are addressed in this court's prior decision. *Berget,* 2013 SD 1 at ¶¶ 2-10, 826 N.W.2d at 8-10. To the extent particular facts bear on the analysis of the legal issues, the state will refer to those facts in the body of the argument.

ARGUMENT

Berget argues for the reversal of his death sentence on three grounds: (1) he was denied the right to present "new" mitigating evidence at resentencing; (2) he was denied the right to attend and reallocute at resentencing; and (3) the original sentencing judge should have recused himself from resentencing Berget. The major premise of Berget's claims of error is flawed, however, because this court did not order a *full* resentencing proceeding.

This court's remand instructions were clear. To correct the error found in *Berget,* this court "remand[ed] for resentencing without the use of or consideration of Dr. Bean's report." *Berget,* 2013 SD 1 at ¶ 119-20, 826 N.W.2d at 37. SDCL 23A-32-19 gives this court plenary power to fashion appropriate remedies for trial error. In addition, SDCL 23A-27A-12 gives this court specific authority to independently review a death sentence. In the event of impropriety in a death sentence, SDCL 23A-27A-13(2) expressly authorizes this court to "[s]et the sentence aside and remand the case for resentencing by the trial judge *based on the record* and argument of counsel." SDCL 23A-27A-13(2)(emphasis added).

Consistent with its broad and specific statutory powers, this court ordered a limited resentencing "to be conducted on the existing record." *Berget,* 2013 SD 1 at ¶ 119-20, 826 N.W.2d at 37. Citing the need to offer "new" mitigating evidence, Berget moved to reopen the record of his original sentencing on remand. REMAND at 3/9-14, 10/14. The trial

court, however, properly declined Berget's invitation to deviate from this court's clear instructions and resentenced Berget on the existing record without reference to the Bean report. REMAND at 18-20.

At the outset, it is useful to define terms as they are used in this brief:

> FULL RESENTENCING – "Full resentencing" means a proceeding which takes place when an original sentencing hearing is tainted by structural error or improper exclusion of mitigating evidence. The remedy for this error is remand for a full resentencing hearing.
>
> LIMITED RESENTENCING – "Limited resentencing" means a proceeding which is required when a sentencing judge commits a decisional error *after* conducting an error-free sentencing hearing. Error of this sort can be corrected by remand to the sentencing judge to determine the sentence anew on the record before it but without the error.

SDCL 23A-32-19 and SDCL 23A-27A-13(2) authorize this court to order either a full or limited resentencing as appropriate to the case. For example, in *Piper v. Weber,* 2009 SD 66, ¶ 21, 771 N.W.2d 352, 360, this court permitted a "full resentencing" after finding Piper's pre-hearing waiver of his right to jury sentencing invalid. Such an error could be corrected only by giving Piper the option to elect a full jury resentencing.

In this case, however, this court ordered a "limited resentencing" because the error that occurred during the trial court's post-hearing sentence determination could be readily corrected by the original fact finding court "on the existing record." *Berget,* 2013 SD 1 at ¶ 118-20, 826 N.W.2d at 37. Thus, no full resentencing was required.

I. BERGET WAS NOT ENTITLED TO INTRODUCE "NEW" MITIGATING EVIDENCE DURING THE REDETERMINATION OF HIS SENTENCE ON REMAND

Berget argues that *Skipper v. South Carolina,* 106 S.Ct. 1669 (1986), gives capital defendants such as himself an absolute right to present "new" mitigating evidence at any resentencing. Berget's argument is flawed in two significant ways: (1) his case was not remanded for a full resentencing as in *Skipper* and (2) his proffered mitigating evidence was not "new."

The "new" mitigating evidence Berget sought to introduce was information about how Berget formed a close relationship with his son after he was sentenced to death. However, Berget became a father 31 years ago. Because of his criminal lifestyle, Berget "assumed that his son's mom and his son did not want the embarrassment . . . that go[es] along with a father in prison." REMAND at 9/19. Berget had no contact with his son from infancy to adulthood. Consequently, Berget's "son did not know until he was an adult" – until after notoriety from Berget's capital murder charges swept through the Sioux Falls community – that Berget was his father. REMAND at 9/24; HEARING DEMAND AFFIDAVIT, Appendix at 1, ¶ 3; SENTENCING V at 35/8.

According to Berget, it was "a revelation" when his son contacted his lawyers three days after he was sentenced to death to arrange a rapprochement with his father. REMAND at 9/11, 10/6. From that point forward, we are told that Berget has formed meaningful

relationships with his son, his son's wife, and his son's children. REMAND at 10/13.

Citing *Skipper,* Berget moved to reopen the original sentencing hearing record on remand so that he could introduce "new" mitigating evidence of the "positive impact" Berget has had "on his son and his son's family, even from the environment of incarceration" during the last year. REMAND at 10/14. However, *Skipper* did not require the court to take Berget's proffered "new" evidence on remand for three reasons: (a) because this case was not remanded for a full resentencing, (b) because evidence about Berget's son was not relevant in light of evidence about his son already in the original sentencing record and other considerations, and (c) because Berget waived introducing further evidence about his son at his original sentencing hearing and on remand.

a. This Court Remanded This Case To The Trial Court For A Limited Resentencing On The Existing Record, Not A Full Resentencing

Berget gives the term "resentencing" broad meaning in order to fit the square peg of his argument into the round hole of *Skipper*. Berget refuses to recognize the distinction between a full and limited resentencing. Since this court did not order a full resentencing as was done in *Skipper,* that case does do not control here.

In *Skipper,* the defendant was convicted of capital murder and rape after a jury trial. The state sought the death penalty in part because of the danger Skipper "would likely rape other prisoners" if allowed to live.

Skipper, 106 S.Ct. at 1670. To rebut this allegation, Skipper sought to introduce evidence from his wife, two jailers, and a friend that Skipper had "made a good adjustment" to incarceration during the 7½ months he was jailed between the time of his arrest and his trial. *Skipper,* 106 S.Ct. at 1670. The trial judge admitted the testimony of Skipper's wife, but excluded the testimony of the two jailers and the friend.

The *Skipper* court ruled that excluding this evidence from the sentencing hearing had been constitutional error inconsistent with its holdings in *Lockett v. Ohio,* 98 S.Ct. 2954 (1978), and *Eddings v. Oklahoma,* 102 S.Ct. 869 (1982). Both *Lockett* and *Eddings* generally state that a sentencer may not be precluded from hearing, or refuse to hear, mitigating evidence concerning any aspect of a defendant's character, record, or circumstances of his offense that a defendant proffers as a basis for a sentence less that death. *Lockett,* 98 S.Ct. at 2964; *Eddings,* 102 S.Ct. at 874.

In light of *Lockett* and *Eddings,* the *Skipper* court ruled that evidence that the defendant could "be trusted to behave if he were simply returned to prison" was relevant both as grounds for a sentence less than death and as rebuttal of the prosecutor's emphasis on "the dangers [Skipper] would pose if sentenced to prison." *Skipper,* 106 S.Ct. at 1671, n. 1, 1673. Logically, Skipper's original sentencing jury could not be re-empaneled to consider improperly omitted evidence so the only corrective option on remand in that case was a full resentencing.

Berget reads *Skipper* to mean that a defendant has an absolute right to a full resentencing any time he desires to present additional mitigation evidence. However, *Skipper* does not lend itself to such an expansive interpretation: *Skipper,* like *Lockett* and *Eddings,* simply held that mitigating evidence of relevant, *pre-conviction* facts cannot be excluded from a defendant's *original* sentencing proceeding. *Skipper* does not create further inalienable rights to either a full resentencing in every case or to supplement one's original mitigation at a limited resentencing with evidence of *post-conviction* facts, as Berget wished.

Unlike *Skipper,* Berget was not denied the opportunity to present mitigating evidence about his son at his original sentencing hearing. To the contrary, a social history report admitted into evidence at the original sentencing informed the court that Berget had an adult son. SENTENCING III at 22-36; EXHIBIT C. The court was told in mitigation testimony that Berget "loves his family very much." FOF/COL at 15/96.t, 97.a.; EXHIBIT C at 8. Berget's son did not appear at the original sentencing only because Berget insisted that his family "not be a part of [his] sentencing hearing" because "he didn't want his family to go through" the "pain" of seeing him sentenced to death. FOF/COL at 15/96.t, 97.a.; SENTENCING II at 30/19-31/7. Berget told the court that the presence of "one family [Johnson's] in that much pain [wa]s enough" for one courtroom. So Berget instructed "his attorneys not to

call [his family] as witnesses." SENTENCING III at 31/4; SENTENCING V at 26/3.

Though Berget did not call his son as a witness at his original sentencing, the trial court gave Berget mitigating credit of having a son whom he loved very much. FOF/COL at 15/96.t, 97.a. Thus, far from being denied the opportunity to introduce further evidence about his son at his original sentencing, Berget himself affirmatively shut the door on it. SENTENCING III at 31/4. Comparing Berget's case to *Skipper* is comparing apples to oranges.

The proper comparison is not to *Skipper,* but to the situation facing the Ohio Supreme Court in *State v. Chinn,* 709 N.E.2d 1166 (1999), *certiorari* denied *Chinn v. Ohio,* 120 S.Ct. 944 (Ohio 2000). In *Chinn,* the defendant was convicted of capital murder. During the sentencing phase, Chinn offered evidence of the emotional trauma he had suffered as a child after his father was murdered, but the trial court ignored the evidence in its weighing of aggravating and mitigating factors. *Chinn,* 709 N.E.2d at 1173. The Ohio Court of Appeals remanded the case back to the trial judge, though not for a full resentencing hearing. Rather, the trial court was instructed simply to reweigh the aggravating circumstances against the mitigating factors with due consideration to Chinn's father's murder. *Chinn,* 709 N.E.2d at 1181.

Prior to its redetermination of Chinn's sentence, the trial court denied Chinn's motions to present additional mitigation evidence. After

reweighing the evidence in the existing record as instructed, the trial court again sentenced Chinn to death. *Chinn,* 709 N.E.2d at 1181. Chinn appealed. The Ohio Supreme Court affirmed Chinn's new sentence.

In response to Chinn's claim that the trial court improperly denied his motion to present new mitigating evidence, the *Chinn* court noted that the case had *not* been remanded to "the trial court to conduct a resentencing hearing." *Chinn,* 709 N.E.2d at 1181. No full resentencing was ordered because "the error for which [the case] was remanded . . . occurred after the mitigating evidence had been presented" so "the trial court was required to proceed from the point at which the error occurred." *Chinn,* 709 N.E.2d at 1180. Because "the error occurred after the sentencing hearing," the *Chinn* court found "no compelling reason why Chinn should have been afforded a second opportunity" to "improve or expand his evidence in mitigation simply because . . . the trial court [was ordered] to reweigh the aggravating circumstances and mitigating factors." *Chinn*, 709 N.E.2d at 1181.

When next confronted with a *Chinn* scenario, the Ohio Supreme Court in *State v. Roberts,* --- N.E.2d ---, 2013 WL 5746121 (Ohio), again rejected the argument that *Skipper* requires a capital sentencing court to take new mitigation evidence at a limited resentencing. In *Roberts,* the defendant was convicted of murdering her husband to collect his life insurance. Roberts was found guilty by a jury. *Roberts,* 2013 WL

5746121 at ¶ 8. At her sentencing hearing, Roberts chose not to present any mitigation evidence except for her unsworn statement. The jury recommended a sentence of death. *Roberts,* 2013 WL 5746121 at ¶ 10.

The appellate court affirmed Roberts' conviction but overturned her death sentence because of improper *ex parte* contacts between the judge and prosecutor regarding the court's written sentencing opinion. The appellate court ordered the trial court to reweigh the aggravating and mitigating evidence and to "determine anew the appropriateness of the death penalty" on the existing evidentiary record. *Roberts,* 2013 WL 5746121 at ¶¶ 11, 43.

On remand, Roberts sought leave to present a revamped mitigation case, including post-conviction good conduct evidence and a new letter from her son "extolling his mother's character, setting forth some of the history of her life before the murder, and pleading that her life be spared." *Roberts,* 2013 WL 5746121 at ¶ 21. The court denied Roberts' motion in keeping with the limited resentencing ordered by the appellate court. *Roberts,* 2013 WL 5746121 at ¶¶ 11, 27.

Roberts appealed. The *Roberts* court started its analysis by acknowledging the federal circuit court's opinion in *Davis v. Coyle,* 475 F.3d 761 (6th Cir. 2007).[1] *Roberts* found the *Davis* decision both non-

[1] The *Davis* court cited four cases from "sister circuits" purportedly "recognizing that . . . at resentencing a trial court must consider any new evidence that the defendant has developed since the initial sentencing hearing." *Davis,* 475 F.3d at 774. A close reading of these four opinions,

binding and unpersuasive because it failed to appreciate that the *Skipper* line of authority stems from cases where mitigating evidence was excluded from the defendant's *original* sentencing proceeding. *Roberts,* 2013 WL 5746121 at ¶ 34. *Roberts* concluded that neither *Skipper* "nor any of its progeny required the trial court to reopen the evidence after an error-free evidentiary hearing had already taken place." *Roberts,* 2013 WL 5746121 at ¶¶ 34, 48. To hold otherwise, *Roberts* held, "would transform the right to present relevant mitigation into the right to *update* one's mitigation. Such a right has no clear basis in [*Skipper*] or its progeny." *Roberts,* 2013 WL 5746121 at ¶ 36 (emphasis in original).

Consistent with *Chinn* and *Roberts,* the Supreme Court of Florida has also ruled that *Skipper* does not require sentencing courts to reopen the sentencing record to admit new mitigating evidence so long as the defendant was not prevented from offering all of his desired mitigating evidence at his original sentencing. *Burch v. State,* 522 So.2d 810, 812-13 (1988). According to *Burch, Skipper* "represent[ed] no change in the law" and simply "holds that [pre-conviction good conduct] evidence is relevant" to mitigation. *Burch,* 522 So.2d at 512.

The logic of *Chinn, Roberts,* and *Burch* applies with equal force to Berget's case. As in *Roberts*, Berget elected to keep his family members out of the courtroom. As in *Chinn,* the error herein (referring to the forensic competency report) occurred "after the close of the mitigation

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however, shows that this question was not squarely presented to or resolved by any of these four courts.

phase of the [original sentencing] trial" and after all the evidence and arguments had been presented to the court. *Chinn,* 709 N.E.2d at 1181; SENTENCING V at 2/4, 27/22-25. Thus, as in *Chinn* and *Roberts,* it was appropriate to remand for a limited resentencing to reevaluate the aggravating circumstances and mitigating factors without reference to Dr. Bean's competency report. *Chinn,* 709 N.E.2d at 563-64.

While caution should be used in reading any particular meaning into a denial of *certiorari,* one suspects that if *Chinn* offended *Skipper* the United States Supreme Court would have reviewed and reversed the decision. *Chinn,* 709 N.E.2d 1166, *certiorari* denied *Chinn,* 120 S.Ct. 944 (Ohio 2000). The United States Supreme Court has historically been vigilant about correcting errant state procedures in the death penalty context. *Oregon v. Guzek,* 126 S.Ct. 1226 (2006)(granting state's petition for writ of *certiorari* to correct Oregon's practice of admitting residual doubt evidence in mitigation). In addition, some federal acceptance of *Chinn* is found in United States Magistrate Judge Michael Merz's adoption of the *Chinn* court's ruling in his recommendation to deny Chinn's federal *habeas corpus* petition. *Chinn v. Mansfield,* 2013 WL 3288375 (S.D. Ohio).

The emerging federal acceptance of *Chinn's* reasoning may reflect a dawning realization that *Davis,* unlike *Chinn,* is incompatible with the appellate reweighing permitted by *Clemons v. Mississippi,* 110 S.Ct. 1441

(1990).[2] In *Clemons*, the court held that on finding one or more aggravating factors invalid, an appellate court could constitutionally reweigh the remaining aggravating factor(s) against the mitigating evidence and reimpose the death sentence without remanding for a full resentencing. *Clemons,* 110 S.Ct. at 1446. One suspects that if the United States Supreme Court intended *Skipper* to dictate a full resentencing each time a death sentence is vacated, it would not have decided *Clemons* as it did four years later. Nor would it have bluntly stated two years after *Clemons* that "federal law does not require the state appellate court to remand for resentencing." *Sochor v. Florida,* 112 S.Ct. 2114, 2119 (1992).

If a defendant must receive a full resentencing where he may retool his mitigation case whenever his death sentence is invalidated on appeal, then the appellate reweighing practice approved in *Clemons* and *Sochor* was constitutionally infirm *ab initio.* After all, potential mitigation evidence from the interval between the original sentence and appellate reweighing would not be before the appellate court. *Clemons,* 110 S.Ct. at 1448 (appellate court could reweigh based on existing record of

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[2] Indeed, there is other constitutional mischief which would result from taking *Davis* to its logical end. *Davis* disregards principles of comity by giving short shrift to a state's strong interest in preserving an error-free mitigation phase proceeding. *Davis'* emphasis on post-conviction conduct could also introduce arbitrary factors and distinctions into the imposition of death, favoring inmates equipped with grounds to delay their sentences and the cunning to construct a façade of "rehabilitation" over those whom circumstance does not so favor. See also *Roberts,* 2013 WL 5746121 at *7.

mitigating evidence). Either *Skipper* does not extend to redeterminations of sentences on remand to correct decisional error, or *Clemons* and *Sochor* are a glaring oversight of *Skipper's* full reach by the United States Supreme Court.

Contrary to the major premise of Berget's argument, *Skipper* does not require courts to give capital defendants a second bite at the mitigation apple each time a death sentence is vacated and remanded to correct decisional error. *Chinn,* 709 N.E.2d at 1179-80; *Roberts,* 2013 WL 5746121 at ¶¶ 4, 13. One suspects that the United States Supreme Court would be doubly reluctant to reopen an error-free sentencing record when a capital defendant deliberately excluded the proffered "new" evidence from his original sentencing trial as Berget did. *Roberts,* 2013 WL 5746121 at ¶ 21 (new letter from son excluded on remand when defendant could have introduced during original sentencing).

b. Because Berget's Newly-Formed Relationship With His Son Was Not Relevant Mitigating Evidence, Its Omission Was Harmless When Weighed Against The Totality Of The Evidence

Intuitively, it is easy to leap to the conclusion that family testimony is in all cases relevant mitigating evidence, the exclusion of which would naturally prejudice a capital murder defendant. Case authorities, however, refute any such hasty conclusion. *Roberts,* 2013 WL 5746121 at ¶ 21 (letter from defendant's son did not warrant reopening evidence on limited remand).

As in any case, "relevance marks the outer limit of admissibility for purported mitigating evidence" in a death penalty case. *Williams v. Norris,* 612 F.3d 941, 948 (8th Cir. 2010). According to *Tennard v. Dretke,* 124 S.Ct. 2562, 2570 (2004), "the meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context . . . . Relevant evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Lockett,* 98 S.Ct. at 2965 n. 2.

Despite the significant function of mitigating evidence in a capital sentencing proceeding, its exclusion "is amenable to harmless error analysis" because it can "be quantitatively assessed in the context of other evidence presented in order to determine" the effect its exclusion had on the trial. *Brecht v. Abrahamson,* 113 S.Ct. 1710, 1717 (1993). The exclusion of mitigating evidence is harmless if it was "not likely [to] have affected the . . . sentence" in light of the evidence as a whole. *Williams,* 612 F.3d at 948; *Skipper,* 106 S.Ct. at 1673 (exclusion of mitigating evidence harmful when "it appears reasonably likely that . . . it may have affected the . . . decision to impose the death sentence").

For example, *Tafero v. Wainwright,* 796 F.2d 1314, 1321 (11th Cir. 1986), found that the exclusion of evidence that defendant "was the parent of two children for whom he cared" did not raise "a substantial likelihood" of actual prejudice to warrant reversing his death sentence.

Under the particular facts of this case – which are materially different than *Skipper* or *Davis* – Berget's proffered family testimony was not relevant to his case or character because: (1) it was not new, (2) it did not rebut aggravating factors that earned Berget a death sentence, (3) it did not rebut future dangerousness, (4) it improperly solicited sympathy for Berget's family, (5) the same evidence could have been introduced through Dr. Bean, (6) it opened the door on further aggravating evidence against Berget, (7) its mitigating value was vastly outweighed by the aggravating evidence, and (8) post-conviction conduct by death row inmates is not predictive of behavior if returned to the general prison population. Thus, omission of Berget's family testimony on remand was harmless because it was not reasonably likely to have secured him a life sentence.

i. Berget's Proffered Family Testimony Was Not New

Berget admits that he "knew he had a son" at the time of his original sentencing. REMAND at 9/19. The existence of his son just beyond the prison walls was not a "revelation" that he first learned about only after he was sentenced to death. Berget actually introduced mitigating evidence about his son at his original sentencing hearing. EXHIBIT C. The court gave Berget's fatherhood due mitigating consideration. FOF/COL at 15/96.t, 97.a. Thus, Berget's complaint here is not that the court refused to hear any evidence about his son at his

original sentencing, it is that he could not offer *additional* evidence about his son on remand.

Berget's argument is, thus, comparable to those raised by the defendants in *Matthews v. Sirmons,* 2007 WL 2286239 (W.D.Okla.), and *State v. Cauthern,* 967 S.W.2d 726 (Tenn. 1998). In *Matthews,* the defendant complained that evidence that he contributed money from the sales of crafts he created in his cell to support his young son had been excluded from his sentencing trial. *Matthews,* 2007 WL 2286239 at *19. Matthews proffered this evidence to rebut "the state's contention that he was nothing more than a cold-hearted killer and that this information would have given the jury another reason to spare his life." *Matthews,* 2007 WL 2286239 at *19. The *Matthews* court determined that there was sufficient evidence of defendant's "overall conduct and character in prison," including "his willingness to better himself," that there was no prejudice in the exclusion of evidence of the defendant "contributing craft sales proceeds to support his child." *Matthews,* 2007 WL 2286239 at *20.

In *Cauthern,* the court excluded a proffered letter from the defendant's eight-year-old son saying that he loved his dad and fondly recalled fun times they had spent together. *Cauthern,* 967 S.W.2d at 738. Though not permitted to introduce the letter, Cauthern had testified that he had a son who visited him every three to five months, and a picture of Cauthern with his son was introduced into evidence.

Cauthern, 967 S.W.2d at 739. Exclusion of the letter was, thus, deemed harmless when "the essence of the excluded evidence was presented to the jury in other forms." *Cauthern,* 967 S.W.2d at 739.

At his original sentencing hearing, Berget, like Cauthern, was given mitigating credit for having a son whom "he loves . . . very much." FOF/COL at 15/96.t, 97.a. Indeed, Berget conveyed the impression that he loved his son so much that he had ordered "his attorneys not to call his family as witnesses" to spare his son and family the "pain" that Johnson's family was enduring in the courtroom that day. FOF/COL at 15/97.a-b; SENTENCING III at 31/5.

Loudly implicit in such an expression of paternal concern is a loving relationship between Berget and his son at the time of his original sentencing. In view of the fact that the essence of a loving father-son relationship was in the record of Berget's original sentencing, "new" testimony from his son further attesting to this loving relationship was cumulative, even duplicative. *Cauthern,* 967 S.W.2d at 739; *Moore v. Mitchell,* 708 F.3d 760 (6th Cir. 2013)(no *Davis* error where proffered mitigating evidence was not "excluded from the record altogether").

In reality, the only "new" twist to Berget's proffered family testimony is that the impression of the loving father-son relationship that Berget convincingly conveyed to the court at his original sentencing was apparently false. Compare FOF/COL at 15/96.t, 97.a-b with HEARING DEMAND, Appendix 1, ¶¶ 3-5 and REMAND at 9-10. Berget's son was

not absent from the original sentencing proceedings out of a selfless paternal impulse to risk a death sentence rather than subject his beloved son to the "pain" of seeing his father sentenced to death. This ruse was devised to score Berget mitigating credit for a son he had never met. If Berget were to think his strategy all the way through, he might see that there is nothing relevant (or particularly mitigating) in the "revelation" that he did not really have a loving relationship with his son at the time of his original sentencing like he said he did but that now he does.

ii. Unlike In *Davis*, Berget's Proffered Family Testimony Is Not Relevant To The Aggravating Factors That Earned Him A Death Sentence

Davis presented a unique set of facts that are not replicated in this case. In *Davis,* the prosecution proffered only one aggravating factor – defendant's future dangerousness – as justification for a death sentence. The new mitigating evidence of Davis' good conduct during his five years on death row that was excluded on remand was thus deemed "highly relevant to [this] single aggravating factor relied on by the state." *Davis,* 475 F.3d at 773.

By contrast, Berget does not proffer either evidence relevant to the aggravating factors that earned him a death sentence or good conduct evidence relevant to the question of his future dangerousness. Berget instead proffers irrelevant evidence of the alleged positive impact that his return to the family fold has had on his son.

First, heartfelt family evidence does nothing to rebut either of the two aggravating factors that earned Berget a deserved death sentence: (1) murder of a corrections officer; and (2) murder during an escape from lawful confinement. SDCL 23A-27A-1(7) and (8); FOF/COL at 23/24; *United States v. Taylor,* 583 F.Supp.2d 923, 938 (E.D. Tennessee 2008)(excluding corrections expert's mitigation testimony that security measures could control defendant in prison because it did not rebut aggravating evidence of defendant's violent character). Thus, unlike *Skipper* or *Davis,* Berget's proffered "new" mitigating evidence was not directly relevant to the aggravating factors at issue.

Second, it is speculative and inaccurate to assume that inmates with children pose less danger to prison society than those without. Death rows are full of fathers and mothers who simultaneously harbor tender affections toward their own children and pathological indifference to the children of others. *Roberts,* 2013 WL 5746121 at ¶ 21; *Matthews,* 2007 WL 2286239 at *20; *Cauthern,* 967 S.W.2d at 738. Thus, Berget's alleged "positive impact" on his son and his son's family is hardly predictive of the danger Berget would pose to non-family if returned to the prison's general population.

iii. Berget's Family Has No Foundation To Testify To His Future Dangerousness

Even if some family relations might be probative of future dangerousness in some circumstances, Berget overlooks an inherent

contradiction in his claim – his new-found family barely knows him. Thus, they have no foundation to testify to Berget's character.

For example, in *United States v. Lighty,* 616 F.3d 321 (4th Cir. 2010), a death row defendant's uncle was permitted to testify to the nightmarish childhood his nephew experienced growing up – and to his own misguided role in putting Lighty on a path to death row by introducing him to a world of drugs, crime, violence, and prostitution at a young age to "toughen him up." *Lighty,* 616 F.3d at 364. However, the defense could not elicit testimony from the uncle about Lighty's possible "positive influence on others in prison." *Lighty,* 616 F.3d at 364. The uncle's "own experience[s]" with his nephew, whom he knew outside of prison for only 10 months, did not supply a basis for him to "say[] how he will get along in prison if he gets life imprisonment." *Lighty,* 616 F.3d at 364.

Berget's new-found family has less experience with the man than Lighty's uncle had with his nephew. Berget's family has never known him as anything but a death row inmate confined to solitary. They have never lived with him. They have never interacted with him except through a partition of safety glass and concrete block in a prison visitation room. They have never seen him on anything but his most ingratiating behavior. They have never been in a position to feel threatened by him. They have never inadvertently tripped his temper triggers or experienced his wrath as others have. After all, Berget once

"fell in love with [Beatrice Miranda] and her family" and "loved her children" only to shoot her later. SENTENCING III at 29/17. With a personality as volatile as Berget's, what is to say that he will not provoke some sort of falling out with his new-found family in a year's time? Justice need not be revisited each time an inmate forms a relationship of convenience with estranged family.

All that Berget's family has seen of him is the self-serving face of a man who seeks acceptance and affirmation despite his years of neglect, or a means to deceivingly humanize himself in the eyes of the court. Berget's new-found family's thoughts on whether he would pose a further threat if returned to the general population are "no more than rank speculation." *Lighty,* 616 F.3d at 364. Such speculative testimony was not relevant to the trial court's redetermination of Berget's sentence.

iv. Sympathy Or Family Impact Testimony Is Not Relevant

If Berget's family testimony was not relevant to the statutory aggravators for which Berget was sentenced to death – or competent rebuttal of the non-statutory aggravating circumstance of his future dangerousness – its only remaining purpose would be to subliminally curry sympathy for Berget's family. However, "mere sympathy" for a condemned's family is not constitutionally-imperative or relevant mitigation evidence. *California v. Brown,* 107 S.Ct. 837, 840 (1987).

In *People v. Sanders,* 905 P.2d 420, 459 (Cal. 1996), the trial court excluded questioning of a defendant's sister "relevant to exemplify the

feelings held toward him" by her. Sanders' sentencing court felt it did not require such pointed emotional testimony to grasp that a capital defendant's sibling would prefer that he not be executed. *Sanders,* 905 P.2d at 459. In affirming the exclusion, the *Sanders* court observed that the impact of a capital sentence on the *defendant's* family "is not comparably relevant" to victim impact testimony or "to mitigate the specific harm of the crime or its blameworthiness." *Sanders,* 905 P.2d at 459.

Likewise, *Jackson v. Dretke,* 450 F.3d 614, 618 (5th Cir. 2006), found that proffered "evidence of [the] impact [of execution] on friends and family d[id] not reflect on [defendant's] background or character or the circumstances of his crime." According to *Jackson,* this family impact evidence fell outside the scope of *Lockett* because it was "not relevant either to the degree of harm [defendant's] crime caused or to [his] moral culpability for the crime." *Jackson,* 450 F.3d at 618.

The limitations of *Brown*, *Sanders,* and *Jackson* so narrow the possible relevance of Berget's proffered family evidence that it is hard to say that its exclusion likely led to Berget's death sentence.

v. Berget's Family's Testimony Was Not The Best Evidence To Rebut Future Dangerousness

Berget's focus on the exclusion of his family's testimony fails to appreciate that, as a matter of law, the same evidence would have been better coming from Dr. Bean. *Skipper* dismisses family testimony such as Berget's as "the sort of evidence that a [sentencer] naturally would

tend to discount as self-serving." One expects family to rally to a condemned relative's cause whereas "the testimony of more disinterested witnesses [like Skipper's jailers] . . . would quite naturally be given much greater weight." *Skipper,* 106 S.Ct. at 1673.

Thus, for example, *Commonwealth v. Clayton,* 532 A.2d 385, 394 (Pa. 1987), concluded that "testimony on the [defendant's] difficult childhood from a disinterested expert witness, the psychiatrist, would be more likely" to influence the sentencer than the defendant's "mother's or stepfather's self-serving testimony" on the same subject. See also *Wright v. Bell,* 619 F.3d 586, 601 (6th Cir. 2010)(third-party testimony from prison chaplain better evidence of defendant's remorse than defendant's self-serving plea negotiations); *Havard v. Mississippi,* 988 So.2d 322 (Mo. 2008)(no constitutional error in excluding self-serving affidavit of defendant's grandfather concerning his adaptability to institutional life).

As in *Clayton,* Berget could have had Dr. Bean testify that Berget's newly-formed family relationships had tamed his vicious temperament (if true), but with the added weight of psychiatric expertise and medical objectivity. REMAND at 26/19; FOF/COL at 5. Berget instead insisted on trying to make his point through "self-serving" testimony laden with family emotion, which the trial court properly excluded.

vi. Berget's Family Mitigation Evidence Is Not "Clean" Mitigation Evidence

The good conduct evidence in *Skipper* and *Davis* was what one might call "clean" mitigation in that introducing it did not open the door

to other aggravating evidence. By contrast, Berget's family mitigation evidence was paired with negative character evidence not otherwise before the court. Mixed mitigating evidence such as Berget's is inherently less relevant than the clean mitigating evidence at issue in *Skipper* and *Davis*.

For example, in *State v. Cook*s, 720 So.2d 637 (La. 1998), the prosecution introduced aggravating evidence that the defendant had disfigured another prisoner's face with a shank as support for a death sentence. The defendant sought to introduce the injured prisoner's institutional record of violent and predatory conduct in order to rebut the inference of defendant's future dangerousness raised by the attack. *Cooks,* 720 So.2d at 646. The trial court excluded the injured prisoner's records. The appellate court affirmed, observing that "had defense counsel presented evidence of [the injured prisoner's] violent tendencies it seems reasonable to conclude that the state could rebut that evidence with evidence of the defendant's disciplinary record," which included evidence of the defendant's own violent acts. *Cooks,* 720 So.2d at 646.

Likewise, in *Commonwealth v. Spotz,* 896 A.2d 1191 (Pa. 2006), the court found no constitutional error in failing to introduce the alleged "mitigating" evidence of a defendant's "favorable adjustment to prison." *Spotz,* 896 A.2d at 1236. The records in question "cut both ways" in that they "detailed both positive and negative adjustments to prison life." *Spotz,* 896 A.2d at 1236. And in *Burch,* exclusion of "mitigating" records

purporting to show the defendant's adjustment to incarceration caused him no prejudice where the same records showed that defendant had been a member of the Ku Klux Klan, affiliated with white supremacy gangs, and was considered "unmanageable" by prison staff. *Burch,* 522 So.2d at 813.

Like the mixed mitigation of *Cooks, Spotz,* and *Burch,* Berget's proffered family evidence is a double-edged sword for him. For one thing, it exposes the intimation of a loving father-son relationship at Berget's original sentencing as a sham. For another, it exposes the full extent of Berget's lifelong neglect of his son. Finally, it exposes some unflattering hypocrisies in Berget's embrace of fatherhood on remand.

If his son was the missing link between Berget's criminal self and his latent humanity, why does he wait until he is face to face with a death sentence to forge a father-son bond? If Berget secretly yearned for family and fatherhood, why wait 31 years to explain himself to his son and to seek his son's forgiveness and understanding? Why did Berget not give *his son* the choice of whether or not to enter into a relationship with his wayward father sooner? Where was Berget's appreciation of fatherhood when he took Ron Johnson from his children? Paternal instincts were nowhere to be found on April 12, 2011, when Berget's foremost consideration, as in all the long days of his incarceration for two attempted murders and a terrifying rape of a young woman, was how he might serve his own impulses by violent means.

Where Berget sees unmitigated redemption in this newfound-son scenario, the state sees further aggravating evidence of calculation, selfishness, and failure to shoulder his responsibilities in life. *Porter v. Wainwright,* 805 F.2d 930, 936 (11th Cir. 1986)(mitigating value of defendant's wife and two small children discounted where he was not living with or supporting them). Given its aggravating downside, Berget's proffered family evidence lacks the relevance of the clean mitigation evidence before the *Skipper* and *Davis* courts.

vii. The Aggravating Evidence Against Berget Overwhelmed Any Mitigating Value Of His Proffered Family Evidence

Mitigation evidence also has diminished relevance when it is substantially outweighed by the aggravating evidence in the record as a whole. Thus, in *United States v. Gabrion,* 719 F.3d 511, 525 (6th Cir. 2013), the court found the exclusion of proffered mitigation evidence "palpably harmless" where "the government's case for aggravation was overwhelming." When weighing Berget's proffered family evidence against the totality of the aggravating evidence against him, the inescapable result is the same as *Gabrion*.

Berget has led a life of ever-escalating criminality and violence, culminating in a vicious, unsparing beating of Ron Johnson. Berget was not satisfied to simply incapacitate Johnson. PLEA at 11/8-11, 12/12-15; EXHIBITS 23, 26-38; FOF/COL 19/121. He was not moved by the sight of Johnson's broken neck, severed finger, physical torment,

spattering blood, or crushed skull to stop short of killing Johnson. SENTENCING I at 127-31, 134/20-25, 135/1-9, 138-39; EXHIBITS 34-35. Instead, Berget wrapped Johnson's battered face with plastic pallet wrap in order to snuff out his victim's life with absolute certainty. FOF/COL at 7/19, 9/45-47; SENTENCING I at 50/21-25; EXHIIBIT 9, 22.

And it is only by virtue of Berget's botched aim, rather than any instinct for mercy, that his body count is one rather than three. Berget's attempts to murder his ex-girlfriend and her new boyfriend in her own home did not fail for lack of planning or effort. SENTENCING II at 37-45. And, as if murdering two people (as he thought he had) was not enough mayhem for one night, Berget afterward kidnapped a third, random victim and raped her during a death-defying, high-speed car chase as he eluded pursuing law-enforcement vehicles. SENTENCING I at 186/21-24, 190/9-22; SENTENCING II at 50/1-14.

Berget had eight years in prison to reflect on his terrible crimes, to nurture qualities of empathy within himself, and to attain a level of remorse potent enough to deter him from harming anyone ever again. Instead, in shaking hands with Robert in the sally port after their escape plan collapsed, Berget showed that those eight years had not in the least tempered his preparedness to kill to suit his ends. FOF/COL 9/42; SENTENCING I at 46/11-12.

As in *Gabrion*, the aggravating evidence of Berget's violent nature and indifference to human suffering is so extreme and of such longstanding duration that it vastly outweighs the self-serving mitigating evidence of some late-staged reunion between Berget and his son. REMAND at 9/10; *Gabrion,* 719 F.3d at 525; *McGehee v. Norris,* 588 F.3d 1185, 1197-98 (8th Cir. 2010)(aggravating circumstances of torture-murder outweighed any prejudice from exclusion of mitigating evidence).

viii. Post-Conviction Good Conduct Evidence Lacks Probative Value

One cannot leave the relevance discussion without commenting generally on the specious mitigating value of model conduct by death row inmates. Unlike *Davis, Skipper* did not attach heightened significance to such evidence. *Skipper* rested "on the facts before" that court, which were limited to Skipper's pre-conviction behavior in the general population of a county jail. *Skipper,* 106 S.Ct. at 1673. Justice Powell's concurring opinion foresaw the problem in assigning such conduct any special relevance beyond rebuttal of a prosecutor's argument of future danger to prison society. Justice Powell observed that a capital "defendant . . . has every incentive to behave flawlessly in prison if good behavior might cause the sentencing authority to spare his life." *Skipper,* 106 S.Ct. at 1676.

Justice Powell's skepticism is even more apropos of post-conviction good conduct of death row inhabitants. At least in South Dakota, death row inmates are housed in a maximum security unit in solitary

confinement cells for 23 hours a day. They never interact with other prisoners. They interact with guards outside of their cells only when physically restrained in four point shackles. When visited by family, death row inmates are secured in an isolation cell behind partitions of concrete and inch-thick safety glass.

Within death row inmates' cells, their comforts are few. Leaving their cell to shower, exercise, meet visitors, or make a phone call is a coveted privilege. The prison's discretion to deny comforts and privileges for misbehavior is so complete that death row inmates have an overpowering incentive to behave.

All of South Dakota's death row inmates also have legal challenges to their death sentences pending, all with the aim of eventually being resentenced to life. No self-interested death row inmate would sabotage his hoped-for resentencing by stirring up trouble.

Strict security measures, incentives to cling to their minimal comforts and privileges, and the instinct for self-preservation combine to create artificially compliant behavior in death row inmates. At least one federal court has recognized that the existence of security measures that simply remove an inmate from opportunities to harm others is not probative of whether the inmate has a violent disposition. *Taylor,* 583 F.Supp.2d at 938; *Roberts,* 2013 WL 5746121 at *2 (affirming exclusion of post-conviction good conduct records at resentencing).

Good conduct in the death row environment is, thus, hardly a reliable indicator of an inmate's likely behavior if he were released back into the general population. Post-conviction good conduct evidence is relevant only in direct relation to its reliability, which in the death row context puts it somewhere below the self-serving family testimony dismissed in *Skipper.*

ix. Omission Of Berget's "New" Family Testimony From The Record On Remand Was Harmless Error

For the reasons outlined above, Berget's evidence of the recent change in his family dynamics was not probative of his crime or aspects of his character relevant to his sentence. Since Berget's proffered family evidence would not likely have affected his sentence on remand, its exclusion was harmless. *Williams,* 612 F.3d at 948.

c. Berget Waived Opportunities To Present Alleged Mitigating Evidence About His Son At Both His Original Sentencing And On Remand

Even if Berget's "new" evidence about his son was relevant in some cognizable way, the record shows that Berget could have presented further evidence about his son at both his original sentencing and on remand but chose not to.

As noted above, the existence of Berget's son was nothing "new." Berget knew his son's name and where he lived. Without putting his son at the slightest risk of public embarrassment or community reproach, Berget's attorneys could have quietly contacted his son or his son's

mother in the months leading up to his original sentencing to ask if he wanted to meet his father. Berget had little to lose if his son privately rebuffed him. Thus, nothing precluded Berget from developing evidence about his son and presenting it to the original sentencing court.

Nor was Berget "cut off in an absolute manner" from presenting evidence of his newly-formed relationship with his son. *McKoy v. North Carolina,* 110 S.Ct. 1227, 1240 (1990). Berget had two opportunities to introduce his family evidence on remand:

1. Berget could have asked this court to amend its remand order prior to remitting the case to the trial court. As Berget now notes, this "court was unaware at the time of its decision" that Berget had "new evidence of mitigation." APPELLANT'S BRIEF at 13. But the only reason this court's remand order "never contemplated the existence of new mitigation evidence" is because Berget did not tell this court about it when he had the chance. APPELLANT'S BRIEF at 13. Berget had already formed a relationship with his son and son's family when he petitioned this court for rehearing on January 17, 2013. Yet, instead of leveling with this court about this burgeoning relationship, Berget's petition only alluded cryptically to "vital information" that "would not be available if the resentencing was conducted on a cold record." REHEARING PETITION, Appendix at 6. Rather than taking up time and judicial resources on a remand process to which he already had a specific objection, Berget should have told this court

exactly what his "new" mitigation evidence was so this court could have "contemplated" its constitutional import and amended its remand order accordingly (if at all).

2. This court's remand order permitted Berget to call Dr. Bean, who could have visited Berget, his son, and his son's family and testified to the "positive impact" (if any) that these "new" family relations have had on Berget and his son. *Berget,* 2013 SD 1 at ¶ 120, 826 N.W.2d at 37. Consistent with this court's remand order, the sentencing court told Berget he could "offer the testimony of Dr. Bean" and that it would "set up a hearing for that limited purpose" if Berget so wished. ZELL E-MAIL, Appendix at 9; REMAND at 16/13. The state likewise told Berget's counsel that Dr. Bean could testify to "the alleged mitigating effect of Berget's rapprochement with his son" if Berget so wished. SWEDLUND E-MAIL, Appendix at 11; REMAND at 15/5. Berget did not call Dr. Bean to testify.

Despite having two readily available paths to presenting his "new" mitigation evidence on remand, Berget conspicuously waived them both.

There is no *Skipper* violation when a defendant's family's absence at sentencing is not due to judicial exclusion but because the defendant himself refuses to call family members as witnesses. *Roberts,* 2013 WL 5746121 at ¶ 21 (capital defendant failed to call her son at original sentencing); *Clayton,* 532 A.2d at 394 (Pa. 1987)(allegedly mitigating family testimony was unavailable only because of defendant's "deliberate

act" of not calling them to testify). By failing to introduce the allegedly mitigating evidence of his recently-forged relationship with his son when and how he had the opportunity, Berget waived his right to do so. *State v. Robert,* 2012 SD 60, ¶ 20, 820 N.W.2d 136, 143 (capital defendant can waive mitigation by failing to present evidence).

II. BERGET WAS NOT ENTITLED TO ATTEND AN OPEN COURT PROCEEDING FOR, OR REALLOCUTE PRIOR TO, THE REIMPOSITION OF HIS SENTENCE

Berget argues that he was improperly denied his right to appear in open court for, and reallocute prior to, the reimposition of his sentence. As noted already, this court did not order a full resentencing hearing for the taking of evidence, or order the court to reimpose its sentence in Berget's presence. If the constitution "does not require the state appellate court to remand for resentencing," it stands to reason that the constitution does not require a defendant's presence at a reimposition of sentence on remand. *Sochor,* 112 S.Ct. at 2119.

On this subject the 8th Circuit Court of Appeals has ruled that a defendant must be present at the reimposition of a sentence only when the defendant's "sentence is made more onerous, or the entire sentence is set aside and the cause remanded for resentencing," neither of which occurred here. *Rust v. United States,* 725 F.2d 1153, 1154 (8th Cir. 1984); *United States v. McLintic,* 606 F.2d 827, 828 (8th Cir. 1979).

As noted above, the subject error in this case occurred after the close of mitigation evidence and after Berget's allocution. Berget was

not denied his right to allocute at his original sentencing. Similarly, in *Roberts,* where the defendant was given prior opportunity to allocute, she was not entitled to reallocute on a limited remand to redetermine her sentence. *Roberts,* 2013 WL 5746121 at ¶ 74. Like *Roberts,* the error in question occurred after Berget's allocution. Because this court remanded this case to a post-allocution point in the proceedings, Berget was not entitled to reallocute.

Not only does the constitution not require Berget's presence at the reimposition of his sentence, Berget did not ask to be present. He attended the court's remand hearing and never asked to be heard. Berget's petition for rehearing to this court, his demand to the sentencing court for a hearing on remand, and the transcript of the remand hearing did not once invoke alleged statutory or constitutional rights to attend the reimposition of his sentence. REHEARING PETITION, Appendix at 3; DEMAND FOR HEARING, Appendix at 12; REMAND at 11/25-12/11. Berget's sole demand on remand was to introduce his "new" mitigating evidence. When that was denied, the sentencing court asked Berget there was "any further hearing [he] wish[ed] to have." REMAND at 26/13. In response, Berget again did not demand a further hearing for, and the right to reallocute prior to, the reimposition of his sentence.

Thus, even assuming Berget had some right to be present for or to reallocute at the reimposition of sentence, he failed to assert the right in

the court below. He may not raise the issue for the first time on appeal. *Ellingson v. Ammann,* 2013 SD 32, ¶ 10, 830 N.W.2d 99, 102.

III. THE SENTENCING JUDGE WAS NOT REQUIRED TO RECUSE HIMSELF PRIOR TO RESENTENCING BERGET

Berget claims that the trial judge should have recused himself because the judge's experience presiding over the prosecution and sentencing of his co-defendant, Eric Donald Robert, biased the court against him. For his "proof" of bias, Berget points to similarities between the sentencing court's findings of fact and conclusions of law in his and Robert's cases. However, Berget's theory that duplicative language in the two sentencing decisions was evidence of bias was previously raised and soundly rejected on direct appeal. *Berget,* 2013 SD 1 at ¶¶ 46-54, 826 N.W.2d at 17.

To the extent that the decision in *State v. Page,* 2006 SD 2, ¶¶ 16-17, 709 N.W.2d 739, 750, implied a constitutional right to recusal of a judge on resentencing due to bias, Berget has failed to satisfy the evidentiary threshold for such a claim. The *Page* court examined the same assertion made herein by Berget, *i.e.* that the judge's prior experiences presiding over a co-defendant's proceedings, and sentencing him to death, caused and was itself evidence of bias. *Page,* 2006 SD 2 at ¶ 12, 709 N.W.2d at 749. This court found that Page's allegations failed to meet the United States Supreme Court's high bar of showing that "opinions formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would

make fair judgment impossible." *Liteky v. United States,* 510 U.S. 540, 114 S.Ct. 1147 (1994).

A "judge is presumed to be impartial, and the party seeking disqualification bears the substantial burden of proving otherwise." *State v. Hoadley,* 2002 SD 109, ¶ 32, 651 N.W.2d 249, 257. Like Page, Berget fails to meet his burden of demonstrating objective evidence of bias that warranted a new sentencing judge on remand.

CONCLUSION

Consistent with state law, this court ordered a limited resentencing on the existing record because Berget was not denied the right to put all relevant mitigating evidence before the sentencer at his original sentencing hearing. Neither the United States Constitution nor *Skipper* require proceedings any different from those ordered by this court. Unlike *Skipper,* Berget never faced an absolute bar to introducing family evidence either at his original sentencing or on remand. The essence of a loving father-son relationship was in the record of Berget's original sentencing and was given due consideration at resentencing.

One wonders why Berget did not employ effective strategies for having his mitigating evidence heard on remand if he felt it was so important. Where Berget could have sought leave from this court to introduce evidence about his son on remand, or could have introduced it through Dr. Bean without further leave of this court, he inexplicably waived both opportunities. Berget's strategy appears to favor the long

game of angling for a second resentencing over effectively securing admission of his "vital" mitigation evidence at his first resentencing.

Whatever his ulterior strategy, Berget's proffered mitigation evidence was not, as in *Skipper* or *Davis,* relevant to the aggravating factors on which his death sentence is based. Nor was it exactly probative of good character traits, unless one considers ignoring a child for 31 years, or artificially exemplary conduct on death row, evidence of good character. The irrelevancy of Berget's proffered family testimony to either applicable aggravators or violent proclivities outside of a highly controlled environment renders its omission harmless in this case. Accordingly, affirming Berget's death sentence will do justice to Ron Johnson's lost life without offending controlling constitutional or statutory principles.

Dated this 3rd day of December 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee'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 9,231 words.

2. I certify 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 3rd day of December 2013 two true and correct copies of the foregoing brief were served by United States mail, first class postage prepaid, on Jeff Larson, 400 North Main Ave., Suite 207, Sioux Falls, SD 57104.

_____
Paul S. Swedlund
Assistant Attorney General

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 26764

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

RODNEY SCOTT BERGET,

Defendant and Appellant.

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

HONORABLE BRADLEY G. ZELL
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Notice of Appeal filed July 18, 2013.

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APPELLANT'S REPLY BRIEF

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OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

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PRELIMINARY STATEMENT

This Reply Brief will be confined to addressing and responding to arguments in the State's Appellee's Brief (referred to within as SB). Any argument advanced in Appellant's Brief and not addressed in this Reply Brief has not been waived. A large portion of Appellant's allotted space in this Brief must be devoted to clarifying misstatements of the factual record and mischaracterization of cited case law.

All references to the settled record or transcripts will be as set forth in the Preliminary Statement of

Appellant's Brief. In addition, the February 1, 2012, sentencing hearing transcript will be referred to as SH, followed by the page number.

STATEMENT OF ISSUES

I. **WHETHER APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT NEW MITIGATION EVIDENCE UPON RESENTENCING.**

II. **WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT WITHOUT APPELLANT'S PRESENCE IN THE COURTROOM AND WITHOUT AFFORDING APPELLANT HIS RIGHT OF ALLOCUTION.**

III. **WHETHER THE TRIAL COURT ERRED IN NOT RECUSING ITSELF PRIOR TO RESENTENCING.**

STATEMENT OF THE CASE AND FACTS

The State asserts, "[T]his court ordered a 'limited resentencing.'" and cites State v. Berget, 2013 SD 1 at ¶118-120, 86 N.W.2d 1, after the quoted material (SB 5). The term "limited resentencing" does not appear at the cited paragraph, nor does that term seem to appear in any case cited by the State. The State defines (Id.) the terms "full resentencing" and "limited resentencing" in single-space indented form, which normally indicates quoted material, yet those purportedly defined terms do not appear in either statute cited, nor in any case cited by the State. The State also sets the term "full resentencing" (Id.) off in quotation marks and cites Piper v. Weber, 2009

SD 66 ¶21, 771 N.W.2d 352, 360. That quoted term does not appear in the text of that opinion.

The State claims that Mr. Berget's right to be present at sentencing and right to allocution were waived because counsel did not object. There was no sentencing hearing held at which that objection could be made. He demanded a sentencing hearing. That hearing would include the defendant's presence and right to allocate. No hearing was granted, and defense counsel learned of the death verdict when he received a call from Mr. Berget's daughter-in-law who had seen it on the news.

Although Mr. Berget's request for a resentencing hearing was denied, the defense did submit an offer of proof, which was apparently ignored or discounted by the trial court. The offer of proof of family mitigation evidence was at T 9-10. Mary Baker's testimony at the original sentencing hearing is found at SH 30-36 of the February 1, 2012 transcript. There was specific mention of Mr. Berget's son, and there was brief mention of the love he had for his family (SH 30). Exhibit C, prepared by Ms. Baker (a paralegal for the Public Defender's Office), at page 7, contained the following about the son: "They broke up before their son . . . was born, but remained friends. She met a new guy and they ended up getting married.

Rodney was happy for her. She also wanted her new husband to be Travis' dad, so Rodney agreed not to contact Travis." Compare that record with the State's assertions.

Compare the State's assertion that "[T]he trial court gave Berget mitigating credit of having a son that he loved very much." (SB 10) to the cited Findings of Fact. There is a comment he has a son, a comment that he has expressed love for his family in general, and no mention it was given any weight as mitigation.

The State asserts the proffered evidence was not new (SB 8). Mr. Berget had no relationship with his son at the time of the sentencing hearing. He now has a substantial and positive relationship (T 9-10) that could have been presented at a resentencing hearing. The State asserted the offered mitigating evidence was to elicit sympathy (Id.), with no record citation supporting that assertion. The offer of proof made clear that it was to demonstrate his character and worth as a human being to others.

The State asserts the same evidence could have been introduced through Dr. Bean (Id.). That would have been difficult because Dr. Bean's examination was solely to determine competency and because there was no meaningful two-way father/son relationship at the time of the competency examination.

The State asserts that it would open the door for further aggravating evidence (Id.), yet it is hard to imagine how a son testifying about the positive aspects of his father would open the door for any evidence not already admitted in aggravation. Finally, his relationship with his son was not offered as predictive of future behavior in prison. That does not make positive "character" evidence irrelevant.

Appellant would ask the Court to simply consider the appropriateness of the following assertions by the State, given the record:

(1) "If Berget were to think his strategy all the way through, he might see that there is nothing relevant (or particularly mitigating) in the 'revelation' that he did not really have a loving relationship with his son at the time of his original sentencing like he said he did but that he now does." (SB 21) He said he had his son. When asked about his family, he said he loved his family. See the context of that statement. He did not have a meaningful loving relationship with his son, but did by the time of resentencing. That is mitigating character evidence.

(2) "With a personality as volatile as Berget's, what is

to say that he will not provoke some sort of falling out with his new-found family in a year's time?" (SB 24). No comment should be required.

(3) "All that Berget's family has seen of him is the self-serving face of a man who seeks acceptance and affirmation despite his years of neglect, or a means to deceivingly humanize himself in the eyes of the court." (SB 24). A meaningful resentencing hearing could have dispelled that preposterous statement.

(4) "[I]t exposes the intimation of a loving father-son relationship at Berget's original sentencing as a sham." (SB 28). There is no cite to such an intimation because there never was such an intimation.

(5) "Berget sees unmitigated redemption in this newfound-son scenario . . ." (SB 29). The lack of citation to the record is noteworthy.

(6) "[T]he self-serving mitigation evidence of some late-staged reunion between Berget and his son." (SB 31). A family's unprompted request to assist is not "self-serving."

(7) None of the assertions about life on death row (SB 31-32) are accompanied by any citation to the record and should be disregarded.

(8) "The ruse was devised to score Berget mitigating credit for a son he never met." (SB 21). As an officer of this Court, counsel does not "devise" "ruses" to "score" points with anyone, and hopes this Court knows that.

Appellant will attempt to demonstrate below that the State's application of cited case law to their argument is as strained as their factual assertions are compared to the factual record.

ARGUMENT

I. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT NEW MITIGATION EVIDENCE UPON RESENTENCING.

The State does not dispute that this court remanded this case "to the circuit court for the purpose of conducting a sentencing . . ." State v. Berget, 2013 SD 1, ¶120, 826 N.W.2d 1. They do not dispute that the Eighth Amendment requires an individual sentencing procedure at a death penalty sentencing, where a defendant must be "permitted to present any and all mitigating evidence that is available." Skipper v. South Carolina, 476 U.S. 1, 8 (1986). See also Lockett v. Ohio, 438 U.S. 586 (1978).

And the State does not dispute that Davis v. Coyle, 475 F.3d 761 764 (6th Cir. 2007) held that after reversal of a death sentence, "[A]t resentencing, a trial court must

consider any new evidence that a defendant has developed since the initial sentencing hearing."

A close examination of the authority cited by the State in support of its position is in order.

The State relies heavily on the Ohio Supreme Court decision in State v. Chinn, 709 N.E.2d 1166 (Ohio 1999), cert. den. 120 S.Ct. 944 (2000). They do not mention that Chinn is procedurally different than the present case. In Ohio, a "weighing state," which South Dakota is not, the jury delivers a verdict, and then the trial court does a statutory review, and is required by statute to make certain findings. The death sentence was reversed, and the case was remanded for errors made by the trial court in its reviewing capacity. In the present case, the trial court had the same role as the sentencing jury in Ohio. The Chinn court noted "that the jury's recommendation had not been tainted by error." Id. at 562. The judicial "errors were committed after the jury and returned its verdict in the penalty phase."

The Chinn court concluded, "In this case as in Davis, the errors requiring resentencing occurred after the close of the mitigation phase of the trial. Under these circumstances, the trial court is to proceed or remand from the point at which the error occurred." In the present

case, the error was in the mitigation phase (and before) as the Bean report was "on record" before the mitigation hearing began and was never mentioned by either counsel at that hearing. The reviewing process by the trial court in Ohio is not dissimilar to the reviewing process this Court is to conduct under SDCL 23A-27A-13, the only statutorily authorized way for this Court to remand a matter for "resentencing . . . on the record." SDCL 23A-27A-13(2).

The State also places some significance in the denial of a writ of certiorari by the Supreme Court, yet cites no authority that denial of certiorari is to be given any precedential value.

The State then cites another Ohio case, State v. Roberts, 2013 Ohio 4580, _____ N.E.2d _____. Of note, and not mentioned by the State is that Roberts was a 4-3 decision, and the concurring opinion of Justice O'Neill points out, that "[T]he majority itself recognizes its analysis on this point is likely to be set aside by the federal courts on collateral review [given the Sixth Circuit's ruling in Davis v. Coyle.]" In Roberts, the first death sentence was vacated and the matter was remanded. That sentence was also vacated because the trial court failed to consider relevant mitigating evidence contained in the defendant's unsworn allocution statement.

(Roberts was allowed to be present and to allocate upon remand.)

In making the holding upon which the State here relies, the Roberts court states, "[W]e are not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court . . . . Hence, we are not bound to follow Coyle." Id. at ¶33. That stance would be akin to this Court saying it was making a ruling on federal constitutional law that it recognized was contrary to Eighth Circuit precedent.

The State cites Burch v. State, 522 So.2d 810 (Fla. 1988) as supporting the position that "Skipper does not require sentencing courts to reopen the sentencing record to admit new mitigating evidence . . ." (SB 13). The facts of Burch are telling. Burch wanted to present Skipper evidence as to his adjustment to prison life. The court points out that Burch was a Ku Klux Klan member who demanded segregation from "non-Aryan prisoners." That, and the fact that the county jail found him to be unmanageable prior to trial "hardly comports with the asserted belief that Burch is or will be a well-adjusted prisoner." Id. at 813. The proposed mitigation facts were far different than in the present case.

The State puts credence in the fact that Clemons v.

Mississippi, 449 U.S. 738 (1990) allowed "reweighing" of mitigation and aggravation in a "weighing state." South Dakota is not a weighing state. Judge Zell was acting as the jury (SDCL 23A-27A-6) would have. The error was made at the presentencing hearing.

The parties do not disagree that mitigation evidence must be relevant to be admitted at a resentencing hearing. "The character of the individual" is always relevant mitigation. State v. Rhines, 1996 SD 55, ¶80, 548 N.W.2d 415. A person's meaningful relationship with and positive influence on family members is at the crux of one's character, as are one's past criminal acts. The sentencer is required to consider both.

Williams v. Norris, 612 F.3d 941 (8th Cir. 2010) is cited by the State as limiting mitigation evidence. In the context of the facts of that case, it does. But the proposed "mitigating evidence" was that the prison was somehow negligent in allowing the defendant to escape. The court understandably found that evidence not to be relevant to the defendant's "character." Nonetheless, the Williams court reiterated that a sentencing court must admit "all relevant mitigating evidence" and "any aspect of a defendant's character or record." Id. at 947.

The State also places reliance on Tennard v. Dretke,

542 U.S. 274 (2004). The State does not mention the following part of the Tennard decision:

> When we addressed directly the relevance standard applicable to mitigating evidence in capital cases in McKoy v. North Carolina, 948 U.S. 433, 440-441 (1990), we spoke in the most expansive terms. We established that the "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context, and thus the general evidentiary standard—"'"any tendancy to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"'"—applies. Id., at 440 (quoting New Jersey v. T.L.O, 469 U.S. 325, 345 (1985)). We quoted approvingly from a dissenting opinion in the state court: "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" 494 U.S., at 440 (quoting State v. McKoy, 323 N.C. 1 55-56, 372 S.E.2d 12, 45 (1988) (opinion of Exum, C.J.)). Thus, a State cannot bar "the consideration of . . . evidence if a sentence could reasonably find that it warrants a sentence less than death." 494 U.S., at 441.
>
> Once this *low threshold for relevance* is met, the "Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence. Boyde v. California, 494 U.S. 370, 377-378 (1990) (citing Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Penry I, 492 U.S. 302 (1989));l see also Payne v. Tennessee, 501 U.S. 808, 822 (1991) ("We have held that a State cannot preclude the sentence from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death . . .. *[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce* concerning his own circumstances" (quoting Eddings, supra, at

114)).

Id. at 284-285 (Emphasis added). The relevance threshold is and should be a low one when it comes to mitigating evidence.

Brecht v. Abrahamson, 507 U.S. 619 (1993) was a harmless error case, but it involved a prosecutor's comment in closing argument relative to a defendant's silence post-Miranda. It did not involve proffered mitigation evidence, as in the present case.

Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986), Commonwealth v. Spotz, 896 A.2d 1191 (Pa. 2006), and Harvard v. Mississippi, 988 So.2d 322 (Miss. 2008), are all cases alleging ineffective assistance of counsel on collateral attack of a judgment and sentence. Applying the Strickland v. Washington, 466 U.S. 668 (1984), standard to whether counsel properly presented mitigation is a far different standard of review than this Court's determination of whether proffered mitigation is relevant.

State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998) is cited by the State because the trial court excluded a 31-word letter by defendant's eight-year old son and the conviction and death penalty were upheld. A closer look at the case is very revealing.

Cauthern was originally convicted in 1988. The case

was reversed in 1989 and certiorari was denied in 1990. The case was remanded for resentencing because the trial court admitted evidence that should not have been considered (in Cauthern, a statement by defendant, in Berget, information from a psychiatrist's report). The Cauthern court found it to be error to not admit the new evidence at resentencing, but found the error to be harmless because there was evidence in the record about his son, and his son visiting his father regularly (presumably after the initial sentencing hearing, given the letter and the child's age). Furthermore, the letter simply said he hoped he got to see his father again and that he went to Chuck E. Cheese and Wal-Mart after his last visit. The Court's statement about that letter is instructive in this case:

> The trial court excluded the letter, finding that it was of negligible probative value and was cumulative to the other evidence presented.
>
> . . .
>
> In light of these controlling principles, it is our view that the trial court erred in excluding the letter written to the defendant by his son. The defendant's family and young son who have expressed love and support are arguably relevant to the defendant's background and character, and a potential basis upon which a juror could decline to impose the death penalty.

What Berget offered to present, on resentencing, as in

Cauthern, was much more powerful, and no similar evidence about a living relative had been presented previously.

In Moore v. Mitchell, 708 F.3d 760, 804-805 (6th Cir. 2013), the Court's application of Davis v. Coyle, supra, actually supports Berget's position in this appeal:

> This Court [in Davis v. Coyle] held that the trial court erred by excluding the mitigation evidence . . . . We held that reweighing was not a proper remedy because the improperly excluded evidence had never been put into the record, and the state appellate court could not reweigh what had never been weighted in the first place. . . . In Moore's case, the mitigation evidence was before the trial court, the court simply found it was outweighed by the aggravating circumstances. The evidence was never excluded from the record altogether.

Judge Zell has never heard from Mr. Berget's son or daughter-in-law. There is no indication in his findings that he even acknowledged the defense offer of proof, let alone weighed it with the other evidence. Under Moore, Berget is entitled to a remand for a true resentencing hearing that comports with due process and the Eighth Amendment.

United States v. Lighty, 616 F.3d 321, 364 (6th Cir. 2013) also supports Berget's position. Lighty ruled that "defense counsel could elicit testimony from [defendant's uncle] about his own experience, his own relationship, his own evaluation of this man's character, but to ask him to

extrapolate saying how he would get along in prison if he gets life imprisonment is not a proper question." Our offer of proof of family testimony was exactly what the Lighty court approved, and there is nothing in our offer of proof indicating our intent to ask an opinion of the family speculating on how Mr. Berget would do in prison.

The mitigation evidence Berget proffered was not to garner sympathy, it was to show his character as a human being, as witnessed by his family. California v. Brown, 479 U.S. 538, 539 (1987) simply approves of a jury instruction which tells jurors not to fix the penalty based on "mere sympathy." People v. Sanders, 905 P.2d 420 (Cal. 1996) merely stated family members should not be allowed to express their opinion as to the appropriate penalty or the fact that the death penalty would stigmatize their family. Berget did not attempt to offer these types of evidence.

The excerpts cited by the State from Commonwealth v. Clayton, 532 A.2d 385 (Pa. 1987) are taken out of context. Clayton requested a continuance, after a guilty verdict at trial, of the death penalty phase of the trial to try to obtain the attendance of defendant's mother and stepfather at the penalty phase. The court said the testimony would have been allowed if the witnesses were available. It then said all the family could have offered was evidence of a

difficult childhood, which came in any way through a defense psychiatrist. In Berget, the relationship with the son was not there at the time of sentencing, but had developed by the time of resentencing. The witnesses were available, but no hearing was held. Clayton does not support refusal of Berget's proposed mitigation evidence.

Wright v. Bell, 619 F.3d 586, 598-599 (6th Cir. 2010) simply states that an earlier plea offer for manslaughter was not "relevant mitigating evidence." State v. Cooks, 720 So.2d 637, 647 (La. 1998) simply held that it was not inappropriate to exclude the prior record of a fellow prisoner stabbed by defendant, because that would have opened the door to other incidents of violence by the defendant while in prison and concluded, "Unlike in Skipper, . . . the jury most likely would have drawn negative inferences from this evidence." See also Commonwealth v. Spotz, supra, at 1237 (not ineffective assistance of counsel not to offer evidence that "cuts both ways.") United States v. Gabrion, 719 F.3d 511 (6th Cir. 2013) merely held that the fact that Michigan did not have the death penalty was not mitigation in a federal murder prosecution for a homicide within a national forest inside the boundaries of the State of Michigan. And finally, McGehee v. Norris, 588 F.3d 1185 (8th Cir. 2009) held that

abuse suffered by a sibling was not mitigation. All of the above rulings are very understandable as to relevance. And none of them had to do with a defendant's relationship with and importance to his family.

This is not a case like State v. Robert, 2012 SD 60, 820 N.W.2d 136, where the defendant chose to present no mitigation. The defendant presented the mitigation he had at the time of sentencing. A family relationship developed after sentencing. It would have been mitigating. Defendant was not allowed to present it at resentencing.

II. THE TRIAL COURT ERRED IN SENTENCING APPELLANT WITHOUT APPELLANT'S PRESENCE IN THE COURTROOM AND WITHOUT AFFFORDING APPELLANT HIS RIGHT OF ALLOCUTION.

Noticeably absent from the State's brief is even an acknowledgement that SDCL 23A-39-1 requires a defendant's presence at all stages of a proceeding, including sentencing, and that SDCL 23A-27-1 requires that a defendant be allowed to address the court "in his own behalf." The exceptions in SDCL 23A-39-2 and 23A-39-3 apply because this is a capital case and no one is alleging there was any courtroom misconduct. That should be as far as the inquiry need go.

The two cases cited by the State are classic examples of either not reading the entire case, or deliberately

misleading this Court as to the holding.

In Rust v. United States, 725 F.2d 1153, 1154 (8th Cir. 1984), Rust was sentenced to two consecutive fifteen year sentences. One of the two sentences was vacated. The Eighth Circuit held, "Since the district court did not need to resentence Rust, his presence was not required."

Likewise in United States v. McClintic, 606 F.2d 827, 828 (8th Cir.), defendant was convicted of multiple counts of receiving stolen property and claimed two of the thefts should have been merged into one count. The court agreed, vacated one count, and effectively reduced defendant's sentence from twenty years to fifteen. The Eighth Circuit held, "Rule 43 *requires the presence of the defendant where* the sentence is made more onerous . . ., or where *the entire sentence is set aside and the cause remanded for resentencing* . . ." (Emphasis added). The court concluded that "McClintic's presence was not required for the reduction of his sentence" Id. at 828-829. Both cases support defendant's position.

The State then argues that despite the fact that defendant filed a written Demand for Hearing (SR 363), and State statutes require that at any felony sentencing hearing the defendant must be present (SDCL 23A-39-1) and the court must allow allocution (SDCL 23A-27-1), counsel

did not preserve Berget's record. First, and most obvious, is the fact that no hearing was held at which one could object. The fact that counsel was asked if he desired any other hearing "regarding the Court's charge from the South Dakota Supreme Court" (T 26) did not obviate the need for a resentencing hearing or excuse the judge from considering the mitigation evidence proffered by the defense or defendant's statement in allocution. The sentencing hearing was requested. That is where one would appear and allocate. That request was denied. There was no other hearing to request regarding the trial court's "charge" from this Court. Defendant did raise the violation of defendant's right to be personally present under SDCL 23A-39-1 as Objection 3 to the State's Proposed Findings of Fact and Conclusion of Law (SR 461), and without one's presence, one can neither object nor allocate.

If, however, the Court takes the position a further record should have been made below, both alleged errors here would be "plain error." Equally as obvious as needing to have a defendant present for sentencing and needing to afford him an opportunity to allocate, is the fact that a trial jury consists of twelve, not thirteen jurors. This Court found the seating of thirteen jurors for deliberation to be plain error in State v. Nelson, 1998 SD 128 ¶19, 587

N.W.2d 439. As in Nelson it was error (both errors were in direct violations of state statutes). That would also make the error plain. Both statutory rights are substantial rights and affect defendant's due process rights under both state and federal constitutions. And it does affect the fundamental fairness and integrity of the proceedings. Not giving a man facing execution the right to face his sentencer or to be heard in allocution casts further doubt on the fairness of these proceedings. The essence of Due Process is notice and an opportunity to be heard in a proceeding that is fundamentally fair. In the criminal context, the right to be personally present and the right of allocution are guaranteed both by statute and the Constitution.

III. THE TRIAL COURT ERRED IN NOT RECUSING ITSELF PRIOR TO RESENTENCING.

This is not a situation like in Liteky v. United States, 510 U.S. 540 (1994) where the defendant claims that prior rulings and actions of the trial court in his case resulted in perceived animosity by the court toward a defendant. Nor is it a case, as in State v. Hoadley, 2002 SD 109, 651 N.W.2d 249, where different defendants, all fighting for their lives, litigate an issue before the same judge.

Here, we have a judge who is trying to be fair in a situation where no mortal could be. He made factual findings and formed personal opinions in a co-defendant's case where the co-defendant wanted to die and disputed none of the very disputable facts before the court. His findings in that case ended up tracking the State's undisputed assertions. Having made those findings, when those facts were disputed by Berget, Judge Zell had two choices: (1) make independent findings, which if inconsistent with his findings in co-defendant Robert's case, could call the finality of the decision in that case into question, or (2) make the same findings, despite evidence and cross-examination he had not heard before making his original factual findings.

A ruling to do the right thing and allow a different judge to handle Berget's resentencing hearing would not create a slippery slope precedent. The ruling would be limited to the unique factual backdrop of this case, with two co-defendants having diametrically opposed goals at sentencing. This situation has never arisen before, and it is unlikely that it will arise again. Due process requires an impartial decision maker. One cannot be impartial when the court views as res judicata, parallel decisions he made in an action to which defendant Berget was not a party.

CONCLUSION

Mr. Berget was entitled to have a resentencing hearing that afforded him the statutory rights to be present at sentencing and the right of allocution. He was also entitled to have the proceeding comport with his constitutional Eighth Amendment and Due Process rights – fundamental fairness, notice and an opportunity to be heard, and the right to be sentenced in a fair and impartial manner. A clerical review in chambers, while appropriate in the limited context of proportionality reviews, is not constitutionally permissible in a death penalty case remanded due to error at the penalty phase, particularly where, as here, the same sentencing judge who committed reversible error necessitating resentencing, was allowed to preside at resentencing.

Mr. Berget respectfully requests that this matter should be remanded for a meaningful resentencing hearing, with instructions that the proceedings should be before a different judge.

Respectfully submitted this _____ day of December, 2013.

_____
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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided in SDCL 15-26A-66(b)(2). Appellant's Reply Brief contains 4,687 words.

2. I certify that the word and character count does not include the table of contents, table of cases, preliminary statement, statement of issues, or certificate of counsel.

Dated this _____ day of December, 2013.

_____
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